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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 6, 1996

Kenneth D'Vant Long, Director
State Reorganization Commission
1105 Pendleton Street, Suite 228
Columbia, South Carolina 29201

Re: Informal Opinion

Dear Mr. Long:

You note in your letter that the State Reorganization Commission is providing assistance to a Legislative Compliance Review Committee in the resolution of recommendations by a management and performance review of the Jobs Economic Development Authority [JEDA]. A review was conducted by the Legislative Audit Council and was published in July, 1995. Two of the recommendations made have resulted in legal questions. These are as follows:

> First Issue: JEDA has bylaws which establish a Loan Committee. This Loan Committee receives loan applications after staff review and consider them for approval. If the Loan Committee approves the loan, a letter of commitment is issued to the prospective borrower, therefore indicating that the Loan Committee does not function merely as an advisory capacity. The JEDA Board has also approved a policy giving approval authority to specified staff for loans of a limited dollar amount. The Legislative Audit Council has taken the position that Section 41-43-60, South Carolina Code of Laws, 1976, as amended, precludes delegation of loan approval authority by

REQUEST LETTER

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> the last sentence which states, "Approval of a majority of the board them in office is required to take action." The response by JEDA is from private council and is attached. An opinion is requested concerning the legality of delegation of loan approval authority to a committee of the board. Also, an opinion is requested concerning the delegation of the authority to staff.
>
> Second issue: Under the authority of Section 41-43-240, South Carolina Code of Laws, 1976, as amended, JEDA has established a not-for-profit corporation called Carolina Capital Investment Corporation. In at least one instance, this corporation took an equity interest in a company in exchange for an investment of capital. The source of these funds was not state appropriations. The Legislative Audit Council has found that this transaction may be in violation of Article X, Section 11 of the South Carolina Constitution. Nichols v. South Carolina Research Authority was referenced. JEDA's response by private counsel is attached. An opinion is requested concerning the legality of ownership investment by the not-for-profit corporation established by JEDA.

QUESTION 1. Delegation of Authority.

JEDA is created by S.C. Code Ann. Sec. 41-43-10 et seq. Section 41-43-30 provides:

> [t]here is created the South Carolina Jobs-Economic Development Authority, a public body corporate and politic and an agency of the State, with the responsibility of effecting the public purposes of this act. The authority is governed by a Board of Directors (board) which consists of eleven members.

Section 41-43-70 provides that "[t]he authority shall promote and develop the business and economic welfare of this State, encourage and assist through loans ... ." Moreover, Section 41-43-90 designates the authority as a "public body, politic and corporate, and an agency of the State and may:

> (A) Adopt bylaws, procedures and regulations for the directors, officers, and employees and for the implementation and operation of the program authorized by this act ... .
>
> (N) Appoint officers, agents, employees, and consultants, prescribe their duties and fix their compensation ... .
>
> In exercising its powers, the authority shall operate in an economical and prudent manner and any powers granted by this act may be exercised by the adoption of a resolution at any regular or special meeting.

Meetings of the Board of the Authority are addressed by Section 41-43-60. Therein, it is stated that "[a] majority of the board then in office constitutes a quorum at any meeting. Approval of a majority of the board then in office is required to take action."

It is well-recognized that "[i]n general, administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, and they cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or other officers or tribunals." Accordingly,

> ... in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character or which require the exercise of judgment.

73 C.J.S., Public Administrative Law and Procedure § 56.

On the other hand,

> [i]t has been observed that in the operation of any public administrative body, subdelegation of authority, impliedly or expressly, exists and must exist to some degree. Accordingly, it is recognized that express statutory authority is not necessarily required for the delegation of authority by an administrative agency, and the omission by the legislature of any specific grant of, or grounds for, the power to delegate is not to be construed as a denial of that power. So, if there is a reasonable basis to imply the power to delegate the authority

> of an administrative agency, such an implication may be made, and the power to delegate may be implied.

Id. (emphasis added).

Legal authorities almost unanimously caution that whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may "deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, or discretionary or quasi-judicial in nature." Id. at § 74. In other words, governmental agencies may delegate to assistants as long as the agency does not abdicate its power and responsibility" and reserves for itself the right to make the final decision. Id. at § 25.

