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OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

September 26, 2005

Mr. Benjamin T. Rook
Chairman, Review Board
S.C. Research Centers of Economic Excellence
c/o S.C. Commission on Higher Education
1333 Main Street, Suite 200
Columbia, South Carolina 29201

Dear Mr. Rook:

In a letter to this office you raised several questions regarding proposals for infrastructure projects that have been submitted to the State Research Centers of Economic Excellence Review Board, hereinafter "the Board", by Clemson University and the Medical University of South Carolina. Such questions involve the interpretation of the South Carolina Research University Infrastructure Act, hereinafter "the Act", codified as S.C. Code Ann. §§ 11-51-10 et seq. (Supp. 2004). You have particularly questioned the appropriate disposition of resources to meet the "required match" as required by Section 11-51-70 and the certification responsibilities of the Board in such regard. Such provision states that

> As a condition precedent to the issuance of general obligation debt pursuant to the provisions of this chapter, the Research Centers of Excellence Review Board shall 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. This portion of the cost, in the discretion of the Research Centers of Excellence Review Board, 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.

Given these Board responsibilities, three specific questions have arisen:

1. Clemson University is in the near-final stages of negotiating partnerships with several private sector entities in the automotive industry. One of the partners is

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offering to locate some of their high-tech equipment within a Clemson facility, and would provide Clemson with access to the equipment for faculty research and instruction associated with graduate offerings in automotive engineering. Although the partner would continue to own the equipment (e.g., it is not a "gift" to Clemson), Clemson is proposing that the value of access to the equipment is a qualifying match. Would this qualify as an in-kind contribution and, if so, what kind of documentation would Clemson be required to provide that would quantify the monetary value of access to the equipment?

2. In a separate project proposal, Clemson is engaged in a partnership with the Greenwood Genetics Center (GCC) of Greenwood, S.C. Clemson is requesting that the Review Board consider the value of access to an existing 30,000 sq. ft. GCC facility as a qualifying match. The facility, known as the South Carolina Center for Treatment of Genetic Disorders, 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 use of the facility would be shared between Clemson and GCC. Clemson argues that shared access to the facility would have considerable value in forwarding research. Would the combined value of the land and the building ($2,850,000) 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?

3. We anticipate that a forthcoming infrastructure project proposal from MUSC will seek Board approval of the difference between the assessed value of a building and the actual purchase price as a qualifying match. Specifically, MUSC will acquire a building with an assessed value of $10 million for the purchase price of $5 million, and propose that the $5 million difference is a qualified match. Would this qualify as an in-kind contribution and, if so, what kind of documentation would MUSC be required to provide as verification of the building's assessed value?

In responding to your questions regarding the interpretation of Section 11-51-70, certain basic principles must be observed. The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Typically, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Insurance Company, 256 S.C. 577, 183 S.E.2d 451 (1971). Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). Courts must apply the clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Furthermore, statutes should be given a reasonable and practical construction which is consistent

with the policy and purpose expressed therein. Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E.2d 166 (1966).

Included in S.C. Code Ann. § 11-51-20 (5) is the expression by the General Assembly of the general intent of the Research University Infrastructure Act "[t]o advance economic development and create a knowledge based economy, thereby increasing job opportunities and to facilitate and increase research within the State at the research universities."[1] It is also provided by subsection (4) of such provision that

> Facility and infrastructure constraints prevent the advancement of research projects as well as restrict the ability of the research universities...to retain faculty and generate research dollars. A dedicated source of funds to repay general obligation debt authorized pursuant to this chapter would provide a consistent funding stream for capital improvements at the research universities and allow for improved planning of capital expenditures to meet the mission of the research universities.

Therefore, any interpretation of Section 11-51-70 should be made with the stated principles in mind of the General Assembly's intent of promoting the mission of the research universities and advancing research.

In your first question you indicated that in association with a partnership with private sector entities in the automotive industry, Clemson is being offered access to high-tech equipment which would be placed within a Clemson facility for research and instruction although the partner would continue to own the equipment. You have asked whether the value of access to such equipment would serve as a qualifying match for purposes of Section 11-51-70 which, again, provides that any such match "... 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." For purposes of your question, therefore, a determination must be made as to whether such access to equipment would qualify as a gift "in kind".

As provided by Section 11-51-70, the ultimate determination of what would constitute "gifts in kind" is a matter within the discretion of the Board. Generally, boards are empowered with reasonable discretion to effectuate legislative purpose. See Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621 (1962). A prior opinion of this office dated June 24, 2003 issued to the Board also dealt in part with a question of the construction of a certain term as used in legislation affecting the Board. That opinion noted that

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[1]The research universities of this State are designated by Section 11-51-30(5) as Clemson University, The Medical University of South Carolina and the University of South Carolina-Columbia.

> ...it is the Board to which authority has been delegated by the General Assembly to execute § 2-75-05 et seq. Courts will generally defer to the Board's interpretation and application of these enabling statutes. As long as the Board's interpretation is considered by the courts as reasonable, such interpretation will likely be upheld.

Therefore, in considering your questions, any reasonable interpretation by the Board made so as to put into place the legislative purpose would be upheld. Again, it should be noted that the General Assmbly has expressed its intent of promoting the mission of the research universities and advancing research.

