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ATTORNEY GENERAL

April 6, 2023

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Dear Mr. Condon:

We received your letter requesting an opinion of this Office on behalf of State Treasurer Curtis M. Loftis, Jr. According to your letter, you request an opinion as to whether the South Carolina Jobs-Economic Development Authority is "prohibited from investing in private or public equity securities by Article X, Section 11 of the State Constitution"? Additionally, you inquire as to whether InvestSC, Palmetto State Growth Fund, Inc., and the Venture Capital Authority are prohibited from investing in private or public equity securities by article X, section 11 of the South Carolina Constitution.

Law/Analysis

Article X, section 11 of the South Carolina Constitution (2009) provides in relevant 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, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution. Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation

(emphasis added). According to the South Carolina Supreme Court, "The constitution clearly prohibits public agencies . . . from engaging in joint ownership with private parties." Nichols v. S.C. Rsch. Auth., 290 S.C. 415, 421, 351 S.E.2d 155, 158 (1986). Therefore, whether this provision is applicable to a particular entity depends upon whether the entity is an agency or political subdivision of the state for purposes of article X, section 11. In Nichols, the Supreme Court considered whether the South Carolina Research Authority was an agency of the state. Relying on the findings of the circuit court, the Court considered the fact that the act creating the Research Authority states it "is a 'corporation owned completely by the people of the state.'" Id. at 418, 351 S.E.2d at 157 (quoting S.C. Code Ann. § 13-17-90 (Supp. 1985)). The Court also

considered the Research Authority's ability to issue revenue bonds under section 11-21-10, et seq. of the South Carolina Code, which allows public agencies to issue revenue bonds under the Advanced Refunding Act. Id. Finally, the Court considered the fact that the act creating the Research Authority "was amended to exempt the Authority from various general law provisions applicable to state agencies and employees" and determined "[i]f the Authority were not an agency, such legislation would have been unnecessary." Id. Based on these facts, the Court concluded the Research Authority was a state agency and therefore prohibited from entering into joint ventures with private firms by article X, section 11. Id. at 421, 351 S.E.2d at 158.

A. South Carolina Jobs-Economic Development Authority

To determine whether South Carolina Jobs-Economic Development Authority (the "Authority") is a state agency, we first look to its enabling legislation. The Legislature created the Authority by enacting the South Carolina Jobs-Economic Development Fund Act (the "Act") found in chapter 43 of title 41 of the South Carolina Code. S.C. Ann. §§ 41-43-10 et seq. (2021). Section 41-43-30 of the South Carolina Code establishes the Authority as "a public body corporate and politic and an agency of the State, with the responsibility of effecting the public purposes of this act." (emphasis added). "The cardinal rule of statutory interpretation is to determine the intent of the legislature." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005). "The legislature's intent should be ascertained primarily from the plain language of the statute." Id. at 230, 612 S.E.2d at 723. Section 41-43-30 clearly expresses the Legislature's intent to treat the Authority as a state agency. This interpretation is further supported by other provisions under the Act. Section 41-43-20(B) of the South Carolina Code (2021) defines "Authority" for purposes of the Act as "the Jobs-Economic Development Authority, which is a state-owned enterprise." This language is almost identical to the statute creating the South Carolina Research Authority considered by the Court in Nichols. Also, like Nichols, the Authority's enabling legislation allows it to issue revenue bonds. S.C. Code Ann. § 41-43-90(H) (2021). The Legislature also, as was the case regarding the Research Authority in Nichols, exempts the Authority from certain provisions of the South Carolina Code generally applicable to state agencies. S.C. Code Ann. § 41-43-909(E) (exempting the Authority from certain provisions of the procurement code); S.C. Code Ann. § 41-43-280 (stating "Notwithstanding any provision of law or regulation to the contrary, the authority shall continue to be an 'agency' for purposes of Chapter 78 of Title 15, but the authority is not considered an 'agency' or 'state agency' or any other form of state institution for purposes of Sections 2-7-65 and 2-57-60."). As such, we believe a court would find the Authority is a state agency and therefore, article X, section 11 of the South Carolina Constitution prohibits the Authority from becoming "a joint owner of or stockholder in any company, association, or corporation" ¹

¹ We note section 41-43-70 of the South Carolina Code (2021) specifically lists the functions and duties of the Authority as including assisting in the location of new and existing business enterprises in this state through investments. However, due to the constitution prohibition on taking ownership in private entities under article x, section 11, we believe a court in an effort to construe this provision as constitutional would limit, if not prohibit, the Authority from making direct investments. State v. Harrison, 402 S.C. 288, 292-93, 741 S.E.2d 727, 729 (2013) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.").

