Reg. 5167

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 17, 1996

H. M. Alexander, Director
Coordinating Council for Economic Development
South Carolina Department of Commerce
Post Office Box 927
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Mr. Alexander:

You have asked whether the Advisory Coordinating Council for Economic Development of the Department of Commerce possesses discretion in the approval of grant applications pursuant to S.C. Code Ann. Sec. 12-21-2423. It is my opinion that the statute in question vests the council with broad discretion.

Section 12-21-2423 establishes a license tax on admissions to a "major tourism or recreation facility." One-fourth of the tax collected by the Department of Revenue and Taxation, beginning when the facility is open to the public and ending fifteen years thereafter, is paid to the county or municipality where the facility is located "to be used directly or indirectly for additional infrastructure improvements."

An additional amount equal to one-fourth of the tax "must be transferred to the State Treasurer to be deposited into a special tourism infrastructure development fund and distributed pursuant to the approval of the Advisory Coordinating Council for Economic Development of the Department of Commerce as provided in this section." (emphasis added). Deposits into the fund must be separated into special accounts "based upon which facility generated the transfer." The statutory provision further provides:

> Local units of governments within five miles of a major tourism or recreation facility may apply to the council for infrastructure development grants from the special account for which they are eligible. The amount of the funds received by each of the eligible local governments must be determined by the council based upon its review of a grant application submitted by each government. Preference must be given to applications for projects which directly or indirectly serve the generating facility or other development occurring as a result of the generating facility. Grants may run for more than one year and may be based upon a specified dollar amount or a percentage of the funds annually deposited into the special account. After approval of a grant application the council may approve the release of funds to eligible local governments. Funds must be used directly or indirectly for additional infrastructure improvements provided in this section. The council shall adopt guidelines to administer the fund including, but not limited to, tourism infrastructure development grant application criteria for review and approval of grant applications. Expenses incurred by the council in administering the fund may be paid from the fund. (emphasis added).

LAW / ANALYSIS

In interpreting any statute, the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The words used in a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Words given should, unless otherwise indicated, be given their popular significance. Hay v. S.C. Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979).

With respect to the "special tourism infrastructure development fund", the statute expressly anticipates that local units of government within five miles of a major tourism or recreation facility will "apply to" the council for infrastructure development grants. The term "apply" in such context normally means "to make an appeal or request." 6 C.J.S., "Apply". An "application" is "a request, or a document containing a request." 6 C.J.S., "Application". Often the terms "application" and "petition" are used interchangeably. Cook v. Glazer's Wholesale Drug Co., 209 Ark. 189, 189 S.W.2d 897, 900 (1945). Thus, the Legislature's use of the words "apply to" in the context of the council, indicates that

discretion on the council's part was anticipated in determining whether the grant "application" was granted or accepted, or not.

Likewise, the General Assembly used the term "review" in describing the council's role with respect to the grant "application". The term "review" ordinarily means to "look over, study, or examine again". The American Heritage Dictionary (New College Edition). Again, this envisions exercise of discretion by the council.

Most significantly, however, is the General Assembly's employment of the term "approval" or "approve" throughout the Section with respect to the council's role in the grant process. Clearly, the legislature envisioned that the council must give its "approval" to a grant application made by local units of government within five miles of a major tourism or recreation facility. While the term "approval" is susceptible of different meanings, depending upon the context in which it is used, that term necessarily involves discretionary power. An "approval" involves the exercise of discretion after knowledge. It is the act of passing judgment or the exercise of judgment, the use of discretion and the determination as a deduction therefrom. 6 C.J.S., "Approval".

Courts have utilized this definition of "approval" in a wide variety of contexts. In virtually every instance, discretion was found to exist where "approval" authority was given. For example, in Simpson v. Marlborough, 127 N.E. 887, 889 (Mass. 1920), a school commission was given the authority by statute to give its approval to school plans. The Court had this to say, in a thorough and comprehensive examination of the statute:

> [a]pproval implies favorable conviction manifested by affirmation concerning a specific matter submitted for decision. It does not import initiative. Approval ordinarily indicates the will to assent to an act done by some one else rather than the doing of that act ... It signifies the application of sound judgment to a proposition emanating from another source and submitted for investigation. It requires the exercise of faculties of criticism and discrimination. It denotes positive sanction. It does not mean original and inventive construction in the first instance. On the other hand, it is not a mere perfunctory act. It imposes no mean responsibility. It carries power and duty of an effective nature. It is the word used in both the State and federal Constitutions ... to ascribe the assent required by the chief executive before acts of the legislative department become operative.

