ALAN WILSON
ATTORNEY GENERAL

November 17, 2011

Chairman Mike J. Spencer, Jr.
Fire Control Board of Carlisle, S.C.
P.O. Box 525
Carlisle, South Carolina 29031-0525

Dear Chairman Spencer:

You have contacted this Office inquiring whether the Fire Control Board of Carlisle, South Carolina ("the Board"), may enter an agreement whereby the Board would "lease to buy" a new fire station constructed by a private entity.[1]

You have provided this Office with a copy of the 1997 Union County ordinance creating the Board. This ordinance indicates the Carlisle Fire District is a fire protection district created pursuant to section 4-19-10 *et seq.* of the South Carolina Code (1986 & Supp. 2010). The Board is the administrative commission for the district. *See* S.C. Code Ann. § 4-19-20(4) ("The fire protection district may be operated as an administrative division of the county, or the governing body [of the county] may appoint a commission . . . and provide for their duties and terms of office."). Because the Board's role is administrative in nature, the Board's powers are limited to the functions lawfully delegated to it by ordinance.

In this opinion, we will first survey several types of financial arrangements that serve a "lease to buy" function. Next, we will consider whether the county can engage in such arrangements. Finally, we will discuss whether the governing body of the county has delegated such power to the Board.

Issue 1: "Lease to buy" arrangements

There are at least two general types of financial arrangement that would be consistent with the "lease to buy" scenario you have described to this Office via telephone: a lease-purchase and a lease option. A lease-purchase agreement is "[a] rent-to-own purchase plan under which the buyer takes possession of the [property] with the first payment and takes ownership with the final payment." *Black's Law Dictionary* (9th ed. 2009). A lease option is lease containing "a clause that gives the renter the right [but not the obligation] to buy the property at a fixed price, [usually] at or after a fixed time." This type of agreement is also known as a lease with an option to purchase. *Id.* Lease-purchase agreements can take a variety of forms. For example, a lease-purchase agreement might give the lessee an option to purchase at a nominal sum following the final lease payment, rather than transferring title automatically. *See* Reuven Mark Bisk, Note, *State and Municipal Lease-Purchase Agreements: A Reassessment*, 7 Harv. J.L. & Pub. Pol'y

[1] This Office has not reviewed a proposed contract in connection with this request.

521, 522 (Fall 1984) ("Lease-purchase agreements are rental contracts that provide for passage of title to the lessee at the end of the lease either automatically or through exercising a nominal purchase option."), *quoted in* Letter to Kenneth D'Vant Long, Op. S.C. Att'y Gen. No. 85-140 (Dec. 9, 1985).

In addition to these lease-based arrangements, the fire district might consider an arrangement whereby each of several payments is the purchase price for an undivided interest in a portion of the property. This type of arrangement appears to have gained popularity among local governments in South Carolina in recent years. *See, e.g.*, Letter to The Honorable James H. Harrison, Op. S.C. Att'y Gen. (Nov. 13, 2000). It is distinct from a typical lease-purchase scenario in that, rather than obtaining title at the end of the lease, the purchasing entity receives an ownership interest in a portion of the property with every payment.

Issue 2: County's authority

It is likely that a court would find any of the financial arrangements discussed above are within the county's general powers. *See generally* S.C. Code Ann. §§ 4-9-30(2)-(3), 4-19-10 (1986 & Supp. 2010); Letter to Sherri Yarborough, Op. S.C. Att'y Gen. (May 23, 2008). Counties are expressly authorized to enter lease-purchase agreements in certain circumstances,[2] and recent legislative efforts to limit the use of such agreements by counties and other "governmental entities" imply recognition that they are not wholly prohibited.[3]

Assuming that a county's general powers include the power to enter financial arrangements of the kinds discussed above, the next pertinent question would be whether a particular arrangement is consistent with the Constitution and general law of the State. *Cf. Hospitality Ass'n of S.C., Inc. v. County of Charleston*, 320 S.C. 219, 224, 464 S.E.2d 113, 116-17 (1995) ("Determining if a local ordinance is valid is essentially a two-step process. . . . [I]f the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.").

A. Constitutional limitations

Article X, section 14 of the South Carolina Constitution provides, in relevant part:

> (2) The political subdivisions of the State shall have the power to incur bonded indebtedness in such manner and upon such terms and conditions as the General Assembly shall prescribe by general law within the limitations set forth in this section and Section 12 of this article.
>
> Such political subdivisions shall have the power to incur indebtedness in the following

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[2] *E.g.*, S.C. Code Ann. § 48-52-660 (2008) (allowing state agencies or political subdivisions to enter lease-purchase agreements for the acquisition of energy efficient products under certain circumstances).

[3] See part B, below, for a discussion of these legislative efforts.

