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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

October 22, 2004

The Honorable Glenn F. McConnell
President *Pro Tempore*
The Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You have requested an opinion regarding "the efforts of the Hunley Commission and the Friends of the Hunley in the ongoing conservation of the Hunley ...." Your letter sets forth in considerable detail a history of the Hunley project. You recount the creation of the Hunley Commission by the General Assembly and the execution of the Programmatic Agreement between "the Hunley Commission and the State Historical Preservation Officer on behalf of the State of South Carolina and the Department of Navy, the General Services Administration, and the Advisory Council on Historic Preservation on behalf of the United States ...." You note that the Programmatic Agreement provides that the State of South Carolina, acting through the Hunley Commission, assumed "responsibility for management of the Hunley subject to the provisions in this Agreement."

Your letter also recites that the Programmatic Agreement "deals with the financial management of the Hunley in Section XII." You state the following regarding such provision:

> [t]hat section [Section XII] provides that "The State of South Carolina will receive all receipts, royalties, and all other revenue generated by the exhibition, display, and curation, all other activities related to the Hunley unless otherwise regulated or prohibited by the laws of the United States." Section XII (B) also provides that "this agreement does not obligate Navy to commit funds to management of the Hunley except as required for administrative duties under the agreement to the extent that appropriated funds are available for the purpose and except as provided in Section XII (C)." Section XII (C) provides that "if either the Navy or the State of South Carolina incurs costs related to the Hunley without express prior consent of the other party, the party incurring the costs shall be solely liable for them." In short, the State of South Carolina was to bear the financial costs of the project unless appropriate funds were made available by the federal government. That is why Section XII (A) was added so that the State of South Carolina would have a method to pay the costs of the project through "receipts, royalties, and all other revenue' generated by the

Hunley's exhibition and display that it was obligated for under the Programmatic Agreement.

Your letter also provides background regarding the formation of the Friends of the Hunley and the purpose concerning such organization. With regard to the Friends of the Hunley, you state:

> ... the Hunley Commission decided to create a non-profit group to raise the funds necessary to remain in compliance with the Programmatic Agreement. The Friends of the Hunley, created by the Hunley Commission, has raised millions of dollars for the Hunley project. This money, that would have otherwise been required from the State of South Carolina to be in compliance with the Programmatic Agreement, was used to pay the bills and keep us in compliance with the Programmatic Agreement.
>
> .... Funds that have been raised from the exhibition, curation, and all other activities related to the Hunley have been used to defray the costs of the recovery, excavation and conservation of the Hunley that otherwise would have been borne by the State of South Carolina taxpayers pursuant to the Programmatic Agreement.

You have thus requested an opinion to address the following questions:

1. Can the Hunley Commission, absent express language, create a 501(c)(3) corporation to further its efforts for the recovery, excavation and conservation of the H. L. Hunley?

2. Does the Programmatic Agreement restrict the funds raised from the exhibition of the Hunley to the general fund of the State rather than to the ongoing costs of the project to comply with the Programmatic Agreement?

Law / Analysis

It is our opinion that the answer to your first question is "yes" and the answer to your second question is "no." These issues will be discussed below.

Analysis of your questions must begin with the statute creating the Hunley Commission. S.C. Code Ann. Section 54-7-100 provides as follows:

> § 54-1-100. Hunley Commission established; coordinates exempt from disclosure
>
> A committee of nine members 'Hunley Commission' shall be appointed, three of whom must be members of the House of Representatives to be appointed by the Speaker, three of whom must be members of the Senate to be appointed by the President Pro Tempore, and three members to be appointed by the Governor. The

committee shall make a study of the law regarding the rights to the salvage of the Hunley and any claim that a person or entity may assert with regard to ownership or control of the vessel. The committee is authorized to negotiate with appropriate representatives of the United States government concerning the recovery, curation, siting, and exhibition of the H.L. Hunley. Provided, inasmuch as actual locations or geographical coordinates of submerged archaeological historic properties are now exempt from disclosure as public records pursuant to Section 54-7-820(A), the geographical coordinates of the Hunley's location, regardless of the custodian, upon receipt from the Navy or receipt otherwise are expressly made exempt from disclosure pursuant to the Freedom of Information Act or any other law and no remedy for the disclosure of such coordinates exists pursuant to the Freedom of Information Act; and provided further, that with respect to the Hunley project, as described herein, the applicable duties and responsibilities contained in Article 5, Chapter 7 of this title shall be vested in the Hunley Commission; and provided further, that with respect to the Hunley project that the Hunley Commission shall be exempt from compliance with the provisions of Chapter 35 of Title 11. However, the committee may not negotiate any agreement which would result in the siting outside South Carolina of any remains, not claimed by direct descendants, found in the Hunley or which would relinquish South Carolina's claim of title to the Hunley unless perpetual siting of the submarine in South Carolina is assured by the federal government in the agreement.

