

1984 WL 249939 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 24, 1984

*1 Joseph H. Earle, Jr. Esquire
Greenville County Attorney
Courthouse Annex
Greenville, South Carolina 29601

Dear Mr. Earle:

You have asked whether a proposed Indenture of Trust, a copy of which you have provided, would answer the problems addressed in our letter of January 24, 1984. Therein, we discussed a proposed transfer to the Greenville County Historic Preservation Foundation by the Greenville County Historic Preservation Commission of title to all the Commission's property as well as its functions and duties.

The proposed Indenture of Trust now seeks to resolve the questions raised in the earlier letter. We have examined the Indenture and done additional research concerning the transfer. We have concluded that it may now be possible to satisfy concerns raised in the January 24 letter. However, as we will discuss more fully below, in order to remove other doubts about the transfer, we would advise that the entire transaction should probably be reviewed by County Council.

To reiterate, the basic problem which the January 24 letter found with the transaction as previously proposed was that the Greenville County Historic Preservation Commission, a public body, would transfer title to all its property, as well as its duties and functions, to the Greenville County Historic Preservation Foundation, a nonprofit corporation. No monetary consideration was to be given for the property. We noted that without any finding by the Commission or other evidence that the transfer would further the public benefit, such a transfer was questionable.

It is well recognized that public property may be exchanged for 'the performance of a public corporate function through the agency' of a non profit corporation. [Bolt v. Cobb](#), 225 S.C. 408, 415, 82 S.E.2d 789 (1954); [Gilbert v. Bath](#), 267 S.C. 171, 227 S.E.2d 177 (1976); [Battle v. Wilcox](#), 128 S.C. 500, 122 S.E. 516 (1924). See also, [O'Neill v. Burns](#), (Fla.), 198 So.2d 1 (1967); [Raney v. Lakeland](#), (Fla.), 88 So.2d 148 (1956). And this office has consistently recognized that the Constitution¹ is not violated where public assets are devoted to private entities which use those assets 'to perform a proper 'function for the state.' [Op. Atty. Gen.](#) (Nov. 16, 1983) [citing numerous cases]; [Op. Atty. Gen.](#), (Dec. 16, 1979). We have stated that the transfer of governmental property 'is, in effect, an exchange of value which results in the performance by those entities of a public function' [Op. Atty. Gen.](#), (Nov. 16, 1983).

However, it must also be remembered that public property is held in a fiduciary capacity and may not be donated to a strictly private use. [Haesloop v. City of Charleston](#), 123 S.C. 272, 115 S.E. 596 (1923). Where no monetary or other consideration is received in exchange for the disposition to a private corporation of property or other governmental assets and thus the public purpose or benefit must serve as consideration, such public purpose must be clearly established. See, [Feldman & Co. v. City Council of Charleston](#), 23 S.C. 57 (1888). Moreover, in analogous situations, this office has recommended that some public control be maintained. [Op. Atty. Gen.](#), (Nov. 16, 1983); [O'Neill v. Burns](#), *supra*. The need for such control in determining whether 'constitutional purposes were being safeguarded' was expressly recognized in [Gilbert v. Bath](#), 267 S.C. at 181.

*2 Turning to the present situation, we would note that generally speaking, historic preservation constitutes a valid public purpose. [Mims v. McNair](#), 252 S.C. 64, 80, 165 S.C.2d 335 (1969), and in this particular instance, the proposed Indenture of

Trust recites that the trust 'is created . . . for the direct benefit of the general public . . .' On the other hand, we would note that the only evidence in the Indenture as to how the public would benefit from ownership by the private Foundation, rather than the public Commission, is the recitation that the Foundation 'has demonstrated the ability to obtain funds for the purpose of preserving, restoring, exhibiting and/or maintaining items of historical significance.' While a court might well conclude that the foregoing is in itself a sufficient showing of public purpose, we would suggest out of caution that the Indenture be made more explicit, such as by showing how, in the past, the Foundation has shown an ability to raise funds and why the Foundation will likely continue to raise more funds than the Commission was able. If such a showing is made, the problems raised in the January 24 letter would be answered.

