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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

October 6, 2003

Frans N. Mustert, Chairman
Tourism Expenditure Review Committee
P. O. Box 125
Columbia, South Carolina 29214-0120

Dear Mr. Mustert:

You note that the Tourism Review Committee has reviewed the expenditure of Accommodations Tax funds by Florence County and you seek an opinion "on the use of Accommodations Tax funds to fund the retirement and service of debt on the Florence Civic Center." By way of background, you provide the following information:

Section 6-4-10(4)(b)(3) addresses the use of accommodations tax funds for the construction of Civic Centers, while Section 6-4-15 addresses the use of accommodations tax funds for debt service where the debt is incurred for the construction of a Civic Center. The last sentence of this section states that none of the revenue received by a municipality or county from the Accommodation Tax may be used to retire outstanding bonded indebtedness, unless Accommodation Tax revenue was obligated for that purpose when the debt was incurred.

In the Florence County case, it appears that the county has authorized the use of \$230,000.00 of accommodations tax funds for the Civic Center. In accompanying notes to the Financial Statements for the year ending June 30, 2002, it explains the use of those funds to be for the debt service on "Certificates of Participation" issued in 1993. These "Certificates of Participation" were issued to repay other certificates which were issued in 1990. The indebtedness, which was incurred in 1990 was taken off the Long Term Debt Account Group of the county which makes it sound like a bond issue. Since the county began levying a special 1.5 mill Property Tax in fiscal 1991 to repay the indebtedness they incurred, for amongst other items the Civil Center, it appears that the indebtedness had the substance, even though not in words, of a bond issue for the express purpose to build the Civic Center. Accommodations tax funding was not mentioned in any of these transactions.

It appears to the Tourism Expenditure Review Committee that Section 6-4-10(4)(b)(3) addresses expenditures, which may occur within a short time span, and

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was not meant to obligate future councils as to the use of Accommodations Tax funds, while Section 6-4-15 addresses specifically any long-term obligation.

Could you please issue your opinion as to whether or not the usage of Accommodations Tax funds is proper in this case, given the information above?

You have also enclosed a document entitled Notes To Financial Statements (Year Ended June 30, 2002) which was provided to you by Florence County. This document summarizes the current funding by Florence County of the Florence Civic Center. The Notes read as follows:

On December 23, 1992, the County issued \$45,880,000 in certificates of participation with an average interest of 5.54% to advance refund \$41,845,000 of outstanding 1990 certificates of participation with an average interest rate of 7.31%. The net proceeds of \$43,692,903 (after providing for \$2,342,484 in underwriting fees, insurance, and other issuance costs) were deposited in an irrevocable trust with an escrow agent to provide for all future debt service payments on the 1990 certificates of participation. As a result, the 1990 certificates of participation are considered to be defeased and the liability for those certificates has been removed from the General Long-Term Debt Account Group. On March 1, 2000, at the first call date for the 1990 certificates, \$33,862,338 from the irrevocable trust was used to pay the outstanding balance of these certificates. Therefore, at June 30, 2002, the balance outstanding of the 1990 certificates was zero (\$0).

The County advance refunded the 1990 certificates of participation to reduce its total debt service payments over the next 22 years by almost \$815,000 and to obtain an economic gain (difference between the present values of the debt service payments on the old and new debt) of \$715,340.

The County is obligated under the certificates of participation issued on December 23, 1992 as noted above. (See Note 8) The annual payments for these certificates are contingent upon County Council making an annual appropriation for each year's lease requirement. These certificates are accounted for as capital leases in the General Long-Term Debt Account Group. Because they are not backed by the full faith and credit of the County, they do not represent general obligation debt of the County. The following is a schedule of future minimum lease payments under capital leases, together with the net present value of the minimum capital lease payments as of June 30, 2002.

NOTE 8. COMMITMENTS (Continued)

During fiscal year 1993, Florence County Council approved an ordinance and certain agreements authorizing the sale of \$45,880,000 of Refunding Series Certificates of Participation. The proceeds of this issue were placed in an irrevocable trust to

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provide for all future debt service payments of the 1990 Certificates of Participation. The County's obligation to repay these certificates is dependent upon annual appropriations being made by the County for that purpose. Although this obligation of the County does not constitute a pledge of the full faith, credit, or taxing power of the County within the meaning of any state constitutional or statutory provision, the County is financially obligated for repayment and has set up certain Special Revenue and Debt Service funds from which it contemplates making the annual appropriations. The proceeds of these certificates were used to finance the construction of a Law Enforcement Center, a Civil Center, a radio transmission tower, and to purchase other County equipment.