The committee shall make recommendations regarding the appropriate method of preservation of this historic vessel and is also authorized to direct the Attorney General on behalf of the State of South Carolina to take appropriate steps to enforce and protect the rights of South Carolina to the salvage of the Hunley and to defend the State against claims regarding this vessel. The committee shall submit a recommendation for an appropriate site in South Carolina for the permanent display and exhibition of the H.L. Hunley to the General Assembly for its review and approval.

The committee members shall not receive the subsistence, mileage, and per diem as may be provided by law for members of boards, committees, and commissions.

A number of principles of statutory interpretation must also be considered in any construction or interpretation of § 54-7-100. First and foremost, is the cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 203 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Caughman v. Cola. Y. M. C. A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's

operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). Notwithstanding the fact that a statute must be construed according to its literal language, the Supreme Court has cautioned against an overly literal interpretation which may not be consistent with legislative intent. Greenville Baseball, Inc, v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942).

In addition, it is fundamental that the authority of a state agency or governmental entity created by statute "is limited to that granted by the legislature." Nucor Steel v. S.C. Public Service Commission, 310 S.C. 539, 426 S.E.2d 319 (1992). An administrative agency "has only such powers as have been conferred by law and must act within the authority granted for that purpose." Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1995). In this regard, we have consistently concluded that "... administrative agencies, as creatures of statutes, possess only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged." Op. S.C. Atty. Gen., February 11, 1993, citing Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991).

While an agency must possess the requisite statutory authority in order to exercise a particular power, we have also noted that it is not absolutely necessary to spell out each and every power which the agency may undertake. As we stated in Op. S.C. Atty. Gen., Op. No. 77-356 (November 9, 1977),

> [e]xpress authority to delegate is not necessary in all cases, since the authority to delegate within the agency, even as to discretionary and quasi-judicial functions, may be deemed implied or contained in certain provisions of the statute, such as an express power to appoint such employees as are deemed necessary to carry out the functions of the agency .... 2 Am.Jur2d, Administrative Law, Section 221, p. 51. Similarly in Beard-Laney, Inc., et al .v . Darby, et al., 213 S.C. 380, 49 S.E.2d 564 (1948), the South Carolina Supreme Court in ruing that the Public Service Commission had certain implied powers which grew out of their general power to regulate the operation of motor carriers held that in the absence of implied or express restricting limitations of public policy or express prohibition of law, a governmental body possesses not only such powers as are conferred upon it by the laws under which it operates but also possesses such powers which must be inferred or implied so as to enable such entity to effectively exercise its express powers. The Court stated that 'to say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions.' 213 S.C. at 389.

Moreover, we have concluded that a state agency or public corporation possesses certain implied power to contract. In Op. S.C. Atty. Gen., Op. No. 78-40 (February 28, 1978), we referenced the following principle of law in this regard:

> [a] corporation, including a public corporation need not have the express capacity to enter into contracts. Where not prohibited, there exists an implied power to make all such contracts as are necessary and proper to fulfil the purposes of its existence. See 18 C.J.S., Corporations, § 1122; 1956-57 Ops. Atty. Gen. p. 264.

Further, a state agency, or governmental entity, such as the Hunley Commission, must act with a public purpose in mind. See, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). The Supreme Court of South Carolina has stated that a public purpose

> has for its objective the promotion of the public health, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given public political division, so that whatever is necessary for the preservation of the public health and safety is public purpose, and if an object is beneficial to the inhabitants and directly connected a public purpose, it will be considered a public purpose ....

Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798, 801 (1953). In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), the Court set forth the following standard for the "public purpose" requirement to be met:

> [t]he Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.

Applying these standards, "[i]t is settled that expenditures of public funds for historical and recreational purposes are for recognized public purposes." Op. Atty. Gen., Op. No. 88-58 (August 2, 1988), citing Timmons v. South Carolina Tricentennial Commission, 254 S.C. 628, 175 S.E.2d 805, Mims v. McNair, 252 S.C. 64, 165 S.E.2d 355. Likewise, the promotion of tourism by the State or its localities serves a valid public purpose. Op. Atty. Gen., October 31, 1985.

