July 28, 2008

The Honorable Dean Fowler, Jr.
Treasurer, Florence County
180 North Irby Street MSC-Z
Florence, South Carolina 29501

Dear Mr. Fowler:

We understand from your letter that you desire an opinion of this Office regarding a $72,600 award by the County Council of Florence County (the "County Council") "to put a new roof on a building in Timmonsville, S.C. owned by Faith Life Ministries (tax exempt) . . . ." According to you, "[t]he award was made with the premise that the Timmonsville Boys and Girls Club is renting space in this building." Based on this information, you ask: "Does the fact that the Boys and Girls Club is renting space in this facility legitimize the expenditure of public funds to upgrade and enhance private property?"

Law/Analysis

As we concluded in numerous opinions of this Office, the State Constitution requires that public funds only be used for public purposes. Ops. S.C. Atty. Gen., January 11, 2006; October 8, 2003; June 27, 1988; July 24, 1984. Article X, section 5 of the South Carolina Constitution (Supp. 2007) mandates: "Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." In addition, Article X, section 11 of the South Carolina Constitution (Supp. 2007) 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." According to State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), the South Carolina Supreme Court interprets this provision as prohibiting the expenditure of public funds for the primary benefit of private parties.

From court decisions, we understand that what constitutes a public purpose is a "fluid concept which changes with time, place, population, economy and countless other circumstances." Bauer v. South Carolina State Housing Auth., 271 S.C. 219, 227, 246 S.E.2d 869, 873 (1978). As our Supreme Court explained in Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975):

> The courts have, as a rule, been reluctant to attempt to define public purpose as contrasted with a private purpose, but have generally left each case to be determined on its own peculiar circumstances. As 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. At the same time legislation is not for a private purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment.

Generally, South Carolina courts give deference to a legislative body in its determination of a public purpose. WDW Prop. v. City of Sumter, 342 S.C. 6, 12-13, 535 S.E.2d 631, 634 (2000). "[T]he courts will not interfere unless it appears that the legislative body was clearly wrong." Caldwell v. McMillan, 224 S.C. 150, 158, 77 S.E.2d 798, 801 (1953). Through case law, our courts developed a four-prong test to determine whether an act by a legislative body promotes a public purpose. This test is set forth as follows: "'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.'" Nichols v. South Carolina Research Auth., 290 S.C. 415, 429, 351 S.E.2d 155, 163 (1986) (quoting Byrd v. Florence County, 281 S.C. 402, 407, 315 S.E.2d 804, 806 (1984)).

By your letter, you informed us that County Council appropriated $72,630 to repair the roof of a building currently leased to the Timmonsville Boys and Girls Club (the "Boys and Girls Club"). From the information you provided, it appears that County Council directly paid the company performing the roofing and neither the Boys and Girls Club, nor the organizations owning or leasing the building received funds directly from the County. You attached an invoice addressed to the Boys and Girls Club for this amount and a memo from County Council authorizing payment of this amount and indicating it is for the "roof replacement at the Timmonsville Boys & Girls Club." Thus, we begin with the presumption that the expenditure is to benefit the Boys and Girls Club.

As we understand it, the Boys and Girls Club is a non-profit organization providing facilities and programs to young people during non-school hours. In several opinions, our courts determined that public funds may be expended for the benefit of a non-profit entity without violating the provisions in article X of our Constitution when the non-profit used such funds to perform a public function. See Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976) (finding a grant by Florence County to a private, non-profit corporation for the purpose of building a hospital served a public function of Florence County); Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954) (determining that Anderson County could issue general obligation bonds for the benefit of the Anderson County

Hospital Association, a non-profit corporation, because it provided "a public, corporate function"). Thus, pursuant to these decisions, a court is not prohibited in finding the Boys and Girls Club is eligible to receive public funds because it is a private, rather than public, entity.

Furthermore, we understand that the Boys and Girls Club provides young people with educational and recreational activities. In other opinions of this Office, we determined that recreational programs likely satisfy the public purpose requirement. Ops. S.C. Atty. Gen., January 8, 1997 (finding the City of Newberry may contract with the Newberry Family YMCA to provide recreation programs for its residents); April 2, 1987 (finding Aiken County may allocate funds to civic organizations for recreational purposes); August 23, 1977 (finding "the City of Dillon is empowered to contract for the provision of recreational services by local, non-profit organizations for 'specified recreational programs and activities', assuming that these recreational programs in fact subserve a public purpose."). Likewise, we have also determined that educational programs satisfy the public purpose requirement. See Ops. S.C. Atty. Gen., June 26, 1997; November 19, 1996; May 13, 1996; September 27, 1995. Accordingly, if a court were to find that by allocating funds on behalf of the Boys and Girls Club, County Council sought to further recreational and educational programs, we believe the court would also likely find that this allocation satisfies the constitutional requirement of benefitting a public purpose. However, as we indicated on numerous occasions, this Office does not have the jurisdiction of a court to investigate and determine factual issues. Op. S.C. Atty. Gen., July 17, 2007. Thus, whether or not County Council's $72,630 expenditure on behalf of the Boys and Girls Club satisfies the public purpose requirement must ultimately be decided by a court.

