

The State of South Carolina

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June 12, 1989

Mr. Ernest B. Segars  
Administrative Assistant  
Laurens County Council  
Post Office Box 495  
Laurens, South Carolina 29360-0445

RE: Your Opinion Request Concerning Development of  
Laurens County Property as Office and Light  
Industrial Park

Dear Mr. Segars:

Your above-referenced request presents, in descending order of preference, seven alternative arrangements for Laurens County's development and sale of 165 acres with the assistance of a commercial real estate developer and agent. Since this Office's opinion is that Arrangement I is most probably constitutional and legal in principle, as structured and discussed below, you do not desire opinions on the remaining six alternatives.

INFORMATION PRESENTED

Arrangement I

The commercial real estate developer and sales agent chosen and the county propose to execute an exclusive contract wherein the developer agrees to use its best efforts to develop a specified portion of the acreage consistent with a specified land use plan, and to promote, advertise and sell parcels in said portion as part of the Office and Light Industrial Park described in said plan. As part of said development, the developer will contribute infrastructure improvements (landscaping, sidewalks and curbs) equal in cost

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to the cost of the county's roads and drainage for said portion up to a given ceiling.

County Council will approve sales and, upon the sale of a given parcel, the county will receive its pro-rata basis or costs for the land plus a pro-rata share of the cost of construction of its roads in said portion, or the appraised value of the given parcel, whichever is greater. The developer will receive a commission consisting of a flat percentage of the gross proceeds plus fifty percent of the gross proceeds remaining after the county receives its above mentioned costs or appraised value and the developer receives its flat percentage. The county will receive the other fifty percent of said remaining proceeds. The county and developer would develop the next portion of the project on the same basis. Each fiscal year, the county will appropriate any funds necessary for construction of its roads in a specified portion, and the contract will contain a non-appropriations clause.

#### Legislative Background

Laurens County Council Minutes of a September 20, 1984 meeting disclose the council unanimously authorized the purchase of acreage to be used for an industrial park and approved "Ordinance Number 196 (Industrial Project)" appropriating \$651,499.00 from the Capital Improvements Account to fund the "County Industrial Park" and authorizing the County Administrator to negotiate a loan secured with the proceeds of the Capital Improvements levy and the full faith and credit of Laurens County for any sums not immediately available in said account.

By Resolution adopted January 16, 1989, council reaffirmed its "COMMITMENT TO PROVIDE FOR THE INDUSTRIAL AND MEDICAL OFFICE DEVELOPMENT OF CERTAIN PROPERTY CURRENTLY OWNED BY LAURENS COUNTY." This property is that purchased pursuant to council's authorization and Ordinance of September 20, 1984. The resolution cites the county powers enumerated in Section 4-9-30 of the Code of Laws of South Carolina, 1976, as amended, which include general public works, such as roads and drainage, economic development, and medical care. It reaffirms past county council commitment and action to establish an industrial park, and medical and government office sites; the county's need for the assistance of a developer for the project; and the importance of the project to attracting industry to the county and to attract medical practices and government services to locations most available and convenient to Laurens County citizens. A public hospital has been constructed on a portion of the acreage purchased in 1984, and the development in question, particularly the office park, would be located adjacent thereto in the remainder.

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CAVEAT, SHORT ANSWER AND SUMMARY ANALYSIS

This Office's opinion that Laurens County could legally enter into an enforceable contract with the private real estate developer properly embodying Arrangement I is not completely free from doubt, particularly regarding the medical offices aspect. Furthermore, only a court of competent jurisdiction in a proper case could determinatively resolve the issues presented by Laurens County's situation.

This opinion does not concern the county's initial purchase of the real estate for industrial development, but such appears proper and legal on its face. This Office has not reviewed the selection of the real estate developer and sales agent, which apparently was accomplished properly through competitive bidding. Nor is this opinion about the reasonableness of the commission in this proposed arrangement. However, disposal of property wherein the county receives the higher of its costs for the land and roads or the appraised value of the land as improved, and half of the proceeds remaining after this and the developer's flat commission are deducted, would appear to be disposal for fair and reasonable value in principle. Furthermore, to the extent these and other issues involve questions of evidentiary fact, they would be beyond the scope of an Attorney General's opinion.

