



ALAN WILSON
ATTORNEY GENERAL

June 25, 2013

The Honorable Robert L. Brown
Representative, District No. 116
5925 Hwy. 162
Hollywood, South Carolina 29449

Dear Representative Brown,

You have requested an opinion of this Office concerning actions taken by the South Carolina Transportation Infrastructure Bank (the "SIB") to provide additional funding for the completion of the I-526/Mark Clark Extension Project (the "Project") in Charleston County.

By way of background, you state:

Some years ago, the SIB allocated \$420 million to Charleston County to extend I-526 from US 17 to Johns Island and then to James Island. On James Island, I-526 would connect the James Island Expressway, which terminates on Calhoun Street in downtown Charleston (map enclosed). The initial allocation did not cover the entire cost of the project and over time the cost has risen. Importantly, as of last summer, the SIB had no additional bonding capacity.

To account for the differential between the initial allocation and the current projected cost of the project (\$556 million), on August 17th, 2012, the SIB Board passed an administrative motion to promise future bonding capacity of \$130 to \$150 million to I-526, after an additional \$90 million is provided to a project in Florence County The SIB believes that adequate funding capacity will not be available until 2020. This action is unprecedented. Based on our review, no state agency with bonding authority has ever exhausted current capacity and then attempted to allocate capacity that may or may not be available a decade or more in the future.

This motion is nonbinding and a future SIB Board may rescind this "promise." But the County is being encouraged to move forward with the project on these terms. The SIB has suggested that the County issue bond anticipation notes, or enter into a "public-private partnership" that would allow the road to be built essentially on credit relying on an eventual payout by the SIB. In order to formalize the motion, the SIB is presently working on a revised Intergovernmental Agreement (IGA) with Charleston County and the S.C. Department of Transportation. It is the belief of the SIB staff and the County that

this contract will establish an enforceable and legally binding commitment for the SIB to provide these future funds.

....

The second issue on which I seek your opinion deals with the Intergovernmental Agreement (IGA) entered into between the SIB, the County and the DOT (IGA enclosed). After a lengthy National Environmental Policy Act (NEPA) process that included substantial public input and thorough analysis by SCDOT and Charleston County Council, Council passed a motion to support the “no-build” alternative in April of 2011, citing major flaws with and lack of support for SCDOT’s preferred highway extension alternative (Alternative G). This “no build” outcome is a legitimate conclusion to the federally mandated NEPA process, just as section of a “build” alternative is legitimate if that alternative proves to have merit.

Shortly after the “no-build” vote, Charleston County Council received a letter from SIB Board Member Ric Tapp (enclosed) indicating that if the county was determined to be “in default” on this project, the SIB would have the authority to intercept state funds to cover the amount already spent on the preliminary engineering and right-of-way acquisition for the project (approximately \$ 11.6 million). Neither the letter from Mr. Tapp nor the IGA between the County, SIB and SCDOT states that a “no-build” vote constitutes an event of default and it is unlikely that the SIB could legally require repayment of these funds (refer to the enclosed legal opinion from the Southern Environmental Law Center). Nonetheless, the SIB board and staff attorney have stated that the County is in default (again, without citing language in the contract to support that assertion).

In response, the County Council rescinded their “no build” vote to avoid this threat of intercept. In essence, the SIB’s threat biased the process, forcing County Council to take a contradictory position to the natural outcome of the NEPA process and to their own assessment of the merits of the project and the public attitudes about it.

This payback threat also significantly influenced the recent vote on December 13, 2012, where the County Council voted to build the project. Much of Council’s discussion revolved around “how to pay back the SIB” if “no build” was again their choice....

In addition to your letter you have provided us with copies of numerous documents in support of your factual assertions and arguments. The author or source of some of these documents is identifiable, while in others it is not.

We were able to obtain copies of the minutes, albeit informal, of the SIB’s meetings dated August 16 and 17 of 2012. The minutes from the August 16 meeting state, in relevant part:

A future bond issue is planned for FY2014 to continue to fund previously approved projects. Currently, there is no excess capacity to issue new bonds for new projects.

....

