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The State of South Carolina

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Wayne L. Sterling, Interim Director
South Carolina Department of Commerce
Post Office Box 927
Columbia, South Carolina 29202

Dear Mr. Sterling:

With respect to S.C. Code Ann. §§ 4-1-170, 4-1-175, and 4-29-68, you have requested the opinion of this Office on several questions related to multi-county industrial parks and special source revenue bonds. Each of your questions will be addressed separately, as follows.

Question 1

> Section 4-29-68(A) of the Code states that "infrastructure" includes improved and unimproved real property. Does the term "improved real property" include buildings, structural components of buildings, or office facilities?

Section 4-29-68 authorizes a county, municipality, or special purpose district which receives and retains revenues from fees in lieu of taxes pursuant to §§ 4-29-60 or 4-29-67 to issue special source revenue bonds according to the terms and conditions set forth therein. Subsection (A)(2) provides that the bonds be issued

> solely for the purpose of paying the cost of designing, acquiring, constructing, improving, or expanding the infrastructure serving the issuer in order to enhance the economic development of the issuer and costs of issuance of the bonds. For purposes of this section, infrastructure includes improved

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> and unimproved real property. Bonds issued pursuant to this section to finance the acquisition of real or personal property may be additionally secured by a mortgage of that real or personal property.

A literal reading of § 4-29-68 indicates that bonds issued pursuant to that section be issued solely for paying the cost of designing, acquiring, constructing, improving, or expanding improved and unimproved real property. It also appears that, at least to some extent, acquisition of certain personal property is contemplated.

While § 4-29-68 does not specifically refer to a "project" as that term is defined in § 4-29-10(3), § 4-29-68 does refer to § 4-29-67, which statute sets forth the qualifications to be met for a fee in lieu of taxes to be arranged. The term "project" is referenced in § 4-29-67. We believe it is appropriate to consider § 4-29-68 not in isolation but as a part of the entire statutory scheme relative to county industrial parks, fees in lieu of taxes, special source revenue bonds, and so forth. Thus, reading all statutes together, various aspects of "projects" could be considered improvements to real property, as "project" is defined as

> any land and any buildings and other improvements on the land including, without limiting the generality of the foregoing, water, sewage treatment and disposal facilities, air pollution control facilities, and all other machinery, apparatus, equipment, office facilities, and furnishings which are considered necessary, suitable, or useful ... .

While the General Assembly has not explicitly defined "improved real property" for purposes of § 4-29-68,[1] we believe that a court faced with the question would most probably conclude that buildings, structural components of buildings, or office facilities, as defined within the term "project," could be considered as improvements to real property, such that special source revenue bonds could be issued to pay the cost of designing, acquiring, constructing, improving, or expanding same. In so concluding, we

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[1] Such an interpretation would be consistent with the definition of the term "improvement" in § 28-2-30(11) for purposes of the Eminent Domain Procedure Act and with definitions of "improve" and "improvement" in § 29-6-10 for purposes of making payments to contractors and subcontractors.

observe that the recent trend of judicial decisions in this State has been toward promotion of economic or industrial development, as evidenced most recently by Quirk v. Campbell, 302 S.C. 148, 394 S.E.2d 320 (1990), and further that the legislative policy of this State in recent years has been to enhance the industrial climate, by acts such as Act No. 361 of 1992 and Act No. 123 of 1993.

Question 2

> Pursuant to § 4-29-68(A)(2), the purpose for which special source revenue bonds are issued is to enhance the economic development of the issuer of the bonds. For purposes of economic development, do those items contained in § 4-29-10 which are within the statement of "other improvements," including but not limited to water treatment, sewer treatment, disposal facilities, air pollution control facilities, other machinery, apparatus, equipment and furnishings constitute "infrastructure"?

In light of our response to your first question, and in reading §§ 4-29-68 and 4-29-10(3) together, it would appear that "infrastructure" would consist of improvements to real property for purposes of § 4-29-68 and economic development related thereto. Certain of the items listed in § 4-29-10(3), such as water sewage treatment and disposal facilities, air pollution control facilities, and similar improvements which are integrated into a building or otherwise permanently affixed to the real property, would most probably be considered to be "infrastructure" by a court considering the issue, in our view.

Items such as machinery, equipment, furnishings, or the like, which are readily movable, but which are unrelated to items forming a permanent part of the infrastructure, would not be considered "infrastructure" in our view. Such a reading would also be consistent with other Code sections, such as those mentioned in footnote 1.

Question 3

> Section 4-29-68(4) states that the infrastructure must be owned or controlled by the issuer of special source revenue bonds. Can the county or other political subdivision own the infrastructure or improved real property including building, and then lease the same to an industry at a minimal or other lease

> rate below fair market value with a purchase option at less than fair market value?

Section 4-29-68(A)(4) provides:

> The issuer may use proceeds of the bonds (including by establishment of a reserve fund to be used) (a) directly for infrastructure owned or controlled by the issuer or (b) to make loans or grants to, or to participate in joint undertakings with, other agencies or political subdivisions of the State that own or control the infrastructure referred to in item (2) of this subsection.

Obviously, for special source revenue bonds to be issued, the issuer (county or other political subdivision) must own or control the infrastructure for direct use of bond proceeds; or some other agency or political subdivision must own or control the infrastructure if a grant, loan, or joint undertaking is contemplated as is permitted by part (b). As to ownership or control, § 4-29-68 is silent as to how, or how long, the county must own or control the infrastructure, or exactly how control must be exercised if the county does not own the infrastructure. From the dicta in Quirk v. Campbell, 302 S.C. 148, 394 S.E.2d 320 (1990), it appears that courts are more concerned with the purposes for which governmental property, leased to private concerns, may be put, rather than the method of accomplishing such. Leasing of county-owned property is specifically authorized in § 4-29-10 et seq., but the details of such arrangements are left to the county and the potential lessee to establish.

Neither how much the property in question is to be leased for, nor the transfer of the property at some future date (presumably after the bonds have been satisfied), with respect to the fair market value of the property, are governed by statute. Conveyance of property by political subdivisions for less than fair market value has been discussed in several judicial decisions. In Op. Atty. Gen. No. 86-117 dated November 25, 1986, we advised the City of Laurens that indirect benefits which may accrue to the City could be considered when the City is determining a fair and reasonable return for the disposition of its property. That opinion relied heavily on the principles enunciated in Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986) in construing

Art. III, § 31 of the State Constitution[2] (applicable only to the State but nevertheless instructive, McKinney v. City of Greenville, 262 S.C. 227, 203 S.E.2d 680 (1974)):

> This Court consistently has construed S.C. Const. Art. III, Section 31, to allow the State to consider indirect benefits accruing to it in determining whether a grant of State property amounts to a proscribed donation. [Citations omitted.]
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> In McKinney v. City of Greenville, 262 S.C. 227, 203 S.E.2d 680 (1974), we stated: "It is established beyond question by the decisions of the Supreme Court of South Carolina that a public body may properly consider indirect benefits resulting to the public in determining what is a fair and reasonable return for disposition of properties without running afoul of the constitutional prohibitions against donations." [Emphasis supplied.] 262 S.C. at 242-243, 302 S.E.2d at 688. See also, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) (no requirement that maximum price be obtained).

290 S.C. at 422. See also Quirk v. Campbell, supra.

The transaction you have described does not appear to be prohibited by statute. It would be within the province of the affected county or political subdivision to determine the amount of the lease or purchase price. Whether either should be below fair market value would be a policy decision to be made by the political subdivision, taking into account whatever factors it desires (including indirect benefits) to determine what a fair and reasonable return would be for the disposition of the property in question.

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[2] Art. III, §31 of the State Constitution provides:

> Lands belonging to or under the control of the State shall never be donated, directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations, or associations, for less price than that for which it can be sold to individuals. ...

Question 4

> Under § 4-1-170 of the Code, as interpreted by this Office on September 7, 1993, two counties may enter into a series of noncontiguous park properties. If it is legal to arrange a multi-county park with noncontiguous property by multiple sets of ordinances, executed concurrently, then why is it not legal to do the same by one set of ordinances?

While the opinion observed that only a court could determine whether multiple sites would be permissible under § 4-1-170, the opinion also stated that the statute does not clearly prohibit the use of noncontiguous property in an industrial park. Upon reconsideration of the previous opinion and re-evaluation of §§ 4-1-170 and other statutory provisions, we are of the view that two counties may enter into a single agreement whereby properties in the two counties would be considered a joint business or industrial park. Article VIII, § 13(D) of the State Constitution provides that "[c]ounties may jointly develop an industrial or business park with other counties within the geographical boundaries of one or more of the member counties ... ." (Emphasis added.) Likewise, § 4-1-170 provides that "counties may develop jointly an industrial or business park with other counties within the geographical boundaries of one or more of the member counties ... ." (Emphasis added.) Black's Law Dictionary defines "an" as "equivalent to 'one' ...; seldom used to denote plurality." (5th Ed. 1979, p. 77.)

The opinion of September 7, 1993, contains one option, that counties could enter into multiple park agreements which would include each separate noncontiguous parcel (which would result in separate industrial or business parks). Upon further consideration, we are of the view that a single agreement could be executed among member counties to have such a park located "within the geographical boundaries of one or more of the member counties." To this extent, the opinion of September 7, 1993, is modified.

Question 5

> Under § 4-1-175, a single county or municipality which receives revenue from a multi-county park may issue special source revenue bonds. Pursuant to § 4-29-68, the special source revenue bonds may be used to provide the infrastructure expenses to develop the multi-county park. Can the special source revenue bonds be issued by a single entity

> receiving a fee stream from the park and be used for expenses of developing the park, or must each county or fee-receiving entity pay a portion of the special source revenue bond used for park expenses?

In part, § 4-1-175 provides:

> A county or municipality receiving revenues from a payment in lieu of taxes pursuant to Section 13 of Article VIII of the Constitution of this State may issue special source revenue bonds secured by and payable from all or a part of that portion of the revenues which the county is entitled to retain pursuant to the agreement required by Section 4-1-170 in the manner and for the purposes set forth in Section 4-29-68. The county or municipality may pledge the revenues for the additional securing of other indebtedness in the manner and for the purposes set forth in Section 4-29-68.
>
> ....

Then, § 4-29-68(A) provides in part that "[a] county or municipality or special purpose district ... may issue special source revenue bonds ... ."

The plain language of these statutes contemplates that a single county or municipality (or special purpose district, according to § 4-29-68), though participating in a multi-county park, may issue special source revenue bonds if such will "enhance the economic development of the issuer." § 4-29-68(A)(2).

In so concluding, it appears necessary to reexamine another conclusion of the opinion dated September 7, 1993. Section 4-1-170 requires that counties jointly developing an industrial or business park enter into a written agreement which addresses sharing expenses of the park and specifies by percentage the allocation of revenues among the participating counties. It is conceivable that one of the counties could totally underwrite the expenses of the joint park while sharing the revenues with other participating counties for whatever reasons the counties feel appropriate. Such a conclusion would be consistent with the interpretation of §§ 4-1-175 and 4-29-68 in the foregoing paragraph. To the extent that this conclusion is inconsistent with the opinion of September 7, 1993, today's opinion is deemed controlling.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook
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