ALAN WILSON
ATTORNEY GENERAL

June 19, 2012

The Honorable Raymond E. Cleary, III
Senator, District No. 34
Suite 501, Gressette Office Building
Columbia, SC 29202

Dear Senator Cleary:

We received your letter requesting an opinion of this Office concerning the use of public funds ("C" funds) for the maintenance of highway/railroad crossings and bridges.

The expenditure of the gasoline tax, commonly known as the "C" funds, among the various counties is governed by S.C. Code Ann. §12-28-2740. The statute provides a means by which roads of the various counties may be constructed, improved, and maintained. The "C" funds are apportioned to the counties by the formula specified in subsection (A). The "C" funds must be deposited with the State Treasurer and expended for the purposes set forth in the statute. Id. The South Carolina Department of Revenue must submit the percentage of the total represented by each county to the South Carolina Department of Transportation (DOT) and annually to each county transportation committee. See §12-28-2740(A) (3). Upon request of a county transportation committee, the DOT may continue to administer the funds allocated to the county. Id. Importantly, the "C" funds expended must be approved by and used in furtherance of a countywide transportation plan adopted by a county transportation committee. See §12-28-2740(B). Before the expenditure of "C" funds by a county transportation committee, the committee must adopt specifications for local road projects. See §12-28-2740(F). The countywide and regional transportation plans must be reviewed and approved by the DOT. Id. In counties electing to expend their allocation directly pursuant to subsection (A), specifications of roads built with "C" funds are to be established by the countywide or regional transportation committee. In counties in which the county transportation committee elects to have "C" funds administered by the DOT, primary and secondary roads built using such funds must meet DOT specifications. Id. All unexpended "C" funds allocated to a county remain in the account allocated to the county for the succeeding fiscal year and must be expended as provided in the statute. See §12-28-2740(E).

Relevant to your question, subsection (C) provides that:

> [a]t least twenty-five percent of a county's apportionment of "C" funds, based on a biennial averaging of expenditures, must be expended on the state highway system for construction, improvements, and maintenance. The [DOT] shall administer all funds expended on the state highway system unless the

> department has given explicit authority to a county or municipal government or other agent acting on behalf of the county transportation committee to design, engineer, construct, and inspect projects using their own personnel. The county transportation committee, at its discretion, may expend up to seventy-five percent of "C" construction funds for activities including other local paving or improving county roads, for street and traffic signs, and for other road and bridge projects. [Emphasis added].

Because §12-28-2740 does not specifically address expending "C" funds for the purposes set forth in your letter, we must employ the rules of statutory interpretation to determine whether such funds may be expended as you describe. The primary consideration in interpreting any statute is ascertaining the intent of the Legislature. Citizens and Southern Systems, Inc. v. South Carolina Tax Commission, 280 S.C. 138, 311 S.E.2d 717 (1984). A statute's words must be given their plain and ordinary meaning without resort to a forced or subtle construction which would work to limit or to expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). The clear and unambiguous terms of a statute must be applied according to their literal meaning. Id. Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can reasonably be discovered in the language used. Clearly, the legislative language must be construed in light of the Legislature's intended purpose. State *ex rel.* McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 438 S.E.2d 273 (Ct.App.1993). In essence, the statute as a whole must receive a reasonable, practical and fair interpretation consistent with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The determination of legislative intent is a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995). If possible, courts will construe a statute so as to escape an absurd result. State v. Gordon, 356 S.C. 143, 153, 588 S.E.2d 105, 110 (2003).

We also find it important to note that the expenditure of public funds must be for a public, not a private purpose. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923). As the Court suggested in Elliott, the Due Process Clause of the Constitution (federal and state) requires that public funds must be expended for a public purpose. An opinion of this office dated December 18, 2000, commented that the constitutional requirement of "public purpose" "...was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises." Moreover, Article X, §5 of the South Carolina Constitution requires that taxes (public funds) be spent for public purposes. Such provision proscribes the expenditure of public funds "for the primary benefit of private parties." Op. S.C. Atty. Gen., October 8, 2003.

