STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 13-91

Authority of the Tennessee Board of Regents and the University of Memphis

QUESTION

Does the Tennessee Board of Regents ("TBR") or the University of Memphis ("University") have the authority to enter into a Student Housing Affiliation Agreement ("Agreement") with a limited liability company pursuant to which the limited liability company would finance, construct and operate a residential facility for the use of University students, faculty and staff on property adjacent to the University campus, where the sole member of the limited liability company would be a non-profit corporation of which the University would be a member?

OPINION

No. Neither the TBR nor the University has statutory authority to execute the Agreement. Furthermore, the Tennessee State Building Commission would have to approve any such agreement pursuant to Tenn. Code Ann. §§ 4-15-102 and 4-15-107 because the proposed transaction constitutes an improvement to real property in which the University, a State Institution, would have an interest.

ANALYSIS

Per the opinion request submitted to this Office, the University of Memphis proposes to enter into a Student Housing Affiliation Agreement with an Alabama limited liability company (hereinafter the "LLC"). A copy of the proposed Agreement has been provided to this Office with this opinion request. An Alabama non-profit corporation (hereinafter "Non-profit Corporation") is the sole member of the LLC. Under the Agreement, the LLC will finance, construct, furnish, equip and operate a building to be used partially for University housing on property adjacent to the University (hereinafter the "Facility"). The LLC will acquire the land on which the Facility is located. The Facility will be part of a mixed use development with retail shops and a University bookstore on the ground floor and with approximately 200 apartment-style units for housing with units to be leased exclusively to University students, as well as University faculty and staff. The retail portion will be privately financed and the student housing portion will be bond financed.

The Student Housing Affiliation Agreement is the only document that the University has to execute, but it contemplates the approval of the University (without specifics) on other documents: a property purchase agreement, development agreement, management agreement and bond documents. The LLC will hire a management company approved by the University. The Non-profit Corporation will be paid fees for its obligations from the bond proceeds and from revenues generated by the Facility. The University covenants that it will not construct additional student housing unless an independent consultant concludes that any such construction will not have a materially adverse effect on the Facility, the rate covenant with respect to the bond financing or the then-current credit rating on the bond financing. The University will market and promote the Facility as a University-affiliated housing option for University students. The University will provide transportation, security and other services and also allow non-exclusive naming rights to the use of "University of Memphis."

The University must be a member of the Non-profit Corporation during the term of the Agreement. The University has no financial obligation with respect to the payment of the bond financing, but the bond documents are subject to the approval of the University. The University is named as an additional insured. The LLC will indemnify, defend and hold harmless the University, the TBR and the State from all liability associated with the Facility including but not limited to any injury or death occurring at or related to the Facility. Upon repayment of the bonds, the LLC will transfer all of its interest in the Facility to another non-profit corporation designated by the University that is a 501(c)(3) organization allowed by the federal Internal Revenue Code to own property for the University. The Agreement provides that the University shall not knowingly take any action that would adversely affect the exemption of interest on any bonds for federal income tax purposes or would otherwise result in a breach of any representations, conditions, or covenants of the LLC as set forth in the bond documents.

The ability of either the TBR or the University to execute the Agreement in question necessarily requires a review of the specific authority granted to the TBR and the University by the State of Tennessee. Both the TBR and the University are instrumentalities of the State, and, as such, they have no inherent or common-law power of their own and possess only "those powers expressly granted by statute and those powers required by necessary implication to enable them to fulfill their statutory mandate." *In re Sentinel Trust Co.*, 206 S.W.3d 501, 519 (Tenn. Ct. App. 2005). *See also Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995); *State ex rel. Com'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 768-69 (Tenn. Ct. App. 2001); Tenn. Att'y Gen. Op. 09-30, at 1 (Mar. 18, 2009) (recognizing that the TBR, as a State agency, is "a creature of statute"). Even though such statutes should be construed liberally because they are remedial in nature, "the authority they vest . . . must have its source in the language of the statutes themselves." *Sanifill*, 907 S.W.2d at 810. "Actions taken by a governmental agency without the required authority are nullities." *In re Sentinel Trust Co.*, 206 S.W.3d at 519 (citing *Sanfill*, 907 S.W.2d at 810).

The TBR and the University of Memphis are both part of the Tennessee university and community college system established by Tenn. Code Ann. §§ 49-8-101 to -1401. The University of Memphis is one of the higher educational institutions that are part of the Tennessee university and community college system. Tenn. Code Ann. § 49-8-101(a). The government,

management and control of this college system is vested in the TBR. Tenn. Code Ann. § 49-8-101(b). The power and duties of the TBR are set forth in Tenn. Code Ann. § 49-8-203.

The General Assembly has directly granted certain powers to the University. *See* Tenn. Code Ann. §§ 49-8-101 to -118, -601 to -603. In addition, the TBR has the statutory power to assume general responsibility for the operation of the institutions, including the University, and to delegate to the chief executive officer of the respective institutions such powers and duties as are necessary and appropriate for the efficient administration of the institution and its programs. Tenn. Code Ann. § 49-8-203(a)(1)(E). Thus, the authority of the University of Memphis to enter into the proposed transaction could also be derived from the delegation of authority it receives from the TBR. However, the TBR may not delegate any powers to the University that the TBR does not itself possess. *See State ex rel. Bd. of Dental Examiners v. Allen*, 192 Tenn. 396, 399, 241 S.W.2d 505, 506 (1951) (observing that "the Legislature cannot, of course, delegate to the Quarterly Court of a County the authority to do an act which the [Tennessee] Constitution forbids the Legislature from doing"); 62 C.J.S. *Municipal Corporations* § 205 (Sept. 2013) (stating that "municipal authorities cannot delegate powers that they do not possess").

The statutory powers granted the TBR and the University do not expressly or by necessary implication authorize either entity to agree to execute the Agreement that is the subject of this opinion request. The Agreement contemplates the construction of a Facility that will at least partially be used for University housing. The Agreement imposes various obligations on the University, including requiring the University to be a "member" of the Non-profit Corporation that will build and own the Facility and the University approving the transfer of the Facility to a "501(c)(3) organization" upon repayment of the bonds and meeting certain other conditions. In essence, the Agreement is designed to provide the University additional leased housing for its students and other personnel and creates various rights and obligations for the University regarding the Facility.

The powers concerning the acquisition and sale of interests in property and the erection of buildings granted to both the University and the TBR are circumscribed by Tennessee statutes. The power of the TBR in this regard is as follows:

> The board [TBR] has the power to purchase land subject to the terms and conditions of state regulations, to condemn land, to erect buildings and equip them for the institution subject to the terms and conditions of legislative appropriations. The board shall be vested with title to property so purchased or acquired. The title to property held on behalf of the institutions named in [Tenn. Code Ann.] § 49-8-101 by the state board of education shall be transferred to the board on the effective date of transfer of responsibility for the government of the institutions named in [Tenn. Code Ann.] § 49-8-101.

Tenn. Code Ann. § 49-8-203(a)(3). The University's relevant authority regarding property is as follows:

> (a) Every college and university is authorized and empowered to sell or convey any lot, plot or tract of land that has been acquired through purchase, gift, devise or by any other means; provided, that:
>
> (1) The land is unsuitable for use by the college or university at present or in the future, or not needed by the college or university;
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> (2) The state building commission approves of the sale or conveyance; and
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> (3) The college or university obtains certified appraisals of the land from two (2) recognized real estate appraisers in the locality of the college or university.
>
> (b) The receipts from the sale or conveyance shall be deposited in the capital outlay fund of the selling college or university.

Tenn. Code Ann. § 49-8-111(a) & (b).

These statutes collectively do not authorize the University or the TBR, either on its own initiative or by delegation to its member institution the University, to execute the Agreement. The TBR has the authority "to purchase land subject to the terms and conditions of State regulations, to condemn land, [and] *to erect buildings and equip them subject to the terms and conditions of legislative appropriations*." Tenn. Code Ann. § 49-8-203(a)(3). The University's specific statutory authority regarding property transactions is limited "to sell or convey any lot, plot or tract of land that has been acquired through purchase, gift, devise or by any other means" subject to certain conditions. Tenn. Code Ann. § 49-8-111(a). The Agreement in various respects goes beyond these limited statutory authorizations by obligating the University to collaborate in several ways with the LLC and its sole member Non-profit Corporation to acquire property and erect a building on that property to be used in part for University housing. These obligations on the University include that the University be a member of the Non-profit Corporation (and thus become an indirect owner of the property and building), approve a management company hired by the LLC, covenant that the University will not construct additional student housing unless certain conditions are met, provide security and other services for the Facility, and approve the transfer of the Facility once the bonds are repaid and certain other conditions are met. Such obligations are not directly authorized by the statutes conveying limited authority to the TBR and the University to purchase and convey property and erect buildings, nor are the making of such broad obligations necessarily implied from these limited statutory authorizations. *See Sanifill*, 907 S.W.2d at 810.

Finally, even if the TBR or the University possessed the requisite authority to execute this Agreement, the Agreement would still require review by and the approval of the Tennessee State Building Commission. The statutes establishing the Commission state that "[n]o contract for the *improvement of real property in which the state of Tennessee or any of its departments, institutions or agencies has an interest* . . . shall be awarded until the plans therefor have been submitted to and approved by the commission." Tenn. Code Ann. § 4-15-102(b)(1).[1] This

[1] The term "improvement to real property" is defined by Tenn. Code Ann. § 4-15-107(2)(A) in relevant part to mean:

> (2) "Improvement to real property" means:

provision grants broad review and approval authority to the Commission over *any* contract for the improvement of real property in which a State institution has an interest. *See, e.g.*, *Wausau Inc. Co. v. Dorsett*, 172 S.W.3d 538, 543 (Tenn. 2005) (stating rule of statutory construction that if "the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, 'to say sic lex scripta, and obey it'") (quoting *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (quoting *Carson Creek Vacation Resorts, Inc. v. State Dept. of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993)).

The University, which is a State institution, clearly has "an interest" in the property to be acquired and improved under the Agreement. The University will become a member of the Non-profit Corporation that controls the LLC which will own the Facility, the Facility will be used in part for University purposes, the University has a right to determine ownership of the Facility once the bonds are repaid and other conditions met, and the University will assume various other obligations related to the Facility. Thus, this Agreement would be subject to review and approval by the State Building Commission assuming the TBR or the University had the authority to execute the Agreement.

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Requested by:

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(A) The construction or erection of new buildings or structures in which the state of Tennessee or any of its departments, institutions or agencies have an interest, whether financed by public or private funds or both.