ALAN WILSON
ATTORNEY GENERAL

June 27, 2023

The Honorable Cody T. Mitchell
Member
South Carolina House of Representatives
District No. 65
P.O. Drawer 1408
Hartsville, SC 29550

Dear Representative Mitchell:

Attorney General Alan Wilson has referred your letter to the Opinions section. The letter states the following.

> I am aware that our South Carolina Code, and other provisions, covers the sale and lease of school district properties. Specifically, S.C. Code § 59-19-250 provides:
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> > SECTION 59-19-250. Sale or lease of school property by trustees.
> >
> > The school trustees of the several school districts may sell or lease school property, real or personal, in their school district whenever they deem it expedient to do so and apply the proceeds of any such sale or lease to the school fund of the district. The consent of the county board of education or, in those counties which do not have a county board of education, the governing body of the county, shall be first obtained by the trustees desiring to make any such sale or lease. The board of trustees, within thirty days after making any such sale or lease, shall send a report thereof to the county board of education or, in those counties which do not have a county board of education, the governing body of the county, setting forth the terms and amount of the sale or lease.
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> It seems to me that the general provisions of this section have been modified, or tempered to an extent, by the subsequent enactment of S.C. Code § 59-19-125:

> SECTION 59-19-125. Leasing school property for particular purposes.
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> Each district board of trustees may lease any school property for a rental which the board considers reasonable or permit the free use of school property for:
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> (1) civic or public purposes; or
>
> (2) the operation of a school-age child care program for children aged five through fourteen years that operates before or after the school day, or both, and during periods when school is not in session, if the property is not needed for school purposes. Under this section the board may enter into a long-term lease with a corporation, community service organization, or other governmental entity, if the corporation, organization, or other governmental entity will use the property to be leased for civic or public purposes or for a school-age child care program. However, if the property subject to a long-term lease is being paid for from money in the district's debt service fund, then all proceeds from the long-term lease must be deposited in that school district's debt service fund so long as the property has not been paid for.

...

With these statutory provisions, your prior opinions, and related materials as a backdrop, I am told that the Lancaster School District entered into a written lease agreement with a nonprofit entity with USC 501(c)(3) status back in 2005 for a building the school district owned. It is my understanding that the lease expired in 2006. However, it seems that this nonprofit entity has remained in this building, paying zero rent even though they continue to occupy it. It is not known if any county entity approved the original one-year lease, or the occupancy arrangement that has taken place from 2006 to the present day, after the written lease purportedly expired.

As a result of this situation described to me, these questions come to mind:

1. What entity would have had to approve the 2006 written lease?

2. What entity would have to approve the current occupancy arrangement for this school district building?

3. Can a school district properly allow a nonprofit to occupy its building without an approved, written lease in effect?

4. Would the nonprofit entity occupying a school district-owned building realize an in-kind donation as part of continuing to occupy this building? Would the school district also realize this donation?

5. Is this nonprofit legally occupying this building without any written lease in effect? If not, how could it do so?

Law/Analysis

Section 59-19-250, which authorizes the sale or lease of school property by a school district board of trustees, has been codified in the South Carolina Code of Laws since before the turn of the twentieth century and has not been amended since 1973. See 1973 Act No. 322; see also Op. S.C. Att'y Gen., 1997 WL 783360 (October 15, 1997) (examining legislative history with regard to county board of education consent requirements when such board had been abolished). Section 59-19-125, which authorizes the leasing of school property for civic or public purposes, was adopted in 1989 and most recently amended in 1992. See 1992 Act No. 315, § 1. In Whiteside v. Cherokee County School District No. One, 311 S.C. 335, 428 S.E.2d 886 (1993), the South Carolina Supreme Court concluded that the provisions of S.C. Code § 59-19-125 serve as an exception to S.C. Code § 59-19-250.

