

2009-028

STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

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Honorable Troy Ford  
Mayor, Town of West Jefferson  
Post Office Box 158  
Quinton, Alabama 35130

Municipalities – Lease – Telecommunications  
– Real Property – Franchise – Competitive Bid  
Law – Jefferson County

Pursuant to section 11-47-21 of the Code of Alabama, if the Town of West Jefferson considers the space at the top of the water tower to be surplus real property, the town may lease this space for fair market value to a commercial interest.

If the town determines that the property is not real property and the lease would be a grant of an exclusive franchise, the town may lease the space at the top of the tower by taking competitive bids.

Dear Mayor Ford:

This opinion of the Attorney General is issued in response to your request on behalf of the Town of West Jefferson.

QUESTION

Can the Town of West Jefferson enact an ordinance declaring that the top of its potable water storage tank is real property not needed for public or municipal purposes, thereby making it legally permissible to enter a lease for the use of the top of its potable water storage tank as a cell tower site and be consistent with the provisions of section 11-47-21 of the Code of Alabama.

FACTS AND ANALYSIS

In your letter of request, you stated the following:

The Town of West Jefferson has been approached by a mobile telephone provider requesting the town lease to the provider the top of one of the town's potable water storage water tanks for the purpose of a cell tower site. Before the town considers such a lease, it requests an opinion from you regarding the legality of entering such a lease in the light of the provisions of section 11-47-21 of the Code of Alabama requiring the town to declare "real property not needed for public or municipal purposes" before it leases town real property.

The concern is that, although the real property is being used as a water storage tank, how can the town adopt an ordinance declaring the top of the tank "real property not needed for public or municipal purposes" as required by section 11-47-21 of the Code.

Your particular inquiry poses a unique situation. As you aptly noted, section 11-47-21 of the Code of Alabama provides the ability for a municipality to lease real property that is not needed for public or municipal purposes. The water tower may be deemed a fixture. A fixture is "an article which was once a chattel, but which, by being physically annexed or affixed to the realty, has become accessory to it and part and parcel of it." *In re Black*, 95 B.R. 223, 224 (Bkrtcy. N.D. Ala. 1988), citing *Farmers & Merchants Bank v. Sawyer*, 26 Ala. App. 520, 522, 163 So. 657, 658 (1935). As such, the proposed cell phone tower would be affixed to the land. The area on top of the tower that has been requested for use is not needed by the municipality, and thus, may be considered surplus.

This Office has addressed similar issues with respect to the leasing of real property. In an opinion to the Honorable Charles E. Osborne, Mayor, City of Talladega, dated April 5, 2002, A.G. No. 2002-202, the city sought to lease one room in a public building to a commercial interest. This Office determined that, pursuant to section 11-47-21 of the Code of Alabama, the city may lease surplus property for commercial purposes provided that the fair market rate is charged for rent. *See also*, opinions to the Honorable Jack Fendley, Mayor, Town of Pennington, dated January 19, 2005, A.G. No. 2005-046; Honorable Michael G. Kendrick, Attorney, City of Homewood, dated April 24, 2002, A.G. No. 2002-214; Honorable Annette Webb Bozeman, Marion County Judge of Probate, dated November 18, 1998, A.G. No. 99-00044. Accordingly, the space at the top of

the water tower may be leased pursuant to section 11-47-21 of the Code of Alabama to a commercial interest for rent of fair market value.

If the Town of West Jefferson determines that the space at the top of the water tower is not real property, it may lease the use of this personal property and must do so pursuant to competitive bids if the contract will be an exclusive contract to use the space on top of the tower. The Supreme Court of Alabama has determined that an exclusive contract exists when a governmental entity grants a special privilege or contractual right for services to one entity. *See, generally, Kennedy v. City of Prichard*, 484 So. 2d 432 (Ala. 1986).

Section 22 of the Constitution of Alabama prohibits granting exclusive franchises. Contracts of this nature must be competitively bid. *Id.*; also see the following opinions:

- Joseph Mitchell, Member, House of Representatives, dated July 8, 2005, A.G. No. 2005-158 (the lease of unused frequencies by a board of education to a commercial wireless provider is an exclusive franchise that is subject to the Competitive Bid Law);
- Honorable Thomas M. Little, Attorney, Talladega County Board of Education, dated April 1, 1999, A.G. No. 99-00158 (contract in which corporate sponsors provided a school scoreboard in exchange for the sole right to sell concessions must be competitively bid);
- Honorable Edwin Bridges, Director, Department of Archives and History, dated March 13, 1998, A.G. No. 98-00112 (a contract entered into by the Department of Archives and History in which one company would be given the exclusive right to reproduce and publish as a poster a painting owned by the Department would require the competitive bid process).

Further, the application of the bid law cannot be avoided based on the fact that only one company has requested to occupy space at the top of the water tower. *See, generally*, A.G. No. 2005-158.

### CONCLUSION

Pursuant to section 11-47-21, if the Town of West Jefferson considers the space at the top of the water tower to be surplus real property, the town may lease this space for fair market value to a commercial interest.

If the town determines that the property is not real property and the lease would be a grant of an exclusive franchise, the town may lease the space at the top of the tower by taking competitive bids.

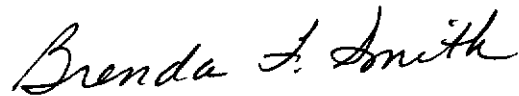
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I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

TROY KING  
Attorney General

By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH  
Chief, Opinions Division

TK/MMG  
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