



HENRY McMASTER
ATTORNEY GENERAL

May 25, 2006

George L. Schroeder, Director
Legislative Audit Council
1331 Elmwood Ave., Suite 315
Columbia, South Carolina 29201

Dear Mr. Schroeder:

We understand from your letter you desire an opinion of this Office concerning the State Budget and Control Board's regulation of expenditures by state agencies for permanent improvements. You state:

According to S.C. Code § 10-1-180, "The expenditure of funds by any state agency, except the Department of Transportation for permanent improvements as defined in the state budget, is subject to approval and regulation of the State Budget and Control Board." The Budget and Control Board's procedures for this process appear in the capital budgeting unit's Manual for Planning and Execution of State Permanent Improvements. Given this statute, what SCDOT expenditures for permanent improvements can the Budget and Control Board regulate? What are "permanent improvements as defined in the state budget"? We would appreciate your interpretation of this language.

Law/Analysis

Section 10-1-180 of the South Carolina Code (Supp. 2005), as you referenced in your letter, is contained in the portion of the South Carolina Code pertaining to public buildings and property. As noted in a prior opinion of this Office, this section was enacted as part of the 1995-1996 general appropriations act "to codify on a permanent basis a proviso which had been in effect on a year-to-year basis previously." Op. S.C. Atty. Gen., October 30, 1995. Section 10-1-180 provides, in pertinent part:

The expenditure of funds by any state agency, except the Department of Transportation for permanent improvements as defined in the state budget, is subject to approval and regulation of the State Budget and

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Control Board. The board shall have authority to allot to specific projects from funds made available for such purposes, such amounts as are estimated to cover the respective costs of such projects, to declare the completion of any such projects, and to dispose, according to law, of any unexpended balances of allotments, or appropriations, or funds otherwise provided for such projects, upon the completion thereof. The approval of the Budget and Control Board is not required for minor construction projects, including renovations and alterations, where the cost does not exceed an amount determined by the Joint Bond Review Committee and the Budget and Control Board.

S.C. Code Ann. § 10-1-180 (emphasis added).

Because a court has yet to interpret the meaning of section 10-1-180 with respect to the South Carolina Department of Transportation's ("SCDOT's") obligations or the phrase "permanent improvements as defined in the state budget," we will employ the rules of statutory construction to interpret this statute. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, ___, 626 S.E.2d 6, 10 (2005). "The legislature's intent should be ascertained primarily from the plain language of the statute." Bass v. Isochem, 365 S.C. 454, 470, 617 S.E.2d 369, 377 (Ct. App. 2005). "Clear and unambiguous words in a statute should be given their plain and ordinary meaning." Brown v. County of Berkeley, 366 S.C. 354, 360, 622 S.E.2d 533, 537 (2005). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Croft v. Old Republic Ins. Co., 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005).

Section 10-1-180 specifically exempts permanent improvement projects by the SCDOT from its general requirement that state agencies must gain the approval of and are subject to regulation by the State Budget and Control Board. Thus, given the plain reading of this statute, we gather the Legislature's intent to exempt the SCDOT from this requirement. Accordingly, to address your first question, we find all SCDOT expenditures for permanent improvements are exempt from Budget and Control Board regulation as provided in section 10-1-180.¹

Next, we address your second question of what is meant by the phrase "permanent improvements as defined in the state budget" contained in section 10-1-180. As noted above, a court has yet to interpret this phrase with respect to section 10-1-180. Thus, we will attempt to interpret it employing the rules of statutory interpretation. Under a plain reading of this portion of the statute, we are instructed to look to the state budget to determine what constitutes a permanent improvement.

¹However, we note the SCDOT, as a state agency, remains subject to requirements of sections 2-47-10 et seq., pertaining to the review of permanent improvement projects by the Joint Bond Committee and the establishment of such projects by the Budget and Control Board.

