

5444 Subiang

# The State of South Carolina



## Office of the Attorney General

T. TRAVIS MEDLOCK  
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING  
POST OFFICE BOX 11549  
COLUMBIA, S.C. 29211  
TELEPHONE: 803-734-3680  
FACSIMILE: 803-253-6283

November 15, 1994

Thomas Dewey Wise, Esquire  
General Counsel, Patriot's Point  
Development Authority  
WISE & COLE, P.A.  
Post Office Drawer 0  
Charleston, South Carolina 29402

Dear Mr. Wise:

You have asked for an opinion on whether the Patriot's Point Development Authority has the authority to establish a nonprofit corporation to carry out the purposes set forth in its enabling legislation, South Carolina Code of Laws, §51-13-770 (1976, as revised).

Patriot's Point Development Authority (PPDA) is recognized as a "body politic and corporate" under the laws of this State and has been given various corporate and other powers to enable it to govern. §51-13-710. It is an "instrumentality of the State" created to carry out an enterprise of public interest - the development and improvement of the Patriot's Point area. §51-3-760.

Since the PPDA is a creation of the State, the State Constitution and the Acts of the South Carolina Legislature must be examined in order to determine the extent and limits of the PPDA's powers. Section 51-13-760 states that the general purposes for which the PPDA is created are intended to broaden and not to restrict any other powers given to the PPDA in the article. From such interpretation, it appears that the powers of the PPDA should be liberally construed in order to give effect to the purpose of the Act. See Leitzsey v. Columbia Water Power Company, 47 S.C. 464, 479, 25 S.E. 744, 749 (1896).

As a creation of state statute, the PPDA derives its entire existence, nature and powers therefrom. It is well known that

*Request Letter*

Dewey Wise, Esquire

Page 2

November 15, 1994

governmental agencies or corporations, municipal corporations, counties and other political subdivisions can exercise only those powers conferred upon them expressly, inherently, or impliedly by their enabling legislation or a constitutional provision. If a power is not expressed or necessarily implied, it does not exist. South Carolina Electric & Gas Co. v. Public Service Comm'n, 275 S.C. 487, 272 S.E.2d 733 (1980); Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E.2d 531 (1987).

Implied or incidental corporate powers are those which are essential to corporate existence and which are reasonably necessary to the execution of the corporation's express powers. Implied or incidental corporate powers are not those which are merely convenient or useful. There can be no implied power independently of an express power. Loving v. Seabrook Island Property Owners Ass'n, 291 S.C. 201, 352 S.E.2d 707 (1987); see also, Op. Atty. Gen. 87-38.

Having reviewed the enabling authority of the PPDA, we are unable to locate any specific authority allowing the PPDA to create a nonprofit corporation. However, in examining the statutorily authorized powers of the PPDA, it would appear that the statute gives PPDA very broad and general powers "to do and perform any act or function which may tend to or be useful toward the development and improvement of Patriot's Point." §51-13-760(7). Further, the PPDA has the power "to do any and all other acts and things authorized or required to be done by the article, whether or not included in the general powers mentioned in §51-13-770(9)."

Even though the State Legislature has not expressly delegated PPDA power to create a nonprofit corporation, the Legislature has, however, given PPDA the power "to do any and all things necessary to accomplish the purposes to the[e] article." §51-13-770(10). The fact that the State has given this specific authority to PPDA is an indication that the power to create a nonprofit corporation would be consistent with the Legislature's intent of the Act.

The law of South Carolina generally does not prohibit the state agencies or authorities from establishing nonprofit corporations. [See Op. Atty. Gen, February 28, 1977, where the State Housing Authority was found to have the power to create a nonprofit organization as included among its "necessary, proper, incidental or useful" powers. Since the State Housing Authority could issue bonds to finance the construction of low cost housing, it could choose to form a nonprofit organization that would carry out that task. See also South Carolina Nonprofit Corporation Act, Act No. 384, May 10, 1994.]

Dewey Wise, Esquire

Page 3

November 15, 1994

Here, the entrepreneurial character of the PPDA and the broad powers conferred upon it would seem to allow the PPDA to create a nonprofit corporation. The PPDA has the power "to sue and be sued, to make contracts and to adopt and use a common seal. . . and to acquire, lease, mortgage, and dispose of personal and real property." §§51-13-770(1) & (2).

Therefore, based on the foregoing, it is the opinion of this Office that the PPDA should be permitted to create a nonprofit corporation. The power to establish such a corporation can be derived from the express power to regulate the manner in which the business of the PPDA is to be transacted and the express power to do any and all things necessary to accomplish the purpose of the Act. §§51-13-770(8) & (10). Further, the creation of such a corporation is apparently deemed a necessary tool to the improvement and development of the Patriot's Point area over which the PPDA has jurisdiction.

I hope this provides the clarification which you have requested.

With my kindest regards, I am

Very truly yours,

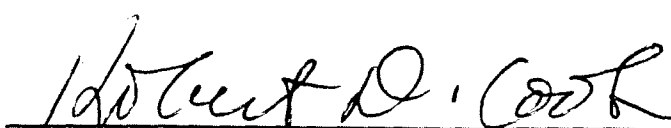


Cameron B. Littlejohn, Jr.  
Assistant Attorney General

CBLjr./fg

REVIEWED AND APPROVED BY:

  
Edwin E. Evans  
Chief Deputy Attorney General

  
Robert D. Cook  
Executive Assistant for Opinions