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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

August 8, 2003

Thomas L. Martin, Esquire
Anderson County Attorney
Post Office Box 8002
Anderson, South Carolina 29622-8002

Re: Request for Opinion Concerning Certain Appropriations and Procedures of Anderson County Council

Dear Mr. Martin:

You have requested an opinion from this Office concerning certain appropriations by the Anderson County Council. By way of background, you indicate that

> The annual Anderson County budget ordinance, and the annual budget which it annually authorizes, contain two council district specific funds, one for paving and one for recreation or recreational activities. The budget ordinance authorizes County Council Members to designate such funds, appropriated for their district, to be utilized for specific paving projects in the respective County Council districts, in the case of the paving accounts, and for specific public recreational activities in the respective County Council districts, in the case of the recreational accounts. ...
>
> In the case of the Anderson County Council district paving accounts, such funds are traditionally and for the most part used by members of County Council for public paving projects in their respective County Council districts. ...
>
> In the case of the Anderson County Council recreational accounts, such funds are traditionally and for the most part used by the members of County Council for recreational projects in their respective County Council districts. Occasionally, a member of Anderson County Council will designate such funds (paving and recreational accounts), under the transfer provisions of the county budget ordinance, for other uses. Such other uses include, without limitation:[1]

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[1] In your request letter, the uses for monies transferred from the paving and recreational accounts were listed separately. However, as the uses appear to be identical, I have cited them only once.

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a. For the use of community-based, 501(c)(3) organizations for activities open to the general Anderson County public;
b. For the use of other government or public educational entities, for public use;
c. For the use of other public or quasi-public entities, including special tax districts and special purpose districts, for activities which are of public use in nature and which are unquestionably within the ability of Anderson County to undertake, directly;
d. For the use of other public and quasi-public entities, including special tax districts and special purpose districts, for purposes, such as the installation of water lines, arguably not authorized to Anderson County, directly, due to the prohibitions of Article VIII, Section 16 of the South Carolina Constitution; and
e. To recognized, 501(c)(3) non-profit organizations which are charitable in nature.

Given this background, you have asked these specific questions:

1. Taking into consideration all of the purposes, powers, functions, and authorities of counties as set forth in Title 4 of the South Carolina Code, 1976, as amended, including, without limitation, the power to protect the health and welfare of the people of the county, may Anderson County Council, and individual members thereof, acting by and through the official action of Anderson County Council, appropriate funds to nationally recognized, 501(c)(3) non-profit organizations for purely charitable purposes; and

2. Taking into consideration all of the purposes, powers, functions, and authorities of counties as set forth in Title 4 of the South Carolina Code, 1976, as amended, including, without limitation, the power to protect the health and welfare of the people of the county, may Anderson County Council, or individual members thereof, acting by and through the official action of Anderson County Council, appropriate Anderson County public funds to other public or quasi-public bodies, such as special tax districts or special purpose districts, for purposes for which Anderson County would be prohibited from the direct use of such funds, due to the constraints of Article VIII, Section 16 of the South Carolina Constitution, or for any other reason, such as for the purpose of providing assistance to local, non-profit water companies to install water lines in the county, particularly when public health or safety are involved or when households have lost all reasonable sources of safe drinking water, when no countywide referendum for that purpose has been held.

It should be noted initially that it is fundamental that a county ordinance is entitled to a presumption of constitutionality. See Rothchild v. Richland County Board of Adjustment, 309 S.C. 194, 420 S.E.2d 853, 856 (1992). Accordingly, while this Office may comment upon constitutional problems, only a court may declare an ordinance void as in conflict with the Constitution.

LAW/ANALYSIS

Question 1

In your first question, you inquire as to the propriety of county council appropriating money to "... nationally recognized, 501(c)(3) non-profit organizations for purely charitable purposes." It is assumed that "for purely charitable purposes" means that the money would in essence be donated to a private, charitable organization for the general benefit of that organization.

