

1990 Library



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

August 30, 2005

Buford S. Mabry, Jr., Chief Counsel  
South Carolina Department of Natural Resources  
Post Office Box 167  
Columbia, South Carolina 29202

Dear Mr. Mabry:

By letter, you have requested an opinion concerning the applicability of Article X, Section 11 of the South Carolina Constitution to the State of South Carolina. You have concerns that such provision may prevent the State from obtaining "ownership of a private corporation for the purpose of liquidating that corporation and acquiring its assets." You explain that the corporation is designated as a "C" corporation having 300 acres of land as its sole asset, the stock of which is held, in total, by two individuals. Furthermore, you indicate that the State would like to acquire the land, but the owners fear the tax consequences involved in such a transaction. Therefore, you inquire as to whether the State can obtain the stock in this private corporation for the purpose of liquidating it and acquiring its assets without violating Article X, Section 11. You note that a prior opinion issued by this Office *Op. S.C. Atty. Gen., Op. No. 79-94* (July 17, 1979), appears to support the contention that the forgoing transaction will not violate Article X, Section 11. It is our opinion that the referenced opinion is controlling and that the proposed acquisition would not contravene Art. X, § 11.

Law/Analysis

Article X, § 11 provides in pertinent part that "[n]either the state nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association or corporation." At first glance, the literal language of this provision appears generally to bar the State from entering joint ventures or obtaining ownership of stock for any private corporation. Indeed, in *Nichols v. South Carolina Research Authority*, 290 S.C. 415, 421, 351 S.E.2d 155 (1986), our Supreme Court found that the Research Authority is a public agency and that Art. X, § 11 "clearly prohibits public agencies, such as the Authority from engaging in joint ownership with private parties." 290 S.C. at 421.

*Henry McMaster*

Mr. Mabry  
Page 2  
August 30, 2005

However, the Court has indicated that application of Article X, Section 11 may not be as strict as it initially appears. *Chapman v. Greenville Chamber of Commerce*, 127 S.C. 173, 120 S.E. 584 (1923). In *Chapman*, the Court noted that “[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 of the public.” 120 S.E. at 588. Likewise, in *Taylor v. Richland Memorial Hospital*, 329 S.C. 47, 495 S.E.2d 431 (1998), the Court emphasized that “[n]ot every joint endeavor between a public entity and private business is constitutionally prohibited .... We have approved arrangements where governmental entities leased assets to private entities without finding a violation of the joint ownership clause.” (Citing *Chapman, supra*; *Gilbert v. Bath*, 267 S.C. 171, 227 S.E.2d 177 (1976); *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982)). *Taylor* upheld an ordinance approving an alliance between Richland Memorial and the Baptist Healthcare System of South Carolina even after recognizing that Richland Memorial was a subdivision of Richland County. In that case, the Supreme Court stated:

[t]he circuit court held Richland Memorial's involvement with the System as a lessor of real property, transferor of personal property, or member in the System does not violate the joint ownership clause. Further, the circuit court concluded that because Richland County will not be liable for the System's obligations and the System will not have the powers to tax and to pledge the full faith and credit of any political entity, this alliance does not create a risk that any losses will be shifted to the public. We agree. Richland Memorial will not retain a partial interest in the personal property because it will quitclaim to the System. The System will have exclusive title to the assets following the transfer. The real property lease agreement between the System, Richland County, and Richland Memorial to be executed at closing describes the relationship as that of landlord and tenant.

... There is no evidence the proposed alliance will run afoul of [Art. X § 11] ....

