ALAN WILSON
ATTORNEY GENERAL

October 27, 2014

The Honorable Robert L. Brown
Representative, District No. 116
5925 Hwy. 162
Hollywood, SC 29449

Dear Representative Brown:

In response to an opinion issued by this Office on June 25, 2013,[1] you have requested answers to several follow-up questions concerning the South Carolina Transportation Infrastructure Bank (the "SIB") and its involvement in providing financial assistance to the I-526/Mark Clark Extension Project ("I-526 expansion" or "the Project") in Charleston County. By way of background, you state:

> As we approach significant milestones related to this project, several of the points made in your Office's previous opinion . . . raise numerous questions. Most importantly, it is my concern that the SIB is moving to enter into a binding contract (the amended I-526 Intergovernmental Agreement) to provide state funds beyond the current fiscal year when said state funds are not available and have not been appropriated by the Legislature. It is my hope that your response to the below questions will lead to preventative actions taken by our state's leaders which will negate the need for costly corrective actions at a later date.
>
> Background:
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> As you will recall, the SIB Board passed a motion on August 17, 2012 to promise future funding capacity in the amount of $130 to $150 million to the I-526 project, to cover the difference between the $420 million previously pledged to the project and the project's current $556 million cost estimate. The SIB does not expect that these additional funds will be available to the project until 2020 or later, and neither the Joint [Bond] Revenue Committee (JBRC) nor the Budget & Control Board have reviewed or approved the commitment of these additional funds to this project.
>
> However, it is my understanding that within a few months, the SIB intends to sign an amended Intergovernmental Agreement (IGA) with the SCDOT and Charleston County, which would commit this additional $130 to $150 million in state funds to the I-526 contract. If fully executed, this amended IGA will be a

[1] Op. S.C. Att'y Gen., 2013 WL 3362068 (June 25, 2013).

legally enforceable contract that will bind the SIB to the commitment of these additional funds prior to the appropriation of said funds.

On page 8 of your Office's June 25, 2013 opinion, it is noted that "state agencies are generally prohibited by law from entering into contracts which obligate state funds beyond the fiscal year." It is further noted that several statutory provisions prohibit state agencies from entering into a contract in an amount beyond that appropriated for a certain purpose for that fiscal year. The opinion goes on to state that the only way to validly enter into such a contract is for the Legislature to authorize or ratify the contract in the form of an appropriation.

To my knowledge, no such authorization or ratification from the Legislature has occurred, which brings into question the validity of the forthcoming amended IGA.

Following this background, you ask the questions below:

1. If the SIB does sign the amended IGA (which is said to include a commitment for the additional $136 million) prior to formal appropriation from the Legislature and without the inclusion of a non-appropriation clause, does this make the amended IGA invalid? If SCDOT also signs the amended IGA, does this make the State a party to this contract, and consequently make the State liable for the SIB's financial commitment?

2. What steps are required to ensure that the fully executed amended IGA (containing a commitment of the $136 million) will be valid? For example, it is assumed that the JBRC must first approve the additional funding commitment before the amended IGA is executed; does the Budget & Control Board also need to review and approve the $136 million commitment, and does the Legislature need to formally appropriate these funds prior to execution? Does a non-appropriation clause need to be inserted into the amended IGA?

Recent Activity Involving the I-526 Expansion Project

To add clarity to this opinion, we will expand on the factual overview recited above in relation to the I-526 expansion. We stress that this Office is in no way a fact finding entity,[2] and the following is merely a chronological recitation of activity concerning the I-526 expansion we found necessary in obtaining to fully understand and address the questions you have raised.

The original 1972 plan for the Mark Clark proposed a Charleston Inner Beltway from Mount Pleasant to James Island, including a connection between West Ashley, Johns Island, and James Island; in an effort to complete this plan, Charleston County voters approved a transportation half-cent sales tax in November 2004. Status Report to Charleston County

[2] See Op. S.C. Att'y Gen., 2014 WL 399594 (Jan. 6, 2014) ("[T]his Office is not a fact-finding entity; investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court").

Council, Mark Clark Expressway Completion Project {conditions of approval}, Sept. 13, 2013, at 3, available at http://www.charlestoncounty.org/departments/county-council/projects.php#I526 (hyperlink titled "Status Report to County Council (September 13, 2013)"). Projects funded with the tax were used by the SIB as a match for its funding for completion of the Mark Clark Expressway in 2006. Id. On June 30, 2006, the SIB Board approved financial assistance for the I-526 expansion with an initial grant of $99 million and a commitment for other grants, up to $420 million in total, as funds became available to the Board. Jim Armstrong, Kurt Taylor, & Steve Thigpen, Mark Clark Expressway Options for the Path Forward, Dec. 4, 2012, p. 2, available at http://www.charlestoncounty.org/departments/county-council/projects.php#I526 (hyperlink under County Council Special Finance Committee Meeting and titled "Presentation by Charleston County Government Staff"). Subsequently, on June 19, 2007, Charleston County, the South Carolina Department of Transportation (SCDOT), and the South Carolina Infrastructure Bank (SIB) signed an Intergovernmental Agreement concerning the funding and construction of the I-526 expansion whereby the SIB agreed to finance the Project, the DOT vowed to serve as the administrator to oversee the construction of the road, and Charleston County undertook sponsorship of the Project with the agreement to spend $117 million in local match contributions for the project. Intergovernmental Agreement for Charleston County Mark Clark Expressway Extension/I-526 Project in Charleston County, South Carolina, June 19, 2007, available at http://www.scdot.org/MCE/documents.shtml (hyperlink titled "Intergovernmental Agreement between SCDOT and Charleston County").