Bobby Clair, representing Charleston County, provided an update on the Mark Clark Expressway Extension Project. He noted construction began in 1977 and continued until 1992 when funding was exhausted. The initial segment constructed connected US 17 South in West Ashley to US 17 North in Mt. Pleasant with the remaining important link under consideration since that time. He stated that additional funding was sought in 1999, and at that time \$199 million was needed to build the project. Today it is about 2-1/2 times that amount to build the same section of road. He stated that \$138 million in addition to the amount that has been approved in 2007 will allow completion of the environmental work with project under construction within 2 years and completion 3-4 years after that. He proposed consideration as design-build-finance project with no additional funds needed from the Bank until capacity is available around 2020 and, at that time, a portion of funds annually could be drawn down as capacity is available with total funding from the Bank not to exceed \$558 million....

Senator Leatherman made a motion as follows:

I make a motion that the Bank approve funding the current shortfall, estimated at \$130 million - \$150 million, for the completion of the Mark Clark Extension Project from future financial capacity of the Bank with the stipulation that prior to providing any additional funding for the project, the Bank will first fully fund the completion of the Florence County Projects estimated to be \$80 million to \$90 million....

The minutes from the August 17 meeting state, in relevant part:

Senator Leatherman restated and made a motion (as stated above)....

Representative Limehouse seconded the motion and it passed by a unanimous vote

With this information in mind, you ask the following questions:

1) Is this method of funding projects by promising future bonding capacity ("forward-bonding") legal and prudent? If so, what would prevent the SIB from committing funds even further into the future? Would a current SIB board be able to obligate a SIB board in, say, 2050 to issue bonds and dedicate those funds to a project of the current SIB board's choice? Is there a time limit beyond which an agency may not, or should not, for fiscal reasons, commit future bonding capacity?

- 2) Is there a limit to the amount of future bonding capacity the SIB can promise to a particular project? If, for example, a project is short by \$2 billion, can the SIB Board promise this amount at some time in the future? How are these types of commitments likely to affect agency and state bond ratings?
- 3) Do other state agencies and local governments that issue bonds possess this same forward bonding authority?
- 4) What transpires if future bonds are unavailable on the expected timetable and the entity building the project is faced with the prospect of covering remaining costs through large tax increases or abandoning a partially completed project? Can that entity sue the SIB and state for failure to deliver on their promise? What type of contract between the SIB and funded entity would be necessary to protect the state in the event of a funding shortfall? What type of contract would protect the funded entity from the liability of the agency's inability to fulfill its funding commitment?
- 5) What is the implication of these types of actions for the Legislature's ability to modify the structure of the SIB and other agencies with similar "forward bonding" authority? If, as has been discussed, the SIB is eliminated as an independent agency and incorporated into the S.C. Department of Transportation, would the SCDOT requirement that transportation projects be prioritized and funded as stipulated by Act 114 supersede the prior actions of the SIB? IF, as is the case with the I-526 project, a project that is not ranked as a state priority has already been approved for SIB funds, would the change in agency status negate the decision by the prior SIB board?
- 6) What is the implication of "forward-bonding" for the Legislature's ability to modify statutory funding sources or amounts? Can the agency, by committing dedicated funds many decades into the future, remove the Legislature's capacity to shift funds to other needs?
- 7) Based on the plain language of the contract, is the SIB board correct in asserting that the County is "in default" with respect to the IGA? What part of the contract gives rise to a determination of "default" based on a decision not to build the road? (Please see the enclosed legal memo on this point by Chris DeScherer with the Southern Environmental Law Center)
- 8) As described in the enclosed Federal Highway Administration (FHWA) policy (see Section 6-c), the FHWA specifically forgives preliminary engineering costs when a "no build" decision results from the NEPA process, to avoid biasing the outcome. In contrast, the SIB board's threat to intercept funds to pay back the \$ 11.6 million did bias the outcome of the NEPA process. Can the SIB enter into a contract to fund a process (i.e. NEPA, feasibility and alternative analysis, permitting) that predetermines the outcome of that process and, in essence, nullifies the significance of the analysis?

Law/Analysis

As a threshold matter, we note that with the exception of the assertions made in your letter, nothing in the information you provided or the informal minutes of the SIB's meetings suggests the SIB has actually committed its future *bonding capacity* to provide the additional funding needed for the completion of the Project. Instead, the information before us indicates the SIB passed a motion approving funding for the Project's current shortfall from the SIB's future *financial capacity*. It is with this in mind that our responses to your questions are given.