Next you ask whether certain activities performed by the Authority would be prohibited as they result in the Authority becoming a joint owner or stockholder in a private company. Addressing this question would require consideration of the facts and circumstances of each activity. As we stated in a prior opinion, “questions of fact are outside the scope of an opinion of this Office.” Op. Att’y Gen., 1995 WL 805733 (S.C.A.G. Sept. 12, 1995). As such, a court must ultimately decide whether particular activities result in the state becoming a joint owner or stockholder in a private company, association, or corporation.

B. InvestSC and Palmetto State Growth Fund, Inc.

You also inquire as to whether InvestSC and Palmetto State Growth Fund, Inc. (“PSGF”) are similarly prohibited from investing in private or public equity securities. As you mentioned in your letter, the Authority created both entities pursuant to section 41-43-240 of the South Carolina Code (2021), which provides:

The authority is authorized to establish profit or not-for-profit corporations as it considers necessary to carry out the purposes of this chapter. Officials or employees of the authority may act as officials or employees without additional compensation of a corporation created pursuant to this section. A corporation established pursuant to this section is considered a “public procurement unit” for purposes of Article 19, Chapter 35 of Title 11.

The authority may make grants or loans to, or make guarantees for, the benefit of any not-for-profit corporation which the authority has caused to be formed whose Articles of Incorporation require that its directors be elected by members of the authority and all assets of which, upon dissolution, must be distributed to the authority if it is in existence or, if it is not in existence, then to the State of South Carolina.

These grants, loans, or guarantees may be made upon a determination by the authority that the receiving not-for-profit corporation is able to carry out the purposes of this act and on the terms and conditions imposed by the authority.

Any guarantee made by the authority shall not create an obligation of the State or its political subdivisions or be a grant or loan of the credit of the State or any political subdivision. Any guarantee issued by the authority must be a special obligation of it. Neither the State nor any political subdivision is liable on any guarantee nor may they be payable out of any funds other than those of the authority and any guarantee issued by the authority shall contain on its face a statement to that effect.

The South Carolina Supreme Court in O'Brien v. S.C. ORBIT, 380 S.C. 38, 668 S.E.2d 396 (2008) made clear that a city could not use a trust to circumvent the constitutional mandate under article X, section 11. However, we find when the entity making the investment is not a state agency or a political subdivision of the state, article X, section 11 does not apply.²

In 1996, this Office was asked to opine on whether the Carolina Capital Investment Corporation (“CCIC”), also created by the Authority pursuant to section 41-43-240, was prohibited under article X, section 11 of the South Carolina Constitution from taking an equity interest in a company in exchange for an investment of capital. Op. Att’y Gen., 1996 WL 599391 (S.C.A.G. Sept. 6, 1996). Initially, we noted the purpose of article x, section 11 as expressed by the South Carolina Supreme Court in Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923), “[i]f the supposed intention of this section of the Constitution could be considered apart from the words used therein, it doubtless would be admitted that the idea was to prevent the state from entering into business hazards which might involve obligations upon the public.” Id. We further explained, “Other South Carolina cases have found the provision was not violated because there was no ‘joint ownership’ of property between the State or its political subdivision and a private corporation.” Id. (citing Johnson v. Piedmont Municipal Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982); Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976)). We proceeded to analyze whether CCIC was a state agency according to the guidance provided in Nichols as well as cases decided in other jurisdictions, primarily focusing on the state’s degree of control over the entity, whether its employees are treated as state employees, whether the entity is an integral part state government, and whether the entity had attributes of sovereignty, including the power to tax, the power of eminent domain, and police power. Id. We also noted prior opinions of this Office concluding “a non-profit corporation is not a State agency so long as it is a separate legal entity, independent of the State.” Id. (citing Ops. Att’y Gen., 1980 WL 120684 (S.C.A.G. Feb. 26, 1980); 1976 WL 23016 (S.C.A.G. July 20, 1976)). Ultimately, we determined:

Of course, this Office, in a legal opinion cannot make factual determinations. Op. Atty. Gen., December 12, 1983. Ultimately, the conclusion of whether or not CCIC is a State agency is a factual question, applying all the criteria referenced above. Based upon the facts at hand, it appears that CCIC is a separate legal entity incorporated as a non-profit corporation, and is not a State agency. As noted above, this Office, in its previous opinions, has generally presumed that an entity incorporated as a separate non-profit corporation is not a State agency. This is consistent with Section 41-43-240 which refers to the authority of JEDA to create either “profit of non-profit corporations as the authority considers necessary to carry out the purposes of this act.” Likewise, it

