



ALAN WILSON  
ATTORNEY GENERAL

January 12, 2012

The Honorable Bruce Cooley  
Abbeville County Director  
P.O. Box 579  
Abbeville, South Carolina 29620

Dear Director Cooley:

You have requested an opinion of this Office concerning the legality of the following pending transaction:

Milliken gave Abbeville County a building. We have been told that it needs a roof replacement which will cost approximately \$250,000. Steve Bowles, Abbeville County Economic Development Director, has secured two grants: \$75,000 from AdvanceSC and \$75,000 from the Coordinating Council that is tied to the creation of 25 jobs. A state senator's company has been leasing a portion of the building.<sup>1</sup> We approached him to see if he would be willing to pay the difference between the two grants and the cost of the roof replacement (approximately \$100,000). After the roof has been replaced, we will deed the building to his company.

As an initial matter, we note you represent that you have consulted with the State Ethics Commission concerning this transaction. We defer to the State Ethics Commission's interpretation of the State Ethics Act, and therefore, we will refrain from commenting upon any issue concerning the application of that Act to the transaction described above.

#### Law / Analysis

Section 4-9-30 of the South Carolina Code (1986 & Supp. 2010) provides the county with the basic authority for this transaction. *Id.* ("Under each of the alternative forms of government . . . each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof: . . . (2) to acquire real property by purchase or gift; to lease, sell or otherwise dispose of real and personal property . . ."). While section 4-9-130 requires a public hearing "after reasonable public notice" before county council takes final action to "sell, lease or contract to sell or lease real property owned by the county," that section imposes no other restrictions on the county's power in this regard.

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<sup>1</sup> You have not indicated in your request to what purpose the portion of the building not leased by the senator's company currently is applied. In addition, you have not indicated the nature of the senator's company. However, because you refer to it as his "company," as opposed to his "office," we assume you refer to a private business and not to a space used in the senator's official capacity.

Because the county has the general authority to dispose of its real property, we turn now to an analysis of whether the conveyance you propose would constitute an abuse of that authority. See *J.S. Bobo v. City of Spartanburg*, 230 S.C. 396, 404, 96 S.E.2d 67, 71 (1956) (“The proposed transaction being within the power of the city, it is not within our province to inquire into its advisability. That is a matter within the discretion of the city council, whose decision we may not disturb except upon a clear showing of fraud or abuse of authority.”).

***A. Sale or disposal of county-owned property***

As a threshold matter, it is important to note that authorities concerning the conveyance of State-owned property differ from those concerning the conveyance of property owned by a political subdivision of the State, in that our Supreme Court has found article III, section 31 of the South Carolina Constitution inapplicable to property owned by a political subdivision of the State.<sup>2</sup> E.g., *J.S. Bobo*, 230 S.C. at 402-03, 96 S.E.2d at 70; *Haesloop v. City Council of Charleston*, 123 S.C. 272, 278-81, 115 S.E. 596, 598-99 (1923).

Addressing the analogous issue of a conveyance of municipal property, our Supreme Court has explained:

In the sense that all powers of municipal corporations are held in trust for public use, all property held by such corporations is held in a fiduciary capacity. . . . [P]roperty acquired and held for general municipal purposes is subject to the corporation’s discretionary power of use and disposal. It is universally conceded, however, that such discretionary power of use and disposal does not include the authority to donate municipal property to a strictly private use, for the obvious reason that a transfer or release of such property by a municipality to a private ownership without receiving in return some consideration of reasonably equivalent value would amount to a palpable breach of the trust upon which it is held.

But it is an equally well settled principle that a Court of equity will not attempt to control the discretionary powers conferred on trustees, or, more specifically, will not interfere at the suit of a taxpayer to restrain the authorities of a municipal corporation in the exercise of their discretionary powers with regard to the control or disposition of property of the municipality, in the absence of illegality, fraud, or clear abuse of their authority.

*Haesloop*, 123 S.C. at 282-83, 115 S.E. at 600 (emphasis added) (citations omitted).

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<sup>2</sup> Article III, section 31 provides, in relevant part:

Lands belonging to or under the control of the State shall never be donated, directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals.

Here, there is cause for concern regarding whether the proposed transaction would yield “some consideration of reasonably equivalent value” to the county. As you have described the transaction, the senator’s company would pay \$100,000 toward the roof replacement, but in return, the company would receive the deed to the building. From these facts, it is difficult to see what benefit would inure to the county from the \$100,000 paid by the company. Since the county would no longer have an ownership interest in the building, the new roof would be of no direct benefit to the county. Thus, at least on the surface, it appears the senator’s company would receive the deed to a county-owned building for free.

