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The State of South Carolina

Office of the Attorney General

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December 20, 1989

The Honorable Grady L. Patterson, Jr.
State Treasurer
Office of the State Treasurer
P. O. Box 11778
Columbia, South Carolina 29211

Dear Mr. Patterson:

You have asked this Office whether we are aware of any statutory authorization for the State of South Carolina to cosign a promissory note whereby the State obligates its future tax revenues to repay local community disaster loans to the federal government. You assert in your request letter that you are not aware of any enabling act that would authorize the State to enter into these long-term commitments. I must concur in your conclusion that there is no specific statutory authority for the State to commit to these loan obligations.

I understand that the community disaster loan program that you reference is the one identified at 44 CFR § 206.560, et seq. The loan program is one of the so-called financial assistance programs available pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ["The Stafford Act"] (42 U.S.C. § 5121, et seq.) administered by the Federal Emergency Management Agency ["FEMA"]. The community disaster loan program makes available loans to local governmental entities that have suffered a substantial loss of their revenues as a result of a major disaster and have demonstrated a need for financial assistance in order to perform their governmental functions. 42 U.S.C. § 5184; 44 CFR § 206.361. FEMA's application form for these loans ordinarily requests that the promissory note either be cosigned by the state or be sup-

ported by a pledge of collateral security. 44 CFR § 206.364.[1] The term of these loans (and notes) is generally five years and

> [i]n the event of default on [the] note by the borrower, the FEMA claims collection officer will take action to recover the outstanding principal plus related interest under Federal debt collection authorities, including administrative offset against other Federal funds due the borrower and/or referral to the Department of Justice for judicial enforcement and collection.

44 CFR § 206.367(b)6. Moreover, any costs incurred by the federal government in collecting the note shall be added to the unpaid balance and bear interest at the same rate as the original loan. 44 CFR § 206.367(b)(5).

I reference these provisions to demonstrate that with the possible exception of the loan cancellation provisions (44 CFR § 206.366),[2] which are favorable to the local governmental entity (borrower), the repayment and default terms appear to require the State, if it cosigns these notes, to ordinarily commit future revenues in order to repay these loans. Whether this cosign requirement as used herein requires that the State assume principal liability (joint and several liability with the county) upon the note as opposed to secondary liability (as a surety) is not completely clear either from the regulations or the documents you have provided. See, Wexler v. McLucas, 121 Cal. Rptr. 453, 48 Cal. App. 3d. Supp. 9 (1975). Regardless, it is clear that if the State were to cosign these notes, as they are presently constituted, the State would be incurring an obligation committing its future general tax revenues and entering into multi-year debt. Cf. Clarke v. South Carolina

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1. Parenthetically, the Stafford Act, 42 U.S.C. § 5184, does not require either of these additional security conditions as a requisite to obtaining federal community disaster loans. These additional conditions are imposed solely by FEMA in its administration of the Act.

2. These favorable loan cancellation provisions are required by the federal act, 42 U.S.C. § 5184, and, thus, reflect no magnanimity on the part of FEMA. Most interestingly, it is not clear how these cancellation provisions would be applied here since FEMA is demanding that the community disaster loans be secured or cosigned by the State.

Public Service Authority, 177 S.C. 427, 181 S.E. 481, 489 (1955) ["... the full faith and credit of the state ... cannot be pledged either directly or contingently, for the payment of the obligation."]; Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985).

Having concluded that the State's commitment as a co-signer would generally obligate its future tax revenues, the State's authority to enter into these commitments is governed by Article X, Section 13, Constitution of South Carolina (1988 Cum. Supp.), which provides, in part, that "'[g]eneral obligation debt' shall mean any indebtedness of the State which shall be secured in whole or in part by a pledge of the full faith credit and taxing power of the State." Article X, Section 13(2). Ordinarily, unless otherwise provided by a state constitution, the legislature has plenary power to incur indebtedness. 81A CJS States, § 213. However, Article X, Section 13 of the State Constitution constrains the General Assembly's authority to enter into the general obligation debt. Most significantly in this context, the General Assembly must specifically authorize the incurring of the general obligation debt. Moreover, any legislation authorizing the borrowing of funds on the part of the State should be strictly construed. Whaley v. Gaillard, 21 S.C. 560 (1884), writ of error dismissed 127 U.S. 216 (1888). Against this backdrop, I have reviewed the various statutory provisions that authorize the incurring of general obligation indebtedness.[3] I do not identify any specific statutory authority for the State to incur general obligation debt for the purpose of obtaining community disaster loans.[4]

The General Assembly has expressly provided various ways to provide State funds for emergency disaster relief. In that regard, I first reference Section 11-5-230 of the 1976 Code that provides for the establishment for a continuing account in the State Treasurer's Office, the funds to be used to match federal disaster assistance funds. This provision requires

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3. See generally Title XI of the South Carolina Code, 1976 (1988 Cum. Supp.).

4. Parenthetically, this Office has previously concluded that "[a] county may incur indebtedness in anticipation of a federal grant [for disaster relief] as provided in Article X, Section 14(10) of the South Carolina Constitution and Chapter 19 of Title 11 of the Code of Laws of South Carolina, 1976." Op. Atty. Gen. October 6, 1989.

that the account is to be maintained by annual appropriations. In addition, Section 25-1-440(a)(8) authorizes the governor, when an emergency has been declared, to enter into an agreement with the federal government authorizing the State to participate in federal grant programs in order to fund financial assistance to individuals and families. This authority does not, by its terms, enable the governor to obligate the State by incurring general obligation debt to secure loans for governmental entities. Additionally, Section 25-1-440(a)(8)(iii), as last amended by 1989 Act 189, Part II, Section 38, provides authority for the governor to make financial grants to individuals or families adversely affected by a major disaster. Moreover, in certain emergency situations, the Budget and Control Board, when the General Assembly is not in session, is authorized to lend State funds to counties or municipalities for emergency and recovery operations for monies derived from the reserve fund of the State Treasurer. Section 25-1-460, as last amended by 1989 Act 189, Part II, Section 38. I emphasize that none of these statutory provisions authorize the State to enter into a general obligation debt whereby public funds derived from future tax revenues are committed.

I summarize my conclusions as follows. First, I agree with your conclusion that the General Assembly has not statutorily authorized the State of South Carolina to cosign a note obligating the State to repay federal community disaster loans. Second, since any such commitment on the part of the State would obligate future tax revenues (tax monies received in subsequent fiscal years) the incurring of this multi-year debt is governed by Article X, Section 13, of the State Constitution. While this provision does not preclude the General Assembly, if it so chooses, from authorizing the State to incur such debt, it must do so by specific statutory enactment and only in a manner consistent with the requirements of Article X, Section 13. Third, the General Assembly has provided several avenues whereby State funds are authorized to be expended or lent for emergency disaster assistance.

If I may provide any further assistance, please call upon me.

Very truly yours,

Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED:

ROBERT D. COOK
Executive Assistant for Opinions