> categories and in no others:
>
> > (a) General obligation debt; and
> >
> > (b) Indebtedness payable only from a revenue-producing project or from a special source as provided in subsection (10) of this section.
>
> (3) "General obligation debt" shall mean any indebtedness of the political subdivision which shall be secured in whole or in part by a pledge of its full faith, credit and taxing power.
>
> . . . .
>
> (7) Subject to the provisions of subsection (4) of this section . . . general obligation debt may also be incurred by the governing body of each political subdivision:
>
> > (a) For any of its corporate purposes in an amount not exceeding eight percent of the assessed value of all taxable property of such political subdivision; or
> >
> > (b) General obligation debt incurred pursuant to and within the limitations prescribed by Section 12 of this article.
>
> In determining the debt limitations imposed by the provisions of subsection (7) of this section . . . bonded indebtedness incurred pursuant to subsection (b) of this section, shall not be considered.

(Emphasis added). Section 12 of article X provides:

> No law shall be enacted permitting the incurring of bonded indebtedness by any county for . . . fire protection . . . or any other service or facility benefitting only a particular geographical section of the county unless a special assessment, tax or service charge in an amount designed to provide debt service on bonded indebtedness or revenue bonds incurred for such purposes shall be imposed upon the area or persons receiving the benefit therefrom.

(Emphasis added). Therefore, where a county incurs "bonded indebtedness" for one of the purposes enumerated in article X, section 12, it may do so without complying with the limitation as to the amount of the debt found in subsection (7) of article X, section 14. However, it may only incur indebtedness that is either (a) general obligation debt as that term is defined above or (b) debt payable from a revenue-producing project or special source. Moreover, it may not incur indebtedness unless it imposes an assessment, tax, or service charge sufficient to provide service on that debt.

Courts have been asked on numerous occasions to determine whether a particular financial arrangement constitutes indebtedness within the meaning of these provisions, or similar ones from other states. *See* Letter to Kenneth D'Vant Long, Op. S.C. Att'y Gen. No. 85-140 (Dec. 9, 1985) (describing how other jurisdictions have resolved similar questions). As we previously have described in detail, whether a

particular arrangement creates indebtedness will depend to a great degree upon its precise terms. *Id.* One key consideration will be whether the terms of the arrangement limit the scope of the government's obligations to the current fiscal year. For example, a non-appropriation clause explicitly "reserves to the governmental entity the right to terminate its legal liability under the [contract] if for any reason it chooses not to make the necessary appropriations . . . in a future fiscal year." *Id.* While the precise wording used to achieve this result may vary, the substance of the provision is that the government entity's current liability is limited to the current year's payment, and any future obligation to pay is contingent upon funds being made available for that purpose.

Where a financial arrangement includes an adequate non-appropriation clause, courts typically find that the arrangement does not constitute indebtedness in the constitutional sense. *Id.*; Letter to Frans N. Mustert, Op. S.C. Att'y Gen. (Oct. 6, 2003); 81A C.J.S. States § 370 ("Generally, an obligation is not a debt within a constitutional limitation, where it is payable from funds on hand or current revenue. . . . A state debt includes all absolute obligations to pay money, or its equivalent, from funds to be provided, as distinguished from money presently available, or in the process of collection, and so treatable as on hand." (emphasis added)); *e.g.*, *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 232-35, 638 S.E.2d 685, 689-91 (2006) (reaffirming the principle that "general obligation debt embraces neither yearly expenses payable from current revenues nor contingent liabilities of the governmental entity . . . because the governmental entity is not obligated to impose property taxes for their payment" (quoting *Caddell v. Lexington County Sch. Dist.*, 296 S.C. 397, 400, 373 S.E.2d 598, 599 (1988))). Therefore, assuming your financial arrangement will include a non-appropriation clause, it is likely a court would find that article X, sections 12 and 14 pose no obstacle thereto.

B. Statutory limitations

Of particular relevance to your question is section 11-27-110 of the South Carolina Code (2011), which limits the circumstances under which a "governmental entity" may enter a "financing agreement," as those terms are defined by the same. "Financing agreement" is defined as follows:

> "[F]inancing agreement" means, with respect to any governmental entity, any contract entered into after December 31, 1995, under the terms of which a governmental entity acquires the use of an asset which provides:
>
> > (a) for payments to be made in more than one fiscal year, whether by the stated term of the contract or under any renewal provisions, optional or otherwise;
> >
> > (b) that the payments thereunder are divided into principal and interest components or which contain any reference to any portion of any payment under the agreement being treated as interest;
> >
> > (c) that title to the asset will be in the name of or be transferred to the governmental entity if all payments scheduled or provided for in the financing agreement are made; and
> >
> > (d) for any contract entered into after December 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or

> other political subdivision to a nonprofit corporation, political subdivision, or any other entity in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities. This item shall apply to any contracts entered into after August 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or other political subdivision to a non-profit corporation, political subdivision, or any other entity, from any source other than the issuance of general obligation indebtedness by the school district, in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities.
>
> However, the term excludes any refinancing agreement and contracts entered into in connection with issues of general obligation bonds or revenue bonds issued pursuant to authorization provided in Article X of the Constitution.