Likewise, in Lincoln Highway Realty, Inc. v. State, 318 A.2d 795, 798 (N.J. 1974), the Court held that under a statute requiring "approval" of the state treasurer to any contract exceeding "$2500, "the lawmakers clearly intended to protect the public interest by drawing upon the judgment of the State Treasurer and validating the transaction only upon his watchful concurrence in the judgment of the Director. This condition is not merely a matter of form."

And in Morgan Co. Commission v. Powell, 293 So.2d 830 (Ala. 1974), the Supreme Court of Alabama opined:

> [t]he phrase "subject to the approval of" necessarily includes the right of disapproval. We do not see how the legislature could have more clearly expressed an intention to make approval by the county governing body a prerequisite to establishing the salaries of the secretaries as fixed by the judges. There is nothing in the entire context of the statute imposing any limitation on the power of the county governing body to approve or disapprove the salaries.
>
> We would, therefore be unjustified in limiting the plain intent of the statute .... [w]e consider it more persuasive to conclude that the true intent of the legislature was to place in the county governing body, which body appropriates the public monies, the final say-so in the disposition of such funds ... .

Id. at 839. The Court also noted that its view in interpreting the word "approval" was well-recognized throughout cases from all over the country. Said the Court,

> [m]any of the courts of our sister states have construed the words "subject to the approval" or similar phrases, as has this court. See Avery v. Norfolk Co., 279 Mass. 598, 181 N.E. 707; McCarten v. Sanderson, 111 Mont. 407, 109 P.2d 1108; Brown v. City of Newburysport, 209 Mass. 259, 95 N.E. 504; Harris v. Board of Education, 216 N.C. 147, 4 S.E.2d 328; Snider v. State, 206 Ind. 474, 190 N.E. 178; Fuller v. Board of Univ., 21 N.D. 212, 129 N.W. 1029; Baynes v. Bank of Caruthersville (Mo. App.), 118 S.W.2d 1051.

Id. at 838.

In Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981), a dispute resulted between a local conservancy subdistrict and the State Board of Water and Natural Resources. By statute, all proposed subdistrict contracts and budgets were to receive the "approval" of the State Board. The subdistrict submitted its proposed 1980 budget and six contracts for the Board's approval. Included in the proposed budget was an item of $300,000 for a continuing construction fund which the State Board reduced to $100,000. The budget and the six contracts were otherwise approved.

The subdistrict argued that the State Board was granted "only ministerial authority in the approval process ... limited to a determination that the contracts were in proper form and that the budget does not exceed the prescribed levy." Id. at 561. On the other hand, the Board argued that "the authority to approve connotes an exercise of discretion and judgment, unless otherwise limited in the context of the Statute." The Court rejected the subdistrict's argument and found for the State Board. Concluded the Court:

> [i]t is generally held that statutes which vest "approval" authority imply a discretion and judgment to be exercised to sanction or reject the act submitted .... The very act of "approval" unless limited by the context of the statute providing therefor, imports the act of passing judgment and the use of discretion, and a determination as a deduction therefrom ... and does not contemplate a purely ministerial act .... The word "approval" in a statute must be given its usual and accepted sense, where neither the context nor the apparent intention of the Legislature justifies any departure from the ordinary meaning which is the opposite of "disapproval" and necessarily involves the exercise of discretionary power. ... It implies a final, direct, affirmative sanction ... .

Id. at 561.

