May 23, 2008

Sherri Yarborough, Director
Melba Banton, Chairperson of the Board
R.D. Anderson Applied Technology Center
Post Office Box 248
Moore, South Carolina 29369

Dear Ms. Yarborough and Ms. Banton:

We received your letter addressed to Attorney General Henry McMaster concerning R.D. Anderson Applied Technology Center ("R.D. Anderson"). According to your letter, R.D. Anderson's Board of Trustees (the "Board") seeks to make $5,000,000 to $10,000,000 in capital improvements and thus, you have several questions dealing with the Board's ability to finance the capital improvements. Specifically, you ask as follows:

1. What type of entity is the R.D. Anderson Board?

2. Does the R.D. Anderson Board have the power to borrow money to finance the Project?

3. Assuming, arguendo, the R.D. Anderson Board has the power to borrow money to finance the Project,

    a) Can the Board issue its own general obligation debt?

    b) Can the Board enter into a lease purchase contract for purposes of financing the Project, and if so, would the millage rate cap set forth in Section 6-1-320 of the Code apply?

Law/Analysis

According to your letter,

> R.D. Anderson was formed in 1967, pursuant to Act No. 830 of 1966 (the "Act") now codified at Section 59-53-1810, et seq., of the Code

> of Laws of South Carolina, 1976, as amended . . . , when the [Spartanburg District No. 6, No. 4, and No. 5] entered into an affiliation agreement . . . pursuant to Section 2 of the Act, now codified as Section 59-53-1890 of the Code, for the purpose of planning, constructing and operating a vocational school to serve the Districts' students from Byrnes, Dorman and Wooduff high schools.

Chapter 53 of title 59 of the South Carolina Code (Supp. 2007) contains, among other things, provisions allowing school districts to affiliate with one another to develop and maintain career and technology education facilities and programs. Pursuant to sections 59-53-1880 and 59-53-1890, affiliating school districts must enter into written affiliation agreements, which according to section 59-53-1890, must provide for:

> (1) for the affiliating school districts to appoint a liaison committee which shall recommend organizational and administrative procedures and measures to assure adequate accounting procedures;
>
> (2) procedures by which career and technology education funds appropriated by the federal, state, or county government may be applied for and received;
>
> (3) procedures by which one of the affiliating school districts may hold title to real and personal property acquired with affiliated funds for the benefit of all affiliated school districts; and
>
> (4) that each of the affiliating school districts shall have an equity in the joint assets to the extent that the assessed tax value of the property within the school district bears to the aggregate assessed tax value of the property within the combined area of the school districts. If less than an entire school district is served by the career and technology education facilities or programs, only the area served must be considered in computing equities in joint assets.

Furthermore, section 59-53-1900 of South Carolina Code provides for the establishment of career and technology school boards.

The legislation establishing the Board does not address what type of entity the Board is. However, section 59-53-1910 of the South Carolina Code specifies that career and technology schools do not "constitute a separate school district, but is a joint project for the establishment of a

career and technology school by the cooperating school district." In your letter, you suggest that the Board is a political subdivision. You cite to an opinion of this Office issued in 1968 to support this conclusion. In that opinion, we considered whether the Lancaster County Natural Gas Authority is a political subdivision for purposes of section 90 of act 207 of 1961, requiring certain publicly-owned motor vehicles to display State license plates. Op. S.C. Atty. Gen., November 19, 1968. We found that the act in question did not contain a provision defining "political subdivision" for purposes of the act. Id. Thus, we looked to the generally accepted meaning of this term according to Words and Phrases, which stated: "'Attributes generally regarded as distinctive of 'political subdivision' are that it exists for purposes of discharging some function of local government, that it has prescribed area, and that it possesses authority for subordinate self-government through officers selected by it.'" Id. (quoting 32A Words and Phrases, Political Subdivision (Supp. 1968)). We noted that, consistent with this definition, sanitary districts, water districts, school districts, and pipeline districts have been found to be political subdivisions. Id. With regard to the Authority, we considered the fact that the Governor appointed its board, it is charged with "the duty of constructing and maintaining gas lines for use by the public, and is empowered to borrow money and issue revenue bonds for such purposes." Id. Despite finding the Authority did not have the authority to levy taxes, we ultimately concluded that it had the attributes of a political subdivision. Id.

