



HENRY McMASTER  
ATTORNEY GENERAL

October 6, 2009

William E. Whitney, Jr., Esquire  
William E. Whitney Attorney at Law  
Post Office Box 266  
Union, South Carolina 29379

Dear Mr. Whitney:

We understand that you are the City Attorney for the City of Union (the "City") and would like to request an opinion on behalf of the City "as to the oversight and accountability of a certain local tax levy that we have in Union."

#### **Law/Analysis**

As you indicated in your letter, in 1946, the Legislature passed an act authorizing the Union County Auditor to levy a property tax for "the purpose of assisting in the expenses of creating and maintaining a Veterans Memorial Park . . ." 1946 S.C. acts 2518. The tax to be levied according to the act consists of "two (2) mills for the fiscal year beginning July 1, 1946, and ending June 30, 1947; and, thereafter, the levy on all taxable property in said County for said purposes, a tax of one-half (½) mill . . ." Id. The act also instructs the County Treasurer "to hold, in a separate fund, the amount so collected and to credit the same to the account of The American Legion for Veterans Memorial Park." Id. Moreover, under the appropriation provision of this act, the Legislature provides: "The amount so collected is hereby appropriated to the American Legion for Veterans Memorial Park." Id.

According to your letter, you are concerned about oversight over these funds as they are provided directly to American Legion Post No. 22. You stated in your letter:

At the present time there is not procedure to replace the Board of Directors for the American Legion. The County continues to collect the ½ mill which at this point of time equals approximately \$26,158.00 per year and turns that over to the American Legion. In addition, the Lodge Hall is a nice facility and rents for \$300.00 per event which money goes to the American Legion. There is no oversight or accountability for these tax dollars over the American Legion. It would seem that the County should hold the American

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Legion accountable for these funds but the County apparently wants not part of this. Recently, the Legion bought an automobile for a Park Superintendent who was retiring and this caused quite a stir in the community.

Another possible problem is that Act 846 says the Treasurer is supposed to credit the amount collected each year to the account of the American Legion for Veteran's Memorial Park. American Legion Post No. 22 has always received the money but there are at least 2 other American Legion Posts in Union County - one in Jonesville and one in Lockhart.

In numerous opinions, this Office discussed the transfer of public funds to private entities. In each opinion, we stressed that our Constitution, pursuant to article X, section 5 and article X, section 11, requires that public funds only be used for public purposes. Ops. S.C. Atty. Gen., July 28, 2008; March 20, 2007; January 11, 2006. However, our courts recognize that public funds may be expended for the benefit of private non-profit entities without violating our Constitution, so long as the non-profit uses such funds for the performance of a public function. See Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976) (finding a grant by Florence County to a private, non-profit corporation for the purpose of building a hospital served a public function of Florence County); Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954) (determining that Anderson County could issue general obligation bonds for the benefit of the Anderson County Hospital Association, a non-profit corporation, because it provided "a public, corporate function").

According to the 1946 act, the funds are to go to the American Legion for a Veteran's Memorial Park. We gather from your letter that you are not taking issues with whether or not the Veteran's Memorial Park is a public purpose. However, you are concerned that no mechanism exists to ensure that the American Legion is using the proceeds of the ½ mill tax for a public purpose. Initially, we note that the 1946 act specifically states that the funds are being appropriated "for a Veterans Memorial Park." 1946 S.C. Acts 2518. Therefore, we stress that American Legion is restricted in its use of such funds to the support and maintenance of the Veteran's Memorial Park.

Although the legislation is clear that the funds must be used for a Veteran's Memorial Park, we found no provision in the legislation pertaining to establishing oversight over the use of these funds by the American Legion. In a prior opinion of this Office addressing the transfer of public funds to private non-profit entities, we stated:

The appropriation of public funds to these private entities is, in effect, an exchange of value which results in the performance by those entities of a public function for the state. Cromer v. Peoria Housing

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Authority, 78 N.E.2d 276, 284 (Ill. 1948). Generally, however, some public control is also required on those expenditures by the private entities in order for the constitutionality of the appropriation to be upheld. O'Neill v. Burns, 198 So.2d 1, 4 (Fla. 1967); Dickman v. Defenbacher, *supra*; State v. City of New Orleans, 24 So. 666, 671 (La. 1898). In our opinion, such control could be accomplished, at least in part, by including in each such appropriations act the provision set out in § 135 of the 1983-84 General Appropriations Act, which requires those private organizations to submit to certain accounting and review procedures by the State.

Op. S.C. Atty. Gen., November 16, 1983.

In a subsequent opinion addressing the contribution of State funds to a private non-profit transit authority, we stated:

While, it is our opinion that a court would conclude that the Authority serves a public purpose and public funds thus may be spent in support thereof, our prior opinions have also concluded that 'some public control is also required on those expenditures by the private entities in order for the constitutionality of the appropriation to be upheld.' Op. Atty. Gen., November 16, 1983. We have further advised that such control could be 'accomplished, at least in part, by including in each such appropriations act the provision set out in § 135 of the 1983-84 General Appropriations Act, which requires those private organizations to submit to certain accounting and review procedures by the State.' Id.

Op. S.C. Atty. Gen., July 12, 1984.

By the 1946 act, although the County is charged with collecting the tax, the Legislature itself appears to be levying the tax for the support of the veterans memorial park. Thus, in our opinion, the Legislature has the responsibility of providing a sufficient level of public control to make sure expenditures by the American Legion serve a public purpose. Accordingly, the Legislature would need to take action to ensure the constitutionality to the appropriation to the American Legion.

### **Conclusion**

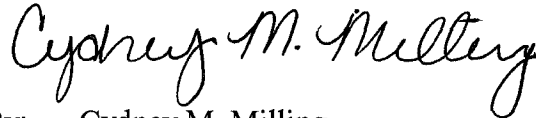
The 1946 act appropriating the revenue from a ½ mill property tax levied on all taxable property in Union County to the American Legion clearly states that such funds are to be used for

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the Veteran's Memorial Park. Thus, any expenditures for any other purpose would be in violation of this provision. However, as you point out, the legislation lacks any provisions establishing a level of public control after the funds are appropriated. We believe a certain level of public control is necessary in order to ensure such an appropriation to a private entity is constitutional. Therefore, we suggest that legislative action be sought to require that the American Legion submit accounting and review procedures established by the State.

Very truly yours,

Henry McMaster  
Attorney General



By: Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General