Notwithstanding these limitations upon the subdelegation of discretionary decisions, federal courts usually have upheld decisions by federal agencies to subdelegate executive authority (non-judicial) to employees and assistants. In Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111, 121, 67 S.Ct. 1129, 91 L.Ed. 1375 (1947), for example, the United States Supreme Court addressed the issue of whether the Emergency Price Control Act allowed the administrator to delegate his authority to issue subpoenas, clearly a discretionary decision. Relying upon the statutory authority for the administrator to make regulations, the Court held the subdelegation was lawful. Said the Court,

> [s]uch a rule-making power may itself be an adequate source of authority to delegate a particular function unless by express provisions of the Act or by implication it is withheld.

And in E.E.O.C. v. Raymond Metal Products Co., 530 F.2d 590 (4th Cir. 1976), the Fourth Circuit Court of Appeals stated that "[a]n important factor suggesting to the Court [in Fleming] that Congress did not intend to prohibit such delegation was the complexity of administering the statute." 530 F.2d at 594.

However, despite this trend in federal law to allow the subdelegation of authority, our own courts have not generally been supportive of the subdelegation of discretionary functions. In Pettiford v. S. C. State Bd. of Education, 218 S.C. 322, 62 S.E.2d 780 (1950), our Supreme Court held that an administrative board, or body, when acting in a quasi-judicial capacity must itself consider all the evidence before rendering a decision. While the Board of Education could delegate to Board members the authority to take testimony and hear witnesses, the Board could not subdelegate its decision-making authority, concluded the Court. And in Dawson v. State Law Enforcement Division, 304 S.C. 59, 403 S.E.2d 124 (1991), the Court reasoned:

> [w]e further conclude the Grievance Committee, as the final administrative authority, may not delegate its role as final decision-maker to the Personnel Director. See Bradley v. State Human Affairs Comm'n, 293 S.C. 376, 360 S.E.2d 537 (Ct.App.1987). Once an appeal is forwarded to the Grievance Committee, the Committee has exclusive jurisdiction to decide all issues.

In Bradley, moreover, the Court of Appeals held that the State Employee Grievance Committee chairperson could not delegate quasi-judicial powers of the Committee to the Committee's attorney, notwithstanding the existence of a statute providing that the attorney may assist the Committee in preparation of its findings of fact, statements of policy and conclusions of law. The Court concluded:

> [a] reading of the statute makes it clear that the job of a committee attorney is only advisory to the committee. (Not all committee members are lawyers and as such are not familiar with procedural and evidentiary matters.) However, the role of decision maker cannot be delegated. Kerr-McGee Nuclear Corporation v. New Mexico Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (1981) (administrative bodies cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character or which require the exercise of judgment). Cf. South Carolina Department of Social Services v. Bacot, 280 S.C. 485, 489, 313 S.E.2d 45, 48 (Ct.App.1984) (family court's duty to decide issue of paternity cannot be delegated to expert or anyone else). Here, the committee chairman took it upon himself to delegate decision making to the attorney. This was error.

360 S.E.2d at 539. (emphasis added).

In addition, Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985) is instructive. In Carll, it was contended that the Act creating JEDA constituted an unlawful delegation of legislative power. The Court, rejecting the argument, analyzed the Act as follows:

> [a]ccording to the provisions of the Act the Authority may delegate the implementation of the loan programs to lending institutions, but retains ultimate responsibility for the programs through regulations and contractual agreements with the institutions, and the Authority must provide proper oversight for implementation of the programs. Each loan made by the lending institution must be to someone in the beneficiary class and must comply with all of the Authority's regulations. Further, the lending institution must submit evidence satisfactory to the Authority that all loans satisfy the conditions and regulations of the Authority.
>
> A careful review of these provisions shows the Authority maintains final control over the implementation and management of loan programs. Given the Authority's control over and involvement in the implementation of these programs, the Authority's power to delegate ministerial responsibility by contract pursuant to the Act and the Authority's regulations constitutes a constitutionally permissible delegation.

327 S.E.2d at 336-337.

In addition, the previous opinions of this Office appear to be in accord with these South Carolina court decisions. In Op. Atty. Gen., No. 89-45 (April 13, 1989), the question addressed was whether the administrative functions of a town's water and sewer department could be lawfully delegated to a single commissioner of public works. In concluding that such subdelegation was not authorized, we stated:

> [t]he general law, applicable in this situation, is that authority vested in a board or commission for public purposes may be exercised by a majority of the members if all have had notice and opportunity to act and a quorum, or the number fixed by statute, are present. The presence and vote of a quorum is necessary, and the action of less than a quorum of a public body is void. 1 Am.Jur.2d Administrative Law Sec. 196. Unless otherwise provided by statute, the authority of a commission may not be exercised by a single member of such

> body, or less than a majority. 73 C.J.S. Public Administrative Law and Procedure Sec. 20. Therefore, the response to your question is that the elected commissioner has no individual authority to single-handedly make decisions concerning direction and control of the water and sewer department. Instead, all such decisions must be made by a majority vote of a quorum of the commissioners of public works, except where the Town ordinance provides otherwise. See also, Pettiford v. S.C. State Board of Education, 218 S.C. 322, 62 S.E.2d 780 (1950) as to what constitutes an unlawful delegation of power.