Nonetheless, we do not believe your concern lies with whether County Council may appropriate funds to the Boys and Girls Club for its facilities. The crux of your concern appears to rest with the fact that the Boys and Girls Club is renting space in a building owned by Faith Life Ministries, a non-profit, religious organization. Thus, you are concerned that by appropriating funds to replace the roof on behalf of the Boys and Girls Club, County Council benefits a non-profit religious organization.

In you letter, you mentioned an opinion issued by this Office in 2005 in which we addressed the City of Gaffney's ability to move a storm drain located on church property. Op. S.C. Atty. Gen., February 3, 2005. We noted that "counties and municipalities cannot expend public funds or use equipment or employees to perform work on private property unless a public purpose can be demonstrated." Id. Finding church property to be private property, we concluded that "the general constitutional prohibitions against using public funds for private purposes or expending public funds for work on private property apply with equal force to church property." Id. Accordingly, we advised that the City's work on the church's property does not meet the constitutional public purpose requirement. Id.

The situation posed in your letter is slightly different from that addressed in our 2005 opinion. While the property is owned by a private, religious organization, it is being used to house

the Boys and Girls Club. The information provided in your request indicates that County Council appropriated funds for the new roof on behalf of the Boys and Girls Club, rather than Faith Life Ministries. Thus, in this situation, unlike in our 2005 opinion, the appropriation is on behalf of the Boys and Girls Club, which as we determined above may satisfy the public purpose requirement. However, we cannot ignore the fact that Faith Life Ministries, as the owner of the building, is likely to receive at least some benefit from County Council's appropriation. As our courts concluded in the past, "an incidental benefit to private individuals is not fatal to a finding of public purpose." Wolper v. City Council of City of Charleston, 287 S.C. 209, 216, 336 S.E.2d 871, 875 (1985). Nonetheless, the question remains to be answered as to whether the new roof is merely an incidental benefit to Faith Life Ministries or whether the appropriation of the funds for the new roof primarily benefits a private organization and therefore, does not serve a public purpose.

You included a copy of the lease of the building to the Boys and Girls Club with your request. The lease, as you pointed out, is not between Faith Life Ministries and the Boys and Girls Club, but is between Golden Gate Christian Academy and the Boys and Girls Club. Presuming Faith Life Ministries is the record owner of the building, we can only deduce that this lease is a product of some sort of subleasing arrangement. The lease indicates that it is effective as of April 10, 2008 and provides for a lease term of twenty years. In addition, as you noted in your letter, the lease provides as follows: "Landlord shall, at its own cost and expense, maintain the roof, foundation, exterior walls and structural portions of the premises in a safe and stable condition and make all necessary repairs, restorations and replacements thereof." Thus, assuming this lease has not been amended, it appears that the landlord, Golden Gate Christian Academy, must make needed repairs to the roof of the building.

Without the ability to perform an investigation into this matter, we can only speculate as to the reason the Boys and Girls Club is taking on the responsibility to install a new roof on the building. However, the fact that the Boys and Girls Club is taking on this responsibility, when it does not appear it is legally responsible certainly raises a question as to whether County Council's appropriation serves the Boys and Girls Club or its landlord or even the owner of the property. But, without the benefit of knowing all of the facts regarding this situation, we feel this question is best answered by a court, which has the ability sort through evidence and make factual determinations as to whether County Council's $72,600 appropriation benefits the Boys and Girls Club with only an incidental benefit to Golden Gate Christian Academy or Faith Life Ministries or whether these organizations are in fact the primary beneficiaries of public funds. Op. S.C. Atty. Gen., September 14, 2007.

Conclusion

Based on our analysis above, we believe a court is likely to find that an appropriation to the Boys and Girls Club to put a new roof on their facility satisfies the public purpose requirement. However, given the information provided in your letter, we are concerned with whether the Boys and Girls Club's landlord, Golden Gate Christian Academy, or the owner of the property, Faith Life Ministries, will receive more than an incidental benefit from the appropriation, especially in light

of the fact that the Boys and Girls Club, pursuant to the lease you provided, does not appear to bear the responsibility for maintenance and repair of the roof. Nonetheless, because the determination of exactly how much benefit the Golden Gate Christian Academy and Faith Life Ministries will receive from the appropriation is a factual determination, we believe only a court may ultimately resolve this issue.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Deputy Attorney General