Principal and interest payments for the refunding series of certificates of participation are being funded by annual appropriations made by County Council. In fiscal year 2002, the millage requirement for debt service, jail operations, and the sheriff's department was 31.5 mil[l]s.

The debt service costs and the operation and maintenance costs for the Civic Center are being jointly paid by the City of Florence and the County. The two entities have entered into a service agreement whereby each are making equal annual payments into a Civic Center Debt Service and Operations and Maintenance Fund from which these costs will be paid. All Civic Center revenues are to be used to offset operation and maintenance costs, thereby reducing the amounts needed from the Debt Service and Operations and Maintenance Fund. The County began levying a special 1.5 mill property tax in fiscal year 1991 and is using the revenues therefrom, along with an annual appropriation of \$230,000 from accommodations tax funds to meet its obligations under this service agreement. The City-County service agreement requires that, if the annual payments and balances on hand in the Debt Service and Operations and Maintenance Fund are not sufficient in any year to pay the debt service and net operations and maintenance costs, the County and City must make equal additional payments to fund the deficiency. The annual payment from both the County and the City was approximately \$672,000 each for the fiscal year ended June 30, 2002. It is expected that the City's and County's annual payments will need to be increased to approximately \$900,000 per year beginning in fiscal year 2003.

Law / Analysis

It is important to note at the outset what we address in this opinion. Your question relates solely to the applicability of § 6-4-18 and the use of accommodations tax funds. We do not comment upon, nor could we in this opinion, the method of financing for the Florence Civic Center. In other words, this opinion is very limited in the question presented here and only addresses that specific question. Any issues related to the method used to finance the Florida Civic Center would have to be addressed by local counsel to handled that transaction.

The Accommodation Tax statute, S.C. Code Ann. Section 6-4-10 et seq., provides for the allocation of funds received by a municipality or a county which collects more than fifty thousand dollars from the local accommodations tax. The first twenty- five thousand dollars is allocated to the general fund of the municipality or county. The statute allows a portion of the balance plus interest to be disbursed to a special fund to be used for “tourism-related expenditures.” Subsection (4)(b) provides a list of eight items to be included as “tourism-related expenditures.” Items two and three are as follows:

- (2) promotion of the arts and cultural events;
- (3) construction, maintenance, and operation of facilities for civic and cultural activities including construction and maintenance of access and other nearby roads and utilities for the facilities

Section 6-4-15 further provides as follows:

[a] municipality or county may issue bonds, enter into other financial obligations, or create reserves to secure obligations to finance all or a portion of the cost of constructing facilities for civil activities, the arts, and cultural events which fulfill the purpose of this chapter. The annual debt service of indebtedness incurred to finance the facilities or lease payments for the use of the facilities may be provided from the funds received by a municipality or county from the accommodations tax in an amount not to exceed the amount received by the municipality or county after deduction of the accommodations tax funds dedicated to the general fund and the advertising and promotion fund. However, none of the revenue received by a municipality or county from the accommodations tax may be used to retire outstanding bonded indebtedness unless accommodations tax revenue was obligated for that purpose when the debt was incurred. (emphasis added).

Several principles of statutory construction are pertinent to your inquiry. The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Most often, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Ins. Co., 256 S.C. 577, 183 S.E.2d 451 (1971). The words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). Courts must apply clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Furthermore, it is a general rule that “the canon of construction ‘expressio unius est exclusio alterius’ holds that to express or include one thing that implies the exclusion of another, or the alternative.” Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

Here, § 6-4-15 places a limitation upon the expenditure of accommodations tax funds for debt service – that the use of such funds to retire “outstanding bonded indebtedness” must have been

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obligated at the time the debt was incurred. Thus, the question presented by your letter is whether accommodations tax funds would be used to retire "outstanding bonded indebtedness" with respect to this project. In Robinson v. White, 256 S.C. 410, 182 S.E.2d 744 (1971), Justice Bussey, in a dissenting opinion, stated the following with reference to the term "bonded indebtedness":

[f]or at least a half century the term "bonded debt" and "bonded indebtedness" contained in Article VIII, Sec. 7 and Article X, Sec. 5 of the Constitution, have been consistently defined in numerous decisions by this Court. These terms signify a primary obligation of the particular subdivision involved, secured primarily by an ad valorem tax levied upon all of the taxable property therein. Among other cases see: Jackson v. Breeland, 103 S.C. 184, 88 S.E. 128, 130; Bolton v. Wharton, 163 S.C. 242, 161 S.E. 454; Thomson v. Christopher, 141 S.C. 92, 139 S.E. 178; Barnwell v. Matthews, 132 S.C. 314, 128 S.E. 712; Briggs v. Greenville County, 137 S.C. 288, 135 S.E. 153.

182 S.E.2d at 748. As stated by the Court in Thomson v. Christopher, *supra*, "the most important elements of the 'bonded debt' of a political subdivision of this state, as that term is used in section 5 of Article X of the Constitution, are that such debt must be a primary obligation of the political subdivision involved and must be secured primarily by a tax levied upon all the taxable property therein." 139 S.E. at 180. And, as the Court recognized in Barnwell v. Matthews, *supra*, contingent liability does not constitute "bonded indebtedness." With respect to the County's obligations to pay a sum of \$205,000 for certain highways, the Court stated:

[t]he act of April 1, 1925, makes explicit provision for two of the designated highways of the "Pay-as-You-Go Act," and authorizes the expenditure of \$205,000 thereon. As to these, it is too clear for argument that the county is only contingently liable, and, in fact, I am constrained to hold a taxpayer to the county can never be required to pay any part of such amount, as the state would be legally bound to discharge such obligations without permitting such action against taxpayers to the county.

128 S.E. at 714.

Involved here is the question of service of debt payments on certificates of participation which were issued to finance construction of the Florence Civic Center. Based upon the information provided, "[t]he debt service costs and the operation and maintenance costs for the Civic Center are being jointly paid by the City of Florence and the County." Each governmental entity is, by agreement, making equal annual payments into a Civic Center Debt Service and Operations and Maintenance Fund from which these costs will be paid.

The County of Florence levied a special 1.5 mill property tax in fiscal year 1991, and is utilizing those revenues as well as an annual appropriation of \$230,000 in accommodations tax funds to meet its obligations under the service agreement. We are informed, however, based upon the

information submitted, that the County's obligation to repay the Certificates of Participation is "dependent upon annual appropriations being made by the County for that purpose." It is also noted that although the county believes it is "obligated" to make these payments each year, "this obligation of the County does not constitute a pledge of the full faith, credit or taxing power of the County within the meaning of any state constitutional or statutory provision." The Special Revenue and Debt Service account is paid from annual appropriations made by the County.

There is no indication in § 6-4-15 that the General Assembly intended to ascribe a meaning to the term "bonded indebtedness" other than the common and ordinary meaning, discussed above. It has been held that a certificate of participation issue is "similar to a bond issue, but rather than purchasing bonds, investors purchase participation units" Sirote and Permutt v. Bennett, 776 So.2d 40 (Ala. 2000). Certificates of participation are generally deemed not to be bonds. McKay v. Juran & Moody, 1998 WL 1780694 (D.N.D. 1998). See also, Gold, "The Privatization of Prisons," 28 Urb. Law 359, 399, n. 93 (Summer 1996) [approximately one-half of all government-sponsored projects are funded with general obligation bonds; the other one-half are financed through certificates of participation (COPS) or leases, neither of which are subject to constitutional debt limits. Non-general obligation government projects "are usually rated by rating agencies one or two levels below a general obligation, full faith and credit rating due to construction period risk, annual appropriation risk and any other legal risks that affect these projects"]

In Dept. of Ecology v. State Finance Committee, 116 Wash.2d 246, 804 P.2d 1241 (1991), the issue of the legal nature of certificates of participation was addressed by the Washington Supreme Court in an en banc decision. The question before the Court was certificates of participation (COPS) used to finance construction costs for the Department of Ecology for the State of Washington constituted "debt" within the meaning of the Washington State Constitution. The Court concluded that it did not.

The Court stressed the restrictive limits of the State's obligations as set forth in the Certificates of Participation. It was important to the Court's analysis that "[t]he offering prospectus prepared by the underwriter of the COPS will also highlight the fact that DOE's payments will end if the Legislature fails to appropriate sufficient funds, or the Executive orders a cutback." 804 P.2d at 1243. Moreover, the Certificate stated that it "is not a general obligation of the State ... and the full faith and credit of the State are not pledged to the repayment of this certificate"

Cited by the Washington Supreme Court were cases such Caddell v. Lexington Co. Sch. Dist. 1, 296 S.C. 397, 373 S.E.2d 598, 599 (1988), a decision rendered by our own Supreme Court, for the proposition that "[t]he overwhelming majority of jurisdictions that have considered the issue have concluded that a nonappropriation clause precludes the creation of debt." Id. at 1246. Thus, the Washington Court concluded as follows:

[t]he DOE financing plan is not backed by the full faith and credit of the State. The plan does not obligate the State to appropriate any funds for the project or the subsequent lease. The nonappropriations clause allows future Legislatures and future

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Executives the flexibility to terminate or continue the lease as they see fit. Therefore, the plan does not create debt within the meaning of article 8, section 1 of the Washington Constitution

804 P.2d at 1247.

Likewise, our Supreme Court reached the same conclusion in Caddell. In the context of the issuance of Certificates of Participation by a non-profit corporation to provide the necessary finding for the construction and renovation of school buildings, with a lease back to a school district, the Court held that "debt" had not created. There, the Court concluded that

... general obligation debt embraces neither yearly expenses payable from current revenues nor contingent liabilities of the governmental entity. This is so because the governmental entity is not obligated to impose property taxes for their payment Similarly, a leaseback arrangement containing an explicit non-appropriation clause places no such requirement on the political entity. Under the plan here, rental payments are to be included in the District's annual budget. Liability under the lease back agreement is, at most contingent: The District has the option of terminating simply by returning to appropriate money for rent.

We hold that the lease/purchase agreement do not constitute debt under Article X, § 15, of the Constitution.

373 S.E.2d at 599.

Based upon the foregoing authorities, it appears that the limitation contained in § 6-4-15 – that expenditure of accommodation tax funds to retire bonded indebtedness may be made only if the accommodations tax revenue was obligated for that purpose when the debt was incurred – relates solely to "bonded indebtedness" in the literal sense of the word. The Legislature could easily have included other types of financing, such as certificates of participation, if it had so wished. However, it did not. While it is true, as your letter indicates, that the COP method of financing is somewhat similar to general obligation bonds, we cannot infer that the General Assembly intended to include these other forms of financing when it did not specifically so state and, in fact, used the specific term "bonded indebtedness." This is particularly so when our Supreme Court and many other courts also have held that certificates of participation as well as other forms of financing which utilize a non-appropriation clause do not constitute "debt" or "indebtedness" in the legal sense of the word. With respect to such forms of financing, the full faith and credit and taxing power of the State or its political subdivisions is not pledged and the Legislature or county council is not obligated in a legal sense to commit funding therefor each year. Thus, "bonded indebtedness" in the literal sense is not present and § 6-4-15 would likely be deemed by a court to have no applicability here.

We note, however, that in 1997, the General Assembly enacted legislation which is codified at § 11-27-110. This Act makes lease-purchase financing, as well as other forms of financing,

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subject to the constitutional debt limit contained in Article X of the South Carolina Constitution. While as a general rule statutes concerning the same or similar subject matter must be read together in pari materia, see, Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934), it is unclear whether the General Assembly intended that § 11-27-110 should be interpreted as broadening the meaning of “bonded indebtedness” as employed in § 6-4-15. Section 11-27-110’s purpose appears to be limited to insuring that lease-purchase agreements and other similar forms of financing are included within the applicable debt limit. Thus, while it is arguable that certificates of participation could be considered “bonded indebtedness” for purposes of § 6-4-15, it is our opinion that the better interpretation is that they are not. The subject matter of § 6-4-15 dealing with expenditure of accommodations tax funds is somewhat different from that of § 11-27-110. We thus believe a court would read § 6-4-15 literally as not including certificates of participation within the limitations contained in this statute.

Conclusion

Based upon our reading of § 6-4-15, the term “bonded indebtedness” must be given its ordinary meaning – that of general obligation bonds subject to the full faith and credit and taxing power of the State or its political subdivisions. While certificates of participation are similar to the bonds, such instruments are not ordinarily deemed to constitute bonded indebtedness because of the use of a nonappropriation clause. See, Caddell, supra. See also, Redmond v. Lexington Co. School Dist. No. 4, 314 S.C. 431, 445 S.E.2d 441 (1994). In an opinion issued only recently, we concluded that payment of funds from a municipality’s general account would not invoke the term “bonded indebtedness” for purposes of § 6-4-15. See, Op. S.C. Atty. Gen., September 23, 2003. Moreover, our reading of § 11-27-110 is that this statute was designed for a different purpose from that of § 6-4-15 which was to place limitations upon the expenditure of accommodations tax funds. Thus, we do not construe the last sentence of § 6-4-15 as being applicable here.

In view of the fact that this issue appears to be one often arising before the Committee in a variety of circumstances, you may wish to seek legislative clarification with regard to § 6-4-15. It would be helpful if the General Assembly specifically defined not only the term “bonded indebtedness” but other key terms in the statutes governing the expenditure of accommodations tax monies as well.

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General