> We are persuaded that from its inception until the most recent amendment in 1973, Section 59–19–250 contemplated the term "lease" in the conventional sense. In 1989, during the evolution of lease-purchasing as a prevailing method of acquiring school facilities, the legislature enacted Section 59–19–125. This court has held that where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Wilder v. South Carolina Hwy. Dept., 228 S.C. 448, 90 S.E.2d 635 (1955). Moreover, later legislation supersedes earlier laws addressing the identical issue. *State v. Brown,* 289 S.C. 581, 347 S.E.2d 882, 884–85 (1986); Duke Power Co. v. South Carolina Pub. Ser. Comm'n, 284 S.C. 81, 326 S.E.2d 395 (1985).
>
> ...
>
> We conclude that it is logical to believe the legislature was cognizant of lease-purchasing transactions in the enactment of the later statute, and hold that the lease-purchase arrangement under consideration is within the scope of Section 59–19–

> 125. Therefore, this Court holds that Section 59–19–125 will be considered an exception to, or qualifier of, Section 59–19–250 and given such effect.

Whiteside, 311 S.C. at 340, 428 S.E.2d at 888–89. Following the Whiteside decision, our opinions have advised that the determination of which statute applies to a given lease-purchase agreement will depend on the facts of the transaction.

> As to which of the two statutes applies in a given situation, the facts of each lease-purchase transaction will be crucial. ... If it is clear from the documents comprising the transaction that the parties intend that the property to be leased will be used only for "civic or public purposes," then the school district could proceed under § 59–19–125 without the approval of the county board of education or county council, as may be appropriate. If, however, the parties to the transaction contemplate that the property to be leased could conceivably be used for a purpose other than a "civic or public purpose," then the school district should proceed under § 59–19–250, at least as to approval of the ground lease.
>
> Considerations other than the legal issues discussed above also enter into the determination to proceed under a particular statute. The availability of financing, the requirements and intentions of the parties involved in the transaction, and other similar matters must be considered.

1993 S.C. Op. Att'y Gen. 148 (1993).

It must be noted that the resolution to your questions concerning leasing school district property requires factual determinations which are beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 2006 WL 1207271 (April 4, 2006) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions"). However, we will assume the facts provided in your letter in order to offer guidance where it is possible.

Your first question asks, "What entity would have had to approve the 2006 written lease?" As described in your letter, the school district entered into a lease in 2005 which expired in 2006. Therefore, I understand your question to ask which body would have been authorized to enter into a lease of the subject school districts property had a lease been sought at the time. As explained above, if it can be demonstrated that the property would be used for civic or public purposes the school district could proceed under S.C. Code § 59–19–125 without the approval of the county board of education or county council. If there was no indication of such a purpose for the use of the school district's property, then the transaction would need to be approved as authorized under section S.C. Code § 59-19-250. In that case, the 2006 lease would need to be approved by the county board of education or county council.

Your section question asks, "What entity would have to approve the current occupancy arrangement for this school district building?" The analysis described in response to your first question is equally applicable here. Again, determining which entity was required to approve the lease-purchase transaction depends on whether the school district property was used for civic or public purposes.

Your third question asks, "Can a school district properly allow a nonprofit to occupy its building without an approved, written lease in effect?" Both statutes contemplate that a public body would approve a lease agreement. For a school district, county board of education, or county council to approve such a lease, its governing body would have to act collectively in an open meeting and the vote would be recorded in its meeting minutes. See S.C. Code § 30-4-90(a) ("All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to: ... (3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken."). In addition to meeting minutes reflecting an approval of a lease-purchase agreement, even in a scenario under section 59-19-125 where the school district approves free use of school property, presumably a document would establish terms by which the nonprofit would occupy an identified property, such as who is responsible for utilities, insurance, and when the agreement expires. While section 59-19-125 does not explicitly require a written document when a school district approves the free use of school property, in many cases there will be written documentation outlining the parameters of the occupancy and that the body of trustees voted to approved it.