While examples of "gifts in kind" are provided by Section 11-51-70, the term "in kind" is not defined by the Act. As a result, consideration must be given to the common and ordinary definition of such term. As determined by the California Attorney General in an opinion dated April 12, 1988, "... the term 'in kind' means something of the same species or category as another; something that is not necessarily identical, but is equivalent to it." In its decision in In re the Marriage of Thompson v. Thompson, 27 S.W.3d 502 (Mo. 2000), the Missouri Court of Appeals defined "in kind" as "in a similar way, with an equivalent of what has been offered or received."

A review of cases and other sources is helpful in construing what may be considered a gift in kind. In its decision in Cook v. Eggers, 593 N.W.2d 781 (N.D. 1999) the North Dakota Supreme Court referenced that certain guidelines being reviewed in order to determine gross income had defined "in kind income" to include the "use of property". See also: Bielecki v. Benettieri, 1998 WL 457730 (Conn. 1998) (use and enjoyment of a residence considered to be an in kind contribution of monetary amount of child support); 11 Pace Environmental Law Review 587, 644 (in kind contributions may include the use of state vehicles, equipment and personnel in lieu of cash payment). In an opinion of this office dated April 16, 1968 it was determined that contributions included "'in kind' use of facilities and personnel". See also: Op. Miss. Atty. Gen. dated September 8, 2000 (donation of equipment and labor constituted an in kind donation in lieu of cash); Op. Colo. Atty. Gen. dated July 26, 1978 (a contribution in kind included a gift or loan of any item of real or personal property in lieu of money); Op. Tenn. Atty. Gen. dated May 3, 2005 (for purposes of meeting a matching requirement, an in kind contribution included the use of privately owned physical facilities); Op. Mass. Atty. Gen. dated November 6, 1980 (cited Federal Election Commission opinion which indicated that the loan of equipment qualified as an in kind contribution equivalent to normal rental rates).

Consistent with such authorities, in my opinion, the access to and use of high tech equipment by Clemson University would qualify as a gift "in kind" for purposes of Section 11-15-70. In my opinion, the access to the equipment could be construed as being, while not identical, of sufficient equivalency as to qualify as an in kind gift, especially where the gift of equipment is specifically set forth by statute as an example of a gift in kind.

Such is especially the case where the provision states that 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" , a quite broad potential pool of "in kind" gifts. Again, however, such is ultimately a matter for determination by the Board as it possesses the discretion in such regard.

As set forth by Section 11-51-70, "[a]s a condition precedent to the issuance of general obligation debt pursuant to the provisions of this chapter, the Research Centers of Excellence Review Board shall 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." Referencing such , you have questioned what kind of documentation would Clemson be required to provide that would quantify the monetary value of access to the equipment.

In my opinion, to make such a determination, an appraisal, such as that provided by an independent appraiser, would have to first be made to determine the value of any gift. It would then be a matter for the Board to determine whether or not such qualified as a reasonable appraisal of any gift. Again, such would be a matter within the discretion of the Board. As repeatedly indicated in numerous opinions of this office, an opinion of the Attorney General cannot investigate or determine facts. See: Ops.Atty.Gen. dated October 27, 2004 and November 4, 2003.

You next indicated that Clemson is engaged in a partnership with the 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? I presume that the facility is equipped in some regard.

As set forth, Section 11-51-70 provides that any such match "... 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." For purposes of your question, therefore, a determination must be made as to whether access to, but not ownership of, a facility would qualify as a gift "in kind".

Again the 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. However, as stated previously, such is ultimately a matter for determination by the Board as it possesses discretion in such regard.

As to your question of what kind of documentation Clemson would be required to provide to quantify the value of the land and the facility, again in my opinion, to make such a determination, an independent appraisal should be made to determine the value of any gift. It would then be a matter for the Board to determine whether or not such appraisal qualified as a reasonable appraisal of any gift. As this office cannot determine facts in an opinion, such would be a matter within the discretion of the Board.

In your last question you indicated that a forthcoming infrastructure project proposal from MUSC will seek Board approval of the difference between the assessed value of a building and the actual purchase price as a qualifying match. You stated that MUSC will acquire a building with an assessed value of $10 million for the purchase price of $5 million, and propose that the $5 million difference serve as a qualified match.

Again, while any determination is ultimately a matter for decision by the Board, I would note that Section 11-51-70 provides that the Board shall certify to the State Budget and Control Board that at least fifty percent of the cost of each research infrastructure project is provided by outside resources. As further stated, "[t]his portion of the cost, in the discretion of...(the Board)...may be in the form of cash; cash equivalent; buildings...." In my opinion, it is not necessary to construe the "gifts in kind" provision of that same statute inasmuch as it is stated that the portion of the cost may be in the form of "buildings". In my opinion, the gift of a building valued at $10 million for the purchase price of $5 million would qualify as the gift of the building with the required fifty percent of the cost being provided by an outside resource.

As to your question of what kind of documentation would MUSC be required to provide as verification of the building's assessed value, again, I can only recommend that an independent appraisal be obtained which could then be considered by the Board as to whether it considered such to be a reasonable appraisal.

If there are any further questions, please advise.

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General