Support of the Project has been a topic of debate since it was initiated nearly four decades ago, and currently, controversy exists over the completion of the I-526 expansion. See generally Teddie Pryor, Clearing up misinformation about Mark Clark Expressway, The Post and Courier, July 13, 2013, available at http://www.postandcourier.com/article/20130713/PC1002/130719749. On April 19, 2011, County Council, in a 5-3 vote, rejected the preferred alternative developed by the SCDOT for the Mark Clark Expressway Completion. See Charleston County Council, Minutes of a Regular Meeting, April 19, 2011, p. 16, available at http://www.charlestoncounty.org/departments/county-council/index.php (hyperlink to 4-19-2011 Meeting Minutes). In other words, this so called "no-build" vote shelved the Project. In the same vote, County Council authorized and directed the Chairman and County Attorney to negotiate with the SCDOT and the SIB as necessary "to find a different preferred alternative for the project that either modifie[d] and/or reduce[d] the scope of the current preferred alternative to be within the available funding commitment identified by the SIB in the inter-governmental agreement entered into among the County, SCDOT, and the SIB." Id. Simply put, County Council planned to request to use the financing pledged by the SIB to the Project to improve upon existing roads rather than to build a new highway. See Charleston County, Amendment to Application to the South Carolina State Transportation Infrastructure Bank Board for Completion of the Mark Clark Expressway (I-526), May 2011, available at http://www.charlestoncounty.org/departments/county-council/projects.php#I526 (hyperlink titled "Amendment to State Infrastructure Bank Application").

Also at the April 19, 2011 County Council meeting, a second vote was taken on a motion to reject the "Alternative G" plan, which was one of seven construction proposals presented to the public in 2009 by the SCDOT for the Project's completion. See Charleston County Council,

Minutes of a Regular Meeting, April 19, 2011, p. 16-17, available at http://www.charlestoncounty.org/departments/county-council/index.php (hyperlink to 4-19-2011 Meeting Minutes). The motion passed, six members voting in favor of rejecting Alternative G and two members abstaining. Id. at 17. Alternative G – the subject of the vote – was previously selected by the SCDOT as the preferred alternative, under which the completion of I- 526 from West Ashley to Johns Island and the James Island Connector would be a low-speed, four-lane parkway including paths for bicycles and pedestrians. See South Carolina Department of Transportation, Mark Clark Expressway Public Hearing Project Update, Summer 2010, available at http://www.scdot.org/MCE/documents.shtml (hyperlink titled "Public Hearing Handout"); Diana Knich, Parkway would complete I-526, Post and Courier, July 29, 2010, available at http://www.postandcourier.com/article/20100729/PC1602/307299890.

After County Council voted against completion of the I-526 expansion, the SIB sought reimbursement from Charleston County for the $11.6 million spent on the Project up to that date on the basis that the County was in default pursuant to the terms of the IGA. See generally Charleston County Council, Minutes of a Regular Meeting, April 19, 2011, p. 14-15, available at http://www.charlestoncounty.org/departments/county-council/index.php (hyperlink to 4-19-2011 Meeting Minutes) (reading a letter received from the SIB's Corporate Secretary Richard L. Tapp, Jr. into the Minutes that expressed the SIB's intentions if County Council voted in favor of "no-build").

On May 17, 2011, County Council voted to rescind the April 19, 2011 no-build vote. Charleston County Council, Minutes of a Regular Meeting, May 17, 2011, p. 7, available at http://www.charlestoncounty.org/departments/county-council/index.php (hyperlink to 5-17-2011 Meeting Minutes). As represented by the minutes of the meeting, the vote also

> [d]irect[ed] the County Attorney to cure the default of the Intergovernmental Agreement, as determined by the South Carolina Transportation Infrastructure Bank on May 12, 2011, and through negotiations with the S.C. Transportation Infrastructure Bank and the South Carolina Department of Transportation to explore any opportunities regarding the Mark Clark Extension Project and bring back alternatives for consideration by County Council.

Id. at 7-8. Thereafter, on June 12, 2011, the SIB board attorney notified the County that it was no longer in default of the IGA. Jim Armstrong, Kurt Taylor, & Steve Thigpen, Mark Clark Expressway Options for the Path Forward, Dec. 4, 2012, p. 3, available at http://www.charlestoncounty.org/departments/county-council/projects.php#1526 (hyperlink under County Council Special Finance Committee Meeting and titled "Presentation by Charleston County Government Staff").

We note that during a January 10, 2012 meeting, County Council voted to assign its interest under the IGA to the SCDOT. Charleston County Council, Minutes of a Regular Meeting, January 10, 2012, p. 3, available at http://www.charlestoncounty.org/departments/county-council/index.php (hyperlink to 1-10-12 Meeting Minutes). However, on September 26, 2012, the SCDOT commission unanimously voted against accepting the assignment and service as sponsor of the I-526 extension project.

South Carolina Department of Transportation Commission, Minutes of a Commission Meeting, September 26, 2012, p. 2, available at http://www.scdot.org/inside/minutes.aspx (hyperlink to September 26, 2012 Commission Minutes).

Because the initial $420 million grant from the SIB has been determined an insufficient amount to cover the costs of the Project, additional funding from the SIB is needed to cover the cost differential from the initial projection cost of $420 million and the anticipated cost of the Project, approximately $558 million. See Jim Armstrong, Kurt Taylor, & Steve Thigpen, Mark Clark Expressway Options for the Path Forward, Dec. 4, 2012, p. 7, available at http://www.charlestoncounty.org/departments/county-council/projects.php#I526 (hyperlink under County Council Special Finance Committee Meeting and titled "Presentation by Charleston County Government Staff"). Prior to moving forward with the Project, the additional $138 million in funding from the SIB must first be approved by the JBRC. See S.C. Code Ann. § 2-47-50, amended by 2014 Act No. 121 (effective July 1, 2015); see also Diane Knich, SCDOT Commission approves revised I-526 contract, The Post and Courier, Dec. 5, 2013, available at http://www.postandcourier.com/article/20131205/PC16/131209689. While each party to the initial IGA has taken steps towards formalizing the completion of the Project and adopting an Amended IGA, to date, there is no indication that the additional funding has been approved by the JBRC or that the Amended IGA has been executed. Nonetheless, we will recount the recent actions taken by County Council, the SIB, and the SCDOT in moving forward with the completion of the Project below.

