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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

January 11, 2006

William E. Whitney, Jr., Esquire  
Union City Attorney  
Post Office Box 266  
Union, South Carolina 29379

Dear Mr. Whitney:

You recently sent a letter to this Office describing a proposal to the Union City Council to establish a Union County Foundation (the "Foundation"). You stated the proposed foundation would have its own board and be established with one million dollars of insurance proceeds received by the City of Union (the "City"). As you explained, the City received two million dollars in insurance proceeds as a result of a fire which destroyed a City-owned building. The purpose of the Foundation, as you describe it, would be to use the interest generated from the investing the one million dollars "for specified public purposes in the community as determined by the board." You request our opinion as to the legality of the establishment of the Foundation by the City Council, and whether the Foundation initially may be funded with the insurance proceeds held by the City.

Based on our review of the applicable law, in our opinion, the City may create such a Foundation and use insurance proceeds received by the City to fund the Foundation.

**Law/Analysis**

Initially, we address the City's ability to form a nonprofit foundation. Although no statutory authority exists expressly enabling a municipality to create a nonprofit entity, such authority can be inferred from section 5-7-30 of the South Carolina Code (2004) providing, in pertinent part:

Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the

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municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it . . . .

(emphasis added). Thus, as long as the City finds the creation of the Foundation to be necessary and proper to the performance of its powers under section 5-7-30, in our opinion, the creation of the Foundation would be authorized.

Next, we address your question as to whether the Foundation can initially be funded with proceeds from an insurance policy held by the City. This Office repeatedly has acknowledged provisions of the State Constitution requiring public funds be expended for public purposes. See e.g. Op. S.C. Atty. Gen., October 8, 2003; Op. S.C. Atty. Gen. Op. No. 88-52 (June 27, 1988); Op. S.C. Atty. Gen. (July 24, 1984). Article X, Section 5 of the South Carolina Constitution requires taxes be spent for public purposes. In addition, Article X, Section 11 provides, in pertinent 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." The South Carolina Supreme Court interpreted this provision to prohibit the expenditure of public funds for the primary benefit of private parties. State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981).

In several cases, the South Carolina Supreme Court determined these constitutional provisions were not violated when public funds were expended for the benefit of a nonprofit organization. In Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954), the Court determined Anderson County appropriately issued general obligation bonds for the benefit of the Anderson County Hospital Association, a nonprofit corporation. The Court based its holding on a conclusion that the nonprofit provided "a public, corporate function." Id. at 415, 82 S.E.2d at 793. The Supreme Court reached a similar conclusion in Gilbert v. Bath, 267 S.C. 171, 182, 227 S.E.2d 177, 182 (1976), finding a one million dollar grant by Florence County to a private, nonprofit corporation for purposes of building a hospital a proper exercise of "the County's corporate purposes for which the expenditure of tax funds is authorized."

On many occasions, our Office also determined the expenditure of public funds to private nonprofit entities lawful. In an opinion of this Office dated June 27, 1988, we determined a county's allocations of funds to the Child Abuse Prevention Association of Beaufort County, a private nonprofit corporation, to be a valid appropriation of public funds. Op. Atty. Gen. Op. No. 88-52 (June 27, 1988). In another instance, we found a town's decision to donate funds to a nonprofit cemetery legal. Op. S.C. Atty. Gen. Op. No. 77-118 (April 26, 1977).

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As we declared in a prior opinion, defining what is and is not a public purpose is not an easy undertaking. Op. S.C. Atty. Gen., October 8, 2003 (citing Op. S.C. Atty. Gen., December 18, 2000). However, using the test as set forth in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), we have determined “[a]s a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose.” Op. S.C. Atty. Gen. Op. No. 88-52 (June 27, 1988).

In determining whether governmental action satisfies a public purpose, [the court] look[s] to the object sought to be accomplished. If a legislative act is designated to achieve a public goal, satisfy a public need, or solve a public problem, the method chosen by the legislative body will not invalidate the act.

Carll v. South Carolina Jobs-Economic Dev. Auth., 284 S.C. 438, 443, 327 S.E.2d 331, 334 (1985). The courts give great weight to a legislative determination as to what constitutes a public purpose or public need. Id. In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), the South Carolina Supreme Court affirmed the four-prong test formulated in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984) to determine the whether the expenditure of public funds is constitutional.

The Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.

Id. at 429, 351 S.E.2d at 163 (quoting Byrd, 281 S.C. at 407, 315 S.E.2d at 806) (emphasis supplied in Byrd).

An opinion of this Office dated October 8, 2003, dealt with the issue of whether a special tax district had the authority to transfer money to a private, nonprofit civic club. We determined the special tax district would not be authorized to do so, unless it performed a “designated public function.” In addition, we also determined the “the use of tax monies for civic club projects would also be required to meet the public purpose test.”

Although the City did not procure the funds to which it wishes to contribute to a private nonprofit entity from taxes, we find these funds to be public funds nonetheless. (Presumably, these

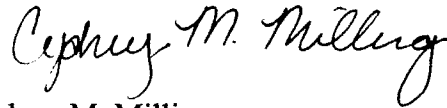
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funds were derived from expenditures of public funds to build the building owned by the City and to pay premiums on the policy held by the City insuring the building.) Thus, because the City proposes to expend public funds for the benefit of the Foundation, it must establish the Foundation will perform some designated public function. In addition, the use of the funds by the Foundation for its purposes must also meet the public purpose requirement.

### Conclusion

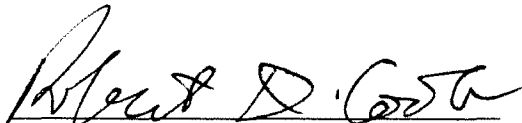
In our opinion, the City Council may take such action as necessary to establish the Union County Foundation as a nonprofit entity. However, whether the City may transfer its insurance proceeds to the Foundation hinges on whether it can be shown that the insurance proceeds will be utilized for a public purpose by the Foundation and its various projects. Such determination is a factual issue beyond this scope of an opinion of this Office and to be determined by the City based upon all the facts and circumstances. See Op. S.C. Atty. Gen., December 12, 1983; Carll, 284 S.C. at 443, 327 S.E.2d at 334. The Nichols test, as set forth above, should be used in such determination.

Very truly yours,



Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General