And in an Opinion, dated April 6, 1989, we addressed the issue of the Workers' Compensation Commissioners' authority to delegate the approval of settlement agreements. We referenced previous opinions, dated August 2, 1985 and December 1, 1986. In the April 6, 1989 Opinion, we stated:

> [w]e believe that the August 2, 1985, Opinion made clear that the approval of workers' compensation settlements is a quasi-judicial function involving an exercise of discretion by an official who maintains quasi-judicial power under the Compensation Act and is non-delegable in the absence of express statutory authority. In the event that any doubt remains, I reference a recent State court decision [which recognized that] ... administrative bodies cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character or which require the exercise of judgment ... . Bradley v. State Human Affairs Comm., 296 S.C. 376, 360 S.E.2d 537, 539 (S.C.App.1987).

Furthermore, in an Opinion dated August 25, 1983, we said that "[i]t would appear, then, that the Director of SLED has the authority to delegate the responsibilities for conducting hearing to a separate hearing officer so long as the final decision on the matter is made by him." (emphasis added).

Section 41-43-10 et seq. bestows broad authority upon JEDA to adopt bylaws, procedures and regulations for the director, officers and employees and for the implementation and operation of the programs authorized by the Act. Under the Fleming

41-43-90(N) authorizes JEDA to "[a]ppoint officers, agents, employees and consultants, prescribe their duties and fix their compensation ... ." Thus, in my judgment, a court could uphold such subdelegation of authority.

I must urge that JEDA proceed cautiously in this matter, nonetheless. As discussed above, no South Carolina case has yet recognized that a discretionary act, such as is present here, may be subdelegated, absent express statutory authority. Moreover, prior opinions of this Office advise against subdelegation except with respect to ministerial or administrative functions. Thus, even though I am of the opinion that the subdelegation of loan approval authority to a loan committee is legally supportable, I would recommend that the Board err on the side of prudence and caution, by subsequently ratifying loan decisions made by the loan committee. It would be a simple matter to have the Board ratify loans which the committee has approved "subject to" the Board's subsequent ratification. Board ratification of loans previously approved at its next regularly scheduled meeting, is consistent with South Carolina case law and opinions of this Office concluding that a governing board should retain the ultimate decision-making authority in discretionary and quasi-judicial decisions.

QUESTION 2. Article X, § 11 Issue.

Here, you note that JEDA has, pursuant to Section 41-43-240, established a not-for-profit corporation called Carolina Capital Investment Corporation (CCIC). You further indicate that in at least one instance, this corporation took an equity interest in a company in exchange for an investment of capital. Your question is whether such would violate Article X, § 11 of the South Carolina Constitution.

Art. X, § 11 provides in pertinent part that

> [n]either the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association or corporation.

Section 41-43-240, however empowers JEDA

> ... to establish profit or not-for-profit corporations as the authority considers necessary to carry out the purposes of this act.

> The authority may make grants or loans to, or make guarantees for, the benefit of any not-for-profit corporation which the authority has caused to be formed ... .
>
> These grants, loans, or guarantees may be made upon a determination by the authority that the receiving not-for-profit corporation is able to carry out the purposes of this act and on the terms and conditions imposed by the authority.
>
> Any guarantee made by the authority shall not create an obligation of the State or its political subdivisions or be a grant or loan of the credit of the State or any political subdivision. Any guarantee issued by the authority must be a special obligation of it. Neither the State nor any political subdivision is liable on any guarantee nor may they be payable out of any funds other than those of the authority and any guarantee issued by the authority shall contain on its face a statement to that effect. (emphasis added).

Apparently, the Carolina Capital Investment Corporation was created pursuant to this statutory authority.

Our Court has decided a number of cases interpreting this Art. X § 11 provision. For example, in Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923), without specific reference to the history of the adoption of the "joint owner or stockholder" provision, the Court centered its analysis upon the original purpose of the proscription:

> [i]f the supposed intention of this section of the Constitution could be considered apart from the words used therein, it doubtless would be admitted that the idea was to prevent the state from entering into business hazards which might involve obligations upon the public.