Arrangement I also appears to be constitutional and legal in principle. It violates no constitutional prohibition, and the county has the statutory authority to take the actions contemplated. Since the county's commitment to the construction of roads would be limited to the given year, and the exchange of the roads for an equal value of landscaping from the developer is not a donation or loan of credit in any case, there is no question of pledging the county's credit with the constitutional issues and higher public purpose standard that entails. The projected development and sale of county acreage for industrial plant, and for industrial, medical and governmental offices, seems to serve a public purpose under any standard, anyway.

The county's means to develop and sell its land also appear constitutionally proper and authorized by statute and resolution. The only expenditure of tax revenues proposed will not only be a one year commitment matched by developer contribution, but will be a one time use of tax revenues which will be reimbursed from the proceeds of sale unless the project is a complete failure. This initial expenditure is for building roads on county property for public ways, to encourage its industrial development, and to obtain a higher return for the county's land than it would receive for raw acreage.

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Since the county may not donate its land to private parties, and as a corollary, must obtain a reasonable price for said land, it may proceed to develop it in such a manner as will do so. By the same token, once, because of its public purpose, the county may engage in these business or proprietary functions of real estate development, it may engage in said proprietary role in a sound business or proprietary manner; i.e. obtain an optimum price for its land.

The land's development for industrial and office use serves a public purpose. The means of development, including the initial temporary expenditure of taxes for public roads (which is also a public purpose in and of itself) and the development, promotion and sale with a private agent, are rationally related to, and serve, the public purpose of the development. These public purposes are not invalidated by the incidental benefits to the promoter/developer/real estate agent or to the purchasers. Nor is the business relationship between the county and the private developer the kind of joint venture prohibited by the South Carolina Supreme Court's interpretation of the State Constitution.

#### PUBLIC PURPOSE

The opinion requested concerned the means of developing the acreage with private assistance, not whether the accomplished purchase of the acreage for development for industry and non-industrial office buildings, was itself legal. Nor was an opinion requested about the propriety of government participation in developing an industrial park with a non-industrial office aspect. However, the latter is a threshold question, because all legislation must serve a public purpose, and, although Laurens County may engage in proprietary functions, those proprietary functions must serve a public public.

As in Wolper v. City Council of the City of Charleston, 287 S.C. 209, 336 S.E.2d 871 (1985), the public purpose question herein is two-fold. First, does the development of the acreage as an industrial and office park serve a public purpose? Second, does the county's contribution to the development plan comply with this public purpose?

#### Public Credit and Financing, Public Purpose Standards, and Industrial Development

Since the county's commitment to the construction of roads would be limited to a given year, there is no questions of pledging the state's credit in a constitutional sense. Caddell v. Lexington County School District No. 1, \_\_\_ S.C. \_\_\_, 373 S.E.2d 598

(S.Ct. 1988). Implicit in the South Carolina cases addressing the public purpose doctrine is the recognition of a less stringent public purpose standard where, as here, the public's credit is not pledged. The South Carolina Supreme Court may have called an aspect of this principle somewhat into question with regard to financing of industrial development in Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986). This question, the public purpose doctrine, and the several public purposes standards are exhaustively addressed in "A Reexamination of the Public Purpose Doctrine: Nichols v. South Carolina Research Authority" 39 S.C.L.R. 565.

Courts generally have acknowledged that legislation serves a public purpose if (1) the articulated goals of the legislation are in the furtherance of a public purpose, and (2) there is a reasonable relationship between the public purpose sought to be achieved and the means chosen to effectuate that purpose. When analyzing the public purpose of legislation that subjects taxpayers to pecuniary liability, courts usually have undertaken a more exacting scrutiny than this standard suggests...39 S.C. L.Rev. 566.

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<sup>5</sup> See, e.g. Wolper, 287 S.C. at 216, 336 S.E.2d at 875; Bauer, 271 S.C. at 230-31, 246 S.E.2d at 875. The means to achieve that purpose is primarily within the discretion of the legislature. See Carll v. South Carolina Jobs-Economic Dev. Auth., 284 S.C. 438, 327 S.E.2d 331 (1985). Courts applying this standard generally defer to the will of the legislature. See *infra* notes 54-63 and accompanying text.