Id. § 11-27-110(A)(6). In the opinion of this Office, a contract used to finance a fire station will be a "financing agreement" within the meaning of section 11-27-110 only if it meets the literal terms of subsections (a) through (c).[4] Our Supreme Court has refused to apply section 11-27-110 to an arrangement that does not fall within the letter of the definitions therein. *Colleton County Taxpayers Ass'n*, 371 S.C. at 233, 638 S.E.2d at 690 ("[T]his argument overlooks the inescapable fact that the scheme put in place by the . . . agreements complies with the letter of the statute's requirements."). Therefore, if the arrangement you contemplate will not fit within the precise terms of this statute, a court likely would find that the restrictions imposed by section 11-27-110 do not apply.

Notably, we suggested in a previous opinion that an arrangement whereby a governmental entity purchases an undivided interest in a portion of the property at issue each time it makes a payment would not fall within the literal terms of subsection (c), and therefore, would not constitute a "financing agreement." Letter to The Honorable James H. Harrison, Op. S.C. Att'y Gen. (Nov. 13, 2000).[5]

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[4] Subsection (d) concerns only those contracts used to finance projects for school buildings and school facilities. Despite the placement of an "and" between subsections (c) and (d), we do not believe a contract must satisfy subsection (d) in order to be a "financing agreement." Previously, the definition of "financing agreement" ended with subsection (c) and the "and" was placed between subsections (b) and (c). S.C. Code Ann. § 11-27-110 (Supp. 2005); *see Colleton County Taxpayers Ass'n*, 371 S.C. at 231 n.8, 638 S.E.2d at 689 n.8 (construing the previous version of the definition to require all three subsections—(a) through (c)). With the 2006 revision of this definition, the General Assembly added subsection (d) and moved the "and." The title of Act 388 of 2006, which made these changes, states in relevant part that the Act was "to amend section 11-27-110 . . . relating to lease purchase or financing agreements subject to constitutional debt limitations, so as to revise the definition of a 'financing agreement' and 'refinancing agreement' to include certain school district or political subdivision contracts." Act No. 388, 2006 S.C. Acts 3135, 3135-36 (emphasis added). This title suggests the amendment was intended to add a new subset of contracts to the term "financing agreement," not to limit that term to the narrow subset of contracts concerning schools.

[5] Though we were construing a previous version of section 11-27-110, the relevant subsections remain unchanged in substance.

Subsequent case law has not presented a reason to vary from this view.

Moreover, while our Supreme Court has acknowledged legislative disapproval of certain lease-purchase agreements, it has not treated that disapproval as bearing on the validity of the Court's previous decisions regarding whether such agreements create constitutional "indebtedness" within the meaning of article X. *E.g.*, *Colleton County Taxpayers Ass'n*, 371 S.C. at 234-36, 638 S.E. at 690-91; *cf. Berkeley County Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 351, 679 S.E.2d 913, 922 (2009) (Pleicones, J., concurring in result) ("Moreover, while S.C Code Ann. § 11-27-110 (Supp.2008) subjects school district lease-purchase agreements to the constitutional limits on general obligation debt, it cannot and does not purport to convert those obligations into general obligation debt.").

In sum, section 11-27-110 does not affect the constitutionality of a financial arrangement. However, if an arrangement falls within the precise terms of that section, it must comply with the restrictions imposed therein.[6] This Office has opined previously that if a financial arrangement transfers an undivided interest in a portion of the property with each payment, the arrangement would not be a "financing agreement" within the meaning of section 11-27-110, and therefore, would not be subject to the restrictions of that section.

C. Conclusion

Because this Office has not reviewed a proposed contract in conjunction with your request, it is not possible to give a definite answer concerning the legality of your proposed transaction. Depending upon the precise terms of the contract, there might be other constitutional or statutory provisions that merit consideration. Nevertheless, it does appear likely that the county could use one of the forms discussed above in Issue 1 to finance a fire station, particularly if the contract includes a non-appropriation clause and is drafted in a manner that does not trigger section 11-27-110.

Issue 3: Authority delegated to the Board

As an administrative body, the Board's authority is limited to the powers lawfully conferred upon it by ordinance. *See generally Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 234-35, 489 S.E.2d 630, 632 (1997) ("[A] municipality may delegate the administration of its ordinances to a board provided the board's discretion is sufficiently limited by clear rules and standards."); *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 491 n.9, 536 S.E.2d 892, 897 n.9 (Ct. App. 2000) ("The [zoning board] is a creature of . . . ordinance and as such is controlled by that ordinance.").