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Thus, we reviewed several years of appropriation acts enacted by the Legislature after the passage of section 10-1-180.² Although we did not uncover a "definition" for the term "permanent improvements," we discovered generally the Legislature provides for a budget for the SCDOT and contained within this budget are several line items for "permanent improvements." We found these line items under categories such as "Administration" and "Highway Engineering." Thus, we can infer this phrase to mean those permanent improvements which make up the budget line items entitled "permanent improvements" provided for in the appropriations act.

As for the types of expenditures that may be included in these budget line items, we are given no guidance in the appropriations acts we reviewed or in section 10-1-180. Additionally, we were unable to locate a South Carolina court decision addressing permanent improvements with respect to the appropriation of state funds. However, this Office addressed this issue with respect the language used in the provisos included in annual appropriations acts prior to the enactment of section 10-1-180. For instance, in an opinion dated November 1, 1963, this Office addressed whether the proviso required Budget and Control Board approval of funds be used by the University of South Carolina to acquire land. Op. S.C. Atty. Gen., November 1, 1963. The proviso contained in the appropriations act, as quoted in our opinion, stated:

' . . . the expenditure of funds, heretofore or hereafter provided, by any State Agency, except the State Highway Department, for permanent improvements, shall be subject to approval and regulations of the State Budget and Control Board. The Board shall have authority to allot to specific projects from funds made available for such purposes, such amounts as are estimated to cover the respective costs of such projects, to declare the completion of any such project, and to dispose, according to law, of any unexpended balances of allotments or appropriations, or funds otherwise provided for such projects, upon the completion thereof.'

Id. Thus, we were charged with determining whether the acquisition of land by the University constituted a permanent improvement, requiring Budget and Control Board approval. Id. We noted the fact that standard budget classifications listed "Purchase of lands" as a subcategory to permanent improvements. Id. In addition, we stated:

I do not feel that the term 'permanent improvements' is used in the commonly accepted sense of betterments (Dunham vs. Davis, 232 S.C. 175, 101 S.E.2d 278) but, on the contrary, it has an especial meaning as used in the General Appropriations Act and the available

²We reviewed General Appropriations Acts enacted by the General Assembly for State fiscal years beginning July 1 of 2000, 2001, 2002, 2003, 2004, and 2005.

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criteria indicate that mere acquisition of land is intended to be included within the phrase in that Act.

Id.

Again in a 1977 opinion, we addressed whether the alteration and renovation of an existing building constitutes a permanent improvement, thus requiring Budget and Control Board approval under the proviso. Op. S.C. Atty. Gen., November 10, 1977. We quoted a North Carolina Supreme Court stating:

“‘Permanent improvements’ to land include all improvements of a permanent nature which substantially enhance the value of the property--and, . . . includes putting up [buildings] and any substantial improvements which might be made to those buildings, . . . but do not include repairs to buildings which should be made . . . in the ordinary use of the property.”

Id. (quoting Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144, 145 (1921)). Accordingly, we determined alterations and renovations are permanent improvements “if they enhance the value of the property and are not repairs in the normal course of operation as above.” Id.

In an opinion issued in 1982, we addressed whether lease or a lease-back agreement of publicly-owned real property to a private entity constituted a permanent improvement for purposes of requiring Budget and Control Board approval under the proviso. Op. S.C. Atty. Gen., January 11, 1982. We found:

Budget and Control Board approval would not be required for an ordinary lease of land for fair market value by an agency or institution having the statutory authority to give such a lease. However, in view of the provisions of Sec. 137 of the 1981 Appropriations Act requiring Board approval of plans ‘for permanent improvements of any nature’ prior to construction by any means, and the other provisions of law con-concerning permanent improvements to State property, it is our opinion that the proposed lease and related agreements should be submitted to the Board for approval.

Id.

Consistent with these opinions, we believe the acquisition of land, construction of buildings, substantial improvements to buildings, and leases to private entities constitute permanent improvements for purposes of section 10-1-180, but repairs due to the ordinary use of the property do not. However, this list may not be exhaustive of what is and is not a permanent improvement for purposes of section 10-1-180. Because we cannot imagine all scenarios under which an expenditure

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may be considered as a permanent improvement, we will attempt to provide you with some further guidance to evaluate whether or not a particular item constitutes a permanent improvement.