In Nichols, the Supreme Court overruled the holding of Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984) that the industrial development discussed therein did not constitute a valid public purpose. However, the Nichols court did apply Byrd's more exacting four part scrutiny to legislation providing for financing industrial development even though no general obligation debt or other pledging of the state's credit and possible taxpayer liability was involved.

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In light of possible financial liability of county taxpayers under the general obligation bonds of the ordinance, the Byrd court analyzed: (1) the ultimate goal or benefit to the public intended by the project; (2) whether public or private parties will be the primary beneficiaries; (3) the speculative nature of the project; and (4) the probability that the public interest will be ultimately served and to what degree. Byrd, 315 S.E.2d at 806.

In the more recent case dealing with the Industrial Development Bond Act, Hucks v. Riley, 292 S.C. 492, 357 S.E.2d 458 (1986),

The Court cited Nichols only for the proposition that "the current trend is to broaden the scope of those activities which serve a public purpose, and legislation is not for a private purpose merely because private parties may be benefited." The failure of the Hucks court to address the application of the four-point standard affirmed in Nichols suggests that standard is applicable only in cases addressing legislation authorizing the imposition of taxpayer liability. 39 S.C.L.R. at 583.

In any case, even under the broadest interpretation of Arrangement I, there is not only no pledging of public credit, there is no financing of the development at all, unless the construction of roads and drainage is somehow so construed. Consequently, it would appear to remain safe to apply the less stringent standard even in the face of the most cautious reading of Nichols, and the August 1, 1986 Opinion would still be applicable. Finally, although the Byrd analysis is fact intensive and cannot be conducted with the information provided or in the context of this opinion, this Office has no information or legal authority indicating Arrangement I would not meet the Byrd standard.

Hucks also cites Nichols for the well-established proposition that legislation is not for a private purpose merely because private parties may be benefited. Hucks v. Riley, supra. Furthermore, the Hucks court found that Horry County's issuance of industrial bonds to finance the acquisition and construction of public lodging and restaurant facilities to be owned and operated by a private corporation would serve the public interest by creating jobs and increasing tax revenues of both the state and local governments, as well as support tourism, sports and recreational facilities in the City of Myrtle Beach and Horry County. Id. Although increasing the sale price of its land may not alone con-

stitute a public purpose, (and probably would not constitute the requisite public purpose for engaging in the project to begin with) a dollar of profit serves the public's interest in the county's fisque as much as a dollar of taxes does, and thus increasing the sale price would arguably constitute a public purpose for pursuing the project in a particular way.

Even prior to Nichols, in Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), the court approved the constitutionality of legislation providing for county involvement in industrial development (Industrial Revenue Bond Act, No. 103 of 1967) holding that the increase of employment to result from new industrial enterprises was sufficient public purpose to justify the issuance of revenue bonds by the counties.

Therein, and in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), the court acknowledged that the legislature "primarily determines public policy [and] found that the [Industrial Revenue Bond Act] served a public purpose", 217 S.E.2d at 46. The Baehr court went on to state that, although legislative findings on the public purpose issue are not conclusive, they are entitled to weight. There were no such findings of public purpose regarding the scheme for funding essentially private development of Bond Act 1097 of 1974, which the Baehr court found to serve primarily private profit purposes with only incidental public benefits. Herein, the General Assembly's findings on the public purpose of counties' industrial development in general implicit in counties' Section 4-9-30(5)'s power to appropriate money for economic development and explicit in the Industrial Revenue Bond Act (Section 4-29-10, et seq. of the Code, as amended.), and the court's recognition and approval of same in Elliott v. McNair, Nichols, and Hucks would be applicable.

Furthermore, the above referenced Laurens County Council's legislative findings of the public purposes of this development would also be entitled to weight from the judiciary. This is particularly true of the council's determination that the county's economic development is in need of attracting industry and is well served by the county's own development of an industrial park to do so.

#### Public Purpose of Office Park

Whereas the information available to this Office indicates that the purpose contemplated when the acreage in question was purchased in 1984 or 1985 was industrial development (an established public purpose), after the building of a public hospital on a portion of the acreage, a best use of the remainder includes a medical office park. Consequently, although it appears that the

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original purchase of the property was proper, there could now be a question as to whether the purpose presently contemplated in light of the changed circumstances does so.

A court might determine that it is unnecessary to answer this question for one or more of several reasons. First, it is the purpose contemplated when the county goes into the land development business which counts in terms of satisfying the public purpose requirement of the legislation authorizing the purchase by which the county entered into that proprietary function. Secondly, once the county has entered into a properly purposed proprietary function of real estate development, it is not bound to sell all of the real estate for the ultimate use originally contemplated. Thirdly, the office park aspect may well be subsumed within the concept of the industrial park of which it is a part. The first two theories would support the third if not be incorporated into it. That an office park in general is subsumed within an industrial park for the purposes of public purpose analysis is illustrated by Section 4-29-10(3)(d) of the Code of Laws of South Carolina, 1976, as amended, which provides that "office buildings" are included within the definition of Industrial Development Project "if the primary purpose is to provide service in connection with another facility qualifying under this subitem."

Public hospitals are not facilities qualifying under subitem 4-29-10(3). For one reason, they have their own revenue bond act, Section 44-7-1410, et seq., wherein the General Assembly declares its policy of promoting the public health and welfare by providing means for financing hospital facilities, and details the public purpose and need for doing so. That such are in truth public purposes is clear beyond cavil.

It could also be argued that, if office facilities considered necessary or useful by a commercial enterprise providing laundry services to hospitals (Section 4-29-10(3) of the Code) serve a public purpose, office facilities useful to the hospital itself would serve the same public purpose, and do so more directly. That office facilities for governmental services serve a public purpose is at least self-evident, if not tautological.

It is not necessary for the development contemplated herein to satisfy all of the requirements of an Industrial Development Project under Section 4-29-10, et seq.; because it is not an Industrial Development Project within the meaning of Chapter 29, in that there is no county financing of the development involved. Furthermore, Section 4-29-150 provides that nothing in Chapter 29 shall be construed as a restriction or limitation upon any powers which a county might otherwise have under any laws of this state,

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and the county has the power to act as is contemplated herein as demonstrated below under Means.

Although a superficial reading of Jacobs v. McClain, 262 S.C. 425, 205 S.E.2d 172 (1974), and State v. Riley, 276 S.C. 323, 278 S.E.2d 612 (1981) might cause some concern regarding the public purpose of the office park aspect of this project, they are clearly distinguishable, and the court's trend has been toward broadening "public purpose."

The State v. Riley holding that the issuance of industrial revenue bonds to finance non-industrial computer and office facilities and shopping centers is for an unconstitutional private purpose would be inapplicable herein, since there is no "financing" involved, the county is in no way engaging in any office construction itself, and, as set forth in this section, these medical offices may well serve a public purpose in this situation.

The statute the Jacobs' court found violative of Article 10, Section 6 of the South Carolina Constitution, authorized hospital districts to issue general obligation bonds to finance the construction of medical office buildings. Herein, no question of such pledging of the public's credit is involved and there is no financing or construction of the office buildings contemplated. Consequently, Section 6 of Article X's prohibition of the General Assembly's authorization of local governments levying taxes or issuing bonds for any purpose except "to...build and repair public...buildings" would not apply. Office space to be leased to doctors who were part of the active medical staff at a public hospital may not be a public building or "essential to the function of a hospital in the constitutional sense" of Article X, Section 6, pledging public taxes and credit. However, the Jacobs' court did not quarrel with the soundness of the trial court's statement that a building essential to the discharge of the public function of maintaining a hospital would promote or subserve a public purpose. 205 S.E.2d at 173. Herein, tax dollars are to be expended only to build the public roads to serve the property on which the medical offices will be built to "subserve" the public hospital, and the benefit to the private medical practitioners, although quantitatively greater, is qualitatively no more primary or direct than the benefit to the public, i.e. their patients' and the hospital's. Furthermore, herein, although this also involves questions of fact beyond the scope of this opinion, there does not appear to be a question of the government subsidizing the construction of office space in competition with private enterprise, rather it is indirectly facilitating the construction of such office space where it is needed due to the new hospital but not presently underway otherwise.