Further, our courts, as well as opinions of this Office, have consistently recognized that the State or its subdivisions may contract with private entities in the carrying out of a public purpose. Our Supreme Court stated in Bolt v. Cobb, 225 S.C. 408, 415, 82 S.E.2d 789 (1954) that a county may validly contract with a private entity for the "performance of a public, corporate function ... ." [providing a hospital]. Moreover, we have concluded that Beaufort County Council could "allocate public funds to the Child Abuse Prevention Association, albeit a private nonprofit corporation ... ." because such expenditure "would constitute a valid public purpose." Op. Atty. Gen., Op. No. 88-52 (June 27, 1988). In Op. Atty. Gen., Op. No. 93-44 (June 23, 1993), we noted that " ... the courts of this State have looked favorably at the use of public funds with respect to nonprofit (eleemosynary) corporations serving public purposes ... ." Citing Bolt v. Cobb, supra and Gilbert v. Bath, 267 S.C.

171, 227 S.E.2d 177 (1976). See also, Ops. Atty. Gen., January 16, 1978; April 20, 1982, July 12, 1984; March 1, 1991.

And in Op. No. 85-81 (August 8, 1985), we concluded that the law did not absolutely prohibit the Department of Corrections from contracting with a private corporation to assist in the management of a State corrections facility. We opined that so long as the State does not unlawfully delegate its statutory and legal authority, such a contract would be valid. In our judgment, it was clear "that the administration of the prison system constitutes an unmistakable public purpose." Moreover, we stated that

> [i]t is well established that the State may properly maintain supervision and control through the use of a contract. As a general matter, any employment contract contemplates supervision and control by the employer over his employee. More specifically, a private corporation "may be employed to carry a law into effect." 16 C.J.S., Constitutional Law, Sec. 137. As stated in Amer. Soc. P.C.A. v. City of N.Y., 199 N.Y.S. 728, 738 (1933),
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> > While it is true that strictly governmental powers cannot be conferred upon a corporation or individual ... still it has been held by a long line of decisions that such corporations may function in a purely administrative capacity or manner.
> >
> > While "an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties ... ." Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5th Cir.1957); see also, 73 C.J.S., Public Adm. Law and Procedure, Sec. 53; McQuillin, Municipal Corporations, Sec. 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) (contract between a city and private company for the control, management and operation of waterworks plant is valid).

Compare, Op. Atty. Gen., April 4, 1996 (MUSC needs enabling statute to turn over its duties to a private for-profit corporation).

Along these same lines, our Supreme Court has upheld a governmental entity's grant of an exclusive franchise to a private nonprofit corporation for the execution of a public purpose. In South Carolina Farm Bureau Marketing Assn. v. South Carolina State Ports Authority, 278 S.C. 198, 293 S.E.2d 854 (1982), the Court addressed the legality of an Agreement between the Ports Authority and the Association for the operation and management of the State's grain elevator. Pursuant to the

Agreement, the Association was "granted complete and exclusive custody of the elevator as an independent contractor." 278 S.C. at 199. The State received rent from the Association, but contributed no funds to its operation.

The Court concluded that the challenge to the Agreement was, in reality, based upon the fact that the State had received a "bad bargain." In essence, the State was losing money while the Association "is making a profit." Id., at 201. Rejecting the State's constitutional challenge, the Court opined:

> [i]n considering the assertion that the Association is making a profit, we find the Association does indeed have retained earnings, but these earnings are necessary to keep the operation going. This money is used as working capital and for equipment, improvements and accrued taxes, with any excess being refunded to the customers. Furthermore, merely because an individual or private corporation makes a profit as a result of legislation does not change the public purpose into a private purpose. Anderson v. Baehr, 265 S.C. 153, 271 S.E.2d 43 (1975).
>
> We conclude the operation of the grain elevator is primarily for the benefit of the State and the farmers. Thus, the argument that Act No. 1272 of 1970 is unconstitutional because it pledges the credit of the State primarily for the benefit of a private corporation must fail.

Id. at 203. (emphasis added).

Likewise, in Brashier v. South Carolina Department of Transportation, 327 S.C. 179, 490 S.E.2d 8 (1997), overruled on other grounds, I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), the Court upheld the Department of Transportation's exclusive licensing agreement with a nonprofit public benefit corporation to operate and collect tolls on the Southern Connector. The Association's sole purpose was to assist the State in paying off the bonds used to finance the project. Once such bonds were paid, "the Association's license will expire, Association will dissolve and all of its assets will be distributed to SCDOT." 327 S.C. at 183.