As the Legislature expressly acknowledged when it created the SIB with the passage of Act No. 148 in 1997, the SIB's authority to finance, or to assist other entities in financing, highway or transportation projects is rather unique in comparison to the financing authority of other state agencies with regards to financing:

SECTION 1. The General Assembly finds that:

(1) Adequate transportation facilities are an important element in the ability of a community to provide for the health and welfare of its citizens and the continuing economic growth and development that will provide jobs for the citizens of South Carolina.

(2) **Traditional transportation financing methods in South Carolina cannot generate the resources necessary to fund the cost of transportation facilities** which are required for continued economic viability and future economic expansion.

(3) The State of South Carolina has the ability to provide for **alternative methods of financing highway and transportation projects** which, when combined with existing financing sources and methods, will allow the State to address its transportation needs in a more timely and responsive manner.

(4) Loans and other financial assistance to government units and private entities can play an important part in meeting transportation needs. This assistance is in the public interest for the public benefit and good as a matter of legislative intent.

(5) **The chapter provides an instrumentality to assist government units and private entities in constructing and improving highway and transportation facilities by providing loans and other financial assistance.**

(6) It is the General Assembly's intent for the instrumentality created by this act to focus greater attention on larger transportation projects, and thereby allow the South Carolina Department of Transportation's resources to be devoted sooner to smaller, but yet important, rural transportation projects.

(Emphasis added).

The relevant provisions of the S.C. Code governing the SIB are found in §§ 11-43-110 et seq. The SIB's purpose is stated in subsection (C) of § 11-43-120 as follows:

(C) The corporate purpose of the bank is to select and assist in financing major qualified projects by providing loans and other financial assistance to government units and private entities for constructing and improving highway and transportation facilities necessary for public purposes including economic development. The exercise by the bank of a power conferred in this chapter is an essential public function.

§ 11-43-120(C).

The SIB is given broad statutory authority with regards to the manner in which it elects to provide financial assistance for a transportation or highway project. As stated in subsection (A) of § 11-43-150:

(A) In addition to the powers contained elsewhere in this chapter, **the bank has all power necessary, useful, or appropriate to fund, operate, and administer the bank**, and to perform its other functions including, but not limited to, the power to:

....

(5) make loans to qualified borrowers to finance the eligible costs of qualified projects and to acquire, hold, and sell loan obligations at prices and in a manner as the board determines advisable;

(6) provide qualified borrowers with other financial assistance necessary to defray eligible costs of a qualified project;

(7) enter into contracts, arrangements, and agreements with qualified borrowers and other persons and execute and deliver all financing agreements and other instruments necessary or convenient to the exercise of the powers granted in this chapter;

(8) enter into agreements with a department, agency, or instrumentality of the United States or of this State or another state for the purpose of planning and providing for the financing of qualified projects;

....

(11) procure insurance, guarantees, letters of credit, and other forms of collateral or security or credit support from any public or private entity, including any department, agency, or instrumentality of the United States or this State, for the payment of any bonds issued by it, including the power to pay premiums or fees on any insurance, guarantees, letters of credit, and other forms of collateral or security or credit support;

....

(14) borrow money through the issuance of bonds and other forms of indebtedness as provided in this chapter;

....

(20) apply for, receive and accept from any source, aid, grants, and contributions of money, property, labor, or other things of value to be used to carry out the purposes of this chapter subject to the conditions upon which the aid, grants, or contributions are made;

....

(22) do all other things necessary or convenient to exercise powers granted or reasonably implied by this chapter.

§ 11-43-150(A) (emphasis added).

With regards to the SIB's financial capacity to provide financial assistance for a project in any manner stated above, the SIB is authorized to utilize a number of different resources, only one of which is the proceeds from the issuance of bonds:

(A) The following sources may be used to capitalize the bank and for the bank to carry out its purposes:

(1) an annual contribution set by the board of an amount not to exceed revenues produced by one cent a gallon of the tax on gasoline imposed pursuant to Section 12-28-310;

(2) federal funds made available to the State;

(3) federal funds made available to the State for the bank;

(4) contributions and donations from government units, private entities, and any other source as may become available to the bank including, but not limited to, appropriations from the General Assembly;

(5) all monies paid or credit to the bank, by contract or otherwise, payments of principal and interest on loans or other financial assistance made from the bank, and interest earnings which may accrue from the investment or reinvestment of the bank's monies;

(6) proceeds from the issuance of bonds as provided in this chapter;

(7) other lawful sources as determined appropriate by the board; and

(8) loans from the Department of Transportation to the bank to be repaid from revenues committed to the bank for the following year.

