

The State of South Carolina



Office of the Attorney General

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March 16, 1988

The Honorable Robert N. McLellan
 Chairman, Ways and Means Committee
 House of Representatives
 Post Office Box 11867
 Columbia, South Carolina 29211

Dear Representative McLellan:

You have advised that a proposal may be pending to grant six million dollars to the Greenville Performing Arts Center, an eleemosynary corporation, as a part of the Bond Bill that is currently being prepared. Your concern is the legality of including this project in the Bond Bill inasmuch as title to this property will not be held by the state or, according to your information, by any political subdivision.

Background

This Office has learned that the City of Greenville is in the process of acquiring a six-acre site for the project; title to the site will be vested in the City of Greenville, we have been advised. The Center for the Performing Arts Foundation is committed to construct the project on that site. The Foundation is a tax-exempt public foundation to be managed by a board of trustees with representatives from the public and private sectors. The Center will be operated by the Foundation under a long-term lease from the City. We understand that the Foundation was incorporated as an eleemosynary corporation in 1985 for the purpose of establishing a center for the performing arts "for the enjoyment, appreciation and use by the public in general." The upstate region of the State will be served by the Center and the Foundation.

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Constitutional Issues

Article X, Section 13 of the Constitution of the State of South Carolina authorizes the State of South Carolina to incur bonded indebtedness, using either general obligation or revenue bonds. General obligation debt, apparently the type of indebtedness being considered in this instance, is defined in Section 13(2) as "any indebtedness of the State which shall be secured in whole or in part by a pledge of the full faith, credit and taxing power of the State." Section 13(3) permits general obligation debt to be incurred only for a public purpose.

Article X, Section 11 of the State Constitution provides that

[t]he credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution

This constitutional provision must also be examined in response to your inquiry; public purpose is also an important consideration as to this provision, as well.

Public Purpose

A "public purpose" for purposes of incurring bonded indebtedness under the Constitution was examined in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984), overruled in part by Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986):

Public purpose is not easily defined. It is oftentimes stated that a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof.

Byrd, 281 S.C. at 404. The court in Nichols cited with approval the four-prong test from Byrd by which bond issues

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may be judged to serve a public purpose:

The 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.

Byrd, 281 S.C. at 407. Each case is determined on its own merits as to whether a public purpose is served thereby.

This Office has previously researched the issue of whether the construction of a performing arts center would serve a valid public purpose. See Op. Atty. Gen. No. 85-5, enclosed. As noted therein, while the determination that a particular project meets the public purpose test is factual and hence beyond the scope of an opinion, we did conclude that a court considering the question could conclude that the construction of an arts center would serve a public purpose.

In Op. Atty. Gen. No. 85-5, this Office opined that Richland County Council could expend public funds for a performing arts center to be built by the Carolina Research and Development Foundation (an eleemosynary corporation) and leased to the University of South Carolina for a period of years. Richland County would technically have no interest or control in the project, but because the center would serve a public purpose, monetary contributions by Richland County would most probably be permissible.

In that opinion, a number of cases were examined concerning the issue of one political subdivision (i.e., the State, here) expending public funds for the aid of another political subdivision or governmental entity for the purpose of assisting that entity in some public venture (as here, an arts center). Such a contribution has been upheld by the South Carolina Supreme Court in the many cases cited within Opinion No. 85-5.

Similarly, courts have upheld the expenditure of public funds by a political subdivision in which the beneficiary is an

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eleemosynary or other private corporation which is serving legitimate public purposes. For examples, see Bolt v. Cobb, 255 S.C. 408, 82 S.E.2d 789 (1954); Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976); Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); and Battle v. Wilcox, 128 S.C. 500, 122 S.E. 516 (1924).

Based on the foregoing, it would appear that Article X, Section 13 of the State Constitution would most probably not be violated if the six million dollar bond issue were to be included in the pending Bond Bill. While of course only a court could finally determine that a public purpose would be served, we have previously opined that building a performing arts center would most probably serve a public purpose. The fact that title to the subject property was not vested in the entity receiving the appropriation was not deemed sufficient to defeat the appropriateness of the expenditure.

Pledging the Credit of the State

A number of the cases cited in the preceding paragraphs have also been cited for the proposition that such an expenditure of public funds does not violate the prohibition against pledging the credit of the State for a private corporation which performs legitimate public functions.

In a similar situation, this Office opined, in an opinion dated November 16, 1983 (copy enclosed), that public funds may be appropriated to private entities which perform functions of or for the State without violating Article X, Section 11. As noted therein, "[t]he appropriation of public funds to these private entities is, in effect, an exchange of value which results in the performance by those entities of a public function for the state." The opinion concluded that the General Assembly could "lawfully appropriate public funds to a proper private entity to enable it to perform a public function."

As concluded in Opinion No. 85-5, Section 4-9-30(5), Code of Laws of South Carolina (1976, as amended), recognizes that recreation is a proper function of a county, one of the state's political subdivisions; in that opinion, "recreation" was deemed to include activities such as dancing and performing plays. See also Sections 5-7-30 and 51-1-10 et seq. of the Code. It may reasonably be said that the General Assembly has recognized recreation to be a public function, so that provision for

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a facility for performances of dance or drama would be a public function.

As concluded with respect to Article X, Section 13, the notion of public purpose is a question of fact, the determination of which is beyond the scope of this Office. As long as a public purpose is being served and a public function is being carried out by a private entity such as the Center for the Performing Arts Foundation, however, it would appear that no violation of Article X, Section 11 of the State Constitution would occur if the proposed project were included in the Bond Bill.

Conclusion

It is the opinion of this Office that to include in the pending Bond Bill a six million dollar allocation for the Greenville Center for the Performing Arts would not violate either Article X, Sections 11 or 13, of the State Constitution, based upon the facts presented to this Office. Of course, only a court could examine the details of a particular proposal and determine with finality that a public purpose is met as to a particular project; but it is the further opinion of this Office that a court could well conclude that a public purpose is being served thereby.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosures