ALAN WILSON
ATTORNEY GENERAL

March 14, 2011

Mr. Steven A. Gantt
City Manager
City of Columbia
P.O. Box 147
Columbia, SC 29217

Dear Mr. Gantt:

We received your letter requesting an opinion of this Office concerning the legality of the City of Columbia funding the burial of electrical utilities owned by Columbia College. According to your letter, the South Carolina Department of Transportation ("SCDOT") is "streetscaping" the area of North Main Street near Columbia College. Public funds are being used to relocate utility lines underground within the North Main Street right of way. Columbia College has requested that the City of Columbia fund the underground relocation of electrical utilities owned and maintained by it and located on the Columbia College campus outside of the North Main Street right of way. These utilities are part of the electrical distribution system which serves the Columbia College campus. Specifically you asked whether "state law or the South Carolina Constitution prohibits the City of Columbia from using public funds to relocate Columbia College's utilities."

Law/Analysis

Columbia College is a private educational institution affiliated with the United Methodist Church. Article X, section 11 of the South Carolina Constitution provides in pertinent part: "The credit of neither the State nor 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."[1] This Office has previously concluded "that this provision is violated 'when public funds are appropriated to a private entity and such appropriation is not for a public purpose.'" Op. S.C. Att'y Gen. (October 28, 2008) (citing Op. S.C. Att'y Gen. (March 19, 1985)). Although the City of Columbia's funding the "burying" of Columbia College's utility lines clearly benefits a private education institution, it could be argued that the expenditure serves a public purpose and primarily benefits the public.

This Office has previously opined that the Laurens County Council could provide bond proceeds to, *inter alia*, assist in the construction, paving, landscaping, lighting, and purchasing of real property to be used

[1] Section 3 of Article XI of the South Carolina Constitution addresses "free public school and other public institutions of learning."

for public parking in the downtown area of Clinton, which public parking lot would also benefit the Presbyterian College Pharmacy School. Op. S.C. Att'y Gen. (October 28, 2008). In that opinion, this Office noted that our courts recognize economic development as a legitimate public purpose. Id. (citing Ed. Robinson Laundry and Dry Cleaning, Inc. v. South Carolina Dep't of Revenue, 356 S.C. 120, 588 S.E.2d 97 (2003) and Nichols v. South Carolina Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986)). Further, we recognized that providing parking open to the public serves a public purpose. Id. (citing Cameron v. City of Chester, 253 S.C. 574, 172 S.E.2d 306 (1970)). While this Office is unaware of the circumstances surrounding the "streetscaping" project and cannot find facts (*e.g.*, Op. S.C. Att'y Gen. (November 10, 1988)), it is certainly possible that the burying of Columbia College's utility lines in an area where surrounding lines have been buried as part of a "streetscaping" project would serve the public purpose of economic development. For example, such project may provide an aesthetic and safety benefit resulting in revitalization of the area. Further, it may generate economic activity by attracting additional students, faculty, and staff to the City. Additionally, such project may provide a sense of civic pride to the area. While relocating Columbia College's utility lines underground clearly benefits the College, it appears that such relocation would provide public benefits as well and may primarily benefit the public.

The more troubling constitutional provision for Columbia College is article XI, section 4 of the South Carolina Constitution. This section provides, "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution."[2] "[T]he line of demarcation between a violation and a non-violation of Art. XI, § 4 appears to be whether the particular aid primarily benefits the student or the institution itself." Op. S.C. Att'y Gen. (May 13, 1996). There are numerous opinions of this Office which opine that the particular benefit at issue to the private or religious institution is "indirect" and therefore does not violate Art. XI, § 4 of the South Carolina Constitution. For example, we deemed the lending of money (in the form of tuition payments) to students who are South Carolina residents but attend out-of-state sectarian institutions constitutional because the benefit to the schools was "indirect." Op. S.C. Att'y Gen. (June 5, 1973). Further, this Office decided that the South Carolina Department of Education's loaning educational films to parochial schools did not directly benefit the institution itself, but rather the students who attend the institution and learn from the loaned films. Op. S.C. Att'y Gen. (January 4, 1974). Subsequently, this Office opined that utilization of State funds to purchase textbooks for use at private colleges as part of a program to encourage enrollment of African Americans in health care programs did not violate Article XI, section 4 of the South Carolina Constitution. We noted that the benefit to the colleges would appear to be indirect and that "the public benefit would greatly outweigh any incidental private gain." Op. S.C. Att'y Gen. (July 12, 1983). In 1994, we decided that tuition assistance grants to students attending Columbia Bible College did not violate Article XI, section 4 because, *inter alia*, the aid would be for the direct benefit of the students, not the institution. Op. S.C. Att'y Gen. (February 2, 1994)

