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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 7, 2000

Brenda Reddix-Smalls, Esquire
Eleazer R. Carter, Esquire
Attorneys for Williamsburg County School District
P.O. Box 2073
Columbia, South Carolina 29202

RE: Informal Opinion

Dear Ms. Reddix-Smalls and Mr. Carter:

As counsel for the Williamsburg County School District (School District), you have requested an opinion of this Office concerning the School District's return of monies to Williamsburg County (County) pursuant to their inducement to Tupperware U.S., Inc. (Tupperware) to relocate to Williamsburg County.

By way of background you inform us that the County and Tupperware entered into an agreement in which the County would assist the company with their tax liability as an inducement for Tupperware to move its equipment from its Tennessee facility to Hemingway, South Carolina. The arrangement apparently would proceed as follows: Tupperware would issue a check for the total amount of the tax liability to the County. A portion of the tax liability, which had already been paid by an affiliate of Tupperware to the County, was to be reimbursed to Tupperware. The remaining balance was to be used by the County to purchase Tupperware's property, which would then be leased back to the company for a nominal amount. Your opinion request results from the School District's allocated interest in the tax monies due to Williamsburg County. The School District questions whether it can agree to the return of the monies to Tupperware

As a preliminary note, this Office has reviewed neither a comprehensive account of the transactions between the County and Tupperware, nor the fees in lieu of taxes agreement that is the basis for your question. Indeed, the facts surrounding the arrangement between the County and Tupperware are somewhat unclear. As such, this Office does not advise on the propriety of the arrangement between the County and Tupperware. Furthermore, without a firm understanding of the facts, this Office does not attempt to address whether the School District does, in fact, have a vested interest in the allocated monies.

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For the purposes of this opinion, however, we will assume that the School District is rightfully entitled to the allocated monies. Thus, the School District's return of the monies to the County for the benefit of Tupperware is actually an expenditure of the School District's funds. This opinion is limited to the general authority of the School District to expend funds by purposefully returning them to the County to reimburse a private business.

It is well settled that the expenditure of government funds must be for a public, not a private purpose. While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43, 47(1975): "[a]s a general rule, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all inhabitants or residents, or at least a substantial part thereof." A number of cases, decided by our Supreme Court, have generally upheld a local government's expenditure of funds to another political subdivision or governmental entity for the purpose of assisting that entity in some public venture. For example, in Allen v. Adams, 66 S.C. 344, 44 S.E. 928 (1903), the Court upheld the Edgefield town council's issuance of bonds to construct a school building in the town. The Court concluded that, unquestionably, such construction would constitute both a corporate purpose (of the town) and a public purpose. Such expenditure of funds was within the town's corporate purpose because the presence of the school building would surely "promote the convenience, welfare and order of its inhabitants. . . ." 66 S.C. at 355, 44 S.E. at 942.

Noting the trend in recent case law to broaden the concept of a public purpose, the South Carolina Supreme Court has expressly held that industrial development is a valid public purpose. See Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986). The Court recognized that although benefits may accrue to private individuals, that alone did not destroy the public purpose when incidental to the promotion of the public welfare. The court adopted a four prong analysis for determining a public purpose:

> ... [F]irst determine the ultimate goal or benefit to the public intended by the project. Second, ... analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth ... analyze and balance the probability that the public interest will be ultimately served and to what degree.

Nichols, at 429, 351 S.E.2d at163.

Accordingly, the School District must demonstrate a sufficient public purpose under the Nichols test to expend the funds permissibly in favor of the County for the benefit of Tupperware. In theory, although Tupperware appears to be the primary beneficiary of the return of the monies, arguably the community benefits in the long term from having more industry located in the County. The gain to the County by the number of jobs and amount of revenue generated conceivably outweighs the incidental benefits to the private organization. Ultimately, however, the determination of whether the inducement to Tupperware serves a legitimate public purpose involves numerous questions of fact which are beyond the scope of an opinion of this Office to resolve. Only a court could make such a determination.

Once the return of the monies qualifies as a legitimate public purpose, the School District must

additionally show that it serves a legitimate corporate purpose to make such an expenditure. Although the concepts are similar and have been interpreted as being coextensive, a legitimate corporate purpose is one that promotes the general prosperity and welfare of the particular community that makes the expenditure. See Op. Atty. Gen. No 91-49 (Aug. 7, 1991) (quoting County of Livingston v. Darlington, 101 U.S. 407 (1879)). In other words, although the community of the County benefits from the expenditure, the School District must also generally benefit from the action. In the instant case, presumably the School District has received other allocated revenues resulting from the presence of Tupperware in the County. Arguably, it is in the School District's best interest to promote this industry. If returning the monies induces Tupperware and other industry to remain in the County, then a legitimate corporate purpose may be served by the expenditure. Again, of course, this Office is without sufficient information to resolve all the factual questions necessary for such a determination.

A final consideration for the School District in determining whether to allow the expenditure of funds to the county is whether the monies, when originally collected, were to be held in trust for a particular purpose. Although we have been advised that the funds remain segregated in a bank account until the School District renders a decision, we have not been advised of any limitations placed on the School District in their use of the allocated monies. Apparently, an arrangement between the County and Tupperware was contemplated at the time the funds were paid, which explains why they were not dispersed. This limitation probably does not prevent the School District from making the expenditure in this case, but we offer it for your consideration because this opinion does not attempt to address the particulars of the arrangement between the County and Tupperware.

In sum, it is the opinion of this Office that the School District may expend the allocated funds, provided the expenditure serves a legitimate public purpose, a legitimate corporate purpose, and does not violate the terms of a particular trust holding the monies. Be advised, however, that this Office cannot counsel the School District on whether it should or should not allow the return of the monies to Tupperware. The weight of that decision must be borne by the School District in determining its own best interests.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General