While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described by the South Carolina Supreme Court in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975) as follows:

> [a]s a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment for all the inhabitants or residents, or at least a substantial part thereof. Legislation [*i.e.*, relative to the expenditure of funds] does not have to benefit all of the people in order to serve a public purpose.

Id., 217 S.E.2d at 47; see also WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000); Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986); Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985); Bauer v. S.C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978); Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). As emphasized in Bauer, the "mere fact that benefits will accrue to private individuals or entities does not destroy public purpose." Bauer, 246 S.E.2d at 874. In Nichols, the Court established the following test to determine whether the "public purpose" requirement has been 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.

Nichols, 351 S.E.2d at 163. This test was applied in WDW Properties, where the Court upheld the legislatively-created program in which the Jobs-Economic Development Authority (JEDA) could issue revenue boards whose proceeds would be loaned to private developers for the renovation of property in blighted areas. The Court held that application of the Nichols test led to the conclusion that the JEDA program served a public purpose - the "creation of jobs, the reinvigoration of the downtown area, and benefits, both tangible and intangible, that should result from that reinvigoration" WDW Properties, 535 S.E.2d at 636.

On several occasions the South Carolina Supreme Court has recognized that transportation clearly subserves a public purpose. In Charleston Co. Aviation Authority v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982), the Court held that the construction and operation of an airport constitutes a public purpose, recognizing the public benefit of air transportation. In State v. Whitesides, 30 S.C. 579 (1888), the Court, noting that absent constitutional limitation, the Legislature's power to tax was plenary, concluded that the operation of the railroads in this State constituted a public purpose. The Whitesides Court upheld as constitutional an act which provided for the payment of township bonds, issued in aid of railroads in this State. Relying principally upon Feldman v. City Council of Charleston, 23 S.C. 57 (1885), the Court stated:

> [w]e think there can be no doubt that the general assembly has the power to authorize taxation for any public purpose . . . . Now, was the act in question passed to promote a public purpose, and within the domain of legislative action? . . . The object of the act was to aid the building of certain railroads in the State . . . .

Whitesides, 30 S.C. at 663; see also Op. S.C. Atty. Gen., July 12, 1984 [advising that the purpose of the Coastal Rapid Public Transit Authority, to provide public transportation to Georgetown and Horry Counties, is a valid public purpose].

Pursuant to §12-28-2740(C), at least twenty-five percent of a county's apportionment of "C" funds must be expended on the state highway system for "construction, improvements, and maintenance." See §12-28-2740(C). Significantly, a county transportation committee, at its discretion, may expend up to seventy-five percent of "C" funds for activities including "local paving or improving county roads, for street and traffic signs, and for other road and bridge projects." Id.[1] Clearly, by this language the Legislature merely designated examples of purposes acceptable for the expenditure of "C" funds by a county transportation committee. A county transportation committee is thus not expressly limited by the above provision to specific projects for the use of "C" funds. Based on the foregoing, it is therefore the opinion of this Office that "C" funds may be used for expenditures involving highway/railroad crossings, including bridge projects, at the discretion of the county transportation committee, provided that such are acceptable in the county or regional transportation plan adopted by the transportation committee and are designated for a public purpose. See Op. S.C. Atty. Gen., August 13, 1998 [advising that "C" funds may be used to construct roads inside of an industrial park, because such expenditure is for a public purpose]. Of course, if this is not an accurate interpretation of the Legislature's intent, they are free to clarify this subject by legislation upon their return in January. Although it would appear that in the situation you describe these expenditures are intended to maintain and/or improve public safety regarding highway/railroad crossings and bridges, such a determination would necessarily require factual findings and an opinion of this Office cannot make such findings. See Ops. S.C. Atty. Gen., April 19, 2012; September 3, 1999. Lastly, a final determination of the money to be allocated for such projects and the specifications of such projects must comply with the terms of §12-28-2740.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

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[1]In addition, funds allocated to the county may be used to issue county bonds or state highway bonds as provided, pay directly for appropriate highway projects, including engineering, contracting, and project supervision, and match federal funds available for appropriate projects. See §12-28-2740(D).