All legislative action must serve a public rather than a private purpose. Elliot v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). Similarly, public funds must be expended only for a public purpose. See Op. S.C. Atty. Gen., dated January 15, 1999. This principal is based on and rooted in our State's Constitution. See Article X, § 11 of the South Carolina Constitution. This principal, however, is not necessarily violated when public funds are appropriated to a private, non-profit corporation in exchange for the performance of a public function. See Op. S.C. Atty. Gen., dated April 2, 2003. This is particularly true where the government entity has contracted with the non-profit corporation for the performance of a proper governmental function. See, Op. S.C. Atty. Gen., March 19, 1985. Additionally, where such expenditures have been upheld, we have stressed the importance of maintaining adequate controls to insure a public purpose. See Ops. S.C. Atty. Gen., dated December 18, 2000 and April 28, 1971.

On the other hand, the mere fact that a non-profit corporation is charitable in nature does not in and of itself satisfy the public purpose requirement. In a previous opinion, this Office stated that "[a] court would likely deem the use of government resources for the sole purpose of promoting or assisting a specific private charity as infringing upon this fundamental constitutional principle." See Op. S.C. Atty. Gen., dated May 19, 2003. Our Supreme Court long ago in Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1884), held that public funds could not be expended for the benefit of private entities even though incidental advantages may result to the public. The Court in Feldman stated that "[h]owever certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental." Id. This Office has previously advised against expenditures of public funds which would result in benefits only to the members of civic organizations such as the Salvation Army (Op. S.C. Atty. Gen., April 13, 1971) or Boys' Club (March 31, 1981 and May 28, 1981).

Based on the foregoing, it would be the opinion of this Office that a court would likely find the appropriation of funds by Anderson County Council to a private, non-profit corporation for purely charitable purposes to be in violation of this State's Constitution. This conclusion, however,

would not prohibit the county from providing funds to such a private entity in return for the service of a valid public function.

Question 2

Your second question generally relates to the propriety of appropriating county funds to "... other public or quasi-public bodies, such as special tax districts or special purpose districts..." Specifically, your concern relates to the provisions of Article VIII, Section 16 of the South Carolina Constitution which provides in part that

> Any county or consolidated political subdivision created under this Constitution may, upon a majority vote of the electors voting on the question in such county or consolidated political subdivision, acquire by initial construction or purchase and may operate water, sewer, transportation or other public utility systems and plants ... .

You question whether Article VIII, Section 16 is violated by the appropriation of county funds to a public or quasi-public body that provides water service to the residents of Anderson County without first having a county-wide referendum.

This Office has stated in a previous opinion that a "... county has considerable powers in the area of water control quality." See Op. S.C. Atty. Gen., dated January 18, 1979. S.C. Code Ann. §4-9-30(5) gives the governing body of a county the power to make "... appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution ... ." Additionally, we have opined that "counties are generally authorized to appropriate money to a public service district so long as such appropriations are used for a valid county purpose." See Op. S.C. Atty. Gen., dated May 23, 1980. Given that counties have the authority to appropriate money for water services and that this Office has previously authorized the appropriation of money to public service districts, it appears that, as a general matter, the appropriations referenced in your request letter would be proper.

The question then becomes would a referendum be required prior to the County making such appropriations. Article VIII, Section 16 requires a referendum prior to a county acquiring or operating water, sewer, transportation or other public utility systems and plants. The particular words used in the Constitution should be given their plain and ordinary meaning. Johnson v. Collins Entertainment, 333 S.C. 96, 508 S.E.2d 575 (1998). In interpreting Article VIII, Section 16 in a previous opinion, we noted that "[t]o 'acquire' means to come into ownership[,] Weinberg v. Baltimore & Annapolis R. Co., 88 A.2d 575, 577 (Md.1952) ... [and] [t]o 'operate' means to manage or conduct. F.W. Woolworth Co. v. Erickson, 127 So. 534, 536 (Ala.1930)." See Op. S.C. Atty. Gen., dated December 1, 1987. We have opined that "... initial involvement by a county in providing water and sewer services must be handled in accordance with Article VIII, Section 16 ... ." See Op. S.C. Atty. Gen., dated January 16, 1989. Further, we have opined that this "... Constitutional requirement cannot be avoided by merely contracting with others to provide such services since it is the provision of sewer service in areas within the county which is authorized by the Constitution. Regardless of whether the county's initial involvement in the providing of such services is