Our Supreme Court, in Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998), stated: "Generally, statutes are to be construed with reference to the whole system of law of which they form a part." Although the portion of the South Carolina Code pertaining to public buildings and property does not define the term "permanent improvements" we found this term, which is used many times throughout the Code, defined on two occasions in the provisions of the Code pertaining to the Joint Bond Review Committee's involvement establishment of permanent improvement projects. The Legislature created the Joint Bond Review Committee, in part, to review the establishment of any permanent improvement projects and the source of funds to be used for those projects by state agencies and institutions, if the Legislature has not previously authorized the project. S.C. Code Ann. § 2-47-30(1) (2005). Section 2-47-50 of the South Carolina Code (Supp. 2005), defines the term "permanent improvement project" with respect to institutions of higher learning as:

- (1) acquisition of land, regardless of cost;
- (2) acquisition, as opposed to the construction, of buildings or other structures, regardless of cost;
- (3) construction of additional facilities and work on existing facilities for any given project including their renovation, repair, maintenance, alteration, or demolition in those instances in which the total cost of all work involved is five hundred thousand dollars or more;
- (4) architectural and engineering and other types of planning and design work, regardless of cost, which is intended to result in a permanent improvement project. Master plans and feasibility studies are not permanent improvement projects and are not to be included;
- (5) capital lease purchase of a facility acquisition or construction; and
- (6) equipment that either becomes a permanent fixture of a facility or does not become permanent but is included in the construction contract shall be included as a part of a project.

Furthermore, the statute dealing with the establishment of Comprehensive Improvement Plans, which all state agencies responsible for providing and maintaining physical facilities are required to submit to the Joint Bond Review Committee and the Budget and Control Board, states: "The State shall define a permanent improvement only in terms of capital improvements, as defined by generally accepted accounting principles, for reporting purposes to the State." S.C. Code Ann. § 2-47-55 (2005).

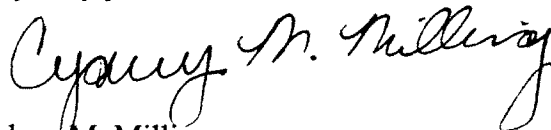
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From the provisions pertaining to the Joint Bond Review Committee, we find in addition to the list provided above, permanent improvements for purposes of 10-1-180 may also include the acquisition of buildings, architectural and engineering costs for planned permanent improvements, capital leases, equipment that is to become a fixture, and other items considered capital improvements pursuant to established generally accepted accounting principles. Although, in our prior opinions we determined repairs are generally not permanent improvements, section 2-47-50 indicates repair and maintenance costs may be considered permanent improvements if the expenditure exceeds a certain amount. While these definitions contained in title 2 of the South Carolina Code do not specifically pertain to section 10-1-180, we believe a court may find them helpful to interpreting the term "permanent improvements" included in section 10-1-180.

Conclusion

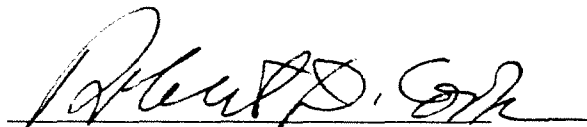
Based on a plain reading of section 10-1-180, we find the Department of Transportation's permanent improvements are exempt from approval and regulation by the State Budget and Control Board as required by this provision. Furthermore, the phrase "permanent improvements as defined in the state budget," appears to mean those permanent improvement projects included in moneys appropriated to the Department of Transportation in its budget under line items entitled "permanent improvements." As for what types of expenditures constitute "permanent improvements," based on prior opinions of this Office, expenditures for the acquisition of land, the construction of buildings, the substantial improvement of existing buildings, as well as the lease of property in certain instances constitute permanent improvements. Because a court may find other expenditures out side of these to be permanent improvements, we find other provisions of the Code defining the term "permanent improvement" may prove helpful in evaluating a specific expenditure.

Very truly yours,



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Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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