As to the problem of maintenance of some public control, it would appear that such has been met here. The trust instrument itself purports to create a trust relationship between the Commission as Settlor and the Foundation as trustee. Such is, of course, a fiduciary relationship and places certain fiduciary obligations upon the trustee. Moreover, it should be noted that the Indenture (as had the proposed deed) contain a clause where under certain circumstances the assets of the trust will revert to the Settlor (Commission).²

In addition, we would recommend that this entire transaction be reviewed and approved by County Council. [Section 4-9-30\(6\) of the Code of Laws of South Carolina](#) (1976, as amended) provides in pertinent part that a county governing body possesses the authority to establish such agencies, departments, boards, commissions, and positions in the county as may be necessary and proper . . . , to prescribe the functions thereof, and to regulate, modify, merge or abolish such agencies, departments, boards, commissions positions . . . (emphasis added).

Although there is some authority to the contrary, it is the general rule that where an agency's property, the agency or duties are transferred in entirety elsewhere, the agency or position is deemed to have been abolished. McQuillin, Municipal Corporations, § 12.39; 20 C.J.S., Counties, § 100; [Hardy v. Francis](#), 273 S.C. 677, 259 S.E.2d 115 (1979); [Shamberger v. Ferrari](#), (Nev.), 314 P.2d 384 (1957); but see, [Malone v. Williams](#), 118 Tenn. 390, 103 S.W. 798 (1907). Moreover, where an office or agency is created by statute, its abolition or modification is purely a legislative function. McQuillin, supra, § 12.38; [Shamberger v. Ferrari](#), supra; [Foley v. City of Oakland](#), 164 P. 419. Thus, only a legislative body may abolish or modify the office unless such authority has been expressly delegated to another agency. 67 C.J.S., Officers, § 14; [Carroll v. Walton](#), Del.Sup., 269 A.2d 556 at 558 ['The decision abound in support of the principle that an office legally created by one authorized body cannot be abolished by another agency or body without specific authority to do so.']

*3 It would appear that as a result of Home Rule, the authority to regulate, abolish or modify county offices or agencies has now been expressly delegated by the General Assembly, pursuant to [§ 4-9-30\(6\)](#), to the county governing body which, of course, functions as the legislative body for local matters. [Duncan v. York County](#), 267 S.C. 327, 228 S.E.2d 92 (1976). Thus any regulation, modification or abolition of the Greenville County Historical Commission as an agency of the county³ should, consistent with that provision, be performed only by County Council. In this particular instance, all of the Commission's property and its powers and duties are to be transferred to the Foundation, at least for the foreseeable future. Such is arguably tantamount to an abolition of the agency under the usual meaning of that term, see above, or certainly a modification of its present status. Accordingly, we would recommend that County Council be given the opportunity to review the transfer consistent with [§ 4-9-30\(6\)](#).

If we can be of further assistance, please let us know.

With kindest personal regards, I am
Sincerely yours,

Robert D. Cook

Executive Assistant for Opinions

Footnotes

- 1 E.g. [Art. X, § 11, of the South Carolina Constitution](#) (1895 as amended) provides in pertinent part:
The credit of neither the State nor 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 except as permitted by [Section 3, Article XI of this Constitution](#).
See also, [Art. I, § 3](#); [Art. I, § 13](#).
- 2 We have not attempted to address herein each and every technical aspect of the transfer such as its compliance with all requirements of trust and property law. Those issues, should they arise, can best be answered by local attorneys who would have the opportunity to review the matter in greater detail.
- 3 Although the Commission's enabling legislation designates it a body corporate and politic, it is nonetheless an agency of the county and has previously been treated as such by the county. See, [Greenville County Ordinance No. 784](#); [Op. Atty. Gen.](#), July 3, 1984 (copy enclosed).

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