A corollary of this factual issue is also related to one of the four points of Byrd court's more stringent test for public purpose. Thus, the fact that there do not presently appear to be other office buildings in the vicinity of the hospital supports drawing an inference of need and demand for such offices there and this reduces the speculative aspect of the project. The very limited commitment of county funds prior to a financial return thereon, with the attendant cost recoupment, also further reduces any speculative aspect. Demand for medical offices in the vicinity of the new hospital, along with other relevant questions such as general office supply and demand in Laurens County, its convenience to the new hospital, and the importance of such convenience to the public, are questions of fact which this Office cannot determine. However, a court may even take judicial notice of hospital patients' and their attending physicians' preference for doctor's offices close to the hospital.

Furthermore, the court's trend has been toward an expanding concept of public purpose. Hucks v. Riley, 357 S.E.2d at 459, citing Nichols v. South Carolina Research Authority, supra.

#### MEANS

Once it has been established that legislation is designed to serve a public purpose, the means to achieve that purpose, if otherwise constitutional, will not invalidate the Act. Carll v. Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331, 334 (1985). By the same token, legislation may not be invalidated as long as there is a reasonable relationship between the public purpose and the means chosen to effectuate that purpose. Bauer, 246 S.E.2d at 875. These means and their relationships with the public purpose of the development survived and supported the above public purpose and analysis. The county's authority to employ them, and to employ the private company in the manner planned, are discussed further below.

#### County's Powers In General

Whereas, the county's powers are limited to those provided by charter or legislative enactment, Williams v. Wylie, 217 S.C. 247, 251 and 252, 60 S.E.2d 586, 587, the county has the power to sell or otherwise dispose of its real property pursuant to §4-9-30(2), to make and execute contracts (§4-9-30(3)), including contracting with any individual or corporation to perform any of its functions (See §§4-9-40 and 4-9-30(17)), "exercise such other powers as may be authorized for counties by general law", as well as tax and make appropriations for public works including roads and drainage, and for economic development, hospital and medical care (§4-9-30(5)). Again, the only appropriations at issue herein, are

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for public roads and drainage, directly; economic development, indirectly, and medical care, tangentially, indirectly or at a remove.

#### Power to Sell

Although it is clear that Laurens County owns this acreage in its proprietary, rather than governmental capacity, and the acreage will not be dedicated to any public use except for so much of it as becomes public roads, the county's statutory authority to dispose of its real property is not necessarily restricted to property held in its proprietary capacity in South Carolina. Bobo v. City of Spartanburg, 230 S.C. 396, 96 S.E.2d 67, at 71 (1956) citing Carter v. City of Greenville, 175 S.C. 130, 135, 178 S.E. 508, 510. The county has the right to sell or exchange this property in good faith, upon adequate consideration and upon any reasonable and lawful terms. Id. Sale of the acreage under Arrangement I being within the county's power as established above, the courts would not inquire into its advisability, that being a matter within council's discretion, which the courts would not disturb except upon a showing of fraud or abuse of authority. Bobo, supra, 96 S.E.2d 71 citing Carter v. City of Greenville, supra and Green v. City of Rock Hill, 149 S.C. 234, 262, 263, 147 S.E. 346, 356.

Since it is the council itself which will exercise this discretionary power to sell, it is unnecessary to address the probability that this power could not be lawfully delegated to the private developer. 10 McQuillin, Municipal Corporations, 3rd Ed., §28.46 "Delegation of power; employment of broker."

#### Construction of County Roads

On its face, the county is merely constructing roads and drainage on property which it currently holds and will continue to hold until such property is purchased by members of the public, at which time these roads will become public ways. Thus, these roads are either on county property or, for the benefit of the public, as public ways. They and the property they serve, are never in the possession of the private developer. Since Section 4-9-30 of the Code specifically gives the county the authority to collect taxes and appropriate tax moneys to construct public roads and drainage, and public ways serve a public purpose, the county's construction of, or expenditure for, these roads would be proper, legal and constitutional.