On December 13, 2012, in a five-to-four vote, County Council passed a Resolution which, in part, permitted County Council to, "pursue any and all modifications to the IGA with the [SIB] and/or the SCDOT which are necessary or helpful to proceeding with the Modified Project. . . . [and authorized] "the Chairman of Council . . . to execute any and all modifications to the IGA or other documents or instruments necessary or helpful to the completion of the Modified Project as authorized herein." Charleston County Council, Minutes of a Regular Meeting, Dec. 13, 2012, available at http://www.charlestoncounty.org/departments/county-council/index.php#agendas (hyperlink to 12-13-2012 Meeting Minutes).

Subsequently, on August 17, 2013, the SIB passed a motion made on the previous day to "approve funding the current shortfall, estimated at $130 million - $150 million, for the completion of the Mark Clark Extension Project from future financial capacity of the bank . . . " subsequent to completion of the Florence County Projects, and "that staff be authorized to prepare the documentation to effectuate these actions." South Carolina Transportation Infrastructure Bank, Minutes of a Board Meeting, p. 3, August 16- 17, 2012.

On December 5, 2013, the SCDOT Commission voted unanimously

> to an Amendment to the IGA for the Mark Clark Expressway Extension Project provided that: 1) It does not bind SCDOT to make any financial contribution to the project beyond the original IGA; and 2) SCDOT will be in control of design/modification approvals and the standards to which the project is built through its construction, engineering and inspection ("CE&I") oversight. The SCDOT Commission agrees in principle with the preliminary draft of the

> Amendment to the IGA as presented to the Commission on December 5, 2013 and directs the Secretary of Transportation complete[ ] the agreement in coordination with the State Infrastructure Bank and Charleston County.

South Carolina Department of Transportation Commission, Minutes of a Commission Meeting, December 5, 2013, p. 4, § 7, available at http://www.scdot.org/inside/minutes.aspx (hyperlink to December 5, 2013 Commission Minutes).

Thus, as for the current posture of the Project, the JBRC, and in our opinion the BCB, must approve the final $130 to $150 million in additional funding to the Project prior to the Amended IGA being executed, or if executed prior to funding approval, before it will take effect. See infra. In addition to funding concerns, various agencies must also approve several pending environmental permits. Diane Knich, SCDOT Commission approves revised I-526 contract, The Post and Courier, Dec. 5, 2013, available at http://www.postandcourier.com/article/20131205/PC16/131209689.

Law / Analysis

1. Overview of the South Carolina Transportation Infrastructure Bank ("SIB")

a. Financing Mechanisms and Capital Sources of the SIB

With the factual context surrounding the I-526 expansion in mind, we now turn to the Legislature's intent in the creation of the SIB and the mechanisms it has provided for it to carry out its purpose. In Section One of the South Carolina Transportation Infrastructure Bank Act which established the SIB, the General Assembly noted the importance of transportation facilities to the welfare of our citizens and the growth of our community. 1997 S.C. Act No. 148, 1997 S.C. Acts 773 ("the Act"). Due to the inadequacy of the State's *"traditional transportation financing methods"* to generate the necessary resources to fund transportation facilities, the General Assembly noted the need "to provide for *alternative methods of financing* highway and transportation projects" which when coupled with the "existing financing sources" would allow the State to address its transportation needs in a more timely and responsive manner. Id. at 774 (emphasis added). Thus, through the creation of the SIB, the Act "provides an instrumentality to assist government units and private entities in constructing and improving highway and transportation facilities by providing loans and other financial assistance." Id. Furthermore, Section One of the Act notes the Legislature's intent that the SIB focus on "larger transportation projects" and that the SCDOT's resources to be devoted to "smaller, yet important, rural transportation projects." Id.

Cognizant of these guiding principles and presumably the complexity and often lengthy nature of "larger transportation projects" the Legislature has provided broad statutory authority regarding the SIB's choice of how to provide financial assistance[3] and has diversified the

[3] See S.C. Code Ann. § 11-43-150(A) (2011 & Supp. 2013) ("[T]he bank has all power necessary, useful, or appropriate to fund, operate, and administer the bank, and to perform its other functions . . ." The SIBs specified powers are enumerated in items (1)-(22). Item (22) provides its ability to "do all other things necessary or convenient to exercise powers granted or reasonably implied by this chapter").

funding mechanisms available to the SIB to obtain capital to apply towards public highway and transit projects[4]. The Legislature also included a section within the Act titled "Liberal Construction" specifying that: "[t]his chapter, being for the welfare of this State and its inhabitants, must be liberally construed to effect the purposes specified in this chapter." S.C. Code Ann. § 11-43-260 (2011). Yet, the same provision cautions that "nothing in this chapter must be construed as affecting any proceeding, notice, or approval required by law for the issuance by a government unit or private entity of the loan obligations, instruments, or security for loan obligations." Id.

While the financial structure of the SIB is complex and the nuances of its operations are beyond the scope of this Office, what it is abundantly clear is that the SIB was created to serve as a funding entity for major infrastructure projects. Specifically, S.C. Code Ann. § 11-43-120 (2011) states that:

> [t]he corporate purpose of the bank is to select and assist in financing major qualified projects by providing loans and other financial assistance to government units and private entities for constructing and improving highway and transportation facilities necessary for public purposes including economic development. The exercise by the bank of a power conferred in this chapter is an essential public function.