In concluding that such a licensing agreement was constitutionally valid – i.e. did not constitute a violation of Article X, Section 11 of the South Carolina Constitution as a pledging of the State's credit to a private corporation – the Court also concluded that the Agreement was not an improper delegation of SCDOT's authority. The Court's reasoning was as follows:

> SCDOT has been given the police power and duty to plan, construct, maintain, and operate the state highway system consistent with the needs and desires of the public. S.C.Code Ann. § 57-1-30 (Supp.1996) *See also id.* at § 57-1-20

(establishing SCDOT as an administrative agency); 39 Am.Jur.2d *Highways, Streets & Bridges* § 32 (1968) (laying out of highways and streets for public use involves exercise of state's police power). Initially, we point out that in making these covenants SCDOT did not actually give its authority to another entity; rather, it contractually limited its authority. As a general rule, administrative bodies cannot alienate, surrender, or abridge their powers and duties, by contract or otherwise. However, courts have upheld contracts entered into by administrative bodies or local governments arguably bartering away police power if that body has legislative authority to do so. *See, e.g., Vap v. City of McCook*, 178 Neb. 844, 136 N.W.2d 220 (1965) (contract to improve federal highways within city's borders whereby city, in order to secure federal funds, promised to prohibit parking on a certain street, held not an improper delegation because legislature authorized governmental entities to do whatever necessary to secure federal funds); *Bidlingmeyer v. City of Deer Lodge,* 128 Mont. 292, 274 P.2d 821 (1954). This is in keeping with the well-settled principle such bodies may only exercise those powers specifically delegated to them. *See, e.g.,* S.C. Code Ann. § 57-1-20 (Supp. 1996) (SCDOT shall have such functions and powers as and powers as provided by law); *Riley v. South Carolina State Hwy. Dept.*, 238 S.C. 19, 118 S.E.2d 809 (1961) (powers exercised by Highway Department must be found in some legislative act because it has no inherent authority). Thus, the issue here is whether SCDOT has legislative authority to enter into noncompetition agreements such as are involved here. We hold that it has. ...

To accomplish its functions and purposes of "the systematic planning, construction, maintenance, and operation of the state highway system ... consistent with the needs and desires of the public," SCDOT has the following relevant powers. Generally, it has the power to "lay out, build, and maintain public highways and bridges." It may "enter into such contracts as may be necessary for the proper discharge of its functions and duties," and "do all things required or provided by law." More specifically, SCDOT has been given authority to "enter into ... partnership agreements with ... private entities to finance, by tolls and other financing methods, the cost of acquiring, constructing, equipping, maintaining and operating highways, roads, streets and bridges in this State." SCDOT has the discretionary power to construct turnpike facilities. To accomplish the express powers granted it regarding turnpike facilities construction, SCDOT may "[d]o all acts and things necessary or convenient." Here, SCDOT found it necessary to enter into these covenants because of the understandable practical concerns future bondholders would have regarding bond repayment. We find the legislature gave SCDOT the power to enter into such covenants as part of its broad power to contract. We therefore affirm the master's ruling of no improper delegation.

327 S.C. at 191-193.

With these basic principles in mind, we turn now to an examination of the questions set forth in your request. The central issue raised by your letter is the statutory authority of the Hunley Commission not only to create the nonprofit corporation, known as Friends of the Hunley, but the authority of the Hunley Commission, in light of the Programmatic Agreement with the Navy, to allow this corporation to retain the funds derived from the exhibition of the Hunley as part of the ongoing operation of the project.

Of course, as stated above, the overriding principle in any analysis of these questions is the intent of the General Assembly in the enactment of the enabling legislation creating the Hunley Commission. Act 247 of 1996, which created the Hunley Commission, and which is now codified at § 54-7-100, sets forth as the findings of the General Assembly, the Legislature's purpose in creating the Commission. Among the General Assembly's findings, is the expressed purpose that the Hunley be "displayed in perpetuity in South Carolina in an appropriate manner for the benefit of future generations ...." This legislative intent is important in resolving your questions.

In addition, it is significant that § 54-7-100 exempts the Hunley Commission from the Procurement Code. This is important primarily because such exception clearly indicates that the Legislature assumed that the Commission possessed the power to contract; otherwise, there would have been no need to exempt the Commission from the Procurement Code. Here, the lesser power is subsumed within the greater, and it logically follows that if the Hunley Commission is exempt from the Procurement Code's requirements in the Commission's consummation of contracts, such power to contract is present in the Commission.

Second, the Hunley Commission is not a typical state agency which is part of the executive branch of state government. In Op. S.C. Atty. Gen., February 18, 2003, we concluded that the Hunley Commission is, in effect, more akin to a committee of the legislature than to the typical agency which is part of the executive branch of state government. In that opinion, we concluded that

> [i]n this instance, the Legislature has retained the ultimate authority of oversight over the salvage, title, preservation and display of the H.L. Hunley unto itself. The General Assembly has assigned to the Hunley Commission, which it deems a "committee," comprised principally of members of the General Assembly, the task of implementing this work day-to-day. (emphasis added).

