

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-758-3970

June 19, 1986

George H. Spare
Administrator, Town of Hardeeville
Post Office Box 608
Hardeeville, South Carolina 29927-0608

Dear Mr. Spare:

You have asked that this Office examine proposed ordinance #86-01 to determine whether the ordinance reflected an expenditure of public funds for a public purpose. You had enclosed a detailed opinion from Joseph R. Barker, attorney for the Town of Hardeeville, who identified problems with expenditure of public funds for the purposes detailed in the ordinance. We concur with the advice given to you by Mr. Barker for the following reasons.

Proposed ordinance #86-01 contemplates the use of funds from the Town's "Water and Sewer Enterprise Account" to reimburse developers of specified residential areas for a portion of the cost for installing water and sewer facilities and to rebate to one or two such developers a percentage of the tap-in fees collected. The developer would be required to comply with the requirements of Section 2 of the ordinance which requires, inter alia, that all systems must be fully completed, approved, and deeded to the Town before any grant may be made under the program.

For areas zoned General Residential or Residential-10, the developer's grant or rebate would be calculated according to the following maximum assistance formula:

Sewage lift stations: 15% of total cost of materials. Pipe and pipe supplies: 15% of total cost of materials. Fire Hydrants and

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stubs: 100% of total cost of materials.
Tap-in rebate: 50% of taps collected first
12 months. 25% of taps collected next 24
months.

You have advised that for these zoning classifications, lots are smaller and houses built thereon are smaller and not as costly to build. Many of the houses within these classifications may be subsidized or for persons of lower income levels.

For areas zoned Residential-14 or Residential-20, the following maximum assistance formula would apply:

Sewage lift stations: 30% of total cost of materials. Pipe and pipe supplies: 30% of total cost of materials. Fire Hydrants and stubs: 100% of total cost of materials.
Tap-in rebate: 50% of taps collected first 12 months. 25% of taps collected next 24 months.

You have advised that houses built on lots within these zoning classifications are more costly to construct, the lots themselves are larger, and person occupying such houses would generally be within higher income levels.

You have further advised that the grants being provided to the developers are intended to encourage development of the residential areas, particularly those in classifications 14 and 20. With the multiplicity of housing would come an enhanced or increased tax base and would permit more public amenities, such as parks, recreation, open spaces, and so forth. You have also indicated that the Town has an abundance of subsidized housing and that the Town would like to encourage building more houses in the higher zoning classifications. With this background in mind, the legal aspects of the problem will be presented.

Article X, Section 11 of the State Constitution, as amended in 1977, retains substantially the provisions of former Section 6 of Article X and provides in pertinent part:

The 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,

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corporation, or any religious or other private education institution... .

This provision has been construed to prohibit the expenditure of public funds for the primary benefit of private parties. State ex rel. McLeod v. Riley, 276 S.C. 323, 278 S.E.2d 612 (1981); Feldman Co. v. City Council of Charleston, 23 S.C. 57 (1886). 1/

In Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), the South Carolina Supreme Court distinguished between public and private purposes; 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. Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment.

* * *

Some public benefit comes from the development of any property by free enterprise or by the government. Many objects may be public or beneficial in the general sense that their attainment will benefit or promote the public convenience, but not be public in the sense that

1/ Even if it should be argued that the Town is not incurring pecuniary liability, so as to invoke Article X, Section 11, see Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), public funds must nevertheless be spent for a public purpose.

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legislation is permitted...to bring about
the objects.

* * *

It is not sufficient that an undertaking
bring about a remote or indirect public
benefit to categorize it as a project within
the sphere of "public purpose."

265 S.C. at 162-163.

The apparent emphasis of the proposed ordinance is the expansion or enhancement of the tax base of the Town of Hardeeville. In an analogous situation in which the Supreme Court addressed the appropriate use of public funds, the Court stated:

In ascertaining what is a public purpose within the power to tax, such benefits from a proposed expenditure as will accrue from increased taxable values, from enhancement of property values generally, and from increased impetus to the commercial life of the community will ordinarily be considered of too incidental or secondary a character to justify an outlay of public funds.

Haesloop v. City Council of Charleston, 123 S.C. 273, 286, 115 S.E. 596 (1923). See Also Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1886); cf., In re Opinion of the Justices, 324 Mass. 724, 85 N.E.2d 222 (1949); American Aniline Products, Inc. v. City of Lock Haven, 135 A. 726 (Pa. 1927).

As Mr. Barker's opinion of April 15, 1986, to you stated:

Both the use of the Capital Expansion Fund [now the Water and Sewer Enterprise Account?] in the way suggested in [your letter] of October 17, 1985, and the proposed Ordinance do nothing more than place Hardeeville in a partnership with the developer of the subdivision in question.

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The providing of service to that subdivision, without charge or for a reduced charge, is something that is primarily to the benefit of the developer with only a negligible advantage to the general public.

We concur with Mr. Barker's conclusion that the proposed expenditure of public funds would most likely be found by a court to be for a private purpose. We refer you to Mr. Barker's opinion for additional reasons for determining that the benefit to the general public would be overshadowed by the benefit to the developer.

We trust that the foregoing adequately responds to your inquiry. If you need additional information or clarification, we respectfully request that your Town Attorney, Mr. Barker, be contacted first.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:hcs

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

cc: Joseph R. Barker, Esquire
Hardeeville Town Attorney