S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

March 15, 2007

Opinion No. 07-30

Sale of Land by the City of Tullahoma to Marcum Capital

QUESTIONS

1. Whether the City of Tullahoma Board of Mayor and Aldermen (the "Board") violated Tullahoma Municipal Code § 20-401 when it approved a Memorandum of Understanding on May 10, 2005, to sell city-owned land to Marcum Capital?

2. Whether the Board violated Tullahoma Municipal Code § 20-401 when it approved the sale of city-owned land to Marcum Capital on November 22, 2005?

3. Whether the City of Tullahoma's purchasing policy was violated once the city-owned land was declared surplus?

4. Whether the Board violated Tenn. Code Ann. § 13-4-104 when it approved a Memorandum of Understanding on May 10, 2005, to sell city-owned land to Marcum Capital?

5. Whether the Board violated Tenn. Code Ann. § 13-4-104 when it approved the sale of city-owned land to Marcum Capital on November 22, 2005?

6. Whether the land sale negotiation team approved by the Board was required to abide by the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101 to -201?

7. Whether the Board violated the Open Meetings Act when it recessed a regular meeting and reconvened the next day?

OPINIONS

1. Yes.

2. Based on the information provided to us, it appears that the Board may have violated Tullahoma Municipal Code § 20-401.

3. Based on the information provided to us, it appears that the Board may have violated the City of Tullahoma's purchasing policy.

4. Yes.

5. No.

6. Yes.

7. We are aware of no authority that prohibits a governing body from temporarily adjourning or recessing its meetings. Thus, we are of the opinion that the Board was not prohibited from continuing its regular May 9, 2005, meeting to the following day since neither the Open Meetings Act nor the Tullahoma Municipal Code prohibits the temporary adjournment of a meeting. Nevertheless, the Open Meetings Act clearly contemplates "adequate public notice" of all meetings. Accordingly, the Open Meetings Act was violated if "adequate public notice" of the reconvening of the meeting was not given.

BACKGROUND

According to the information you have provided, in January 2005, the Mayor of the City of Tullahoma (the "City") recommended that the City solicit proposals from private entities for the purpose of partnering with the City to design and develop a mixed-use project on city-owned land. The Board approved the Mayor's recommendation, and a request for proposals was advertised in the *Tullahoma News*. Those wishing to submit a proposal were to do so by February 24, 2005. The Board received two proposals, and it considered each proposal at a public board meeting on February 28, 2005. On March 14, 2005, the Board selected the proposal submitted by Marcum Capital. The Board then asked the Mayor to designate a negotiation team to represent the City in its dealings with Marcum Capital. During the March 28, 2005, meeting of the Board, the Mayor named an alderman, a citizen, and the city administrator to the negotiation team. The Board approved the team members and the following objectives developed by the Mayor for the team: (1) to refine the scope of work details and the cost of the project; (2) to determine if the value of city-owned land was sufficient to purchase necessary city hall space without additional cost to the City; (3) to establish a detailed schedule of events; and (4) to report negotiation progress to the Board.

On May 9, 2005, the negotiation team presented a "Memorandum of Understanding for Implementation of Proposal for Property Improvement and Redevelopment" ("MOU") at a meeting of the Board. Part of the MOU required the City to sell a majority of the subject property to Marcum Capital on or before June 30, 2005. The MOU contained a price of $679,000 for the property located at West Grundy Street and North Jackson Street. The MOU also gave Marcum Capital a 120-day option to purchase another parcel (the Whitmore property) for $200,000. The Board's meeting was continued to the following day, May 10, 2005, and the Board approved the MOU on that date.

Due to the publicity regarding this transaction, the property was not sold by June 30, 2005. On July 11, 2005, the Board approved submission of the property sale to the Planning Commission so that it could declare the property as surplus. On July 25, 2005, the Planning Commission did so. On August 15, 2005, a public hearing was held regarding the property. At the meeting of the Board

immediately following the public hearing, the Board approved the Planning Commission's surplus declaration and again approved the fulfillment of the MOU.

On September 12, 2005, the Board approved the sale of the property located at West Grundy Street and North Jackson Street for $679,000, and it approved the termination of the MOU. Then, on October 24, 2005, the Board voted to rescind the sale so that it could again determine whether the property was surplus. Nevertheless, on November 14, 2005, the Board rescinded the motion it had approved on October 24, 2005, and authorized the Mayor to close on the sale within ten days. On November 22, 2005, the City sold the property on West Grundy Street and North Jackson Street to Marcum Capital for $679,000. At its meeting on November 28, 2005, the Board extended Marcum Capital's option to purchase the Whitmore property for $200,000, and Marcum Capital elected to exercise this option on March 22, 2006.

ANALYSIS

1, 2, and 3. Tullahoma Municipal Code § 20-401 and the City's Purchasing Policy

The first question posed is whether the Board violated Tullahoma Municipal Code § 20-401 when it approved the Memorandum of Understanding on May 10, 2005, to sell city-owned land to Marcum Capital. This code provision states as follows:

> Disposal and/or sale of real property. From time to time the board of mayor and aldermen of the City of Tullahoma, Tennessee, may, by majority vote after due deliberation, declare certain real property owned, or held or claimed or apparently owned by the City of Tullahoma, Tennessee, and/or its agencies on the behalf of the City of Tullahoma, Tennessee, to be surplus and may direct the disposition thereof upon such terms and conditions as the board may, from time to time, prescribe either by action properly taken or by ordinance. If said declaration of property as being surplus involves a public street or road, same shall be closed by ordinance. Pursuant to the provisions hereof any property declared to be surplus and disposed of pursuant hereto shall be conveyed to the purchaser/ conveyee pursuant to the sales and/or disposition provisions established from time to time by the board.
>
> Prior to any real property being declared surplus by the board of mayor and aldermen, the board of mayor and aldermen shall refer the consideration of such matter to the planning commission, and upon receiving a report from said commission shall publish a notice for a public hearing for the consideration of the declaration of that certain property as surplus property at which time interested citizens may speak on the subject. Said notice must be published in a newspaper of general circulation in the City of Tullahoma at least fifteen days prior to the public hearing. Adjoining property owners shall be notified of said proposed action in writing by certified mail, return receipt requested, prior to said public hearing.

First, Tullahoma Municipal Code § 20-401 provides that the Board may direct the disposition of real property owned by the City only after such property has been declared surplus by it by majority vote after due deliberation. Based on the information you have provided, there is no indication that the Board had done such when it approved the MOU on May 10, 2005. Furthermore, § 20-401 states that "*[p]rior to* any real property being declared surplus by the board of mayor and aldermen, the board of mayor and aldermen *shall* refer the consideration of such matter to the planning commission." Again, based on the information you provided, the Board had not complied with this mandatory directive when it approved the MOU on May 10, 2005. Moreover, since the Board did not comply with this directive, it necessarily failed to comply with the last part of § 20-401, which requires the Board, upon receiving a report from the Planning Commission, to publish a fifteen-day notice for a public hearing and notify adjoining property owners by certified mail, return receipt requested, prior to the public hearing so that the declaration of property as surplus could be duly considered. Consequently, the Board failed to comply with § 20-401 when it approved the MOU on May 10, 2005.

The second question is whether the November 22, 2005, sale of the city-owned property violated Tullahoma Municipal Code § 20-401. According to the information you provided, the Board did submit the property sale to the Planning Commission on July 11, 2005, so that it could declare the property as surplus. The Planning Commission declared the property as surplus on July 25, 2005, and a public hearing was held on August 15, 2005, regarding the property. The provided information does not state whether notice was published fifteen days before the hearing, nor does it state whether adjoining property owners were notified by certified mail, return receipt requested, prior to the public hearing. Failure to comply with these provisions would constitute a violation of § 20-401.

Additionally, Tullahoma Municipal Code § 20-401 requires that any property declared to be surplus must be conveyed to the purchaser or conveyee pursuant to the sales and disposition provisions established from time to time by the Board. Pursuant to Resolution No. 1028, the Board had established such provisions in the City's "Purchasing Policies and Procedures." Section 16 of these policies and procedures addresses surplus property sales. Section 16.2 sets forth the procedure to dispose of surplus real property:

> The following procedure shall be used for the sale and disposition of surplus real property.
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> (a) Appropriate agencies will be contacted to insure no utility easements or right-of-ways present a problem for surplusing.
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> (b) Request to purchase City property and recommendations to sell City property will be presented to the board of Mayor and Aldermen as requested or as needed.
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> (c) Request will be reviewed at Board Study Session prior to any proposed action.

> (d) The Purchasing Officer will prepare a list of property being proposed for sale and recommend a public hearing for declaring the property surplus and review by the Planning Commission.
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> (e) The list of property will be referred to the Planning Commission for review and recommendation.
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> (f) After the public hearing has been conducted and the Planning Commission recommendation has been reviewed, the Board will take action on whether or not to declare the property surplus.
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> (g) After the property has been declared surplus, the Board will decide upon one of two sale procedures. A decision will be made to auction the property or advertise for bids using the following procedures:

Subsection (g) of Section 16.2 is then followed by Section 16.3, which addresses the auction of property, and Section 16.4, which outlines the procedure that the Purchasing Officer is to use in preparing bid notices.

In reviewing subsections (a) through (f) of Section 16.2 of the City's "Purchasing Policies and Procedures," it appears that certain procedures may not have been followed in declaring the subject property as surplus. For instance, the provided information does not indicate that appropriate agencies were contacted to determine whether easements or rights-of-way presented a problem for surplusing. There is also no indication that the request to declare the subject property as surplus was reviewed at a Board Study Session. If these procedures were not followed, the Board violated the City's "Purchasing Policies and Procedures" unless the Board had waived these provisions.

Additionally, once the property is declared to be surplus, subsection (g) of Section 16.2 requires the Board to decide on one of two sale procedures. The first sale procedure is by auction, and Section 16.3 details the auction process to be implemented by the Purchasing Officer. The second sale procedure is set forth in Section 16.4, and it requires the Purchasing Officer to prepare bid notices and mail such notices to the adjoining property owners via certified mail, return receipt requested. At the same time, Section 16.4 also requires the Purchasing Officer to advertise the bid notice in a local publication of general circulation to solicit bids from the general public. Neither sale procedure was followed here once the subject real property was declared to be surplus. Consequently, unless the Board had waived these provisions, the Board's November 22, 2005, sale of this property violated the City's "Purchasing Policies and Procedures," as well as Tullahoma Municipal Code § 20-401, since it expressly states that property declared to be surplus shall be conveyed in accordance with the sales and disposition provisions established by the Board.

4. and 5. Tenn. Code Ann. § 13-4-104

The fourth question is whether the Board violated Tenn. Code Ann. § 13-4-104 when it approved the MOU on May 10, 2005, to sell city-owned land to Marcum Capital. Part 1 of Chapter

4 of Title 13 of the Tennessee Code addresses municipal planning commissions. Tenn. Code Ann. § 13-4-104 provides as follows:

> Whenever the commission shall have adopted the plan of the municipality or any part thereof, then and thenceforth no street, park or other public way, ground, place or space, no public building or structure, or no public utility, whether publicly or privately owned, shall be constructed or authorized in the municipality until and unless the location and extent thereof shall have been submitted to and approved by the planning commission; provided, that in case of disapproval, the commission shall communicate its reasons to the chief legislative body of the municipality, and such legislative body, by a vote of a majority of its membership, shall have the power to overrule such disapproval and, upon such overruling, such legislative body shall have the power to proceed; provided, that if the public way, ground, place, space, building, structure or utility be one the authorization or financing of which does not, under the law governing the same, fall within the province of such legislative body, then the submission to the planning commission shall be by the state, county, district, municipal or other board or official having such jurisdiction, and the planning commission's disapproval may be overruled by such board by a majority vote of its membership, or by such official. The widening, narrowing, relocation, vacation, change in the use, acceptance, acquisition, sale or lease of any street or public way, ground, place, property or structure shall be subject to similar submission and approval, and the failure to approve may be similarly overruled. The failure of the commission to act within thirty (30) days from and after the date of official submission to it shall be deemed approval, unless a longer period be granted by such chief legislative body or other submitting board or official.

Tenn. Code Ann. § 13-4-104.

Under this statute, when a municipal planning commission has adopted a plan of the municipality,[1] the municipality is not authorized to sell its property until and unless the legislative body of the municipality has submitted the proposed sale to the commission for approval. The Board did not submit the proposed sale to the Planning Commission until July 11, 2005. Consequently, the Board violated Tenn. Code Ann. § 13-4-104 when it approved the MOU on May 10, 2005, that authorized the sale of city-owned land to Marcum Capital.