S.C. Code Ann. § 11-43-120 (2011). As referenced above, the SIB obtains capital from various sources and funds its projects using diversified methods. S.C. Code Ann. § 11-43-160 (2011) lists the sources of capitalization for the bank which are as follows:

> (A) . . .
> (1) an annual contribution set by the board of an amount not to exceed revenues produced by one cent a gallon of the tax on gasoline imposed pursuant to Section 12-28-310;
> (2) federal funds made available to the State;
> (3) federal funds made available to the State for the bank;
> (4) contributions and donations from government units, private entities, and any other source as may become available to the bank including, but not limited to, appropriations from the General Assembly;
> (5) all monies paid or credit to the bank, by contract or otherwise, payments of principal and interest on loans or other financial assistance made from the bank, and interest earnings which may accrue from the investment or reinvestment of the bank's monies;
> (6) proceeds from the issuance of bonds as provided in this chapter;
> (7) other lawful sources as determined appropriate by the board; and
> (8) loans from the Department of Transportation to the bank to be repaid from revenues committed to the bank for the following year.

[4] See S.C. Code Ann. § 11-43-160 (2011) (discussed infra).

> (B) Beginning in fiscal year 1998-99, the revenues collected pursuant to Sections 56-3-660 and 56-3-670 and placed in the state highway account, as created by this chapter, must be used to provide capital for the bank.

The SIB also referenced its main sources of funding, in simplified terms, in its 2013 Financial Statements Report:

> [t]he primary sources of funding of the of the Bank consist of an annual contribution of revenues by the South Carolina Department of Transportation to the Bank of an amount not to exceed one cent per gallon of tax collected on gasoline, contributions and donations from government units and private entities, state appropriations, truck registration fees and penalties, electric power tax, and motor vehicle registration fees. The Bank is also authorized to issue bonds to finance its activities. Also, the South Carolina Department of Transportation is committed to make contributions over a period of years to partially fund certain projects.

South Carolina Transportation Infrastructure Bank, Financial Statements Year Ended June 30, 2013, Oct. 14, 2013, p. 15, available at http://osa.sc.gov/stateengagements/Pages/TransportationInfrastructureBank.aspx.

Furthermore, the SIB contributes much of its success in providing financing for major transportation projects to its ability to issue revenue bonds, subject to the review and approval of the Joint Bond Review Committee. See S.C. Code Ann. § 11-43-315 ("Whenever it shall become necessary that monies be raised for qualified projects, including monies to be used to refund any bonds then outstanding, the bank may issue bonds as provided in this article. The review and approval of the Joint Bond Review Committee must be obtained prior to the issuance of the bonds"); see also South Carolina Transportation Infrastructure Bank, Annual Accountability Report 2012-2013, Sept. 20, 2012, p. 9, available at http://www.scstatehouse.gov/reports/aar2013/aar2013.php ("The flexibility provided in the SCTIB Act which allows the SCTIB to issue revenue bonds has played a significant role in the successful financing of the $5 billion in major transportation projects"). The SIB also credits its ability to issue bonds to the completion of projects in a timely manner: "[i]ssuing bonds for major road construction completes the projects much sooner than with pay-as-you-go funding, thus increasing safety and mobility to the motoring public and improving economic development." South Carolina Transportation Infrastructure Bank, Annual Accountability Report 2013-2014, p. A-2, available at http://www.scstatehouse.gov/reports/aar2014/aar2014.php.

Article X, section 13 of our State's Constitution speaks to bonded indebtedness of the State and distinguishes general obligation bonds and revenue bonds. "General obligation debt" is defined 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." S.C. Const. art. X, § 13(2). The Constitution provides specific limits on the debt that can be incurred for "General obligation bonds for highway purposes (highway bonds)," stating that they:

> may be issued if such bonds shall be additionally secured by a pledge of the revenues derived from the 'sources of revenue' . . . *provided*, that the maximum annual debt service on all highway bonds so additionally secured which shall thereafter be outstanding shall not exceed fifteen perfect of the proceeds received from the sources of revenue for the fiscal year next preceding.

S.C. Const. art. X, § 13(6)(a) (emphasis in original). Other "[g]eneral obligation bonds for any public purpose"

> may be issued; provided, that the maximum annual debt service on all general obligation bonds of the State thereafter to be outstanding (excluding highway bonds, state institution bonds, tax anticipation notes, and bond anticipation notes) must not exceed five percent of the general revenues of the State for the fiscal year next preceding (excluding revenues which are authorized to be pledged for state highway bonds and state institution bonds).

S.C. Const. art X, § 13(6)(c). Thus, in summary, restrictions are imposed on the ability of the State to issue general obligation bonds and such bonds are payable from and secured by a pledge of the State's taxing power. 64 Am. Jur. 2d, Public Securities and Obligations § 13 (Aug. 2014).

The Constitution speaks to revenue bonds in S.C. Const. art. X, § 13(9), which states:

> [t]he General Assembly may authorize the State or any of its agencies, authorities or institutions to incur indebtedness for any public purpose payable solely from a revenue-producing project or from a special source, which source does not involve revenues from any tax but may include fees paid for the use of any toll bridge, toll road or tunnel. Such indebtedness may be incurred upon such terms and conditions as the General Assembly may prescribe by law. All indebtedness incurred pursuant to the provisions of this subsection shall contain a statement on the face thereof specifying the sources from which payment is to be made.

Thus, unlike general obligation bonds, revenue bonds are not backed by the full faith and credit and taxing power of the state and are payable out of the revenues derived from the improvement built with the bond proceeds or other special non-tax sources. Furthermore, our Constitution does not set forth restrictions on the amount of indebtedness that can be incurred from the issuance of a revenue bond; rather, it places that obligation on the General Assembly. The General Assembly sets the parameters of the SIB's ability to issue revenue bonds in Title 11, Chapter 43, Article 3, and requires that the JBRC review and approve the issuance of revenue bonds prior to the bond being issued by the SIB. S.C. Code Ann. § 11-43-315 (2011). Furthermore, and importantly, S.C. Code Ann. § 11-43-330(2011) states that

> [b]onds issued by the bank do not constitute a debt or a pledge of the full faith and credit of this State, or any of its political subdivisions other than the bank, but are payable solely from the revenue, money or property of the bank. . . . *The bonds*

issued do not constitute an indebtedness of the State within the meaning of any constitutional or statutory limitation.[5]

Equally important to the understanding of the overall functions of the SIB is the following statement contained in its 2013 Financial Statements Report:

> [t]he Bank is a funding entity that only provides loans and other financial assistance to approved projects pursuant to the Act. The Bank does not own, construct, manage the construction of, or maintain any of the projects it has approved for funding. The Bank has no financial obligation to fund any portion of any project other than that which is selected by action of its Board, is approved by the Joint Bond Review Committee of the State of South Carolina (the "JBRC"), and is subject to a valid and enforceable intergovernmental agreement or loan agreement. Subject to JBRC approval and, with respect to general obligation bonds, approval of the State Budget and Control Board, the Bank may, in it is sole discretion, issue bonded indebtedness in order to finance all or any portion of its obligations to provide approved projects with loans or other financial assistance.

