

MEMO

TO: CHARLOTTE CITY COUNCIL

FROM: THOMAS M. HITCH, CITY ATTORNEY

RE: THE CIRCUMSTANCES UNDER WHICH
THE CITY MAY "LOAN ITS CREDIT" TO THIRD PARTIES

DATE: May 3, 2017

The purpose of this memorandum is to provide an opinion relating to the very limited circumstances under which a municipality, such as the City of Charlotte, may "loan its credit" to other parties. I am in the process of researching and preparing ballot language for a proposed charter amendment relating to the uses of the O-I funds. While the initial discussions by the Council centered on loans for strictly municipal projects, such as streets, or loans amongst the separate funds of the City, such as between the Sewer Fund and the General Fund, a request was made to prepare separate ballot language that might include something different, such as loans for "economic development." I expressed concern regarding certain constitutional limits which I believed were important to share with the Council. The following is the result of my research on this issue.

In Michigan, the Constitution strictly limits the extension of credit at both the local and state level. As it pertains to cities, the Michigan Constitution of 1963, at Art 7, §26, provides as follows:

"Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose."

As it pertains to the State, Art 9, §18, has been held to make certain that the State, which itself cannot borrow, except as authorized, does not accumulate unauthorized debts by endorsing or guaranteeing the obligations of others. It provides as follows:

“The credit of the state shall not be granted to, or in aid of any person, association or corporation, public or private, except as authorized in this constitution.”

See *Advisory Opinion Regarding the Constitutionality of 1966 PA 346*, 380 Mich 554, 564 (1968). In addition, the prohibition of this article applies to local governments as they are political subdivisions and instrumentalities of the State. See *Oakland Co Drain Commr v Royal Oak*, 306 Mich 124, 142 (1943).

The Supreme Court has held that the public purpose exception provides an opening for the extension of a municipality's credit. At *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 119 (1988), the Supreme Court stated:

“As we observed in *Gaylord v Gaylord City Clerk*, 378 Mich 273, 292; 144 NW2d 460 (1966), art 7, §26 is an exception to the general rule of art 9, §18, governing the lending of credit by municipalities. In order to conform to the requirements of the art 7, §26 exception, the loan of a municipality's credit must be both: (1) authorized by law, and (2) for a public purpose.”

It is, therefore, my opinion, and following these decisions, that so long as it is provided by law, the City has the authority to extend its credit “for any public purpose.” The question then is how one determines what is or is not a public purpose. Given the very nature of the phrase, particularly where economic development is involved, it provides little guidance in and of itself. Particularly in the areas of enterprise (economic development, promoting job growth, increasing property taxes, and the like), there is much room to argue in many cases whether the public purpose outweighs, or was outweighed by the interests of private parties that in any economic development are always present.

In researching this issue, it is my opinion that the determination of what extensions of credit would meet the public purpose test would be those extensions of credit for which the Michigan Legislature has specifically authorized by statute. In *Advisory Opinion on Constitutionality of 1976 PA 295*, 401 Mich 686 (1977), the Michigan Supreme Court wrote:

At the outset it should be noted that this Court has recognized that the determination of what constitutes a public purpose is primarily the responsibility of the Legislature, and that the concept of public purpose has been construed quite broadly in Michigan. *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465, 495-498; 242 NW2d 3 (1976). For example, this Court has found that promoting the sale of Michigan apples, the payment of dues by a city for a membership in the Michigan Municipal League, the construction of a port marina by a city, the issuance of bonds by a city to finance the construction of privately owned industrial buildings, the construction of a sports arena, public financing of gubernatorial elections and the creation of a state authority authorized to make loans directly to, or guarantee loans made to, provide business enterprises for financing job development projects may all serve a valid public purpose.

The Michigan Supreme Court, like other courts in other states, pays great deference to a legislative finding that a particular project serves a public purpose. See *Advisory Opinion on Constitutionality of 1986 PA 281*, p 131.

It is, therefore, my opinion that the City's exercise of what is or is not in the "public purpose" is constrained by what the Legislature has authorized the local municipalities to do by statute. See, for example, the tax increments financing which is the subject of the Supreme Court opinion in the decision *Advisory Opinion on Constitutionality of 1986 PA 281*. See further the extension of credit provision in the Downtown Development Authority Act, MCL 125.1657(1)(q).

By honoring this requirement, it offers significant safeguards to the City and to the Council itself. If each municipality were left to its own devices to determine what extension of credit was or was not "for a public purpose," there is a significant likelihood of lawsuits challenging the action of the City Council. Further, by only extending credit in those areas provided by state law, there are mechanisms in place that offer greater safeguards that the money will in fact be used for a "public purpose."

It is, therefore, my opinion that a charter amendment that would permit the extension of credit to private individuals for a public purpose where expressly provided by a statute would be lawful and could be lawfully enacted if so approved by the voters of the City of Charlotte.