Furthermore as you point out, this Office has recognized a more specific exception to the general ban on State ownership of private corporations when the ownership of the private corporation is sought purely for the purpose of immediate liquidation and attainment of assets. In the July 17, 1979 opinion, referenced above, we advised that “[t]he City of Charleston is not prohibited by the Constitution from purchasing and/or receiving all of the stock in a private corporation for the purpose of liquidating the corporation and acquiring its assets.” Our decision was primarily based upon the underlying purpose for executing the transaction in such a manner. We there emphasized:

In neither of the two situations here presented is there any attempt to have the City of Charleston act as a stockholder or otherwise participate in the affairs of a private corporation. The complexity of the two transactions is mandated by the effect of income tax laws rather than by any desire to have the City circumvent Article X, Section 11.

Mr. Mabry  
Page 3  
August 30, 2005

*Id.*

As explained in our 1979 opinion, other jurisdictions, when faced with similar issues, have interpreted constitutional provisions very similar to Article X, Section 11 and have found that the governmental entity did not violate the respective constitutional provision. Citing *People ex rel. Murphy v. Kelly*, 76 N.Y. 475 (1879), we stated that there

[t]he Court, however, held that that constitutional provision by an Act which provided for governmental purchase of stock for the purpose of dissolving the corporation and acquiring its assets:

[t]he Act of 1875, is not, as claimed by the appellant, in conflict with the constitutional provision above recited. It was not the purpose or effect of the act, to make the city of New York a stockholder in the bridge company, or to cause it to loan any money, or credit to such company. It was the purpose of the act to extinguish the company, and vest all its property in the two cities for a public purpose.

*Id.*

Furthermore, in the 1979 opinion, we recognized that:

[a]nother case, *State, ex rel. Johnson v. Consumer P. Pow. Dist.*, 143 Neb. 753, 10 N.W.2d 784, 152 A.L.R. 480 (1943) reached the same result, citing Kelly and the statutory construction principle already discussed above. In that case, a public power district acquired all the stock of a private power company and then dissolved the corporation. The court held:

[t]his provision of our Constitution must be construed with reference to the evils it was intended to correct or prevent.

\*\*\*

Section 1, Article XI of our Constitution was never intended to prohibit a purchase by a subdivision of the state of all the capital stock of a corporation solely for the purpose of lawfully acquiring the physical property of such corporation for a public use, constitutionally defined and lawfully authorized by the legislature. 152 A.L.R. at 491-492.

Similarly, in *Long v. Mayo*, 111 S.W.2d 633 (Ky. App. 1937), the Kentucky Court upheld the State's purchase of stock in a bridge company for the purpose of obtaining a bridge. The court found that, because the constitutional provision prohibiting state ownership of stock in a private corporation was intended to prevent the State from acquiring an ownership interest in a private

Mr. Mabry  
Page 4  
August 30, 2005

business enterprise, and because the state had a valid interest in freeing the public from paying a toll on a well-traveled bridge, this purchase of stock was not in violation of the Constitution.

With respect to the situation presented here, it appears that South Carolina's underlying purpose in purchasing the stock is very similar to that presented to us in the 1979 opinion as well as that stated in the aforementioned cases. Like these authorities, here, it appears that the State desires to obtain the stock in the fashion proposed strictly to ease the income tax burden on the sellers and for the purpose of immediately liquidating the corporation in order to acquire its assets, namely the 300-acre plot of land. It would also appear that a public purpose is involved. If in fact the State intends to liquidate the corporation immediately, it appears from the above authorities that such would not be in violation of Article X, Section 11. As the Court stated in *Taylor*, the purpose of Art. X, § 11 was to "prevent the state from entering into business hazards which might involve obligations upon the public." 329 S.C. at 50, *supra*, Where the corporation will be immediately liquidated and all its assets transferred to the State, for a public purpose, such "business hazards" are not present, in our opinion.

#### Conclusion

Accordingly, we advise that, in our opinion, the State would not violate Article X, Section 11 of the Constitution, which prohibits the State or any of its political subdivisions from becoming a joint owner of or stockholder in any company, association or corporation in a situation in which the State acquires stock or ownership of a corporation, and plans immediately to liquidate the corporation for the purpose of acquiring its assets.

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General