South Carolina Transportation Infrastructure Bank, Financial Statements Year Ended June 30, 2013, Oct. 14, 2013, p. 15, available at http://osa.sc.gov/stateengagements/Pages/TransportationInfrastructureBank.aspx.

Regarding the SIB's net position, it states:

> [t]he largest portion of the Bank's assets are non-current assets from loans and other contributions receivable from county and state governments. The largest portion of the Bank's liabilities are non-current liabilities which include bonds payable. As the mission of the Bank is to provide financing for transportation projects, but not own or maintain those projects, the Statement of Net Position will generally reflect a negative net position. The investment in infrastructure as a result of the projects financed by the Bank will generally be reflected on the financial statements of the SCDOT or other governmental entity which will own and maintain the roads.

Id. at 5.

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[5] With the distinctions of general obligation and revenue bonds in mind, our prior opinion on this topic discussed the State's liability upon the SIB's issuance of both a general obligation and revenue bond:

> the State's liability with regards to the SIB's financial obligations is limited to the extent it has issued general obligation bonds, also known as transportation infrastructure bonds, on behalf of the SIB. The State's credit and taxing powers are not otherwise pledged towards the payment of the SIB's financial obligations; this the SIB alone is generally liable for its financial commitments which are payable only from revenue bonds issued by the SIB or any other funding source available to it with the exception of transportation infrastructure bonds.

Op. S.C. Att'y Gen., 2013 WL 3362068 (June 25, 2013).

Through these authorities we seek to demonstrate the diversity of the capital sources the Legislature has provided for the SIB to carry out its purpose of providing financial assistance for large transportation projects through "alternative methods of financing." See 1997 S.C. Act No. 148, 1997 S.C. Acts 773. Its ability to issue bonds provides more flexibility than traditional "pay-as-you-go funding." South Carolina Transportation Infrastructure Bank, Annual Accountability Report 2013-2014, p. A-2, available at http://www.scstatehouse.gov/reports/reports.php. Also of importance, the SIB is required to give approval preference for projects which have local financial contributions. See S.C. Code Ann. § 11-43-180(B) (2011 & Supp. 2013). With loan repayments to the SIB, the SIB is able to increase its capacity to fund more projects. In short, the SIB's financing ability extends beyond state appropriations made fiscal year to fiscal year.

b. The Joint Bond Review Committee, The State Budget and Control Board, and the State Fiscal Accountability Authority

While the Legislature has provided the SIB with broad authority in the manners it can provide financial assistance for its projects and the capital sources available to the SIB, it has also put checks in place to monitor the projects accepted by the SIB. We will discuss the oversight of the SIB below, however, prior to doing so we will note that significant changes will go into effect on July 1, 2015 pursuant to Act No. 121 titled the "South Carolina Restructuring Act of 2014." As Act No. 121 (2014) abolishes the State Budget and Control Board, we will attempt to address the relevant changes Act No. 121 may have on the Project herein.

As set forth in S.C. Code Ann. § 11-43-180, the SIB may:

> provide loans and other financial assistance to a government unit or private entity to pay for all or part of the eligible costs of a qualified project. Prior to providing a loan or other financial assistance to a qualified borrower, *the board must obtain the review and approval of the Joint Bond Review Committee.* The term of the loan or other financial assistance must not exceed the useful life of the project. . . .

S.C. Code Ann. § 11-43-180 (2011 & Supp. 2013) (emphasis added).

To expand briefly on the JBRC, its primary purpose is to implement: "careful planning of permanent improvements," "utilization of state general obligation and institutional bond authority" to ensure "the continued favorable bond credit rating our State has historically enjoyed." S.C. Code Ann. §§ 2-47-10, amended by 2014 Act No. 121 (effective July 1, 2015). In particular, the JBRC was created to aid entities such as the SIB to:

> study and monitor policies and procedures relating to the approval of permanent improvement projects and to the issuance of State general obligation and institutional bonds; to evaluate the effect of current and past polices on the bond credit rating of the State; and provide advisory assistance in the establishment of future capital management policies. . . .

S.C. Code Ann. § 2-47-20, amended by 2014 Act No. 121 (effective July 1, 2015). In the JBRC's enumerated powers, it is "specifically charged with" the responsibility to "review, prior to approval by the Budget and Control Board, the establishment of any permanent improvement project and the source of funds for any such project not previously authorized specifically by the General Assembly." S.C. Code Ann. § 2-47-30 (2005). Pursuant to Act No. 121 (2014), certain oversight of the JBRC that was tasked to the BCB, will be conducted by the State Fiscal Accountability Authority. Thus, effective July 1, 2015 the JBRC is specifically charged with the power: "to review, prior to approval by *the State Fiscal Accountability Authority* ("the Authority"), the establishment of any permanent improvement project and the source of funds for any such project not previously authorized specifically by the General Assembly." Act No. 121 (2014) (effective July 1, 2015) (emphasis added). It follows that if the source of funds to be used for a permanent improvement project is not previously authorized by General Assembly, the BCB, and in time the Authority, must approve the source of funds the SIB intends to use to fund permanent improvement projects.