Although you suggest that the Board is a political subdivision, unlike the situation described in our 1968 opinion, we are not clear as to the context in which you assert that the Board is a political subdivision. Thus, we note that numerous provisions of the South Carolina Code employing the term "political subdivision" contain their own specific definitions. See, e.g., S.C. Code Ann. §§ 2-7-76 (concerning the filing of fiscal or revenue impact statements); 3-7-110 (concerning agreements for federal reforestation); 4-10-720 (concerning local sales and use taxes); 5-31-2310 (concerning electricity, water, natural gas, and sewerage systems); 6-11-285 (concerning special purpose and public service districts); 6-11-435 (concerning special purpose and public service districts); 11-35-310 (concerning the South Carolina Consolidated Procurement Code); 11-42-30 (concerning the Comprehensive Infrastructure Development Act); 15-78-30 (concerning the South Carolina Tort Claims Act). In addition, section 14 of article X of the South Carolina Constitution (Supp. 2007), dealing with the bonded indebtedness of political subdivisions, also provides a definition for "political subdivisions." "The lawmaking body's construction of its language by means of definitions of the terms employed should be followed in the interpretation of the act or section to which it relates and is intended to apply." Fruehauf Trailer Co. v. South Carolina Elec. & Gas Co., 223 S.C. 320, 325, 75 S.E.2d 688, 690 (1953). Thus, if you inquire as to whether the Board is a political subdivision under one of these or any other body of legislation defining the term, we suggest you first look to the definition provided by the Legislature.

Nonetheless, under circumstances in which the definition of a political subdivision is not provided, we believe the reasoning provided in our 1968 opinion applies. Furthermore, in our

research we discovered other opinions of this Office considering whether or not a particular entity is a political subdivision. For example, in 1985, we considered whether the Old Ninety-Six Tourism Commission is a political subdivision for purposes of exemption from certain tax regulations. Op. S.C. Atty. Gen., February 21, 1985. Similar to our 1968 opinion, we looked to the following indicators to make this determination: "how the subdivision is created, whether it serves a specific geographic area, how the governing body is selected, the purpose for existing, taxation or assessment powers, power to issue bonds or notes or incur indebtedness, and possession of corporate powers and duties." Id. Finding that although the Old Ninety-Six Tourism Commission was organized to serve a governmental purpose, it was not established as a body politic and corporate, it does not possess corporate powers, and is not authorized to incur indebtedness, issue bonds, or levy taxes. Thus, we concluded it is not a political subdivision of the State.

We again considered the same factors in determining whether the Lowcountry and Resort Islands Tourism Commission was a political subdivision in an opinion issued in 1993. Op. S.C. Atty. Gen., June 2, 1993. Finding the Lowcountry and Resort Islands Tourism Commission lacked most of the attributes considered, we determined that it was not a political subdivision. Id.

The provisions contained in sections 59-53-1810 et seq. authorize, but do not establish, career and technology schools. School districts, rather than the Legislature, actually establish career and technology centers. According to your letter, R.D. Anderson serves students located in Districts 6, 4, and 5. Thus, it appears to serve a specific area. According to section 59-53-1900 of the South Carolina Code (Supp. 2007), members of the Board are appointed by the various school boards involved, which must consist of current members of such school boards and the superintendents of each district. Section 59-53-1900(A) indicates the Board is established for the purpose of constructing, operating, governing, supervising, managing, and controlling a career and technology school. Thus, we believe the Board discharges a function of local government by providing vocational education. Moreover, section 59-53-1920 states the Board has the power to:

(1) have perpetual succession;

(2) sue and be sued;

(3) adopt, use, and alter an institutional seal;

(4) define a quorum for meetings;

(5) establish a principal office;

(6) make bylaws for the management and regulation of their affairs;

(7) acquire, build, construct, equip, maintain, and operate a career and technology school or schools;

(8) select a career and technology school director or directors;

(9) accept gifts or grants of services, properties, or monies from private individuals or entities, from the State of South Carolina, the United States, or its agencies;

(10) make contracts and execute and deliver all instruments necessary or convenient for the carrying on of the business of the career and technology school;

(11) acquire in the name of the cooperating districts, as tenants in common, by purchase or gift, all land and interest in it which the boards shall consider necessary to enable them to fully and adequately discharge their responsibilities;

(12) appoint officers, agents, and employees and prescribe their duties, fix their compensation, and determine if and to what extent they must be bonded for the faithful performance of their duties; and to make contracts for construction, architectural, engineering, legal, and other services and materials;

(13) determine each school year the student capacity of the career and technology school, with the capacity to be apportioned by agreement among the cooperating districts. If a board fails to fulfill its quota, the other boards must be permitted to fill the unused allocation with students from their county. The boards utilizing the unused allocation shall pay for each student on a pro rata part of the year's current operating expenses based upon the budget. This amount must be paid at the beginning of the fiscal year, except that the actual cost must not be computed until the end of the current school year or the end of each semester and adjustments must be made at that time. Nothing in this section must be construed to limit the cost of maintenance, support, and operations of the career and technology schools jointly;

(14) perform other actions necessary or convenient to carry out a responsibility, function, or power committed or granted to the boards.

