



Lynn Fitch
ATTORNEY GENERAL
OPINIONS

June 26, 2020

Moran M. Pope, III, Esq.
Attorney for the City of Hattiesburg
Post Office Box 17527
Hattiesburg, Mississippi 39404-7527

Re: Refund of “Initialization Fee”

Dear Mr. Pope:

The Office of the Attorney General is in receipt of your request for the issuance of an official opinion.

Question Presented

Would the refund of an “initialization and startup fee” by the City of Hattiesburg, initially paid to the City by a limited liability company pursuant to a contract, constitute a donation in violation of Article 4, Section 66 of the Mississippi Constitution?

Background Facts

A limited liability company entered into a contract with the City of Hattiesburg for the development of a subdivision to be located outside of the city limits. Pursuant to the contract, the LLC paid to the City an “initialization and start-up fee” of \$10,000.00 for the purpose of connecting the subdivision to the City’s wastewater system. No provision is made in the contract for the refund of this fee if no wastewater is sent into the City’s system.

A copy of the referenced contract was not provided to the Office of the Attorney General. Thus, our background facts are based solely upon the recitation of facts as set forth in your written request submitted for the issuance of an official opinion.

Brief Response

Your request is predicated upon a contract, such that the money was paid by an LLC to the City and services were to be provided by the City for the benefit of the LLC in exchange therefore,

pursuant to a written contract. The Office of the Attorney General may not issue an official opinion which requires an interpretation of a contract.

However, based upon basic contract principles, the City of Hattiesburg may refund money paid to it pursuant to a contract if the City is not providing the service for which the money was paid. Such a refund would not constitute an illegal donation in violation of Section 66 of the Mississippi Constitution.

Applicable Law and Discussion

By virtue of a telephone conversation subsequent to our receipt of your written request for an official opinion, it is our understanding that it is the City's concern that should it refund the "initialization and start-up fee," such payment may constitute a donation in violation of Section 66 of the Mississippi Constitution.

Article 4, Section 66 states:

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.

"The term 'donation or gratuity' implies absence of consideration, the transfer of money or other things of value from the owner to another without any consideration." *Craig v. Mercy Hosp.—Street Mem'l*, 45 So.2d 809, 814 (Miss. 1950). Of course, "[i]f there is no 'donation or gratuity' involved in the instant case, then Section 66 has no application at all." *Id.*

The premise of Section 66 is the governmental entity must receive adequate consideration for something it gives to another individual or entity. In the current scenario, the funds in question are consideration paid by the LLC to the City pursuant to the terms of the contract for the purpose of connecting a residential development to the City's wastewater system. Based upon the facts set forth in your request, the development has not utilized the City's wastewater system, meaning the City is not providing the contracted services for which the LLC paid \$10,000.00. Based upon these facts, it is the opinion of this office that the return of those funds by the City to the LLC would not constitute a donation in violation of Section 66 of the Mississippi Constitution.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ Kim P. Turner

Kim P. Turner
Assistant Attorney General