We noted in that opinion that, pursuant to § 54-7-100, the Commission is required to "'make recommendations regarding the appropriate method of preservation of this historic vessel,'" but that the preservation of the Hunley is to be done "acting through its 'committee'," the Hunley Commission. We observed that case law supported the proposition "that the preservation of historic

sites is principally a legislative function." Accordingly, with respect to the preservation of the Hunley, such function has not been delegated to the executive branch as are other duties and responsibilities of state government, but instead has been retained by the Legislature, acting through its committee – the Hunley Commission. This means two things: first, that the General Assembly, acting through its "committee" is surely aware of the manner in which the preservation and exhibition of the Hunley is being administered. Secondly, we may safely assume the Legislature, in enacting § 54-7-100, contemplated that such administration and the expenditure of funds with respect thereto will not be handled in the typical manner – by delegation to a state agency in the executive branch – but through its legislative committee – the Hunley Commission.

Third, § 54-7-100 states explicitly that "the applicable duties and responsibilities contained in Article 5, Chapter 7 of this title shall be vested in the Hunley Commission ...." Such duties and responsibilities are found in the South Carolina Underwater Antiquities Act of 1991, codified at § 54-7-610 et seq. This Chapter empowers the South Carolina Institute of Archaeology and Anthropology to convey to a licensee on behalf of the State title to submerged archaeological historic property and artifacts and all submerged paleontological property or a portion of the property recovered from submerged lands.

Significantly, § 54-7-650 authorizes the State to grant a license to an individual or group in the event that submerged archaeological historic properties or paleontological properties are "removed, displaced or destroyed ... ." In addition, this provision empowers the State to "enter into agreements with licensees for the disposition of recovered submerged archaeological historic property and submerged paleontological property." Thus, the Hunley Commission is given express authority to contract with a "licensee" relating to the "disposition" of such "recovered" historic property. A "licensee" is defined by § 54-7-620(21) as "any person or entity authorized to perform certain recovery operations from a submerged archaeological property ..." pursuant to § 54-7-610 et seq. (emphasis added).

Based upon the foregoing, it is evident that the General Assembly intended the Hunley Commission to possess sufficient authority to carry out the functions relating to the recovery, preservation, curation, display and exhibition of the Hunley as a historic artifact of the State of South Carolina. We noted this delegation of authority to the Commission in an opinion dated April 16, 1996, in which we stated that "the General Assembly created the Hunley Commission to 'take the lead' in the State's effort regarding the salvage, rescue, restoration and display of the Hunley." We also recognized in that same opinion that "[m]ost specifically, it is the [Hunley] Commission which is delegated by the Legislature [the duties] to perform and carry out with respect to the Hunley all the applicable duties and responsibilities which are normally given the [South Carolina Institute of Archaeology] pursuant to the Underwater Antiquities Act."

While the General Assembly has reserved the right to make certain ultimate decisions, such as the precise location of the Hunley exhibition, it has clearly assigned to the Hunley Commission "the task of implementing this work day to day." Op. S.C. Atty. Gen., February 18, 2003, supra. And, like any other legislative committee, the General Assembly would most certainly be aware of the Commission's actions in carrying out this task. It is apparent to us that the General Assembly has concurred in the Hunley Commission's implementation of § 54-7-100.

We now address your specific questions. Your first question is whether the Hunley Commission may create a 501(c)(3) corporation to further its efforts in the recovery, excavation, and conservation of the H. L. Hunley. We are of the opinion that such creation is consistent with the Hunley Commission's duties to conserve and display the Hunley.

In previous opinions, we have reviewed and approved the authority of other State and local agencies to create eleemosynary entities to assist those agencies in carrying out their statutory duties. For example, in an opinion dated January 16, 1997, we concluded that the Department of Parks, Recreation and Tourism was authorized to create a nonprofit corporation to assist PRT in carrying out the public purpose of historic preservation so long as certain supervision and control was maintained. Part of the Foundation's duties was the "holding, retaining, leasing, licensing, renting, managing, investing, reinvesting, selling or otherwise disposing of or assigning the income from and/or rights in or to real and personal property ... ." Id. Pursuant to the agreement between PRT and the Foundation, PRT was authorized to provide the Foundation with State/Departmental resources, including facilities and personnel, at no expense to the Foundation. In our view, such an arrangement served a clear public purpose – that of tourism and historic preservation – and thus we concluded that PRT's creation of the nonprofit corporation and its agreement with that entity constituted a reasonable implementation and execution of PRT's duties in that regard.

And, in Op. S.C. Atty. Gen., Op. No. 94-69 (November 15, 1994), we examined the authority of Patriots Point Development Authority "to establish a nonprofit corporation to carry out the purposes set forth in its enabling legislation ...". We noted that PPDA was by statute deemed a "body politic and corporate" and an "instrumentality of the State" created "to carry out an area of public interest - the development and improvement of the Patriots Point area." We also noted that

> [a]s a creation of state statute, the PPDA derives its entire existence, nature and powers therefrom. It is well known that governmental agencies or corporations, municipal corporations, counties and other political subdivisions can exercise only those powers conferred upon them expressly, inherently or impliedly by their enabling legislation or a constitutional provision. If a power is not expressed or necessarily implied, it does not exist. South Carolina Electric and Gas Co. v. Public Serv. Comm., 275 S.C. 487, 272 S.E.2d 733 (1980); Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E.2d 531 (1987).

> Implied or incidental corporate powers are those which are essential to corporate existence and which are reasonably necessary to the corporations express powers. Implied or incidental corporate powers are not those which are merely convenient or useful. There can be no implied power independently of an express power. Lowering v. Seabrook Island Property Owners Ass'n., 291 S.C. 201, 352 S.E.2d 707 (1987); see also, Op. Atty. Gen. 87-38.

The opinion could locate no express authority enabling PPDA to create the nonprofit corporation. However, we noted that PPDA's enabling statute gave the agency "broad and general powers 'to do and perform any act or function which may tend to or be useful toward the development and improvement of Patriot's Point.'" Moreover, PPDA's authorization included the power "to do any and all other acts and things authorized or required to be done by the article, whether or not included in the general powers mentioned in § 51-13-770(9)." Based upon these provisions, we opined:

> [t]he law of South Carolina generally does not prohibit the state agencies or authorities from establishing nonprofit corporations. [See Op. Atty. Gen., February 28, 1977, where the State Housing Authority was found to have the power to create a nonprofit organization as included among its "necessary, proper, incidental, or useful" powers. Since the State Housing Authority could issue bonds to finance the construction of low cost housing, it could choose to form a nonprofit organization that would carry out that task. See also South Carolina Nonprofit Corporation Act No. 384, May 10, 1994.]

Based upon these authorities, it is our opinion that the Hunley Commission possesses the power to create the nonprofit corporation known as the Friends of the Hunley to further its statutory duties to provide for the recovery, excavation and conservation of the Hunley. The authority of the Commission to implement the Legislature's purpose in preserving and displaying the Hunley carries with it the authority to create a nonprofit corporation to raise funds and assist in that effort. Such an action by the Commission is particularly reasonable in view of the fact that the Hunley Commission does not itself possess the resources to carry out the project and must, of necessity, turn to private funding for payment of the costs of preserving and exhibiting the Hunley. Moreover, as indicated in your letter, such costs of preserving and displaying the Hunley must be borne by the State of South Carolina, not the United States, under the Programmatic Agreement. It is, as you indicate, important to the State of South Carolina to remain in compliance with the Programmatic Agreement. You indicate that the Friends of the Hunley, a nonprofit, charitable organization, "has raised millions of dollars for the Hunley project" through private donations. We believe that this approach is reasonable and is consistent with the Hunley Commission's powers and duties under its enabling statute.

Your second question is "[d]oes the Programmatic Agreement restrict the funds raised from the exhibition of the Hunley to the general fund of the State rather than the ongoing costs of the project to comply with the Programmatic Agreement." The short answer to this questions is "No." The Programmatic Agreement is an agreement between the Hunley Commission and the State Historical Preservation Officer on behalf of the State of South Carolina and the Department of the Navy. While it is important that the State remain in compliance with the Agreement from the standpoint of the parties to that contract, Section XII of the Agreement, appears to have been designed simply to insure that revenue generated by the Hunley's display and exhibition would not go to the United States, but would remain in South Carolina. However, it is state law, not this contract with a third party, which must determine whether or not such revenues must actually be deposited in the General Fund of the State or may be retained instead by the Friends of the Hunley to pay for the ongoing costs of the project. Thus, we must examine state law in this area.

The above discussed decisions in South Carolina Farm Bureau Marketing Assn. v. South Carolina State Ports Authority, supra and Brashier v. South Carolina Dept. of Transportation, supra provide legal support for the Hunley Commission's decision to reach what amounts to an exclusive licensing or franchise agreement with the Friends of the Hunley in order to assist the Commission in the curation, display and exhibition of the Hunley. In both of these cases, the South Carolina Supreme Court upheld an agreement between the State and a nonprofit corporation to carry out certain duties of the agencies involved. That there existed a public purpose was clear in both these cases. The fact that the nonprofit corporation was allowed to make a profit or to retain revenues as part of the project in order to accomplish what was a public purpose did not invalidate the agreement. In Brashier, the Court concluded that "the legislature gave SCDOT the power to enter into such covenants as part of its broad power to contract."

A similar conclusion was reached in our 1997 opinion regarding the agreement between PRT and its Foundation, discussed above. And, in Op. S.C. Atty. Gen., Op. No. 1315 (May 9, 1962), we concluded that it was lawful for the South Carolina Aeronautics Commission to grant an exclusive franchise for limousine service at a state-owned airport. There we noted that "[t]he South Carolina statute does not seem to prevent the granting of [an] exclusive limousine franchise." In other words, it is not unusual for the State or a governmental entity to contract with or enter an exclusive licensing or franchise agreement with a nonprofit corporation to assist it in carrying out its statutory duties so long as a public purpose is involved, and provided there is statutory authorization therefor. Here, the public purpose is clear – the preservation of an important historic artifact.

Moreover, based upon § 54-7-100, the Hunley Commission possesses the statutory authority to enter into a cooperative agreement with the Friends of the Hunley, in essence, making the Friends the exclusive licensee to manage the exhibition and display of the Hunley. As we have noted, the Commission is exempt from the Procurement Code, thus indicating a clear legislative intent to contract with an entity without competitive bidding. Such intent is reinforced by bestowing upon

the Commission the same powers as are provided the Institute of Archaeology and Anthropology pursuant to the South Carolina Underwater Antiquities Act. In other words, pursuant to § 54-7-650, the Commission "may enter into agreements with licensees for the disposition of recovered submerged archaeological historic property...." The Underwater Antiquities Act, codified as Article 5 of Chapter 7 of Title 54, envisions the State's reaching exclusive licensing agreements with licensees.

In addition, the Commission is impliedly authorized to contract based upon the necessity of carrying out its duties and responsibilities regarding the curation, display and exhibition of the Hunley. As we have concluded in other opinions, "[w]here not prohibited, there exists an implied power to make all such contracts as are necessary and proper to fulfill the purposes of [an agency's] ... existence." Op. S.C. Atty. Gen., Op. No. 78-40 (February 28, 1978), supra. Thus, in our opinion, the Hunley Commission possesses the power to reach an agreement with the Friends of the Hunley and to grant the Friends the exclusive license or franchise to carry out the display and exhibition of the Hunley and to retain the revenues generated thereby.

These principles are fully illustrated in Green v. City of Rock Hill, supra. There our Supreme Court upheld the transfer of a city's water system to a private, nonprofit corporation for the operation and management thereof. Based upon a statute which authorized all cities and towns to "construct, purchase, operate and maintain waterworks .. for the use and benefit of such cities and towns and the inhabitants thereof ...," the Court concluded that Rock Hill's contract with the corporation was legally valid. In part, the Court's reasoning was as follows:

> ... it is clear that the "full power" to "operate and maintain" and the "full control and management" ... vested in the municipal authorities confer a discretion as to means and methods of operation and maintenance to the end that the property subserve the purpose of its acquirement which is limited only by the broad measure of fiduciary obligation prescribed in the statute, "for the use and benefit of such cities and towns and the inhabitants thereof." ... Certainly, the operation, maintenance, and disposal of such a waterworks system, "for the use and benefit" of a city and its inhabitants calls for the exercise of the same kind of "common sense," business judgment, and discretion as to means, methods, and policies, on the part of the municipal authorities as would be exercised and applied in the conduct of a similar enterprise by a private individual or corporation. The mechanical and physical purpose of a waterworks system is to supply a city or town and its inhabitants with water. The civic or municipal purpose in acquiring and maintaining such property is as comprehensive as the public interests which the supply of water so made available tends to promote ... .

> In the light of the foregoing interpretation of the measure of the fiduciary obligation imposed upon the municipal authorities of Rock Hill, under the well-settled principles of law above stated, it is clear, we think, that this contract may not be pronounced invalid upon the ground that it contemplates and involves such a donation or diversion of public property to a private use as amounts to a breach of the trust imposed upon the city council to operate, manage, and dispose of the waterworks, about to be constructed, "for the use and benefit" of the city and its inhabitants.

