



Lynn Fitch
ATTORNEY GENERAL

OPINIONS DIVISION

January 31, 2020

Michelle D. Easterling, Esquire
Attorney for East Mississippi Community College
Post Office Box 835
West Point, Mississippi 39773

Re: Authority of Community College to Enter Into Lease with Private Corporation

Dear Ms. Easterling:

Attorney General Lynn Fitch is in receipt of your opinion request and has assigned it to me for research and reply. In your letter, you explain the Board of Trustees of East Mississippi Community College (hereinafter "EMCC") desires to enter into a long-term ground lease agreement with a private, non-profit corporation, without a specific fair market value rent, but rather with the lessee agreeing to pay all construction costs, ad valorem taxes and maintenance of the building that will be constructed. You have included the proposed lease agreement, which has been presented to the EMCC Board of Trustees for approval.

Questions Presented

1. Notwithstanding your response regarding the matter of the duration of the lease, must EMCC receive fair market value (monetary) lease payments for the private entity's use of the College's property? If so, can the private entity lessee's payment of all construction costs for the building to be erected on such property, payment of all maintenance and upkeep of the building and property, as well as payment of any and all real and/or personal property taxes to the private entity substitute in lieu of, or in exchange for, fair market value compensation for use of the property by the private entity?
2. Would the payments outlined in question #1, together with the College's right to utilize a portion of the facility, be sufficient consideration to avoid any allegation of unconstitutional donation? Specifically, I wish to confirm that by

allowing the private entity to construct and maintain the premises at its own expense, pay all real or personal property taxes thereon, and opening the facility to the public, including allowing EMCC certain uses of the facility, that there would be no unconstitutional donation in violation of Miss. Constitution, Article IV, Section 95.

Applicable Law and Discussion

Senate Bill 3120 of the 2019 Mississippi Legislative Session provides:

The Board of Trustees of East Mississippi Community College District is authorized and empowered, in its discretion, to enter into a long-term lease agreement of any unimproved real property owned by the board that is located in Lowndes County, Mississippi, for the purpose of facilitating the construction of a state-of-the-art multimillion dollar facility which may include a museum, a conference and learning center, classrooms, meeting rooms, a kitchen and/or a catering kitchen and other facilities that will complement the public and educational purposes of East Mississippi Community College. The term of the lease shall not exceed sixty (60) years and may include one (1) renewal option.

The EMCC Board of Trustees has the authority to lease real property for a term not to exceed sixty (60) years, with one renewal option, to a private non-profit corporation for purposes outlined in Senate Bill 3120.

There are two sections of the Mississippi Constitution of 1890 which address prohibited donations of public funds and property. Section 95 provides, in part:

Lands belonging to, or under the control of the State, shall never be donated directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations or associations for a less price than that for which it is subject to sale to individuals.

This prohibition was at issue in ***Whitworth College v. City of Brookhaven***, 161 F. Supp. 775 (S. D. Miss. 1958) *affirmed* 260 F. 2d 868 (5th Cir. 1958), in which the Court considered the adequacy of the consideration of a lease of municipal property by the City of Brookhaven to Whitworth College, a Mississippi corporation. Pursuant to the lease, Whitworth College agreed to (1) pay \$1.00 per year to the City, (2) use the property only for educational purposes, (3) maintain improvements to the property, and (4) pay premiums for fire and tornado insurance on the leased premises. Taking the lease in its entirety, the Court found the consideration thereunder as sufficient and therefore did not find the lease to Whitworth College to be a prohibited donation under Section 95, 161 F. Supp. at 779.

Additionally, Section 66 of the Mississippi Constitution likewise prohibits the donation of public funds or property to private entities and reads as follows:

No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the Legislature, nor by any vote for a sectarian purpose or use.

This office has previously opined that leases of public property must be for adequate consideration in order to avoid violation of Section 66, although such consideration need not be in the form of monetary compensation. See *MS AG Op., Holleman* (April 2, 2010); *MS AG Op., Clark and Martin* (Sept. 26, 2008).

In our opinion to Dean Holleman, dated April 2, 2010, our office considered whether a community college could enter into an agreement with a private college for the use of its building and equipment with part of the consideration for the agreement being in the form of other benefits constituting consideration.

At issue in the Holleman opinion was a proposed agreement by the Board of Trustees of Mississippi Gulf Coast Community College (hereinafter "MGCCC") for the use of its building and equipment by USA, a private college, in order for MGCCC students and district residents to continue their studies. In exchange for the use of the property, USA agreed to (1) purchase furniture and computers for offices and classrooms, (2) install internet connections in the building and related networking and video conferencing equipment at an estimated cost in excess of \$100,000.00, and (3) pay MGCCC \$66,000 per year during the second and third years of the term.

Our office concluded MGCCC was authorized to enter into the proposed agreement for the use of its building and equipment by USA in order for the community college students and district residents to continue their studies. While it was incumbent upon the Board of Trustees to determine whether a donation resulted from the proposed agreement, we noted the consideration was not nominal and, in fact, exceeded that in *Whitworth*, wherein the Court found no violation of Section 95 of the Mississippi Constitution. With regard to Section 66, we found a governmental interest was being served by providing educational opportunities for residents; thus, consideration other than cash payments could be taken into account when determining whether a donation would result from the proposed agreement. See ***Craig v. Mercy Hospital-Street Memorial***, 45 So. 2d 809 (1950), suggestion of error overruled 47 So. 2d 867 (1950).

Conclusion

It is the opinion of this office that the EMCC Board of Trustees may take into account the proposed lessee's payment of all construction costs for the building to be erected on the property, payment of all maintenance and upkeep of the building and property, payment of all real and/or personal property and EMCC's right to use a portion of the facility when making its determination as to whether a donation results from the proposed lease agreement. While the consideration contained in the proposed lease agreement appears equivalent to or perhaps exceeds that set forth in *Craig* and *Whitworth*, respectively, the adequacy of the consideration is a question of fact which must be decided by the EMCC Board of Trustees.

If this office may be of any further assistance to you, please let us know.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By:



Avery Mounger Lee
Special Assistant Attorney General

OFFICIAL OPINION