(B) Beginning in fiscal year 1998-99, the revenues collected pursuant to Sections 56-3-660 and 56-3-670 and placed in the state highway account, as created by this chapter, must be used to provide capital for the bank.

§ 11-43-160.

We are not aware of any provision which expressly prohibits the SIB from committing its future financial capacity to provide assistance for any given project. In the absence of any such express prohibition and in consideration of the SIB's broad statutory authority to determine the manner in which it provides financial assistance for a project and the numerous sources of capitalization it is authorized to use, we believe the SIB is generally permitted to commit its future financial capacity toward the completion of a project. The question of whether it is prudent for the SIB to do so is beyond the scope of an opinion of this Office. See Op. S.C. Att'y Gen., 2011 WL 2214062 (May 11, 2011) ("When rendering opinions, this Office may not give a view regarding policy decisions made by various institutions"); 1992 WL 575683 (June 26, 1992) ("Only the legal questions will be addressed herein; no comment is made as to policy matters or as to the wisdom of the undertaking").

We note that state agencies are generally prohibited by law from entering into contracts which obligate state funds beyond the fiscal year. Article X, § 8 of the South Carolina Constitution provides that "[m]oney shall be drawn from the treasury of the State or the treasury of any of its political subdivisions only in pursuance of appropriations made by law." Several statutory provisions also prohibit state agencies and public officers from entering into a contract or incurring indebtedness in an amount beyond that appropriated for a certain purpose for that fiscal year.¹ See Op. S.C. Att'y Gen., 1982 WL 189182 (Feb. 22, 1982) ("[A] contract made by a public officer, which seeks to obligate state funds beyond the fiscal year, where there is no existing appropriation providing for the expenditure of such funds is invalid. Unless the Legislature subsequently authorizes or ratifies the contract in the form of an appropriation ... the contract may not be enforced") (citations omitted). As we further stated in the preceding 1982 opinion:

The only basis on which the State or an agency thereof could validly enter into a contract obligating public funds for a period beyond the fiscal year as determined by the constitution and statutes of this State, would be the inclusion of a proviso

¹ See § 11-1-40(A) ("It is unlawful for an authorized public officer to entering into a contract for a purpose in which the sum is in excess of the tax levied or the amount appropriated for that purpose"); § 11-9-20(A) ("It is unlawful for an officer, clerk, or other person charged with disbursements of state funds appropriated by the General Assembly to exceed the amounts and purposes stated in the appropriations ..."); § 11-9-220 ("It shall be unlawful for any department, institution, commission or board of the state government or officer or agent of the state government authorized to make contracts or draw appropriations to contract indebtedness in excess of the amount specifically provided in the annual appropriation act").

which would make continuation of the contract term contingent upon the fact that the General Assembly appropriated such funds, from year to year, to pay consideration under the contract as to be solely determined by the State or its agency....²

Id.

Furthermore, since the issuance of that opinion, "both this Office, as well as our Supreme Court, have reaffirmed that a 'non-appropriations' clause is necessary for multi-year contracts entered into by a governmental agency." Op. S.C. Att'y Gen., 1996 WL 599418 (Sept. 12, 1996) (citations omitted). As we further stated in that opinion:

As a general matter ... long-term contracts by the State are always subject to the contingency that the General Assembly will continue to provide the funding and to appropriate funds for the payment thereof. The General Assembly, as the supreme legislative authority, has the absolute discretion whether or not to appropriate monies or whether or not to continue a state agency's existence. Any long-term contract will contain a "non-appropriations' clause to the effect that the contract is contingent upon the continuing availability of appropriated funds....

Id.