Furthermore, pursuant to Act No. 121, the State Fiscal Accountability Authority will be statutorily obligated to approve and "formally establish permanent improvement projects" prior to any action taking place; this task is currently designated to the BCB. S.C. Code Ann. § 2-47-50 (2005) currently reads:

> [t]he board shall establish formally each permanent improvement project before actions of any sort which implement the project in any way may be undertaken and no expenditure of any funds for any services or for any other project purpose contracted for, delivered, or otherwise provided prior to the date of the formal action of the board to establish the project shall be approved.

S.C. Code Ann. § 2-47-50 (2005). "The board" will be replaced with "the Authority" pursuant to Act No. 121 (2014).

Currently the BCB also must approve "substantial" proposed revisions to any previously approved project. Id. A substantial revision includes any modification to a previously approved project's budget proposing to use funds that have not been previously approved:

> [a]ny proposed revision of the scope or of the budget of an established permanent improvement project deemed by the Board to be substantial shall be referred to the Committee for its review prior to any final action by the Board . . . Any proposal to increase the budget of a previously approved project using any funds not previously approved for the project by the Board and reviewed by the Committee shall in all cases be deemed to be a substantial revision of the project budget which shall be referred to the Committee for review.

S.C. Code Ann. § 2-47-50 (2005). Pursuant to Act No. 121, this section will be amended to read:

> (B) Any proposal to finance all or any part of any project using any funds not previously authorized specifically for the project by the General Assembly or using any funds not previously approved for the project by the authority and

> reviewed by the committee shall be referred to the committee [JBRC] for review prior to approval by the authority [State Fiscal Accountability Authority].

Act No. 121 (2014). In addition, the BCB must approve all general obligation bonds pursuant to S.C. Code Ann. § 11-41-80 after approval by the JBRC. We note that pursuant to Act No. 121 (2014), the BCB's approval of general obligation bonds will be handled by the Authority: "related to the issuance of bonds and bonding authority, generally found in Title 11 of the 1976 Code but also contained in certain other provisions of South Carolina law are devolved upon the State Fiscal Accountability Authority." 2014 Act No. 121, 2014 S.C. Acts ____.

Last we note that the JBRC is authorized to regulate the starting dates of certain highway projects: the JBRC "is hereby authorized and directed to regulate the starting date of the various projects approved for funding through the issuance of state highway bonds so as to ensure that the sources of revenue for debt service on such bonds shall be sufficient during the fiscal year." S.C. Code Ann. § 2-47-60 (2005), amended by 2014 Act No. 121. The JBRC will retain such power under Act No. 121.

In a prior opinion of this Office we have addressed what constitutes a "permanent improvement" in light of the requirements of S.C. Code Ann. § 10-1-180 (2011). Op. S.C. Att'y Gen., 2006 WL 1574913 (May 25, 2006). In pertinent part, S.C. Code Ann. § 10-1-180 (2011) states that:

> [t]he expenditure of funds by any state agency, except the Department of Transportation for permanent improvements as defined in the state budget, is subject to approval and regulation of the State Budget and Control Board. . . The approval of the Budget and Control Board is not required for minor construction projects, including renovations and alterations, where the cost does not exceed an amount determined by the Joint Bond Review Committee and the Budget and Control Board.

Quoting the Supreme Court of North Carolina, we stated "'[p]ermanent improvements' to land include all improvements of a permanent nature which substantially enhance the value of the property [ ] and, . . . includes putting up [buildings] and any substantial improvements which might be made to those buildings, . . . but do not include repairs to buildings which should be made . . . in the ordinary use of property. Op. S.C. Att'y Gen., 2006 WL 1574913 (May 25, 2006) (citing Op. S.C. Att'y Gen., 1977 WL 24696 (Nov. 10, 1977) which discussed Prichard v. Williams, 181 N.C. 46, 106 S.E. 144, 145 (1921)). We concluded that, while not inclusive, "the acquisition of land, construction of buildings, substantial improvements to buildings, and leases to private entities constitute permanent improvements for purposes of section 10-1-180, but repairs due to the ordinary use of the property do not." Op. S.C. Att'y Gen., 2006 WL 1574913 (May 25, 2006). In light of the concusion of our 2006 opinion and the statutory authority outlined above, we believe a court would find major transportation projects approved by the SIB would fall under the category of a permanent improvement and thus would require initial approval from the BCB or, as of July 1, 2015 the Authority. It is our opinion that the same process would be required for approval of substantial modifications to a project to the extent the proposed funds to be used have not previously been approved.

2. A State Agency's Contracting Authority for Contracts Reliant on State Appropriations

Now with an understanding of the methods the SIB is permitted to use to finance transportation projects and the requisite approval it must obtain prior to providing financing for its projects, we will examine the general ability of a state agency to enter into a contract, as you state in your letter, to "provide state funds beyond the current fiscal year when said state funds are not available and have not been appropriated by the Legislature." As we noted in our prior opinion on this topic, state agencies are generally prohibited from entering into contracts which obligate state funds beyond a fiscal year. Op. S.C. Att'y Gen., 2013 WL 3362068 (June 25, 2013). We have expanded on this subject in detail in prior opinions, which we will summarize below. See Op. S.C. Att'y Gen., 1982 WL 189182 (1982); Op. S.C. Att'y Gen., 1996 WL 599418 (Sept. 12, 1996).

Article X, section 7(c) of our State's Constitution states that:

> [t]he General Assembly shall provide by law a spending limitation on appropriations for the operation of state government which shall provide that annual increases in such appropriations may not exceed the average growth rate of the economy of the State as measured by the process provided for by the law which prescribes the limitations on appropriations. . . .

Furthermore, S.C. Const. Article X, § 8 states that "[m]oney shall be drawn from the treasury of the State or the treasury of any of its political subdivisions only in pursuance of appropriations made by law." Pursuant to the holding in Beacham v. Greenville County, 218 S.C. 181, 188, 62 S.E.2d 92 (1950), it is clear this section applies to contracts entered into by public officers or officials (holding that architect under contract to repair a courthouse under an appropriation of $400,000, where the total cost totaled $863,000 was charged with knowledge of the limited power and authority of the Board, had actual knowledge of their intentions that the project should cost $400,000 and, finally, he had actual and constructive notice of the amount of the legislative appropriation for the project).

