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STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

June 18, 1996

The Honorable Michael T. Rose
Senator, District No. 38
506 Gressette Building
Columbia, South Carolina 29202

Dear Senator Rose:

By your letter of March 25, 1996, you have advised that the South Carolina Department of Transportation has voted to enter into an agreement with a consortium of companies to build a 17-mile toll road, known as the Southern Connector, in Greenville and Anderson counties. This Southern Connector project would include the sale of $183 million private, tax-exempt bonds by a nonprofit group of Greenville businessmen. The plan also calls for the Department of Transportation to loan the developers $20 million in seed money to start the project. You advised that apparently a new state law permits road projects of this kind.

You have asked to be informed whether the proposed arrangement described above for the Southern Connector, and the law permitting such road projects, would violate any provision of the South Carolina Constitution, including Article X, Section 11 of the Constitution, which states in part that "[n]either the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation."

Law/Analysis

As cited in your letter, Article X, Section 11 of the South Carolina Constitution prohibits the pledging of the credit of the State of South Carolina or its political subdivisions for the benefit of private individuals, companies, associations, or the like except as otherwise permitted by the state Constitution. That section also prohibits the State or its political subdivisions from becoming a joint owner of or a stockholder in any

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Request Letter

company, association, or corporation. This constitutional provision has been the subject of many judicial decisions and prior opinions of the Office of the Attorney General. See, as examples, Ops. Att'y Gen. dated April 4, 1996 (as to transactions involving the Medical University of South Carolina) and September 14, 1987; also Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), among others.

In researching issues relative to Article X, Section 11, it became apparent that a number of states have similar constitutional prohibitions against pledging the credit of the State or one of its political subdivisions for the benefit of essentially private purposes and further prohibiting the ownership of stock by the State or one of its political subdivisions. Several cases explaining these prohibitions and the reasons therefor are collected in Annot., 152 A.L.R. 495. The history of such prohibitions is well-explained in Brautigam v. White, 64 So.2d 781 (Fla. 1953); in explaining Florida's prohibitions, the court stated:

> [T]he purpose of this amendment was to prohibit counties, cities, townships or other incorporated districts of the State from becoming stockholders in or loaning their credit to, any corporation, association, institution, or individual.
>
> Such a practice had become prevalent as a result of the passage of [various Florida laws], encouraging a liberal system of internal improvement by which Boards of County Commissioners of certain counties were authorized to subscribe for and hold certain corporate stock. The practice was also encouraged by the Act of 1853, under which the Florida Atlantic and Gulf Central Railroad Company was incorporated and every County through which it ran was authorized to subscribe for its stock with approval of the voters, and to issue its bonds for payment of said subscription. The result of the civil war and the collapse of the State's economy thereafter made payment of these bonds very burdensome. Hence the addition of Section 10, Article IX to the Constitution to counter debauching the State's credit and the reckless speculation resulting therefrom.

Id., 64 So.2d at 784. The relationship of such prohibitions to ownership of stock in railroad companies and other private corporations by political subdivisions is also discussed at length in Annot., 152 A.L.R. 495.

Other judicial decisions have examined ownership of stock by political subdivisions or by the state itself. In Williams v. Turrentine, 266 So.2d 81 (Fla. Ct. App. 1972), the court repeatedly emphasized that public funds must be used for public purposes and cautioned against the financing of private enterprises: "The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably

to the ultimate destruction of the private enterprise system." Id., 266 So.2d at 85, quoting from State v. Town of North Miami, 50 So.2d 779 (1952). The court also stated that "unless the exercise of a municipal power is primarily for a public or municipal purpose, a municipality's private commercial venture for profit is invalid." Id., 266 So.2d at 83 (emphasis in original). The court continued:

> It should be recognized that whenever a city undertakes to operate a public hospital, a waterworks system, an electric plant, a parking system, a garbage or sewage collection system, the municipality is in reality engaged in competition with private business. The constitution does not prohibit a municipal corporation from owning or operating a system just because it is in competition with private business. What the constitution does prohibit is a municipal undertaking in partnership with private enterprise where the object of such undertaking is a private gain and profit by a private individual or corporation--the use of the municipal power for primarily a private purpose.

Id., 266 So.2d at 86.

Other considerations as to applicability of similar constitutional restrictions in other states include the element of speculation; in Brautigam v. White, supra, the lack of an element of speculation in the proposed transaction was persuasive. Prevention of diversion of tax funds is also important; in City of Louisville Municipal Housing Commission v. Public Housing Administration, 261 S.W.2d 286 (Ky. Ct. App. 1953), the court noted with respect to a housing commission becoming a member of a mutual insurance company by virtue of purchasing insurance:

> The purpose behind [the constitutional prohibitions against stock ownership by the Commonwealth and local governments] was to prevent local and state tax revenues from being diverted from normal governmental channels. This purpose will not be thwarted by the proposed action of the Housing Commission. None of the revenues of the Housing Commission is derived from local or state funds, and it has no authority to assess, levy or collect taxes in any form.

Id., 261 S.W.2d at 288. Indeed, such constitutional prohibitions have not precluded purchasing insurance from mutual insurance companies, whereby the political subdivision becomes a part "owner" of the company. Lawrence v. Schellstede, 348 P.2d 1078 (Okla. 1960); Louisville Board of Insurance Agents v. Jefferson County Board of Education, 309 S.W.2d 40 (Ky. Ct. App. 1958). Such a prohibition has been held not to prevent a

political subdivision from becoming a tenant in common of real property with a private person, as well. Miles v. City of Eugene, 451 P.2d 59 (Or. 1969).

The issue of whether the State of South Carolina could become a joint venturer with private firms was examined in Nichols v. South Carolina Research Authority, supra. The South Carolina Supreme Court determined that the South Carolina Research Authority was an agency of the State. As stated therein,

> The Authority has stipulated it intends to engage in joint ventures by receiving "... some degree of ownership in ... high technology firms." The Circuit Court held the Act [No. 50 of 1983, as amended by Acts Nos. 308 and 309 of 1984] gives the Authority no express or implied powers to enter into joint ventures with private businesses. Moreover, the Court held such undertakings would violate S.C. Const. art. X, §11:
>
> > ...Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation.
>
> The Authority contends this provision is inapplicable because it is not an agency of the State. As discussed above, we hold the Authority is a State agency.
>
> The constitution clearly prohibits public agencies, such as the Authority, from engaging in joint ownership with private parties. We agree with the Circuit Court and hold the Authority may not enter into joint ventures with private firms.

Id., 290 S.C. at 421. See also the judicial decisions discussed in the opinion of April 4, 1996, to you concerning the Medical University of South Carolina.

From these decisions it is clear that a joint venture or joint ownership of the State or one of its political subdivisions with a company, association, or corporation is constitutionally prohibited. From the information presented to this Office concerning the Southern Connector project, nowhere does it appear that the State, acting through its agency the Department of Transportation, will be a joint owner with the consortium of companies which would build the toll project. The consortium of companies submitted one of several proposals to the Department of Transportation; their proposal to build the toll road was accepted by the Department. It is our understanding that upon completion of the road, the road will be turned over to the Department of Transportation by the consortium. The State, through its agency, will not become a joint owner in the

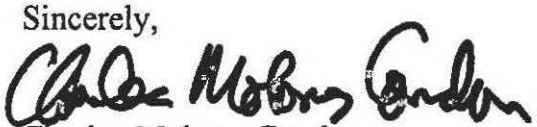
consortium or in any of the companies comprising the consortium, as best we can tell. The State will not be purchasing or otherwise acquiring any stock, as best we can determine. The transactions which will be occurring do not appear to place the State, through its agency, into a joint venture or joint ownership as prohibited by the Constitution.

It is our understanding that, as to this project, the investment of the South Carolina Department of Transportation will be twenty million dollars, with general obligation bonds to be issued in this amount. Of this amount, $17.5 million will be used to build the S.C. 153 connector to the toll road. The remaining $2.5 million will be used to fund an aspect of the Southern Connector project, such as completion of the final environmental impact statement, purchase of rights of way, or preliminary design. Connector 2000, a tax exempt 63-20 corporation (so named for Revenue Ruling 63-20), currently plans to issue $97.8 million in senior toll bonds and $84 million in junior toll bonds. These bonds are said to be non-recourse to the State of South Carolina, the Department of Transportation, and Greenville County. If for some reason the senior and junior toll bonds are not issued, only $2.5 million of state money is potentially at risk; however, the Department of Transportation would have "deliverables" (such as the final environmental impact statement, some rights of way, and/or preliminary design plans) to show for this investment. On its face, such an expenditure does not appear to violate Article X, Section 11 of the South Carolina Constitution.

In conclusion and based on the foregoing, I am of the opinion that the interaction of the South Carolina Department of Transportation and the consortium of companies which will build the toll project known as the Southern Connector will not be of such nature as to cause the State of South Carolina to be a joint owner or stockholder in any company, association, or corporation such as would be prohibited by Article X, Section 11 of the South Carolina Constitution. The project appears to involve a contractual relationship rather than joint ownership or ownership of stock by the State of South Carolina.

With kindest regards, I am

Sincerely,



Charles Molony Condon
Attorney General

cc: The Honorable David L. Thomas