The matter at hand, however, does not currently involve a contract or agreement, but a motion approved by the SIB's board which merely recites the priority of other projects the SIB is obligated to fund and pledges to finance the Project's shortfall after such other projects are completed. Since there is not yet any agreement or contract concerning the completion of the Project, it is impossible to determine whether the funds the SIB intends to use to fund the Project will originate in part from appropriated funds or any of the other revenue sources available to it. We have no information indicating the SIB has taken action which improperly obligates funds appropriated for a certain amount and purpose beyond the fiscal year, nor that the SIB would obligate funds which would not be available. Thus, there is no basis upon which we could conclude the SIB has improperly obligated funds in violation of Article X, § 8, or any of the statutory provisions previously referenced.

As to whether there are any limitations on the SIB's ability to commit its future financial capacity to a particular project, any decision by the SIB to provide loans or financial assistance to aid in the construction or improvement of any transportation or highway project is subject to prior review and approval by the Joint Bond Review Committee (JBRC). See § 11-43-180(A) ("Prior to providing a loan

² We further noted:

It should be remembered that the provisions cited prohibit contracts only in terms of exceeding appropriated public funds. There does not appear to exist any general prohibition upon an agency's power to contract beyond the fiscal year where the contract involves no expenditures of public monies....

Op. S.C. Att'y Gen., 1982 WL 189182 n.3 (Feb. 22, 1982) (emphasis in original).

or other financial assistance to a qualified borrower, the board must obtain the review and approval of the Joint Bond Review Committee”). Likewise, the review and approval of the JBRC is required before the SIB may issue revenue bonds. See § 11-43-315 (stating SIB may issue bonds to raise money for qualified projects or to refund any outstanding bonds subject to prior review and approval of JBRC). It is the policy of this Office not to issue an opinion over a matter which another agency or entity has the authority to decide or administrative authority over. See Op. S.C. Att’y Gen., 1999 WL 1425994 (Oct. 27, 1999); 1976 WL 23068 (Sept. 16, 1976). Since the JBRC has the statutory authority to determine whether the SIB may ultimately provide financial assistance or issue revenue bonds for a certain project, we must defer to their authority on questions concerning the amount of funds the SIB may commit to any particular project.

As for any potential legislation which would abolish the SIB and incorporate it into the South Carolina Department of Transportation (DOT), attention must be given to Article I, § 4 of the South Carolina Constitution which provides that “[n]o ... law impairing the obligation of contracts ... shall be passed” As our State Supreme Court has explained:

To constitute a Contract Clause violation this Court must determine three issues: (1) whether there is a contractual relationship; (2) whether the change in the law impairs that contractual relationship; and (3) whether the impairment is substantial. Finally, “[f]or a law to survive scrutiny under the Contract Clause when the law substantially impairs a contract, it must be reasonable and necessary to accomplish a legitimate public purpose.”

Hodges v. Rainey, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000) (citations omitted).

Therefore, we caution that any such legislation, if enacted, should be carefully drafted so as to not impair the contractual rights of any entity that may have entered into an agreement with the SIB or to have an adverse effect on any person holding bonds previously issued by the SIB. Whether or not any such legislation would violate the Contract Clause is, of course, a factual question beyond the scope of an opinion of this Office.

We note that while the SIB does have the authority to issue bonds, this authority is limited to the issuance of revenue bonds. See § 11-43-315 (“The bank may pledge any of its revenue or funds to the payment of its bonds, subject only to prior agreements with the holders of particular bonds which may have pledged specific money or revenue”). As stated in § 11-43-330:

Bonds issued by the bank do not constitute a debt or a pledge of the full faith and credit of this State, or any of its political subdivisions other than the bank, but are payable solely from the revenue, money, or property of the bank as provided in this chapter. The bonds issued do not constitute an indebtedness of the State within the meaning of any constitutional or statutory limitation. No member of the bank or any person executing bonds of the bank is liable personally on the bonds by reason of their issuance or execution. Each bond issued under this article must contain on its face a statement to the effect that:

(1) neither the State, nor any of its political subdivisions, nor the bank is obligated to pay the principal of or interest on the bond or other costs incident to the bond except from the revenue, money, or property of the bank pledged;

(2) neither the full faith and credit nor the taxing power of the State, or any of its political subdivisions, is pledged to the payment of the principal of or interest on the bond;

(3) the bank does not have taxing power.

§ 11-43-330 (emphasis added).