The next question is whether Board violated Tenn. Code Ann. § 13-4-104 when it subsequently sold the property to Marcum Capital on November 22, 2005. Since the Board did submit the proposed sale to the Planning Commission on July 11, 2005, and the Planning Commission approved the sale of the property on July 25, 2005, Tenn. Code Ann. § 13-4-104, at

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[1] Pursuant to Tullahoma Municipal Code § 14-101, a municipal-regional planning commission was created and established, as authorized by chapters 3 and 4 of Title 13 of the Tennessee Code. A comprehensive development plan for the City of Tullahoma was adopted pursuant to Tullahoma Municipal Code § 14-401. This plan is embodied in Appendix "D" to the Tullahoma Municipal Code.

least on its face, was not violated by the Board when it approved the sale of the property to Marcum Capital on November 22, 2005.

6. and 7. Open Meetings Act

The next question is whether the land sale negotiation team appointed by the Board was required to abide by the Open Meetings Act (the "Act"). This Act, which is sometimes called the Sunshine Law, requires that all meetings of any governing body be open to the public at all times, except as provided by the Tennessee Constitution. Tenn. Code Ann. § 8-44-102(a). The policy behind this Act is that "the formation of public policy and decisions is public business and shall not be conducted in secret." Tenn. Code Ann. § 8-44-101(a). For the Act to apply to the land sale negotiation team, it is necessary to first determine whether the team was a "governing body," as defined by the Act, and then it must next be determined whether the team conducted "meetings," as that term is defined by the Act, as it went about fulfilling its designated objectives.

Under the Act, a "governing body" is defined, in pertinent part, as "the members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration." Tenn. Code Ann. § 8-44-102(b)(1)(A). While the Act defines "governing body," it does not define the term "public body" contained in the above definition. The Tennessee Supreme Court, in deciding the issue of whether the term "public body" as used in the Act is ambiguous or vague, concluded as follows:

> It is clear that for the purpose of this Act, the Legislature intended to include any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City, or County legislative action and whose members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector.

Dorrier v. Dark, 537 S.W.2d 888, 892 (Tenn. 1976), *reh'g denied*, 54 S.W.2d 658 (Tenn. 1976). Thus, in order to be considered a "governing body" covered by the Act, an organization must (1) consist of members of a public body that can be traced back to state, city, or county legislative action and (2) possess authority to make decisions or recommendations concerning policy or administration that affect people in the governmental sector. Op. Tenn. Att'y Gen. 87-91 (May 15, 1987), *citing Chattanooga Bd. of Educ. v. Chattanooga Educ. Ass'n*, 7 T.A.M. 41 (Tenn. Ct. App. 1982).

In applying the Tennessee Supreme's Court's two-part test set forth in *Dorrier*, the negotiation team's genesis can be traced back to legislative action by the Board since the Board approved the team members and its objectives. Thus, the first part of the test appears to be satisfied. As for the second part of the test, it seems to be satisfied, as well. According to the information you provided, the Mayor developed the following objectives for the negotiation team: (1) to refine the scope of work details and the cost of the project; (2) to determine if the value of the city-owned land was sufficient to purchase necessary city hall space without additional cost to the City; (3) to establish a detailed schedule of events; and (4) to report negotiation progress to the Board. To

fulfill these objectives, it would seem that the negotiation team necessarily had to possess the authority to make decisions and recommendations to the Board. Assuming that it did, the second part of the *Dorrier* test would be satisfied, and the negotiation team would have been a "governing body" covered by the Act. *See*, *Dorrier*, 537 S.W.2d at 892; *see also*, *Mid-South Publishing Co*. v. *Board of Regents*, 1990 WL 207410*6, n. 4 (Tenn. Ct. App. 1990) (noting that ad hoc committee to Board of Regents was covered by Open Meetings Act).