On the other hand, a court might interpret the county's agreement to construct roads up to a certain cost as an indirect means to contribute to, or invest in, the development of this property. Although this raises several issues, a court would probably find

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this contribution to be proper, legal and constitutional; because public purposes are served, and there is no issue of pledging the public's credit since the contract will commit the county for one fiscal year only. Caddell, supra. Even under this characterization, the facts remain that the roads constructed will either serve the county's own property, or the public; i.e. the purchasers of the parcels and their tenants and customers. Furthermore if the construction of the roads were interpreted to be a contribution to a project from which the developer would benefit as well, it would still be an exchange of the roads for an equal value of other improvements, and the exchange of one thing for another is not a donation or loan of credit. Sadler v. Lyle, 254 S.C. 535, 176 S.E.2d 290, (1970) (Exchange of property between city and railroad), 15 McQuillin, 3rd Ed §39.30 - "Present-day constitutional prohibitions," and cases cited at note 23. Any expenditure only benefits the developer incidentally by enhancing its ability to sell the parcels and its percentage commission. Even to this incidental private benefit there is a corollary benefit to the public fisc; i.e. enhancing its retrieval of costs and profits. The question of whether such a benefit to the public fisc is itself such a public purpose as is required to justify county action need not be resolved herein, because, in addition to the public purpose served by public ways, the county's expenditures for roads serve the additional "public purpose" of industrial development.

#### Use of "C" Funds to Build Roads in the Development

As an alternative or supplement to its own tax revenues, the county may consider the use of State "C" Funds to build the roads in question. In an Opinion issued on August 1, 1986, to Representative D. M. McEachin, Jr., this Office approved, with certain conditions, Florence County's use of such "C" Funds to build roads on private property (Cane Creek Farms) which it anticipated developing with Cane Creek Farms and High Hill Corporation as an industrial park. This Opinion also recognized that in certain kinds of joint county/private industrial development business ventures were constitutional and proper, and that a much less stringent public purpose standard applied when no public financing was involved.

It also noted that the agreement therein, like Arrangement I herein, provides for cost recoveries and returns on investments which "may remove any possible long-range question of expending public funds for a private purpose."

A major difference between the Florence County - Cane Creek Farms - High Hill Corporation Agreement and Laurens County's Agreement I is, of course, that the property therein was private, whereas herein it is the county's. Consequently, Laurens County's use of its own tax revenues or of State "C" Funds would be much more

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likely to sustain judicial scrutiny as more obviously for a public purpose with less benefit to private persons of a more incidental and indirect nature.

Regarding "C" Funds specifically, note that "[o]nce a road is paved with "C" Funds, it becomes part of the state secondary road system; thus, the roadway must be dedicated (in fee or by a right-of-way) to the State."

#### Joint Ventures with Private Companies

Although a sentence in Nichols raises a question, if Arrangement I is interpreted to provide for Laurens County to enter into a "joint venture" with a private company for the development and sale of the real estate in question, this would not be the kind of joint venture which is prohibited by S.C. Const. Art. X §11: "...Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association or corporation."

Laurens County will hold no stock or other ownership interest in Pulliam; Laurens County and Pulliam will not have joint ownership in a third entity, nor are they ever joint owners in any fashion of the property or development in question. Consequently, it is questionable whether the prohibition is applicable at all. In any case, the most harsh interpretation of Arrangement I should survive the most harsh interpretation of this prohibition.

Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923) suggests that, since the joint venture therein was constitutional, the business relationship herein must certainly be. In Chapman, the General Assembly, by statute, gave the Greenville Chamber of Commerce a one hundred year leasehold interest in, and sole and exclusive control over, (including the right to mortgage the land and building until 2023) the old courthouse built in the middle of the street, requiring the chamber to tear it down and erect an eight or ten story building in which the county was to have the use of certain offices, a public restroom, and one-half of the rent from any offices rented by the chamber. One of the county's grounds of attack on this grant was that it violated the spirit of Section 6 of Article 10 of the constitution's (the predecessor to Section 11 of Article 10) prohibition against the state being a joint owner of, or stockholder in, any private company. The court first cited Lillard v. Melton, 103 S.C. 10, 23, 87 S.E. 421, for the rule that it was not "to be controlled by any unexpressed spirit or public policy supposed to underlie and pervade the instrument," but went on to state that if there were any unexpressed intention of the section it would be to "prevent the state from entering into business hazards which might involve obli-

gations upon the public," and that "[n]othing of the sort would be possible under the act.... There is no joint ownership; there is no partnership." 120 S.E. 588. Such is clearly the situation under Arrangement I.

In light of the court's trend toward broadening the types of business activities it accepts as serving a public interest, there is no reason to expect it would now apply a more stringent reading of the prohibition against joint ownership in private enterprises than it did sixty-six years ago. Its cursory treatment of the Research Authority's receiving "some degree of ownership in...technology firms" in Nichols, wherein it agreed with the trial court and held that "the Authority may not enter into joint ventures with private firms," should not be read as dicta signifying more than its immediately preceding statement of the rule that "[t]he constitution clearly prohibits public agencies...from engaging in joint ownership with private parties." Both of these statements are progressively loose rephrasings of "may not become a joint owner of or stockholder in a private firm." Certainly the court did not intend, with this throwaway line, which, as unnecessary to prohibit the Authority's receipt of some degree of ownership in private firms, would be dicta, to prohibit all joint ventures between public and private entities, and thus invalidate a large proportion of government projects in this state.

This conclusion is strongly supported by Johnson v. Piedmont Municipal Powers Agency, 277 S.C. 345, 287 S.E.2d 476 (1982), wherein Justices Gregory and Harwell concurred with Justice Ness' opinion sustaining the constitutionality of the Joint Municipal Electric Power and Energy Act of 1978 and the PMPA's purchase of an interest in Duke Power Company's Catawba Nuclear Station. Although the court characterized the business arrangement as "ingenious" and "complex," its ruling turned on the facts that the PMPA would not become a "joint owner of" Duke and vice-versa, and that PMPA acquired no form of ownership in a private company.

The court's final word was also on point herein.

Finally, this Court has never held a public entity's naked title to property operated by a private entity resulted in unconstitutional joint ownership. To so hold would overrule our prior decisions in Elliott v. McNair, supra; Chapman v. Greenville Chamber of Commerce, et al., 127 S.C. 173, 120 S.E. 584 (1923) and Gilbert v. Bath, et al., 267 S.C. 171, 227 S.E.2d 177 (1976). In each of these cases we approved as constitution-

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al, projects in which the public entity held title but a private entity operated the project.

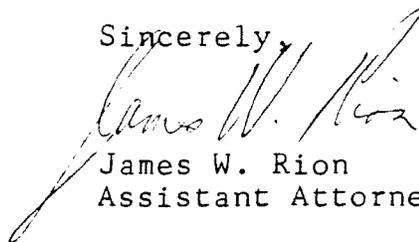
Even Justice Littlejohn's dissent, which found unconstitutional joint ownership of Duke by PMPA behind the ingenuity and complexity of the arrangement, recognized that "[n]ot every joint endeavor or cooperative effort between a public entity and private business is constitutionally prohibited. See Gilbert v. Bath, supra; Chapman v. Greenville Chamber of Commerce, supra."

Recently in Carll supra, 327 S.E.2d at 337, the Supreme Court held that legislation providing for government delegation of ministerial authority over a quasi-public project to private financial institutions was constitutionally permissible.

Conclusion

Although the factual issues involved in determining the legality of these business dealings could only be resolved by a court as trier of fact, Arrangement I should survive judicial scrutiny for the reasons discussed above.

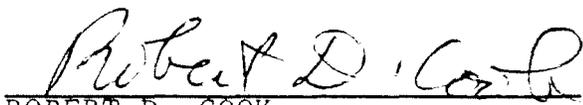
Sincerely,

  
James W. Rion  
Assistant Attorney General

JWR:mwr

REVIEWED AND APPROVED:

  
\_\_\_\_\_  
JOSEPH D. SHINE  
Chief Deputy Attorney General  
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\_\_\_\_\_  
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