Accordingly, through this provision the Legislature appears to provide the Board with extensive corporate powers and duties. However, nothing in sections 59-53-1810 et seq. explicitly provides the Board with the authority to issue bonds, incur indebtedness, or levy or assess taxes.

From our review of the Board's enabling legislation, many of the factors we consider in deciding whether an entity constitutes a political subdivision are present. The Board appears only to be lacking the express power to issue bonds, incur indebtedness, and levy taxes. Thus, arguably the Board could be considered by a court to be a political subdivision under certain circumstances. However, the court must ultimately make this determination in reference to the purpose for which the Board will be treated as such. Therefore, we cannot conclusively determine the status of the Board as a political subdivision. For now, we can only identify the Board as a joint project between school districts.

Next, you question whether the Board has the power to borrow money to finance the capital projects mentioned in your letter. As our Supreme Court explained in Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991), entities created by statute "only [have] those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). As noted previously, we did not find any reference to the Board's ability to borrow money in its enabling legislation found in sections 59-53-1810 et seq. However, in your letter, you propose that this authority is implied based on other responsibilities required of the Board. You argue that based on the Board's power to acquire, construct, maintain, and extend the facilities of the school imply its power to borrow money to finance these activities.

In support of your contention that the Board has the power to incur indebtedness, you cite a 1988 opinion of this Office dealing with, among other things, whether the Georgetown County Mental Retardation Board had the authority to mortgage its property. Op. S.C. Atty. Gen., September 22, 1988. This opinion acknowledged the principal that powers may not be implied unless it is "necessary or essential to such execution or to the Board's existence." Id. However, as you pointed out, this opinion states "the express power to purchase generally includes the power to incur indebtedness in making such a purchase . . . ." However, we found the Georgetown County Mental Retardation Board did not have the express power to purchase and hold real estate and thus, did not have the power to borrow money or mortgage property. Id.

In Craig v. Bell, 211 S.C. 473, 46 S.E.2d 52 (1948), our Supreme Court considered whether a school district had implied authority to borrow money. One party argued that the school district had the authority pursuant to a provision in its enabling legislation stating that the district's trustees

must obtain approval from the county's board of education prior to borrowing any money. Id. at 482-83, 46 S.E.2d at 56. The Court responded as follows:

> I do not think that this statute gives the trustees implied power to borrow money at will. It is quite important that school districts and other political subdivisions should not borrow money without definite authority, and it seems to me that in order for a school district to do so we should be able to put our finger on a statute either expressly or impliedly giving such authority. Clearly, this act of the Legislature does not expressly authorize the borrowing of money, and in my opinion authority to borrow is not reasonably to be implied from it.

Id. at 483, 46 S.E.2d at 56-57. At a minimum, the Court's findings indicate that a governmental body's powers must be narrowly construed when considering an implied power to incur debt.

Furthermore, we note an opinion of this Office finding that the power to borrow money may not be implied in certain circumstances. In 1979, in an opinion authored by the now Honorable Karen LeCraft Henderson, Judge for the United States Court of Appeals for the District of Columbia Circuit, stated "the power to borrow must be expressly provided for and can not be implied from a general grant of power to contract." Op. S.C. Atty. Gen., October 23, 1979. In addition, we note other opinions of this Office finding that public bodies lacked the power to borrow money. See, e.g., Ops. S.C. Atty. Gen., April 5, 1967; April 4, 1963.

In our review of the provisions contained in chapter 53 of title 59, we did not discover any provision giving career and technology center boards the express authority to incur debt. In particular, we did not find this power among those specifically given to boards under section 59-53-1920 of the South Carolina Code (Supp. 2007). However, among these powers, we found the power to "acquire, build, construct, equip, maintain, and operate a career and technology school or schools," "acquire in the name of the cooperating districts, as tenants in common, by purchase or gift, all land and interest in it which the boards shall consider necessary to enable them to fully and adequately discharge their responsibilities," and "perform other actions necessary or convenient to carry out a responsibility function, or power committed or granted to the boards." S.C. Code Ann. § 59-53-1920(7), (11), (14).