In addition to the requirement that a "governing body" exist for the Act to apply, a "meeting" must occur. A "meeting" under the Act is defined as "[t]he convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter." Tenn. Code Ann. § 8-44-102(b)(2). In *Neese v. Paris Special School District*, 813 S.W.2d 432, 435 (Tenn. Ct. App. 1990), the court stated that a meeting exists under the Act if a public body convenes for one of two purposes: (1) in order to make a decision or (2) in order to deliberate toward a decision. The court used the definition of "deliberate" from Black's Law Dictionary and said, "To deliberate is 'to examine and consult in order to form an opinion. . . . [T]o weigh arguments for and against a proposed course of action.'" *Neese*, 813 S.W.2d at 435.

The negotiation team's objectives included refining the scope of work details and the cost of the project, determining if the value of the city-owned land was sufficient to purchase necessary city hall space without additional cost to the City, and establishing a detailed schedule of events, and reporting negotiation progress to the Board. To fulfill these objectives, it would seem that the negotiation team, when it gathered, would have had to examine matters and consult with one another to form opinions and would have had to weigh arguments for and against proposed courses of action. Hence, the team would have deliberated toward decisions regarding the sale of the subject property. Moreover, the negotiation team's deliberations culminated in an MOU that directly led to the Board going forward with the sale of the property, as the team proposed. In sum, it appears that the negotiation team was a "governing body," and its "meetings" were covered by the Act.

The next question is whether the Board violated the Act when it recessed its May 9, 2005, meeting and reconvened the next day.[2] Tenn. Code Ann. § 8-44-103 of the Act addresses notice of public meetings:

> (a) Notice of Regular Meetings. Any such governmental body which holds a meeting previously scheduled by statute, ordinance, or resolution shall give adequate public notice of such meeting.

[2] The Board's May 9, 2005, meeting was a regular meeting. Tullahoma Municipal Code § 1-205 provides that the Board shall hold its regular meetings on the second and fourth Mondays in each month, at 5:30 p.m., at the City Hall in Tullahoma.

> (b) Notice of Special Meetings. Any such governmental body which holds a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is not already provided by law, shall give adequate public notice of such meeting.[3]
>
> (c) The notice requirements of this part are in addition to, and not in substitution of, any other notice required by law.

Tenn. Code Ann. § 8-44-103.

The Act does not address adjournments of public meetings, nor does it address temporary adjournments, or recesses, of public meetings. The Tullahoma Municipal Code, however, does address adjourned meetings. In addition to meeting on its regular day and time, Tullahoma Municipal Code § 1-206(1) provides that the Board "shall also assemble at any time to which it has adjourned any regular or adjourned meeting," and § 1-206(2) provides that Board "shall also assemble in a special meeting whenever, in the opinion of the mayor, there is business requiring the attention of the board, the transaction of which cannot, or ought not to, be postponed to the next regular or adjourned meeting."

We are aware of no authority that prohibits a governing body from temporarily adjourning or recessing its meetings. Thus, we are of the opinion that the Board was not prohibited from continuing its regular May 9, 2005, meeting to the following day since neither the Act nor the Tullahoma Municipal Code prohibits the temporary adjournment of a meeting. Nevertheless, the Act clearly contemplates "adequate public notice" of all meetings. Thus, we are of the opinion that the Board would have had to give "adequate public notice" as to when the meeting was to be reconvened. While "adequate public notice" is not defined in the Act, the Supreme Court has stated:

> We think it is impossible to formulate a general rule in regard to what the phrase "adequate public notice" means. However, we agree with the Chancellor that adequate public notice means adequate public notice under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public.

Memphis Publishing Co. v. City of Memphis, 513 S.W.2d 511, 513 (Tenn. 1974). Whether "adequate public notice" is present is a factual determination made on a case by case basis. *Kinser v. Town of Oliver Springs*, 880 S.W.2d 681 (Tenn. Ct. App. 1994). Since the provided information does not state how the Board gave notice to the public that it was temporarily adjourning its regular meeting until the following day, we are unable to render an opinion as to whether the Board provided "adequate public notice" of the reconvening of the meeting. If a determination is made that the Board did not give such notice, the Open Meetings Act was violated.

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[3] Similarly, Tenn. Code Ann. § 6-3-106(a)(4) states that a Mayor under an Aldermanic Charter may call special meetings of the board upon adequate notice to the board and adequate public notice.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

LAURA T. KIDWELL
Assistant Attorney General

Requested by:

John G. Morgan
Comptroller of the Treasury
State Capitol
Nashville, TN 37243