These constitutional limitations are reinforced by S.C. Code Ann. § 11-1-40 (2011) which prohibits public officers from contracting in excess of the amount of the tax levied or the amount appropriated for that purpose:

> (A) It is unlawful for an authorized public officer to enter into a contract for a purpose in which the sum is in excess of the tax levied or the amount appropriated for that purpose.
>
> (B) It is unlawful for an authorized public officer to divert or appropriate the funds arising from any tax levied and collected for any one fiscal year to the payment of an indebtedness contracted or incurred for a previous year.[6]

[6] Similar provisions are set forth in S.C. Code Ann. § 11-9-20 ("It is unlawful for an officer, clerk, or other person charged with disbursements of state funds appropriated by the General Assembly to exceed the amounts and purposes stated in

The purpose behind S.C. Code Ann. § 11-1-40 has been explained by our courts and also in former opinions of this Office. In Long v. Dunlap, 87 S.C. 8, 68 S.E. 801, 803-04 (1910) the Supreme Court stated that the "manifest intention" of this section is to "protect the state and counties against either legal or moral obligations incurred by state or county officials in excess of the taxes levied, or the amounts appropriated for the purposes specified by the levy or appropriation." Interpreting Long, our Office discussed the applicability of S.C. Code Ann. § 11-1-40 to contracts obligating public funds beyond the fiscal year:

> [t]he obvious implication is that a contractual obligation which includes funds not yet appropriated by the General Assembly, is invalid and unenforceable. While the facts of the case [Long] do not specifically address the situation of a contract which obligates public funds beyond the fiscal year, this type of contract would normally be made without a sufficient existing appropriation, since appropriations routinely extend only for the fiscal year. Thus, it would not represent an unfair extension of Long to conclude that such a contract would be invalid pursuant to § 11-1-40.

Op. S.C. Att'y Gen., 1982 WL 189182 (Feb. 22, 1982) (discussing Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910)). This same opinion further concluded that:

> both the Beacham and Long cases, together with the wording of § 11-1-40 itself, strongly indicate that a contract made by a public officer, which seeks to obligate state funds beyond the fiscal year, where there is no existing appropriation providing for the expenditure of such funds is invalid. Unless the Legislature subsequently authorizes or ratifies the contract in the form of an appropriation, as the General Assembly did in Beacham, the contract may not be enforced.

Id. at * 5 (footnote omitted).

Despite an agencies inability to appropriate state funds beyond the fiscal year, contracts that contain a non-appropriation clause render the contract valid for agency authority. To expand, in Caddell v. Lexington Co. Sch. Dist. 1, 296 S.C. 397, 373 S.E.2d 598 (1988), the Supreme Court addressed a lease-purchase arrangement between a school district and a private corporation. In finding that the lease-purchase agreement was not general obligation debt, it stated that:

> "[c]ritical to this leaseback arrangement is a provision known as the 'non-appropriations clause,' under which the District may decline, without penalty, to renew the annual lease by failing or refusing to appropriate the necessary funds . . . . [A] leaseback arrangement containing an explicit non-appropriations clause placed no such requirement on the political entity. Under the plan here, rental

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the appropriations. . . .") and S.C. Code Ann. § 11-9-220 ("It shall be unlawful for any department, institution, commission or board of the state government or officer or agent of the state government authorized to make contracts to draw appropriations to contract indebtedness in excess of the amount specifically provided in the annual appropriations act").

> payments are to be included in the District's annual budget. Liability under the leaseback agreement is, at most, contingent: The district has the opinion of terminating simply by refusing to appropriate money for rent.

Caddell v. Lexington Co. Sch. Dist. 1, 296 S.C. 397, 399-400, 373 S.E.2d 598, 599 (1988).

In addition, our office has opined on many occasions that a non-appropriations clause is necessary for multi-year contracts seeking to appropriate state funds beyond the fiscal year. See Op. S.C. Att'y Gen. 1982 WL 189182 (Feb. 22, 1982) ("The only basis on which the State or agency thereof could validly enter into a contract obligating public funds for a period beyond the fiscal year as determined by the constitution and statutes of this State, would be the inclusion of a proviso which would make continuation of the contract term contingent upon the fact that the General Assembly appropriated sufficient funds, from year to year, to pay the consideration under the contract as to be solely determined by the State or its agency"); see also Op. S.C. A'tty Gen., 1991 WL 474736 (Jan. 18, 1991) ("[W]e advise that the Department of Highways and Public Transportation has not been given the express authority to enter into a contract with a political subdivision whereby it would agree to assume the indebtedness of a political subdivision. Should such authority be granted by the General Assembly, we reiterate that an agency of the State could not bind the State by contract over a multi-year period unless there is a valid annual appropriation therefor. Such a contract should contain a non-appropriation clause and be terminable with each fiscal year; otherwise, such a contract would amount to a debt").

From the aforementioned authority, it is clear that long-term government contracts reliant on appropriations from the state are contingent upon the General Assembly's continuation of funding and to appropriate funds for the payment thereof. In that regard, a non-appropriations clause indicating that the contract is contingent upon the continuing availability of appropriated funds would be necessary should public funds be used for purposes of funding such a contract. As we have previously concluded, the rationale behind this rule is that future appropriations by the State can never be absolutely guaranteed and that "[t]he inclusion of such contingency through a 'non-appropriations' clause is simply a recognition that when it comes to the allocation of public funds, the General Assembly's authority is supreme." Op. S.C. Att'y Gen., 1996 WL 599418 (Sept. 12, 1996). In addition, "[e]ven continuing appropriations authorized by the Legislature itself may be changed by a subsequent General Assembly. Clearly, one Legislature is not bound by another." Id. at *4 (citing Op. S.C. Att'y Gen., 1987 WL 342760 (Feb. 25, 1987)).