Based upon these provisions, one could argue that the power to incur indebtedness is implied from the Boards' power to acquire property. However, we must emphasize the policy recognized by our courts and this Office that in order to find an implied power to incur debt, the such power must be "necessarily implied from the powers expressly granted, or is essential to the objects for which the [body] was created." 64A C.J.S. Municipal Corporations § 1571. It is our opinion that

pursuant to the Board's enabling legislation, the power to incur debts is not necessarily implied because the Legislature specifically provided for the mechanism by which boards are to fund the purchase and construction of career and technology schools.

Section 59-53-1910 of the South Carolina Code (Supp. 2007) states: "The career and technology school must be funded by the respective district boards, as the district boards may agree upon. The costs of acquiring real property and the improvements on it are to be borne by the respective district boards according to their agreement." (emphasis added). In the past, our courts interpret the use of the term "must" as mandatory language. See Burns v. Universal Health Serv., Inc., 361 S.C. 221, 236, 603 S.E.2d 605, 613 (Ct. App. 2004); Horry County v. City of Myrtle Beach, 288 S.C. 412, 343 S.E.2d 36 (Ct. App. 1986) (stating "[t]he words 'shall' and 'must' are generally regarded as making a provision mandatory."). Accordingly, section 59-53-1910 mandates that the respective school districts fund the career and technology school. Furthermore, this provision provides a means by which the Board is to fund the projects described. Thus, we also conclude that the provisions giving the Board the power to acquire property do not necessarily imply that the Board has the power to incur debt in order to accomplish this task because the Legislature specifically provided for a means of funding. Therefore, we are of the opinion that the Board does not have the authority, either express or implied, to incur indebtedness.

Lastly, you state, assuming the Board has the power to borrow money, whether it can issue general obligation debt or enter into a lease purchase contract to finance the projects in question. Similar to its ability to incur debt, we found no provision in the Board's enabling legislation that specifically allows it to issue general obligation debt. However, in your letter, you reference article X, section 14 of the South Carolina Constitution (Supp. 2007) and section 59-71-10 et seq. of the South Carolina Code (2004 & Supp. 2007), the School Bond Act, as support for your contention that the Board has the authority to issue bonds. Article X, section 14, as your state in your letter, provides: "The political subdivisions of the State shall have the power to incur bonded indebtedness in such manner and upon such terms and conditions as the General Assembly shall prescribe by general law within the limitations set forth in this section and Section 12 of this article." S.C. Const. art X § 14(2). This provision states that "the term 'political subdivisions' shall mean the counties of the State, the incorporated municipalities of the State, and special purpose districts, including special purpose districts which are located in more than one county or which are comprised of one or more counties." The Board does not fall within this definition as it is not a county, municipality, or a special purpose district. Thus, we do not find the Board is authorized under article X, section 14 to issue general obligation debt.

Article X, section 15 of the South Carolina Constitution (Supp. 2007), allowing school districts to incur bonded indebtedness, states: "The school districts of the State shall have the power to incur general obligation debt only in such a manner and upon such terms and conditions as the

General Assembly shall prescribe by law within the limitations set forth in this section." Through the School Bond Act, the Legislature proscribed the manner and terms upon which such debt may be issued and specifically allows the authorities of a school operating unit to issue general obligation bonds. S.C. Code Ann.§§ 59-71-10 et seq. Section 59-71-20(2) of the South Carolina Code (2004) defines "operating school unit" as "any type of school district, whether it be located in its entirety in one county or located partly in more than one county or, in case the schools of any county be operated by the county unit plan, the county." By your letter, you suggest that the School Bond Act allows the Board to issue general obligation debt.

As noted previously, section 59-53-1910 states "[t]he career and technology school does not constitute a separate school district . . ." Thus, we do not believe that a career and technology school can be classified as an operating school unit pursuant to the School Bond Act. Therefore, we do not believe the Board my issue bonds pursuant to article X, section 15 of the South Carolina Constitution or the School Bond Act.

In addition to inquiring as to whether the Board may issue bonds, you also inquire as to the Board's ability to enter into a lease-purchase agreement. In our review of the Board's enabling legislation, we did not find a provision giving the Board the specific authority to enter into lease-purchase agreements. However, you argue that the Board has such authority based upon its power to contract pursuant to section 59-53-1920. In particular, you refer to two provisions under section 59-53-1920. Section 59-53-1920(10) provides the Board with the power to "make contracts and execute and deliver all instruments necessary or convenient for the carrying on of the business of the career and technology school . . . ." In addition, section 59-53-1920(12) gives the Board the power to "appoint officers, agents, and employees and prescribe their duties, fix their compensation, and determine if and to what extent they must be bonded for the faithful performance of their duties; and to make contracts for construction, architectural, engineering, legal, and other services and materials . . . ." From these powers, you assert that the Board has the power to enter into lease purchase agreements.

These provisions do not specifically address the Board's authority to enter into lease agreement. However, one could argue that a lease-purchase agreement is a contract that would be necessary to carry out the business of R.D. Anderson. Thus, a court could find the Board's actions in entering into such an agreement consistent with the Board's authority under section 59-53-1920. However, we recognize circumstances exist in which a lease-purchase agreement constitutes indebtedness. Redmond v. Lexington County School Dist. No. Four, 314 S.C. 431, 445 S.E.2d 441 (1994); Caddell v. Lexington County School Dist. No. 1, 296 S.C. 397, 373 S.E.2d 598 (1988). Therefore, if a court were to determine that the lease-purchase agreement in question constitutes a debt, we reiterate our previous finding that we do not believe the Legislature authorized the Board to incur indebtedness.

Presuming the Board has the authority to enter into a lease-purchase agreement, you also inquire as to whether the millage rate cap set forth in section 6-1-320 of the South Carolina Code (Supp. 2007) applies. Section 6-1-320 places a limitation on the ability of local governing bodies to increase millage rates from year to year. You argue that because the Board does not fall within the definition of a local governing body, this millage rate cap does not apply the Board.

Section 6-1-300(3) defines the term "local governing body" as "the governing body of a county, municipality, or special purpose district." Furthermore, the definition states: "As used in Section 6-1-320 only, local governing body also refers to the body authorized by law to levy school taxes." S.C. Code Ann. § 6-1-300(3). Based on this definition, we agree that the Board does not fall within the statutory definition of a local governing body as it is not the governing body of a county, municipality, special purpose district, or a body authorized to levy school taxes. However, in addition to not falling within the definition of a local governing body, we also believe that section 6-1-320 does not apply to the Board because the Board has no authority to levy taxes.

In our review of the provisions contained in chapter 53 of title 59, we did not discover any provision allowing the Board the authority to impose a tax. Moreover, we do not believe the Board has an implied power to levy taxes. With regard to the power to tax, our Supreme Court held "the authority to impose a tax or to exact a license must clearly appear, and must be strictly construed. If there is a doubt as to the right to tax, it must be resolved adversely to this right." Southern Fruit Co. v. Porter, 188 S.C. 422, 199 S.E. 537, 540 (1938). While courts in other jurisdictions have held that the power to tax may not be implied, Shanken v. Upper Moreland Township, 201 A.2d 249, 249 (Pa. Super. Ct. 1964); Burlington & M.R.R. Co. v. Board of Comm'rs of York County, 7 Neb. 487 (1878), our courts appear to recognize an implied power to tax when the power to issue bonds exists. State v. Goodwin, 81 S.C. 419, 422-23, 62 S.E. 1100, 1103 (1908), Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1885). However, according to our analysis above, we do not believe the Board has the power issue bonds. Furthermore, we do not believe the Board has the power to tax for the same reasons we do not believe the Board has the power to incur debt and issue bonds. The Legislature, in its enactment of section 59-53-1910, clearly provided for the means by which career and technology schools created under this legislation are to be funded. Thus, especially given the strict construction our courts require when considering the authority to impose taxes, we do not find the power to tax is necessarily implied by the express powers and responsibilities vested in the Board. Accordingly, because we find the Board does not have the ability to impose or levy taxes, we do not find section 6-1-320, imposing a cap on millage rates, applies to the Board.

Conclusion

Upon examination of the factors we considered in prior opinions to determine whether a particular entity or body is a political subdivision, we believe the Board, in certain circumstances

could be found to be a political subdivision by a court. However, we note that many statutory provisions applying to political subdivisions contain definitions of the term "political subdivision." Thus, we caution that if the Legislature provides a definition applicable to a particular body of law, for purposes of that body of law, the Board must employ the Legislature's definition. Next, you inquire as to whether the Board has the authority to borrow money to finance the capital improvements mentioned in your letter. Although we recognize that certain powers, including the power to borrow money may be implied from other powers given to governmental bodies, we do not believe the Legislature intended for the Board to have the implied power to borrow money as it provided a specific mechanism by which career and technology schools are to be funded. Furthermore, we do not believe the Board has the authority to issue general obligation debt. Lastly, we believe the Board, through its power to contract, may be able to enter into a lease-purchase agreement. However, if a court were to determine that the particular lease-purchase agreement constitutes indebtedness, consistent with our opinion that the Board does not have the power of incur debt, we do not believe the Board, under these circumstances, has the ability to enter into such an agreement.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Deputy Attorney General