Your fourth question asks, "Would the nonprofit entity occupying a school district-owned building realize an in-kind donation as part of continuing to occupy this building? Would the school district also realize this donation?" This question does not state under what law an in-kind donation would be sought to be recognized. Federal law allows deductions for charitable contributions from income taxes. See 26 U.S.C. § 170. If this question is meant to address such a deduction, this Office would defer to the Internal Revenue Service's interpretation of the relevant statutes and regulations it is charged to administer.[1]

Alternatively, if the question is meant to address a state statutory scheme, it is possible that a lease of property for below market value would qualify as an in-kind donation. This Office previously opined on whether proposed real-estate contracts would qualify as an in-kind donation under the South Carolina Research University Infrastructure Act, S.C. Code § 11-51-10 *et seq.* See Op. S.C. Att'y Gen., 2005 WL 2652381 (September 26, 2005). Our opinion explained that section

[1] As we stated in a prior opinion, "the question of the applicability of federal law to a particular situation is a factual matter which is beyond the scope of an opinion of this Office." Op. S.C. Att'y Gen., (May 8, 1989); see also Op. S.C. Att'y Gen., (March 6, 2008) ("consistent with the policy of this Office, we do not interpret federal statutory law or regulations.") In such matters, this Office defers to the federal agency charged with the interpretation of the federal statute or regulation in question.

11-51-70 required the Research Centers of Excellence Review Board to certify "to the state board that at least fifty percent of the cost of each research infrastructure project is being provided by private, federal, municipal, county, or other local government sources." S.C. Code § 11-51-70. The statute also granted the Review Board discretion to determine "this portion of the cost" while specifically listing contributions "may be in the form of cash; cash equivalent; buildings including sale-lease back; gifts in kind including, but not limited to, land, roads, water and sewer, and maintenance of infrastructure; facilities and administration costs; equipment; or furnishings." Id. (emphasis added). The opinion considered a scenario in which Clemson University engaged in a partnership with Greenwood Genetics Center (GCC) of Greenwood.

> The facility has a market value of $2,600,000 and is located on 5 acres of land valued at $250,000. Under its partnership with Clemson, GCC would retain ownership of the land and the building, and the use of the facility would be shared between Clemson and GCC. Clemson is requesting that the Board consider the value of access to the GCC facility as a qualifying match. You have asked whether shared access to the facility with the combined value of the land and the building set at $2,850,000 would qualify as an in-kind contribution and, if so, what kind of documentation would Clemson be required to provide to quantify the value of the land and the facility?

Op. S.C. Att'y Gen., 2005 WL 2652381, at *4 (September 26, 2005). We noted that loaning property had been recognized as an in-kind contribution and that the board was granted discretion to determine whether the use of the facilities qualified under the statute.

> [T]he ultimate determination of what would constitute "gifts in kind" is a matter within the discretion of the Board. As noted previously, authorities have recognized the permitted use or loan of property as an in kind contribution of cash. Also, the statute specifically provides that the "the cost...may be in the form of...buildings." Consistent with such, in my opinion, access to and permitted use of a building would qualify as a gift "in kind" for purposes of Section 11-15-70. Furthermore, as recognized previously, the fifty percent of cost may be in the form of "...gifts in kind including, but not limited to, land, roads, water and sewer, and maintenance of infrastructure; facilities and administration costs; equipment; or furnishings." Again, with this large potential pool of "in kind" gifts a court could conclude that access to a facility would qualify as an "in kind" gift.

Id. This statute would be inapplicable to your question as the school district is not a research university, but the analysis demonstrates how such a lease could be found to qualify as an in-kind contribution. We recommend determining under which statute the contribution would be evaluated, examining its terms, and referring to the appropriate administering body for guidance.

Your fifth question asks, "Is this nonprofit legally occupying this building without any written lease in effect? If not, how could it do so. As explained above, our opinions cannot find facts. As a result, we are unable to provide a response to this question.

Conclusion

As discussed above, it is this Office's opinion that determining whether a lease-purchase agreement for school district property is authorized by either S.C. Code § 59–19–125 or S.C. Code § 59–19–250 is fact dependent, but the determination will generally turn on whether the property will be used for a "civic or public purpose." See 1993 S.C. Op. Att'y Gen. 148 (1993). The answers to each of your questions are provided in the analysis above.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General