147 S.E.2d at 356-357. The Court added that the consideration for the City to enter the agreement was a "fixed supply of water delivered to it for the use and benefit of the city's present water supply system and relief from the burden of physical operation and maintenance of the plant and equipment ... ." In turn, the company received excess water "and certain payments in money to be made by the municipality." Id. at 358. Use of the City's property and other financial benefits, however, was not deemed by the Court to be an unlawful appropriation or diversion of public property to a private use. In the Court's view, "[t]he contract embodies the city's choice of means and methods of operating and maintaining the waterworks within the discretion conferred by the statute ...." Id.

With respect to the argument that the City lacked sufficient statutory authority to consummate the agreement, such authority was "conferred by the terms of the enabling statute ... granting the power 'to sell, convey and dispose of'" waterworks property. The greater power to sell necessarily carried with it the lesser power to "'transfer an interest less than an absolute one ....'" Moreover, concluded the Court, because the contract was an "operative" agreement, there would "seem to be no necessity, upon either principle and authority, for express legislative sanction." Id, at 359.

Conclusion

In our opinion, a court would uphold the actions of the Hunley Commission in creating a nonprofit corporation – the Friends of the Hunley – for the purpose of raising sufficient funds to defray the costs of curating, displaying and exhibiting the Hunley. Likewise, we believe a court would conclude that the revenues derived from the Hunley's exhibition and display are not legally required by the Programmatic Agreement or any other provision of state law to be returned to the general fund of the State, but may remain with the nonprofit corporation for the operation of the project.

In our view, the revenues from the Hunley's exhibition and display are not governed by the Programmatic Agreement between the Hunley Commission and the United States Navy, but by state law, that is, by the Hunley's enabling legislation. The Programmatic Agreement was consummated with a third party – the Navy – and although such Agreement must be complied with and requires

funds derived from the display of the Hunley to go to the State of South Carolina, such provision's purpose, in our opinion, is simply an effort by the State to insure that these revenues are not claimed by the United States or by the Navy. In any event, this provision in the Programmatic Agreement cannot control the actual disposition of these funds under state law. Such disposition must be governed by state statutes, case law decided by our courts and the agreements made by the Hunley Commission acting pursuant thereto. This means that the revenues derived from the exhibition and display of the Hunley are legally treated as funds retained by the nonprofit corporation – the Friends of the Hunley.

Opinions of this Office have consistently concluded that a governmental entity is not prohibited from creating a nonprofit corporation for fundraising and to assist the entity in carrying out its statutory purpose and mission. Public colleges and universities have done so frequently over the years. These public entities allow the foundations to utilize their names and other public resources for the benefit of the institutions. See, State Bd. of Accounts v. Indiana University Foundation, 647 N.E.2d 342 (Ind. 1995) [funds raised from private sources by a nonprofit foundation created by the University of Indiana remain with the Foundation; even though funds were donated "as a result of University's status as a public institution," the Court concluded that such funds "retain their private character." 647 N.E.2d at 350, 352. Moreover, our courts have concluded that a state agency or governmental entity may consummate an exclusive licensing agreement with a nonprofit corporation so long as a public purpose and statutory authority are present. Here, the public purpose in the exhibition and display of the Hunley – the promotion of tourism and historic preservation – is clear.

Moreover, in our opinion, the Hunley Commission possesses the requisite statutory authority to create the Friends of the Hunley to raise funds, from private sources including the exhibition and display of the vessel, and this nonprofit corporation may use these funds generated from such exhibition and to defray the ongoing costs of the Hunley project. In enacting § 54-7-100, the General Assembly exempted the Hunley from the Procurement Code, indicating an intent to authorize the Commission to contract and to do exclusively. Moreover, the Legislature bestowed upon the Hunley Commission the same powers contained in § 54-7-610 et seq. – The South Carolina Underwater Antiquities Act. Included within such authority is the power to grant exclusive licenses to private entities and to "enter into agreements with licensees for the disposition of recovered submerged archaeological historic property ...." Thus, we believe the Hunley Commission possesses both the express and implied authority to contract.

Moreover, such authority governs the disposition of the funds raised as well. Essentially, what the Commission has done here is to reach an exclusive licensing agreement with the Friends of the Hunley to carry out the management, display, and exhibition of the submarine. We believe it possesses the power to do so. Consistent therewith, we also are of the opinion that the disposition of the revenues from the Hunley's exhibition and display is not governed by the Programmatic

Agreement, but by the agreement between the Hunley Commission and the Friends of the Hunley, an agreement which is authorized and contemplated by § 54-7-100, as well as the other authorities referenced herein.

Accordingly, we are unaware of any conflict with state law with respect to the arrangements described in your letter between the Friends of the Hunley and the Hunley Commission. Such cooperative efforts of a similar nature have been approved by our Supreme Court as well as in previous opinions of this Office, as referenced above.

Yours very truly,

Henry McMaster

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