² We note that the South Carolina Supreme Court in Carll v. S.C. Jobs-Econ. Dev. Auth., 284 S.C. 438, 444, 327 S.E.2d 331, 335 (1985) determined: “There is no mechanism in the Act that would result in assets of Authority being transferred to private parties,” and therefore, the Act itself does not pledge the credit of the state in violation of article X, section 11 of the South Carolina Constitution.

would not appear that CCIC is such “an integral part of State government as to come within regular patterns of administrative organization and structure.” I am advised that there are interlocking directors serving on both the JEDA Board and the CCIC Board and that CCIC is deemed a “public procurement unit” pursuant to the State Procurement Code. See, Section 11-35-4610(5). Notwithstanding these attributes of a State agency, however, I am of the opinion, based upon the facts presented, and previous opinions of this Office, that CCIC is probably not a State agency for purposes of Article X, § 11. I must caution that you should review the various criteria contained in the authorities referenced herein, applying these criteria to all the facts, for any final resolution of this matter.

Id.

First, we consider InvestSC. According to your letter, InvestSC was incorporated as a non-profit pursuant to section 41-43-240. You also informed us that InvestSC and the Authority employ the same person as their executive director and that two of InvestSC’s three boards members are also on the Authority’s board, one of which is the chairman of both boards. Your letter also notes that South Carolina includes InvestSC in its Annual Comprehensive Financial Report. You informed us that InvestSC’s funding comes three sources: a bank loan pursuant to the Venture Capital Act due to its designation as an investor group under the Venture Capital Act, the proceeds from the sale of South Carolina tax credits pursuant to the Venture Capital Act, and a grant from the U.S. Department of the Treasury.

As we stated in our 1996 opinion, the determination of whether InvestSC is a state agency is a factual determination, which only a court can decide. Op. Att’y Gen., 1996 WL 599391 (S.C.A.G. Sept. 6, 1996). However, based on the information you provided, we begin with the presumption that an entity incorporated as a separate non-profit corporation is not a state agency. Here, like CCIC, InvestSC was created as a separate entity pursuant to section 41-43-240. Also, like CCIC, the Authority and InvestSC share leadership. You mention the state includes InvestSC in its Annual Comprehensive Financial Report. While these facts could lead a court to find the state or the Authority, which we believe is a state agency, has some level of control over InvestSC, we do not believe a court would likely find that InvestSC is an integral part of state government. To our knowledge, InvestSC’s employees are not treated as state employees. Additionally, we are not aware of InvestSC having any attributes of sovereignty such as the power to tax, the power of eminent domain, or police powers. Based on our 1996 opinion, we believe it is likely a court would conclude InvestSC is not a state agency for purposes of article X, section 11. But, only a court can make this determination after considering all of the facts.

Next, we consider PSGF. Again, whether PSGF is a state agency is a factual question that must be determined by a court. Nonetheless, we will attempt to provide you with guidance based upon the information you provided. According to your letter, the Authority created the entity now known as PSGF in 1992 as CCIC, the subject of our 1996 opinion. You state after its creation, CCIC’s

functions were performed by employees of the Authority and it was funded by state appropriations via the Authority. As we mentioned in our 1996 opinion, you explain CCIC shared leadership with the Authority, including the same person serving as chairman of both organizations. Additionally, you informed us that CCIC's by-laws contained a clause that property from the organization was to be distributed to the Authority upon its dissolution. However, in 1996 we determined "CCIC is probably not a State agency" Op. Att'y Gen., 1996 WL 599391 (S.C.A.G. Sept. 6, 1996).

In 2003, CCIC became known as Business Carolina, Inc. ("BCI"). BCI separated itself from the Authority by ending its contract with the Authority, changing its board membership, and physically moving to a space away from the Authority. Then in 2014, you state BCI sold its loan portfolio to United Community Bank and most of its employees went to work for United Community Bank. BCI then changed its name to Palmetto State Loan Fund, Inc. According to your letter, in 2015, the entity changed its name again to PSGF, resumed its relationship with the Authority, and assumed the mission of assisting the Authority in carrying out its statutory purposes. You state that three of the nine PSGF directors were also directors of the Authority, but that has increased over time to five of the nine PSGF directors. You informed us that the same person serves as the chairman of both boards and as the director of PSGF.

While PSGF has gone through quite a transformation since we issued our opinion in 1996, PSGF still has many similarities to CCIC. PSGF holds a close relationship to the Authority through its shared management and leadership. As envisioned by section 41-43-240, PSGF's purpose is to carry out the statutory functions of the Authority. While a court may find these facts evidence of the Authority's control over PSGF, PSGF remains a separate legal entity from the Authority. Thus, we must begin with the presumption that PSGF is not a state agency. Moreover, while your letter includes information regarding the close relationship PSGF holds with the Authority, we are not aware of PSGF's employees being treated as state employees. We are also not aware of PSGF performing as an integral part of state government or exercising an attribute of sovereignty. Therefore, based on our 1996 opinion, we believe a court would find PSGF is not a state agency for purposes of article X, section 11. Op. Att'y Gen., 2006 WL 2849807 (S.C.A.G. Sept. 29, 2006) ("This Office recognizes a long-standing rule that we will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law.").