Other South Carolina cases have found the provision was not violated because there was no "joint ownership" of property between the State or its political subdivision and a

private corporation. See, Johnson v. Piedmont Municipal Power Agency, ____ S.C.____, 287 S.E.2d 476 (1982); Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976).

In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), the South Carolina Research Authority was determined to be a State agency because (1) the Act creating it is a "corporation owned completely by the people of the State" (2) is empowered to issue revenue bonds and (3) statutes exempted the Authority from general law provisions applicable to State agencies and employees. The Authority was authorized by statute to acquire "some degree of ownership" in joint ventures with high technology firms. 290 S.C. at 421.

The Authority argued that it was not a "State agency" and thus Article X., § 11 was not applicable. However, the Court determined, based upon the foregoing criteria, that the Authority was a State agency and thus the constitutional provision applied. Concluded the Court,

> [t]he constitution clearly prohibits public agencies, such as the Authority, from engaging in joint ownership with private parties. We agree with the Circuit Court and hold the Authority may not enter into joint ventures with private firms. (emphasis added).

290 S.C. at 421.

Thus, it must be determined whether Carolina Capital Investment Corp. is a "State agency" for purposes of Art. X, § 11. Of course, first and foremost, CCIC is incorporated as a non-profit corporation. We have generally determined that a non-profit corporation is not a "public body" for purposes of the Freedom of Information Act. Op. Atty. Gen., March 27, 1984. This would not end the inquiry, however, as courts sometimes look beyond a non-profit corporation's status as such to determine whether, in reality, the corporation is an "alter ego" of the State. See, State v. Smith, 357 So.2d 505 (La.1978) [presence of public funds flowing through a non-profit corporation not enough to transform it into an agency of State or parish where non-profit corporation not created by statute or Constitution, but instead merely by corporation charter.]. In State ex rel. Public v. City of Portland, 684 P.2d 609 (Or.App. 1984), the Court held that a non-profit corporation was, in reality, a State agency, analyzing the issue as follows:

> PECI's purpose is to implement city policy and to carry out responsibilities assigned by a city agency. Article II B requires that all rules, regulations, standards, criteria and decisions of PECI be appealable to the city council. Article VI A provides that it may be dissolved at any time by the city council. Article VIII provides that its directors are appointed by and serve at the pleasure of the city council. Given the degree of control that the city council possesses over PECI affairs, we conclude that PECI is an instrumentality of the City of Portland.

The Court added that it is not what city council has done, "but what it has the ability to do, that is the determinative factor."

In Kentucky Region Eight v. Com. Ky., 507 S.W.2d 489 (Ky.1974), the Court held that a private nonprofit corporation, organized pursuant to a state statute to participate in administering mental health and mental retardation program and clinics, and whose employees were not under the State merit system, salary schedules or other state personnel regulations, were not "State agencies" within the meaning of statutes providing for State Employee Retirement System. The Court concluded that a State agency was a department of State government that is such an integral part of State government as to come within regular patterns of administrative organization and structure and government personnel policies.

Another illustrative case is Philadelphia Nat. Bank v. U.S. of America, 666 F.2d 834 (3rd Cir. 1981) which held that Temple University, a non-profit corporation, was not a "political subdivision" of the State of Pennsylvania, nor did the University act "on behalf of" the State. The Court noted that three principal attributes of sovereignty - the power to tax, the power of eminent domain and the police power were not possessed by Temple. In addition, the Court stated:

> [n]o such identity of interest, control, or intent, however, exists between Temple and the Commonwealth of Pennsylvania. Nor is there any language in the Commonwealth Act that purports to make Temple the alter ego of the state.

> ... We cannot say, therefore, that Temple issued its obligation "on behalf of" the Commonwealth of Pennsylvania.

666 F.2d at 841.

Then too, there is the case of Bush v. Aiken Electric Cooperative, 226 S.C. 442, 85 S.E.2d 716 (1955). There, the Court held that the Rural Electric Cooperative was not exempt from liability for torts. Finding that the Co-op was not a governmental agency, the Court said this:

> [w]e do not understand appellant to claim immunity on the ground that it is a governmental agency. Indeed, there could be no basis for freedom of liability on this ground. Appellant came into existence at the volition of the incorporators. The State has not undertaken to name its governing board or to control its affairs. It may be dissolved at the will of its members and upon such dissolution the State receives none of its property. Although serving a public purpose, it is a voluntary association to provide its members the benefits of electrical service at the lowest possible cost.