Section 2.03 of the Union County ordinance creating the Board provides, in relevant part:

> The Board of Fire Control . . . shall be authorized to exercise powers as to the policies of the Carlisle Fire District which shall not be inconsistent with the general policies established by the governing body of the county and pursuant to that authority shall be

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[6] In particular, section 11-27-110 requires voter approval for "financing agreements" in certain circumstances, and the existence of a "financing agreement" might reduce the ability of a "governmental entity" to incur new general obligation debt in the future. A copy of the statute is enclosed.

> empowered to:
>
> (1) To buy such fire-fighting equipment as the Board deems necessary for the purpose of controlling fires within the money allocated or made available to the Board for such purposes.
>
> (2) To select the sites or places within the area where the fire-fighting equipment shall be kept.
>
> . . . .
>
> (6) To promulgate such rules and regulations as it deems necessary to ensure that the equipment is being used to the best advantage of the area. To construct, if necessary, buildings to house the equipment authorized herein.
>
> (7) To purchase, lease, hold and dispose of real and personal property in the name of the county for the exclusive use of the Carlisle Fire District. Provided, however, that any such conveyance, lease or purchase of real property shall be by the county governing body and in accordance with the provisions of Sections 4-9-10 *et seq.*, as amended.
>
> (8) Cooperate or enter into contracts or agreements with any public or private agency which results in improved services or the receipt of financial aid in carrying out the functions of the Carlisle Fire District. Provided, however, that such contracts and agreements shall be subject to approval by the governing body of the county.

In the context of a financial arrangement concerning the lease and/or purchase of real property, these provisions appear to require some action by the governing body of the county. However, it is not entirely clear what action is required. While the first sentence of item (7), above, permits the Board to purchase or lease real property in the name of the county, the second sentence requires such purchase or lease to be "by the county governing body." These sentences appear to be in tension with one another.

Notably, the governing body of the county has specific powers concerning fire protection districts enumerated by section 4-19-10, in addition to the county's general powers conferred by section 4-9-30. S.C. Code Ann. § 4-19-170 (1986) (providing such powers are "in addition to all other powers and authorizations previously vested in the governing body"). In particular, "[t]he governing body of each county has the following powers . . . [t]o be responsible for the purchase, acquisition, upkeep, maintenance, and repairs of all fire-fighting equipment and fire stations and the sites of the stations . . . [and] [t]o construct the necessary buildings to house the equipment authorized by this chapter, and all fire stations necessary to provide an adequate fire protection system." S.C. Code Ann. § 4-19-10. A comparison of the language of section 4-19-10 and the ordinance above reveals that while the Board was given broad authority concerning fire-fighting <u>equipment</u> and buildings to house the same, the language of section 4-19-10 concerning fire <u>stations</u> was omitted from the ordinance.

These omissions, together with the ambiguity described above, raise concerns about whether the Board has been empowered to execute a financial arrangement that results in the purchase of a fire station. In

the face of such concerns, it might be prudent to include the governing body of the county as a signatory to any such arrangement.[7]

Issue 4: Other methods of funding the fire station

You have also asked what other methods of financing might be available. We briefly touch on some options here.

The Union County ordinance creating the Carlisle Fire District permits county council to issue general obligation bonds for the purpose of providing fire stations. Union County Ordinance § 4.01 (Oct. 8, 1997) (allowing county council to issue bonds for capital expenditures, including bonds for the "purchasing of appropriate sites and the construction thereon of firehouses"); *see generally* S.C. Code Ann. § 4-19-50 (authorizing such bonds). Whether this source of funding would provide a viable alternative at the present time would depend upon factual considerations, including but not limited to the cost of the fire station. Accordingly, we refer you to local counsel for further discussion in this regard.

In addition, the ordinance allows the Board to enter contracts with public or private agencies, subject to approval by the governing body of the county, where such contracts will result in "improved services or the receipt of financial aid in carrying out the functions of the Carlisle Fire District." Union County Ordinance § 2.03(8) (above). Thus, it might be worthwhile to investigate whether your current project qualifies for aid of any kind.

Very truly yours,

Dana E. Hofferber

Dana E. Hofferber
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

[7] In addition to the concerns above, the governing body's ability to delegate its authority might be limited by other law. For example, section 4-9-130 of the South Carolina Code (1986) would limit any delegation of the ability to alienate property owned by the county. *Id.* ("Public hearings . . . must be held before final council action is taken to . . . sell, lease or contract to sell or lease real property owned by the county.").