C. Venture Capital Authority

Lastly, you question the Venture Capital Authority's ("VCA's") involvement in investments in venture capital funds. The Legislature created the VCA as part of the Venture Capital Investment Act of South Carolina ("VCI Act"). S.C. Code Ann. § 11-45-10 et seq. (2011 & Supp. 2022). According to the enabling legislation, the purpose of the VCI Act is to increase the availability of funding to emerging, expanding, relocating, and restructuring enterprises within South Carolina and to address the long-term capital needs of the state's small and medium sized enterprises. S.C. Code Ann. § 11-45-20 (2011). The VCI Act gives the VCA authority to choose designated investor groups, which may borrow funds from lenders and invest those funds in accordance with their

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contract with the VCA. S.C. Code Ann. § 11-45-55(A) (2011). The VCA then issues tax credit certificates to the lender contemporaneous with the loan. S.C. Code Ann. § 11-45-55(B) (Supp. 2022). Even though the aim of the VCI Act is to promote investment in South Carolina companies, the Act does not contemplate direct investment by the VCA in private companies. As such, the VCA likely would not be in a position to violate article X, section 11 of the South Carolina Constitution.

According to your letter, the VCA chose InvestSC as a designated investor group. Your letter does not argue the VCA made direct investments into private companies, but rather argues the VCA is making equity investment decisions for InvestSC. According to the VCA's enabling legislation, it is permitted to select designated investor groups and does so based on that particular investor's investment plan. S.C. Code Ann. § 11-45-50 (2011). Moreover, the relationships between the VCA and its designated investors are governed by designated investor contracts, which contain investment guidelines. S.C. Code Ann. § 11-45-50(B). As such, the enabling legislation allows the VCA to have input into how capital is invested. Article X, section 11 prohibits state agencies from becoming "joint owner of or stockholder in any company, association, or corporation." As we mentioned above, our courts recognize the purpose of this provision was to "prevent the state from entering into business hazards which might involve obligations upon the public." The VCA is not becoming a joint owner of a company and would not create an obligation for the public by advising InvestSC. Therefore, we do not believe a court would find the relationship between the VCA and InvestSC poses a potential constitutional infirmity for the VCA under article X, section 11.

Conclusion

Article X, section 11 of the South Carolina Constitution prohibits state agencies from taking ownership interest in private companies, associations, or corporations. Application of this provision hinges upon whether the entity is a state agency. The Legislature clearly expressed its intention that the Authority is to be treated as a state agency in section 41-43-30 of the South Carolina Code, as well as, in other provisions under the South Carolina Jobs-Economic Development Fund Act. As such, we believe a court would find the Authority is prohibited from taking an ownership interest in private or public equity securities. However, whether particular actions by the Authority constitute taking an ownership interest must be determined by a court in consideration of all of the surrounding facts. Op. Att'y Gen., 2018 WL 1160085 (S.C.A.G. Jan. 22, 2018) (stating this Office is not empowered to make factual findings in an opinion). Regarding application of article X, section 11 to InvestSC and PSGF, the answer is less clear as these entities are non-profit corporations created by the Authority in accordance with section 41-43-240 of the South Carolina Code. While a court would ultimately have to make this determination after considering the facts, based on the information you provided and with guidance from Nichols, we believe a court would not find these two entities are state agencies and therefore subject to article X, section 11.

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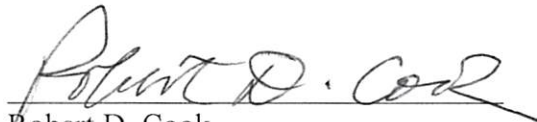
You also inquire as to whether the VCA's involvement in InvestSC's investments under the Venture Capital Investment Act poses an issue under article X, section 11. The VCA is authorized under the Venture Capital Investment Act to choose designated investors based on investment plans they submit to VCA. The designated investor chosen is required to adhere to the designated investor contract with the VCA. Therefore, the VCA's enabling legislation contemplates the ongoing involvement of the VCA in its designated investors' investment decisions. We understand the VCA chose InvestSC as a designated investor. As such, we believe the VCA can direct InvestSC's investment decisions in accordance with the contract. The investments are funded with loans obtained by the designated investor, not state funds. Because the VCA is not making the investment or directing the investment of state funds, we do not believe a court would find its actions in violation of article X, section 11.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General