Nevertheless, in considering other conveyances by political subdivisions made in exchange for something less than the cash value of the property, courts have taken into account whether the conveyance would result in non-cash benefits to the political subdivision. For example, in *Haesloop*, the city imposed conditions on the conveyance to ensure it would receive the following benefits: “(1) erection upon a vacant, unproductive lot, (2) within 10 months, (3) of a tourist hotel, (4) in accordance with prescribed plans and specifications, (5) at a cost of approximately \$1,000,000.” 123 S.C. at 287, 115 S.E. at 601. Thus, “in lieu of accepting in cash the market value of the property . . . the city elect[ed] to receive the financial benefit of a permanent real estate improvement, which would reasonably tend to enhance the value of other municipal property, and from which it [would] derive by due operation of law an annual return in taxes upon an additional \$1,000,000 of taxable property.” *See id.*

The *Haesloop* case is just one of several in which South Carolina courts have upheld transactions by which a private entity received government-owned property in exchange for an agreement to make improvements to that property that would result in significant tax revenue. *E.g., McKinney v. City of Greenville*, 262 S.C. 227, 203 S.E.2d 680 (1974) (county-owned land leased to private corporation for free in exchange for corporation’s agreement to make at least \$10,000,000 in capital improvements beginning within two years). Courts also have upheld other kinds of transactions in which property is conveyed for less than its cash value, provided the other consideration received is of adequate public benefit. *E.g., Babb v. Green*, 222 S.C. 534, 73 S.E.2d 699 (1952) (conveyance of town water system to water district was upheld, even though the sale brought only about twenty percent of the cash value of the system, where the current system did not provide an adequate supply of water and the transaction would allow an improved water supply).

In order to offer an opinion regarding whether the conveyance proposed in your request would result in sufficient public benefit to constitute “consideration of reasonably equivalent value,” this Office would be forced to engage in an investigation of factual issues, which are beyond the scope of our authority. However, we hope that the authorities described above will be helpful to council in making its own determination in this regard.<sup>3</sup>

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<sup>3</sup> We note you have indicated via telephone that Milliken deeded the building to the county for free; therefore, we have assumed in our analysis that the building was not purchased with taxpayer funds. The *Haesloop* Court explicitly distinguished the situation with which it was presented from one in which the property to be conveyed had been purchased with tax revenue or in which the transfer itself would involve raising money by taxation. The *Haesloop* Court explained: “[I]n determining what constitutes a consideration adequately equivalent in value to sustain a disposition of this property, we think it is clear

***B. Restrictions in the conveyance from Milliken or other agreements***

Another factual issue of potential relevance is the circumstance under which Milliken conveyed the building to the county. Our Supreme Court has summarized the law in this regard as follows:

As stated in 39 Amer.Jur., p. 829, Sec. 34: ‘As a general rule, a municipality has no power to convey or sell land dedicated as a public park, square, or common, and the legislature is powerless to authorize such a sale. \* \* \* But where the fee is vested in the public, either by condemnation or otherwise, the legislature may, as against the public and the property owners in the vicinity, control the use, although the use proposed is inconsistent with the one before designated. Hence, the legislature may discharge the city from the trust entirely and empower it to sell the land. \* \* \*’

*Ehrhardt v. City Council of Charleston*, 215 S.C. 390, 402-03, 55 S.E.2d 344, 350 (1949) (alterations in original). In other words, if the conveyance from Milliken included restrictions on the use or ownership of the building, the proposed transaction might be invalid. In addition, if there are restrictions on the use or ownership of the building imposed by the General Assembly or other legislative body, further legislative action might be necessary in order to authorize the transaction.

Moreover, council should investigate whether the proposed transaction would violate any obligations it might have to bondholders or other parties to any contracts concerning the building. *Cf. Elliott v. McNair*, 250 S.C. 75, 90, 156 S.E.2d 421, 429 (1967) (stating that money obtained by a county through an issue of revenue bonds was “impressed with a trust that it be used for the purpose for which it was obtained, the construction of the project”); *Babb*, 222 S.C. at 545-46, 73 S.E.2d at 703-04 (explaining that if a pledge of revenue from a water system constituted part of a town’s contract with bondholders, then it would be necessary to enjoin a conveyance that would violate the pledge); *Williams v. Wylie*, 217 S.C. 247, 254, 60 S.E.2d 586, 588 (1950) (in which the order of the circuit court judge was adopted as the judgment of the Supreme Court and stated: “As State auxiliaries [counties] cannot dispose of public property unless with the formal sanction of the State and even then in those cases only in which the State, violating no trust and no contract and infringing the rights of no one could herself legally act”).