Janklow cited with approval a case decided by our own Supreme Court, State v. Duckett, 133 S.C. 85, 130 S.E.2d 340 (1925), a decision which is particularly instructive here. Duckett was a criminal case where the jury had convicted a bank officer for obtaining a loan from the bank without the "approval" of 2/3 of the directors as required by statute. The defendant moved for a new trial based upon after-discovered evidence, submitting to the Court his written approval of the loan by the directors. The trial court rejected the evidence, concluding that a written approval given by the directors several weeks before the loan was made was not adequate under the statute. Our Supreme Court affirmed, holding as follows:

> [s]o likewise here, it appears that the defendant had acted under a form of approval recognized and used in the conduct of banks. Yet when the mandate of the statute is involved, the statute must govern, and the fact that the defendant followed a proceeding recognized and established, with no intent to defraud, cannot absolve him from the penalties fixed by statute. Approval implies knowledge and, in this case, the exercise of discretion after knowledge.

Id. at 92-93.

Based upon the foregoing authorities, it is my opinion that the General Assembly intended to vest the council with broad discretion in approving applications for grants from the special tourism infrastructure fund. Nothing in the statute suggests an intent to make such function merely ministerial in nature. Indeed, use of terms throughout the statute such as "application", "review", and particularly "approval" indicate discretionary authority instead.

Moreover, with respect to the other fund specified in the statute, the Legislature simply stated that one-fourth of the tax would go to the "county or municipality in which the major tourism or recreation facility is located to be used directly or indirectly for additional infrastructure improvements".[1] If the facility is in an unincorporated area,

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[1] Section 12-21-2423 defines a "major tourism or recreation facility as

> ... an establishment or predetermined formally "designated development area" to which an aggregate investment in land and new capital assets or in refurbishing or expanding an existing facility of at least twenty million dollars is made within a five-year period and which is used for a theme park, an amusement park, an historical, educational or trade museum, a botanical or zoological garden, an aquarium, a cultural center, a theater, a motion picture production studio, a convention center, an arena, a coliseum, an auditorium, a golf course, or a spectator or participatory sports facility and similar establishments. Secondary support facilities such as hotels, food and retail services located within the establishment or the designated development area or immediately adjacent to and which directly support the

(continued...)

these funds are paid directly to the county and if the facility is in an incorporated area, directly to the municipality, the local government body utilizing these funds within its discretion, consistent with the statute. This is in sharp contrast to the specific language employed by the Legislature with respect to the special tourism infrastructure fund. There, the General Assembly obviously desired that this particular fund should have oversight by virtue of the "approval" of the council, a state agency with expertise in state economic development. Thus, the Legislature developed a plan whereby a portion of the tax would be paid directly to the local unit of government where the project was located and another portion thereof would require state oversight by virtue of the council employing its discretion in the payment of funds through the approval of grant applications.

For example, with respect to the special tourism infrastructure fund, the statute requires that "preference be given to applications which directly or indirectly serve the generating facility or other development occurring as a result of the generating facility." Moreover, the Legislature mandated the council to adopt guidelines to administer the fund, including "grant application criteria for review and approval of grant applications." Clearly, the requirement of "criteria" and "guidelines" indicates an intent that the council employ discretion and exercise judgment consistent with the language of the statute and the purpose of the fund (tourism infrastructure improvement) in the decision to grant or not grant funds to a particular locality for a particular project. Thus, it is my opinion that Section 12-21-2423 bestows upon the Advisory Coordinating Council for Economic Development broad discretion in the "approval" of applications for grants from the special tourism and infrastructure fund.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney

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[1](...continued)

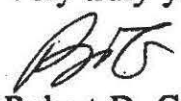
> primary "tourism or recreation facility" are included as part of the aggregate investment of at least twenty million dollars for the primary tourism or recreation facility.

In my judgment, the foregoing definition does not serve as a limitation upon the councils' authority. Notwithstanding the foregoing definition, the council retains the discretion to approve or not approve grant applications, based upon the guidelines and criteria it adopts so long as such guidelines and criteria are consistent with the statutory language and purpose. Because a wide variety of purposes are enumerated in the definition and description of a "tourism or recreation facility" does not transform the council into merely an administrative "pass through" for the disbursement of funds. Otherwise, the terms such as "approval" of the "application" by the council would be rendered meaningless.

as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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