226 S.C. at 446.

Consistent therewith, this Office in its previous opinions, has generally concluded that a non-profit corporation is not a State agency so long as it is a separate legal entity, independent of the State. In an Opinion, dated February 26, 1980, we concluded that the South Carolina Protection and Advocacy System for the Handicapped, Inc. was not a State agency thus requiring written approval of the Attorney General to hire legal counsel. There, we relied heavily upon the Kentucky Region Eight case, cited above. Applying the criteria in that case, we stated:

> [i]t is the opinion of this Office that the General Assembly designated the South Carolina Protection and Advocacy System for the Handicapped, Inc., not as a State agency, but as an eleemosynary corporation chartered by the Secretary of State with an existence separate and apart from the State, to perform the function of advocate for all handicapped citizens of South Carolina. The SCP&A System is a non-stock,

> non-profit corporation which serves a public purpose and whose financial support is derived mainly from public sources. The corporation's employees are not under the State Merit System, State salary schedules, or any other State personnel regulations. It is not such an "integral part of State government as to come within regular patterns of administrative organization and structure."

In another Opinion, dated July 20, 1976, it was concluded that Pee Dee Regional Health Systems Agency, Inc. was not a State agency for purposes of insurance by the State Worker's Compensation Fund or by the Division of General Services. We noted that the legal structure of Pee Dee was that of a non-profit private corporation and considered such legal structure controlling. Again, in an Opinion of May 20, 1982, we deemed the South Carolina Protection and Advocacy System for the Handicapped, Inc. to be a private, non-profit corporation, not a State agency. We noted in the Opinion, concluding that the corporation could not be staffed with state employees, that in order to be a State agency, "the State of South Carolina, not the board of directors of the System, would have the right to direct and control the employees in the performance of their jobs."

Finally, Foster Wheeler Energy Corp. v. Metropolitan Knox Solid Waste Authority, Inc., 970 F.2d 199 (6th Cir. 1992) is enlightening. There, the City of Knoxville and the county created a non-profit corporation for purposes of solid waste treatment. A private corporation contracted with the non-profit Authority to operate the facility. There was no direct contractual relationship with the city and county, however. Subsequently, the Waste Authority was sued by the corporation for breach of this contract and the plaintiff corporation tried to hold the City and County liable. In refusing to hold the City and County liable, the court declined to "pierce the corporate veil" of the non-profit Authority and thus conclude that the Authority was, in effect, the City and County. Concluded the Court,

> [a] corporation has an existence separate and distinct from that of the owners. However, this separate entity may be disregarded in the interests of justice where it can be shown that the corporation is merely a "sham" or dummy" or is being used as an instrumentality for the benefit of its owners. ... This theory will be applied to place liability on the stockholders, or in a parent-subsidiary relationship, to hold the parent liable in spite of the subsidiary's independent status. ...

> In either case, however, the theory is designed to disregard a sham corporation and to impose liability on the corporate owners, who are controlling the corporation for their own benefit.
>
> In the present case, however, the city and county were not equity owners in the Waste Authority, as the project was financed with revenue bonds. Simply because the city and county placed directors on the Waste Authority's board, and agreed to use their best efforts to make the Waste Authority succeed, does not, in our view, create a sufficient nexus between the city, the county and the Waste Authority on which to predicate liability.

970 F.2d at 201-202. (emphasis added).

Of course, this Office, in a legal opinion cannot make factual determinations. Op.Atty.Gen., December 12, 1983. Ultimately, the conclusion of whether or not CCIC is a State agency is a factual question, applying all the criteria referenced above. Based upon the facts at hand, it appears that CCIC is a separate legal entity incorporated as a non-profit corporation, and is not a State agency. As noted above, this Office, in its previous opinions, has generally presumed that an entity incorporated as a separate non-profit corporation is not a State agency. This is consistent with Section 41-43-240 which refers to the authority of JEDA to create either "profit of non-profit corporations as the authority considers necessary to carry out the purposes of this act." Likewise, it would not appear that CCIC is such "an integral part of State government as to come within regular patterns of administrative organization and structure." I am advised that there are interlocking directors serving on both the JEDA Board and the CCIC Board and that CCIC is deemed a "public procurement unit" pursuant to the State Procurement Code. See, Section 11-35-4610(5). Notwithstanding these attributes of a State agency, however, I am of the opinion, based upon the facts presented, and previous opinions of this Office, that CCIC is probably not a State agency for purposes of Article X, § 11. I must caution that you should review the various criteria contained in the authorities referenced herein, applying these criteria to all the facts, for any final resolution of this matter.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney

as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph