

THE STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
COLUMBIA

OPINION NO. ~~88-58~~ 164

August 2, 1988

SUBJECT: Taxation & Revenue - Expenditure Of The Accommodations Tax To Acquire Easement To The Facade Of A Historical Building.

SYLLABUS: Class C funds from the accommodations tax may be expended to acquire a perpetual easement upon the facade of a historical building.

TO: Honorable Glenn F. McConnell
Senator, District No. 41

FROM: Joe L. Allen, Jr. *JLA*
Chief Deputy Attorney General

QUESTION: May the City of Charleston expend a portion of the funds allocated to it from the accommodations tax to acquire an easement upon the facade and the use of a historical building?

APPLICABLE LAW: Section 12-35-720, South Carolina Code of Laws, 1976, as amended.

DISCUSSION:

It is a fundamental rule that the expenditure of public funds must be for a public purpose. As understood, a building in the City of Charleston having significant historical value was, except for its facade, destroyed by fire. The building is situate in an area in which the city is developing a visitor center. The building was a three story structure with the upper floors being of doubtful use for the present needs of the owner. The city in order to encourage the owner to reconstruct this type building and to preserve the facade acquired an easement or interest in the property. The easement gives the city control of the facade and in some ways limits the use to which the reconstructed building may be applied. The city in acquiring the easement used funds allocated to it from the accommodations tax.

Before considering whether the expenditure was proper under Section 12-35-720, we first address the issue of whether the expenditure is for a public purpose. In Morris v. Townsend, 253 S.C.628, 172 S.E.2d 819, our court held that:

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"An easement gives no title to the land on which the servitude is imposed. It is, however, property or an interest in land."

The city in acquiring the easement thus has obtained something in return for the expenditure. It is property and an interest in the facade and the building. The building was first constructed in 1852-1872 and had been designated by the city for its historical value. Its history is likewise published in documents of the South Carolina Department of Archives and History.

It is settled that expenditures of public funds for historical and recreational purposes are for recognized public purposes. Timmons v. South Carolina Tricentennial Commission, 254 S.C. 628, 175 S.E.2d 805, Mims v. McNair, 252 S.C. 64, 165 S.E.2d 355. The court in Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), set the following standard to test the constitutionality of a statute for financing industrial development. It is as follows:

"The Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree. (Emphasis supplied)"

It appears that this expenditure meets this standard and is therefore not constitutionally prohibited.

As understood, the principal beneficiary of the facade is the public. In the absence of the city's action, the facade would not have remained in existence. While there is benefit to the owner, such does not invalidate the expenditure. Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43.

Whether the expenditure falls within the language of Section 12-35-720 presents a more difficult question. The funds involved are designated by the section as class (c) funds. Those funds are to be expended for "tourism-related expenditures." That term is defined by the statute to include:

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"The term 'tourism-related expenditures' includes the following types of expenditures: advertising and promotion of tourism so as to develop and increase tourist attendance through the generation of publicity; promotion of the arts and cultural events; construction, maintenance, and operation of facilities for civic and cultural activities including construction and maintenance of access and other nearby roads and utilities for such facilities; the criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities; public facilities such as restrooms, dressing rooms, parks, and parking lots; tourist shuttle transportation; control and repair of waterfront erosion; and operating visitor information centers . . . "

It should be noted that this section defines the term "tourism-related expenditures" to "include" the listed items. While the word is sometimes construed to be a limitation, it is generally accepted to be a word of enlargement.

". . . the term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 62 S.Ct. 1, 96 L.Ed.2d 65. (For other cases, see Volume 20A, Words and Phrases, "Include".)

It is evident that the General Assembly intended the word "include" to be illustrative. Had the intent been otherwise, there would have been no need to insert the word. Whether the expenditure for the easement to protect the historical value of the facade is a tourism-related expenditure is a matter that in large measure rests with the governing body of the city.

". . . the courts will not interfere with the exercise of discretionary powers by a municipal body except in cases of fraud or clear abuse of power . . . " City of Greenville v. Bozeman, 254 S.C. 306, 175 S.E.2d 211.

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The city has acknowledged that its tourism-related activities are dependent upon its history and the historical properties located therein. Without these buildings there would be a material impairment of the tourist related business. The city found that the preservation of the facade protected and enhanced its ability to attract tourists. It further asserts that the facade is located within an area of the city that is presently receiving major attention to further the area's tourist attractions. As stated by the court, in the absence of fraud or the clear abuse of power, the courts will not interfere.

While not free from doubt, it is thus reasonable to conclude that the expenditure of these funds to acquire the easement to protect the facade and its historical value is a tourism-related expenditure.

CONCLUSION:

Class C funds from the accommodations tax may be expended to acquire a perpetual easement upon the facade of a historical building.

JLAJr/jws