The SIB itself does not have the power to issue general obligation bonds. General obligation bonds, coined "transportation infrastructure bonds,"³ may only be issued to raise revenue for the SIB by the State after the SIB makes a request for such, and obtains approval from, the State Budget and Control Board. See generally §§ 11-43-510 to -630. Thus, the State's liability with regards to the SIB's financial obligations is limited to the extent it has issued general obligations bonds, also known as transportation infrastructure bonds, on behalf of the SIB.⁴ The State's credit and taxing powers are not otherwise pledged toward the payment of the SIB's financial obligations; thus, the SIB alone is generally liable for its financial commitments which are payable only from revenue bonds issued by the SIB or any other funding source available to it with the exception of transportation infrastructure bonds. See Brashier v. S.C. Dep't of Transportation, 327 S.C. 179, 187, 490 S.E.2d 8, 12-13 (1997) overruled on other grounds by I'On, LLC v. Town of Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding State not subject to pecuniary liability for revenue bonds issued by entity where bonds were payable solely from and secured by revenue of entity; thus, credit and taxing power of State not pledged and State had no legal obligation to pay off bonds if entity's revenues fell short).

Your remaining questions involve matters which, for various reasons, are simply beyond the scope of an opinion of this Office. In particular, such questions cannot be answered by an opinion of this Office because: they involve determinations of fact; they do not ask for an opinion on a matter of law;⁵

³ See § 11-43-510(3) ("Transportation infrastructure bonds' means all general obligations bonds of this State designated as transportation infrastructure bonds, which are now outstanding and which may hereafter be issued pursuant to the authorizations of this article").

⁴ Furthermore, the State cannot be deemed liable for the SIB's financial obligations under a contract, if one existed, unless the State is a party to the contract. See Op. S.C. Att'y Gen., 1982 WL 189182 (Feb. 22, 1982) ("[I]t cannot be claimed under any set of foreseeable circumstances that the parties to the lease could derive benefits from or attach obligations to the State, which is not a party to the lease. Nor may the parties to the lease look to the State either by contract or principles of equity to acquire greater rights than those which could lawfully be given by the contract between DSS and the owner-operator.").

⁵ See Ops. S.C. Att'y Gen., 2011 WL 2214075 (May 17, 2011) ("this Office cannot issue an opinion as to a matter which does not raise a legal question"); 2002 WL 31958832 (Nov. 18, 2002) ("Of course ... this Office may only address questions of law").

they ask questions concerning hypothetical matters or potential lawsuits;⁶ they involve questions concerning the interpretation or application of federal regulations or the policies of a federal agency;⁷ they involve the policies decisions of an administrative agency;⁸ they ask for an interpretation of provisions of a contract that this Office was not involved in the negotiation thereof;⁹ or, they involve contractual disputes, questions of liability under a contract, or other matters which the parties involved should consult with their own attorney or private counsel regarding and, if necessary, should be resolved by a court.¹⁰

Conclusion

It is the opinion of this Office that the SIB generally has the authority to pledge its future financial capacity to support the completion of the Project. The Legislature has granted the SIB unique and broad authority to use numerous methods and sources of financing, some of which are considered nontraditional, to support transportation and highway projects; proceeds from the issuance of bonds is only one source out of many the SIB is authorized to use. Although state agencies are generally prohibited by law from entering into contracts which obligate public funds beyond the amount appropriated for a certain purpose for any given fiscal year in the absence of an appropriation expressly permitting such expenditures, the matter at hand does not currently involve a contract or agreement. The SIB's board has merely passed a motion reciting the priority assigned to projects it is obligated to fund

⁶ See Ops. S.C. Att'y Gen., 1998 WL 196485 (March 23, 1998) ("pursuant to Office policy, we will not answer hypothetical questions in a legal opinion"); 1991 WL 632996 (July 8, 1991) ("we do not ... decide or offer an opinion on the merits of the hypothetical lawsuit").

⁷ See Ops. S.C. Att'y Gen., 2011 WL 2648714 (June 16, 2011) ("The examination of federal law and the policies of a federal agency are beyond the scope of an opinion of this Office"); 2009 WL 2406409 (July 24, 2009) ("as a matter of policy, this Office does not opine on questions of federal law [and] defers [such matters] to the federal agency charged with the interpretation of the federal statute or regulation in question").

⁸ See Op. S. C. Att'y Gen., 2011 WL 2214062 (May 11, 2011) ("this Office may not give a view regarding policy decisions made by various state institutions").