accomplished by direct acquisition or construction of facilities, by contract, or otherwise, it appears certain that it must initially be approved in each instance by the voters in an appropriate referendum." See Op. S.C. Atty. Gen., dated June 26, 1978.

Conversely, in the December 1, 1987 opinion referenced above, we concluded that a municipality would not be required to hold a referendum pursuant to Article VIII, Section 16 prior to entering into an agreement to obtain grant funds and then lend those funds to a special purpose district or private water company to construct a water utility system. We opined that "[t]he municipality would not, by virtue of the loan, be deemed to be owning or operating the utility ... ." Id. Also, we have previously opined that a county could apply for and receive federal grant money and then transfer the money to various political subdivisions, including water authorities, for use in constructing water treatment facilities without first having a referendum pursuant to Article VIII, Section 16 as long as the county did not acquire or operate the utility. See Op. S.C. Atty. Gen., dated January 18, 1979. We stated, however, that "[s]hould the county assume the responsibility of providing water service within the county a referendum would be required." Id. See also Op. S.C. Atty Gen., dated June 26, 1978.

It should be noted that in the December 1, 1987 opinion we indicated that "[i]t is our further understanding that the municipality will not pledge or expend any of its own funds incident to this transaction. It is simply serving as a conduit of funds." It does not appear, however, that the opinion turned on this factor. Rather, the fact that the Municipality was lending grant funds was simply another indication that the Municipality was not acquiring or operating a utility. This Office's conclusion that counties and municipalities can provide grant monies received by them to other political subdivisions for the provision of water services without a referendum would appear to be equally applicable to funds received by the county or municipality from other public revenue sources. No matter the source, once money is received by a political subdivision of the State, that money becomes public funds just as though it had originated from public revenue sources. See Op. S.C. Atty. Gen., dated May 2, 2001. As was stated in our opinion of November 15, 1985, in order to be public money, "it does not matter whether the money is derived by ad valorem taxes, by gift or otherwise," citing Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). Therefore, if the referendum provision of Article VIII, Section 16 is not implicated by the giving of money received through grants to a special purpose or other quasi-public body involved in providing water services, then the mere appropriation of money to such a body cannot be said to trigger the requirement either.

This conclusion is not reached and should not be taken without some reservation. There is obviously power in the control or allocation of money. As our Supreme Court recognized in Grimball v. Beattie, 177 S.E. 668 (1934), "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." If through appropriating money, a county council is attempting to exercise some degree of power and control over the operations of another public or quasi-public body regarding public utility services then a referendum should be held. Further, if a county council is to come into ownership of some portion of public utility facilities or plants through the appropriation of money, then a referendum should be held. However, the mere appropriation of money to a public or quasi-public body which provides water services does not appear to trigger the requirement.

CONCLUSION

A court would likely find the appropriation of funds by Anderson County Council to a private, non-profit corporation for purely charitable purposes to be in violation of this State's Constitution. This conclusion, however, would not prohibit the county from providing funds to such a private entity in return for the service of a valid public function. The mere appropriation of money, in and of itself, to a public or quasi-public body which provides water services does not appear to require a referendum pursuant to Article VIII, Section 16 of the South Carolina Constitution. Should the appropriation, however, also carry with it an ownership interest in the facilities of or control over the body providing water services to residents of the county a referendum would be required.

Sincerely,

David K. Avant
Assistant Attorney General