

5379 *Subway*

# The State of South Carolina



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June 28, 1994

The Honorable Herbert Kirsh  
Member, House of Representatives  
Post Office Box 31  
Clover, South Carolina 29710

Dear Representative Kirsh:

You have requested an opinion of this Office as to several issues which have arisen in the City of Rock Hill due to the use of general obligation funds for, allegedly, projects other than those authorized by the electors in a referendum authorizing the issuance of those general obligation bonds.

### Background

The City of Rock Hill held a referendum, as required by the Municipal Bond Act, on May 19, 1969, for the purpose of voter approval of a bond issuance of \$3,250,000. The referendum contained three questions, the second of which is in issue here. According to the decision in Sadler v. Lyle, 254 S.C. 535, 176 S.E.2d 290 (1970), the second question involved "issuing not exceeding \$300,000 general obligation bonds to acquire additional fire protection facilities," 254 S.C. at 539, rather than the question outlined in your request letter. All three questions received voter approval, and the bonds were issued.

You advise that the City to date has built only one fire substation. You further advise that in 1970 the City purchased some property for \$25,000 to build an additional substation, using funds from the bond issue; in 1990 the City Council sold that parcel back to the original owner for \$65,564.89 and deposited the proceeds in the general fund rather than in the bond sinking fund. You further advise that you understand residual funds were in the bond fund, and that you understand certain funds to have been transferred from the bond fund to the City's general fund, then possibly to the City's capital improvement fund. Allegedly none of these transferred funds have been used for the purpose for which the bonds were authorized.

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### Issues

Accordingly, you have asked:

1. May a City Council and/or the municipal finance director divert funds from a general obligation bond issue to projects not authorized in the original bond ordinance and the original referendum question?

2. May a City Council and/or the municipal finance director in any manner divert funds from a general obligation bond issue authorized by a referendum to projects not authorized by that referendum?

3. What criminal penalties, if any, apply to the diversion of general obligation bond funds to purposes other than those for which the bonds were issued?

4. If criminal penalties apply, which state judicial officer would process such a matter?

Each of your questions will be addressed separately, as follows.

### Question 1

Your request letter seems to indicate that the second question voted on by the electors would have authorized the issuance of bonds "for the construction of two new fire substations, the purchasing of a new pumper truck for each new fire substation, and the extension of the fire alarm system." According to the State Supreme Court decision which upheld the referendum, Sadler v. Lyle, supra, the question was actually much broader. We understand the bond ordinance to have specified that \$300,000 in general obligation bonds would be issued to acquire, construct, and equip additional fire protection facilities. We observe that the bonds were issued on or about January 21, 1971.

We further understand that the number 3 substation was constructed and equipped, but the number 4 substation was never constructed, though property was acquired for such purpose and subsequently sold back to the original owner.

The issuance of general obligation bonds by a South Carolina municipality is governed by the Municipal Bond Act, S.C. Code Ann. §5-21-210 et seq. (1976) (formerly §47-831 et seq. of the 1962 Code of Laws). Following a successful bond referendum, the decision to actually issue bonds is completely within the discretion of the governing body of the municipality; the

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Municipal Bond Act does not compel the governing body of the municipality to issue the bonds. Ramsey v. Cameron, 245 S.C. 189, 139 S.E.2d 765 (1965). Similarly, the effect the referendum question is to limit the use of funds for the purposes set forth in the referendum question. How those funds are spent and the precise improvements to which the proceeds are applied are decisions within the discretion of the municipal governing body. Id.

At the time of the referendum, the City planned to apply the bond proceeds to construct and equip two fire substations. As indicated above, the referendum question and the exercise of discretion by the municipal governing body are controlling. The representations made by various parties at the time of the referendum are not controlling. In Sarrat v. Cash, 103 S.C. 531, 88 S.E. 256 (1916)(cited most recently in Redmond v. Lexington School District No. Four, Op. No. 24084, filed in the Supreme Court June 6, 1994), the Supreme Court addressed the allegation by voters that they had approved a bond referendum based on representations made by school trustees that a school would be built in a certain location; upon approval of the referendum, the school trustees decided to build the school elsewhere. The court denied the plaintiffs' request to enjoin the trustees from building the school at a different locality, upholding the trustees' right to exercise discretion in the matter:

[The trustees] could not, therefore, bind themselves by promises or representation, so as to divest themselves of the right to a free and untrammelled exercise of their judgment and discretion for the best interests of their district at the time they were required to act as a body. ...It would be contrary to public policy to allow public officers who are charged with the duty of exercising their judgment and discretion...to bind or fetter themselves by promise or presentation to individuals or to electors of...the district so that they could not, at all times, act freely and impartially... . The power was conferred upon them for public purposes, and it could not be lawfully bartered away to influence...votes in the election. The electors are presumed to have known this. Therefore they had no legal right to reply upon the alleged representations, or to be influenced by them in...voting in the election.

Id., 103 S.C. at 535-36

Thus, the proceeds of the bond issue have been available for the purposes approved by the referendum, to acquire, construct, and equip additional fire protection facilities. A "facility" is

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"a very inclusive term, embracing anything which aids or makes easier the performance of a duty," Edgefield County Water and Sewer Authority v. City of North Augusta, 289 S.C. 148, 149, 345 S.E.2d 260 (1986), or a "thing that promotes the ease of any action, operation, transaction, or course of conduct; advantage, opportunity;... ." Caldwell v. McMillan, 224 S.C. 150, 157, 77 S.E.2d 798 (1953). See other definitions in 16 Words and Phrases, "Facilities" and "Facility." Any expenditure of bond proceeds for capital assets which would promote or make easier the performance of fire protection services would therefore be proper.

In response to your first question, then, it appears that specific expenditures were not contemplated by the referendum question. Representations made at the time of the referendum would not be binding. Any expenditure that would promote or contribute to fire protection services would be permissible. Because the referendum question did not identify specific projects, as contemplated by your letter, it is difficult to provide a more specific response to the first question as it assumes that specific projects were contemplated; since specific projects were not identified, we do not see that a diversion of funds has occurred.

#### Question 2

As discussed in response to your first question, the referendum in question did not identify specific projects. Thus, there cannot be said to be a diversion from specific projects.

Your letter does not contain sufficient information about the various accounts of the City which are affected by the bond issue and the sale of property in 1990. You appear to suggest that residual funds from the bond sale were placed in one fund but should perhaps have been placed in the sinking fund for payment of debt service. Likewise, your letter suggests that proceeds from the sale of land should have been deposited in the sinking fund rather than the City's general fund. You further advise that funds from the bond fund have been transferred to the City's capital improvement account, and that none of the transferred funds have been used for the purpose for which the bonds were authorized.

The pertinent statute within the Municipal Bond Act is §5-21-450, which provides:

The proceeds derived from the sale of any such bonds shall be deposited in a special fund, separate and distinct from all other funds, and applied solely to the purposes for which the bonds are issued, except

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that the premium, if any, shall be placed in the sinking fund established by §5-21-400 and the accrued interest, if any, shall be used to discharge in part the first interest to become due on such bonds. Should any surplus remain, it shall be deposited in the sinking fund required by the provisions of §5-21-400 to be established for the payment of the bonds.

It appears, from your letter, that the bond proceeds were put into a special account. The bond proceeds may be applied only for purposes for which bonds were issued; as long as such are used for fire protection, that requirement is met. Surplus funds are required to be put into the sinking fund; it is not clear whether (or when) any of the funds become surplus funds; however, at the point that the funds should not be used for fire protection, likely the funds would be considered surplus and should then be placed in the sinking fund. It would be within the province of City Council to make such determination.

It is difficult to be more specific in responding to this question, as the referendum apparently provided for expenditure of bond proceeds on a wide variety of capital improvements. Bookkeeping practices within municipalities vary; this Office has no investigatory authority to check into how the City may have handled the funds. It may well be that the funds about which you are inquiring have not been spent but are instead a part of another fund, readily traceable and accessible for appropriate expenditure. Certain assumptions are made in the formulation of your questions, which assumptions may or may not be accurate if fully investigated. Without knowing more, we are hesitant to be more conclusive.

### Question 3

The Municipal Bond Act contains a statute, §5-21-500, which provides criminal penalties for certain diversion of bond moneys:

Any member of any municipal council or any commissioner who shall vote to divert money applicable to the payment of principal or interest of bonds or to the sinking fund or cushion fund for them and any disbursing officer who shall pay out any moneys applicable thereto, whether or not such payment has been ordered by the municipal council, the commissioners or any officer or agent of either, shall be guilty of a misdemeanor and shall be punished by imprisonment for a term of not less than thirty days nor more than one year and by a fine of not less than two hundred dollars nor more than five hundred dollars, either or both, within the discretion of the court.

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Today's opinion is not intended in any way to suggest that the allegations contained in your letter would be a sufficient basis for prosecution under this statute. The facts would require full development before a decision could be made that prosecution of any official would be warranted under this statute.

Question 4

It is assumed that your actual questions would be which court has jurisdiction over actions prosecuted under §5-21-500 and who would prosecute thereunder. The offense created in §5-21-500 would be within the jurisdiction of the Court of General Sessions. The circuit solicitor would prosecute such case if, upon review of all facts and circumstances, he felt prosecution would be warranted.

It must be noted that questions involving bonds and referenda therefor are exceedingly technical, particularly when a great period of time has passed. Too, more than twenty years have passed since the bonds were issued; most probably accounting procedures have changed since the time of issuance. Changes in federal tax laws affecting tax-exempt bonds have occurred since the time of issuance, also adding to the technical difficulty of addressing your questions. It is necessary to have all facts at hand and make certain that assumptions are accurate in responding to questions such as those presented here. (The Office of the Attorney General is not authorized to undertake investigations of fact. Op. Atty. Gen. dated December 12, 1983.) Thus, the foregoing is necessarily general and is as responsive to your inquiries as is possible under the circumstances.


Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

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REVIEWED AND APPROVED BY:



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