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[2] This Office explained the changes between the current version of article XI, section 4 and the previous version in a prior opinion dated January 4, 1974. According to this opinion, "a comparison of the amended version and the original provision . . . reveals that the amended version is much less restrictive in the prescribed connections between the State and private religious educational institutions, to wit: Section 4 no longer contains a prohibition against the "property" of the State being used in aid of any religious or sectarian institution. Likewise, the word "indirectly," referring in the original provision to the use of State property, credit or money in aid of religious or sectarian institutions, has been deleted . . . ."

See also Ops. S.C. Att'y Gen., January 9, 2007 (finding a pre-kindergarten program providing funding to faith-based preschools does not violate article XI, section 4); April 29, 2003 (bill allowing the use of lottery funds to contract with institutions of higher education to provide opportunities to low-income, educationally disadvantaged students does not violate article XI, section 4); September 27, 1995 (State funding of the South Carolina Institute of Leadership for Women at Converse College does not run afoul of article XI, section 4): March 19, 1985 (tuition assistance for students attending private for-profit colleges does not violate article XI, section 4).

In contrast, this Office concluded that the a distribution of three million dollars of State lottery funds to private educational institutions for "Historically Black College and University Maintenance and Repair" does violate Article XI, section 4 of the South Carolina Constitution . This Office stated:

> Applying the . . . constitutional history, as well as the plain language of Art. XI, § 4, it is evident that an appropriation to South Carolina's historically black colleges contravenes the State Constitution as a "direct benefit" to "private educational institutions." If this constitutional prohibition is to retain any meaning, it must be deemed to prohibit a direct appropriation to certain private colleges and institutions of higher learning. . . . [T]he provision was designed to insure 'that public funds should not be granted outrightly to [private institutions of higher education].'

Op. S.C. Att'y Gen. (January 7, 2003). This Office opined that "this was precisely the type of 'direct benefit' to a private educational institution with which the framers and the people were concerned and sought to prohibit." Id. Likewise, this Office opined that rent payments from the Charleston County School District to Florence Crittendon Day Care Program, a private program operating for the benefit of pregnant young women who do not wish to continue their education in the public schools, would violate Article XI, section 4 as a direct benefit to the institution.

Pursuant to the authorities discussed above, it appears at first blush that using public money to bury electrical utilities located on the campus of Columbia College, which are owned and maintained by the College, would be a direct benefit to a private educational institution in violation of Article XI, section 4 of the South Carolina Constitution. On its face, the aid in this particular case appears to primarily benefit the institution itself rather than the students. However, this Office is unaware of the specific details of the "streetscaping" project, which, according to your letter, involves the South Carolina Department of Transportation, the City of Columbia, as well as federal funds. "Whether a particular grant would constitute a 'direct benefit' to invoke [Article XI, section 4] would be a question of fact . . . and addressing questions of fact does not fall within the scope of opinions of this Office." Op. S.C. Att'y Gen. (November 10, 1988). Accordingly, as this Office is not permitted to find facts with regard to this particular "streetscaping" project, it is unable to issue an opinion as to the constitutionality of burying Columbia College's electrical utilities.

Conclusion

We have set forth the applicable law which would govern the situation presented by you. However, the precise answer to your question ultimately will turn on the facts. In our opinion, whether or not the City of Columbia may use public funds to relocate Columbia College's utilities hinges on Article XI, section 4 of the South Carolina Constitution which prohibits the use of public funds for "the direct benefit of any religious or other private educational institution." Whether a particular grant, in this case the funding of the underground relocation of Columbia College's electrical utilities, constitutes a "direct benefit" to the College is a question of fact, which does not fall within the scope of opinions of this Office. Therefore, the City of Columbia must ultimately determine whether its use of public funds to relocate underground Columbia College's electrical utilities would constitute a "direct benefit" to the College pursuant to Article XI, section 4 of the South Carolina Constitution.

Very truly yours,

ElizabethAnn L. Felder
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General