However, in a 1996 opinion, we noted that in practicality, we were not aware of any circumstances where a default of such a major long-term state contract had occurred. Op. S.C. Att'y Gen., 1996 WL 599418 (Sept. 12, 1996). Also, in Op. S.C. Att'y Gen., 1985 WL 166105 (Dec. 9, 1985), involving appropriations for the construction of a new prison facility, we opined that "while technically speaking, the State is not legally obligated to appropriate funds for such lease-purchase project as a result of the insertion of the non-appropriations clause, and thus no debt is created, the importance of the governmental function involved in your question would make non-appropriation very unlikely." It is clear the building of state roads would likewise classify as an important government function, making, in our opinion, non-appropriation highly unlikely.

Nonetheless, should non-appropriation occur, we have previously concluded that "the State cannot be deemed liable for the SIB's financial obligations under a contract, if one existed, unless the State is a party to the contract. Op. S.C. Att'y Gen., 2013 WL 3362068, n.4 (June 25, 2013) (citing Op. S.C. Att'y Gen., 1982 WL 189182 (Feb. 22, 1982)). In reaching this conclusion, we cited Op. S.C. Att'y Gen., 1982 WL 189182 (Feb. 22, 1982) that involved funding for nursing home operations under Medicaid by virtue of a specified rate under contract with the Department of Social Services. In our 1982 opinion we stated that:

> it cannot be claimed under any set of foreseeable circumstances that the parties to the lease could derive benefits from or attach obligations to the State, which is not a party to the lease. Nor may the parties to the lease look to the State either by contract or principles of equity to acquire greater rights that those which could lawfully be given by the contract between DSS and the owner-operator. It is elementary that the assignee of the rights of the assignor possesses for higher claim to benefits or rights under a contract than does the original owner.

Op. S.C. Att'y Gen., 1982 WL 189182 (Feb. 22, 1982). We believe the same reasoning should be applied to your question regarding the State's liability should the SCDOT enter into the Amended IGA.

Relating these cited authorities to the SIB, in the SIB's 2013 financial statement, it specifically acknowledges its obligation to comport with the law of the state and the policies and procedures specified for the state for state agencies and institutions. The relevant portion of its 2013 financial statement reads:

> [t]he Bank is granted an annual appropriation for operating purposes as authorized by the South Carolina General Assembly. The appropriation as enacted becomes the legal operating budget for the Bank. The Appropriations Act authorizes expenditures from funds appropriated from the General Fund of the state and authorizes expenditures of total funds. The laws of the state and the policies and procedures specified by the state for state agencies and institutions are applicable to the activities of the Bank.

South Carolina Transportation Infrastructure Bank, Financial Statements Year Ended June 30, 2013 (Oct. 14, 2013), p. 16 available at http://osa.sc.gov/stateengagements/Pages/TransportationInfrastructureBank.aspx.

While these authorities illustrate that the only basis on which an agency of the State can validly enter into a contract obligating public funds for a period beyond the fiscal year is the inclusion of a provision making continuation of the contract term contingent upon the General Assembly's appropriation of sufficient funds, it is our opinion that a court would find that these restrictions apply solely to state appropriations of public funds. As we have formerly opined, "[t]here does not appear to exist any general prohibition upon an agency's power to contract beyond the fiscal year where the contract involves no expenditure of public monies. . . ." Op. S.C. Att'y Gen., 1982 WL 189182 n.3 (Feb. 22, 1982) (emphasis in original). We also reiterate that for the purpose of funding large permanent improvement infrastructure projects– an

"essential public function" – the General Assembly anticipated the associated time and costs for such highway projects. In turn, it has afforded alternative methods of financing for the SIB to facilitate funding with oversight, in certain regards, from the JBRC, the BCB, and, in due time, the Authority, to ensure such financing methods are prudent and compliant with statutory and constitutional regulations.

Conclusion

In summary, the purpose of the SIB is to serve as a funding entity for large transportation projects in order to address our State's transportation needs in a more timely and responsive manner. To carry out this goal, the Legislature has permitted the use of alternative methods of financing for the SIB with checks in place, in certain regards, by the JBRC, the BCB, and the Authority, as of July 1, 2015. While there is no doubt the SIB must comply with the statutory and constitutional restrictions that prohibit an agency from providing state funds beyond the current fiscal year when state funds have not been appropriated, there is no restriction on an agency's power to contract beyond the fiscal year where the contract does not involve the expenditure of public monies.

While we are hopeful the above analysis will be helpful in answering the questions you pose in your correspondence, we are not able to comment specifically on your inquiries pertaining to the proposed Amended IGA. For various reasons, these questions are outside the scope of an opinion of this Office. As referenced in the previous opinion you requested on this topic, we cannot address questions that involve determinations of fact; do not ask for an opinion as a matter of law; ask questions concerning hypothetical matters or potential lawsuits; involve questions concerning the interpretation or application of federal regulations or the policies of a federal agency; involve the policy determinations of an administrative agency; ask for an interpretation of provisions of a contract that this Office was not involved in the negotiation thereof; or, that involve contractual disputes, questions of liability under a contract, or other matters which the parties involved should consult with their own attorney or private counsel regarding and, if necessary, should be resolved by a court. See Op. S.C. Att'y Gen., 2013 WL 3362068, 10, n.5-10 (June 25, 2013). As the subject of your questions – the anticipated Amended IGA between Charleston County, the SIB, and the SCDOT – has not been executed, we have no indication of the manner in which the SIB will use to fund the Project, should funding be approved. Therefore, speculation as to what is required to ensure the validity of the anticipated Amended IGA would be highly speculative and well outside of authority of this Office.

To the extent that we are able, we are happy to answer any additional questions pertaining to this opinion you may have. Please do not hesitate to contact us.

Sincerely yours,

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REVIEWED AND APPROVED BY:

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