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that the city council are not limited to those elements of value that accrue, or are presumed to accrue, to a municipality from the appropriation of funds or property to such a ‘public use’ or ‘public purpose’ as would justify the exercise of the governmental powers of taxation or of eminent domain.” 123 S.C. at 285, 115 S.E. at 601. Rather, a broader range of “elements of value” to the public could be considered in determining whether the transaction was a valid exercise of the city’s discretion. *See generally id.* at 286, 115 S.E. at 601 (explaining that in the context of a public purpose justifying the power to tax “such benefits from a proposed expenditure as will accrue from increased taxable values, from enhancement of property values generally, and from increased impetus to the commercial life of the community will ordinarily be considered of too incidental or secondary a character to justify an outlay of public funds”).

*C. Use of public funds from grants*

As you have described the proposed transaction, it does not appear the county will be obligated to apply any county funds to the roof replacement. However, the grant the county will receive from the Coordinating Council for Economic Development—which is part of the Department of Commerce—appears to be an expenditure of public funds.<sup>4</sup> Accordingly, county council should make a fact-based determination whether the proposed conveyance would conform to the requirement that public funds must be expended for a public purpose.<sup>5</sup> Cf. *Carll v. S.C. Jobs-Economic Development Authority*, 284 S.C. 438, 443, 327 S.E.2d 331, 334 (1985) (“The findings of the legislature are critical to resolution of the public purpose issue. Here, the legislature’s findings . . . indicate the General Assembly undertook a thorough investigation of the . . . problems faced by this State, determined the problems were severe enough to warrant legislative intervention and made a reasoned judgment as to the appropriate remedies.”); see generally Letter to The Honorable Wayne C. Ramsey, Op. S.C. Att’y Gen. (Feb. 3, 2005) (touching on the various legal bases for this requirement).

Policies imposed by the General Assembly and/or the Department of Commerce concerning the use of grant funds are not dispositive of the public purpose inquiry. *WDW Properties v. City of Sumter*, 342 S.C. 6, 14, 535 S.E.2d 631, 634-35 (2000) (explaining that “[a] statutory or regulatory change could transform a previously constitutional loan program into one that violates the public purpose doctrine,” and therefore, compliance with statutory and regulatory requirements does not “foreclose challenges” to particular uses of public funds). Nevertheless, council should also ensure the transfer would not violate the terms of the grant, and that it would not result in a diversion of public funds from the purpose for which they were intended.

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<sup>4</sup> See S.C. Code Ann. § 13-1-10 (1976 & Supp. 2010) (establishing the coordinating council as part of the Department of Commerce); *id.* § 13-1-25(A) (“The monies constituting a fund of any kind used by the department in carrying out a purpose described in Section 13-1-20 are public monies, notwithstanding their public or private source, and must be treated like public monies for all purposes.”); *id.* § 13-1-1720(A)(4) (authorizing the coordinating council to use “federal funds, foundation grants, and private funds in the development, implementation, revision, and promotion of a strategic plan for economic development” and providing that such funds “are public monies, notwithstanding their private source, and must be treated like public monies”).

<sup>5</sup> As recognized by our Supreme Court, the precise meaning of the public purpose requirement is “a fluid concept which changes with time, place, population, economy and countless other circumstances.” *Nichols v. S.C. Research Authority*, 290 S.C. 415, 425, 351 S.E.2d 155, 160 (1986) (emphasis omitted). However, “[c]ourts and legal scholars alike agree 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 political subdivision.’” *Id.* The context-specific nature of this determination is discussed further in note 3, above.



Conclusion

Any conveyance of public property or use of public funds must serve a public purpose. Whether a particular transaction meets these requirements is a fact-specific inquiry for determination by county council in the first instance. Courts will not disturb this determination absent "a clear showing of fraud or abuse of authority."

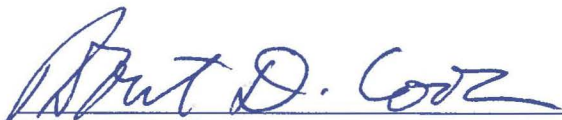
In addition, council should examine the conveyance of the building from Milliken to the county, and the terms of any other agreements concerning the building, to ensure the proposed transaction would be valid and would not violate the county's contractual obligations. Finally, council should ensure the conveyance would not violate the terms of its grant from the Coordinating Council or result in a diversion of public funds from their intended public purpose.

Very truly yours,



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REVIEWED AND APPROVED BY:



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