⁹ See Ops. S.C. Att'y Gen., 2013 WL 650578 (Feb. 7, 2013) ("this Office ordinarily does not review and interpret contractual agreements 'where it has not participated in the negotiation thereof'") (citation omitted); 2003 WL 21691879 (July 1, 2003) ("a legal opinion [of this Office] cannot resolve such obviously critical questions as precisely what expectations the parties may have had or what reliance was placed upon any representations made") (citation omitted).

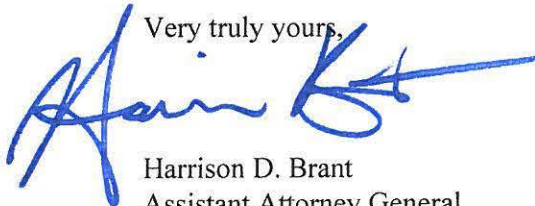
¹⁰ See Ops. S.C. Att'y Gen., 2013 WL 861299 (Feb. 26, 2013) ("We must, therefore, adhere to the longstanding policy of this Office and respectfully decline to issue an opinion determining the Department's financial liability in this particular situation"); 2011 WL 2648710 (June 27, 2011) (advising that although some form of contract between the parties may be necessary to address the issue raised, "[t]he form of such a contractual arrangement is, of course, beyond the scope of an opinion of this Office"); 2006 WL 3522443 (Nov. 3, 2006) ("This office cannot in an opinion determine how the referenced contract involved between the City and the County should be interpreted as to the particular facts you presented"); 2001 WL 790257 (June 25, 2001) ("The county's liability for any particular contractual obligation ... will, of course, depend on the facts and circumstances surrounding each transaction. It is beyond the scope of an opinion of this Office to adjudicate questions of fact, and ultimately a court would be the appropriate body to determine the liability of the county on a given contract.").

and pledging to finance the Project's shortfall after such projects are completed. Thus, it is impossible to determine whether the funds the SIB intends to use will originate in part from appropriated funds or from any of the other revenue sources available to it. In any event, we have no information indicating the SIB has taken any action which improperly obligates funds beyond the amount appropriated for a certain purpose for a given fiscal year, nor that it would obligate funds which would not be available. Furthermore, we are unaware of any statutory provision which expressly prohibits the SIB from pledging its future financial capacity toward the completion of a project. For the above reasons, we believe the SIB is generally not prohibited by law from pledging its future financial capacity toward the completion of the Project. Whether it is prudent for the SIB to do so is beyond the scope of an opinion of this Office.

This is not to say that the SIB has unfettered power to commit its future financial capacity toward projects. Any decision by the SIB to provide financial assistance or issue revenue bonds is subject to prior review and approval by the JBRC. Since the JBRC has the statutory authority to ultimately determine whether the SIB may provide financial assistance or issue revenue bonds, we must defer to their authority on questions concerning the amount of assistance the SIB may pledge to any particular project. We also note that the SIB's bonding authority is limited to the issuance of revenue bonds. General obligation bonds or "transportation infrastructure bonds" which pledge the credit and taxing power of the State toward the payment of such bonds may only be issued on the SIB's behalf by the State Budget and Control Board. Thus, unless the State is a party to a contract entered into with the SIB or has issued general obligation bonds on the SIB's behalf, the State is not subject to pecuniary liability for the SIB's financial obligations.

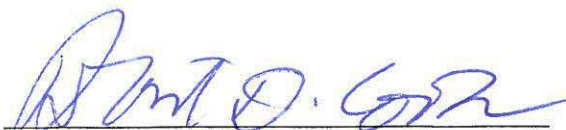
As for any potential legislation which, if enacted, would have the effect of abolishing the SIB and incorporating into the DOT, attention should be given to the Contract Clause found in Article I, § 4 of our Constitution. Consistent with that provision, any such legislation should be carefully drafted so as to not impair the contractual rights of any entity that has already entered into a contract with the SIB, and so as to not have an adverse effect on any person holding bonds previously issued by the SIB. Whether any such potential legislation would result in a violation of the Contract Clause is, of course, a factual question beyond the scope of an opinion of this Office. We respectfully decline to answer your remaining questions, for the various reasons previously stated, are beyond the scope of an opinion of this Office.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General