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The State of South Carolina

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September 22, 1988

Mr. Jack M. Scoville, Jr.
Georgetown County Attorney
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Dear Mr. Scoville:

Your letter asked for this Office's opinion as to whether the Georgetown County Mental Retardation Board (Board) has the authority to mortgage its property. Our subsequent communications established that you are requesting an opinion as to whether the Board, as duly constituted under section 44-21-810 et seq. of the Code of Laws of South Carolina, 1976, would have the powers to borrow money and to mortgage its property, and, if not, what avenues of funding may be available to it.

SHORT ANSWER

Although the Board, if a private non-profit corporation only, would have the powers to borrow and to mortgage its property pursuant to section 33-31-100(2) of the Code, 1976; if duly established pursuant to sections 44-21-830 or 835 of the Code, it would be a public corporation, and whether it has such powers would depend largely on the ordinance creating it, and constitutional and "Home Rule" statutory limitations. There are also a number of alternative forms of financing improvements and acquisitions of facilities available for such a public corporation.

ANALYSIS

Whether the Board has the powers to borrow money and to mortgage real estate depends upon the legal nature of the Board.

The Board has a corporate charter from the South Carolina Secretary of State as a private, non-profit corporation, and it has

not been established or created by county ordinance, resolution or otherwise. Consequently, it has the powers to borrow and to mortgage its property pursuant to section 33-31-100(2) of the Code.

If a county mental retardation board established pursuant to section 44-21-810 et seq. has the power to incorporate as a private non-profit corporation and lawfully can be a private non-profit corporation, then so incorporating would confer the attendant powers to borrow and mortgage. Section 33-31-100(2) of the Code. A corollary is that, if section 44-21-840's mandate that the Board "shall be a body corporate in deed and law with all the powers incident to corporation" refers to private corporations, it could well convey the power for the Board to incorporate privately. It would also grant the Board the powers to borrow and mortgage directly as these are private profit and non-profit corporate powers by virtue of sections 33-3-20(10) and 33-31-100(2). See article IX, section 2 of the South Carolina Constitution. "Formation, Organization and regulation, etc. of corporations." (The General Assembly shall provide by general law for the formation....of corporations and shall prescribe the powers..."). However, the term "corporate powers" includes powers conferred upon public or municipal corporations, as well as those conferred upon private corporations. Terry v. King County, 86 P. 210, 211, 212, 43 Wash. 61 (1906).

Legal Nature of a Lawfully Constituted
County Mental Retardation Board

It is clear that the General Assembly uses "corporate" to refer to public corporate bodies in many contexts. See generally Title 5 of the Code, "Municipal Corporations", and article I, section 17 of the South Carolina Constitution. It is revealing that section 58-19-30, which grants the Public Railways Commission its powers, gives it the powers of a body corporate in subsection (1), yet gives it the power to mortgage its property in subsection (2) and the power to issue bonds (i.e., borrow) in subsection (7). Since the legislature intends to accomplish something with each statutory provision and not to engage in a futile action, State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964); the necessary implications of these separate grants of powers are that the powers of a "body corporate" do not include the powers to mortgage or issue bonds (borrow); and, since those are statutory private corporate powers, the "body corporate" referred to in section 58-19-30 and in analogous provisions, such as 44-21-840's, is not a private body corporate.

Section 44-21-830. "Establishment and membership of county mental retardation boards." provides that "[e]very county or combination of counties establishing a county mental retardation service program shall, before it comes within the provisions of this article, establish a county mental retardation board of not less than five members...[who] shall be appointed by the Governor...". Section 44-21-835, enacted in 1987, provides that "County Mental Retar-

dation Boards created by actions of county councils have equal status with those created pursuant to section 44-21-830...[and have the same] duties...". In order to come under the provisions of article 5, section 44-21-810, et seq., Georgetown County alone, or in concert with other counties, must establish or create a "county mental retardation board." Section 44-21-835 refers specifically to "created by actions of county councils." Section 4-9-30(6) gives the governing body of each county government the power to establish such agencies, boards...and to prescribe the functions thereof. The creation or establishment of a county board would be a legislative act, and pursuant to section 4-9-120, the county council shall take legislative action by ordinance. Certainly the county cannot act, "create" or "establish" through the action of a number of private citizens, as in their obtaining a private non-profit corporate charter. Furthermore, where the General Assembly intends for such services to be administered by non-profit corporations, as well as by public boards, it so provides. See, e.g., section 44-15-10. Note, also, that section 44-15-10 refers to "non-profit corporations or a community mental health board" - the use of the conjunctive denoting the distinction between the two.

As a creation of statute and county ordinance, such a board would derive its entire existence, nature and powers therefrom. Brooks v. South Carolina State Board of Funeral Service, 271 S.C. 457, 247 S.E.2d 820 (1978). Bank of Augusta v. Earle, 38 U.S. 519, 10 L.Ed. 274 (1839); Dartmouth College v. Woodward, 17 U.S. 518, 4 L.Ed. 629, (1819); Thompson v. Shepherd, 165 S.E. 796, 203 N.C. 310 (1932). McQuillin Municipal Corporations (3rd Ed.) § 10.09. Power cannot be conferred on a public corporation by the corporation itself. Id. §10.03. For instance, the municipal corporation cannot give itself authority to issue negotiable instruments where none existed before. "To hold otherwise would be to invest a municipal corporation with full legislative power, and make it superior to the laws by which it was created." Katzenberger v. Aberdeen, 121 U.S. 172, 7 S.Ct. 947, 949, 30 L.Ed. 911 (1887), and "it would always be in the power of a municipal body to which power was denied to usurp the forbidden authority, by declaring that its assumption was within the law." Dixon County v. Field, 111 U.S. 83, 92, 4 S.Ct. 315, 319, 28 L.Ed. 360 (1884). Cited in Bolton v. Wharton, 163 S.C. 242, 161 S.E. 454, 458 (1931). Consequently, a board properly "established" or "created" under section 44-21-810 et seq. could not alter its nature or its powers under those enabling legislative acts by obtaining a private non-profit corporate charter. It would remain an "administrative planning, coordinating and service body" established by the county. Sections 44-21-830, 835 and 840, with whatever powers granted it by sections 44-21-810 et seq. and by the county ordinance establishing it, consistent with those sections, and the applicable constitutional and statutory provisions concerning county powers.

The Federal District Court of South Carolina, has held that the York County Mental Retardation Board, which was created by

county ordinance, but also held a private non-profit corporate charter, is a public agency which is a political subdivision within the meaning of the Fair Labor Standards Act, and that its Board members are government officials entitled to qualified immunity. Hovis v. York County Mental Retardation Board et al., C.A. Nos. 3:87-322 through 325-16, Orders entered November 5, 1987 at p. 5, and August 10, 1988, at p. 11 note 3, and p. 13. Although instructive, the Honorable Karen LeCraft Henderson's November 5, 1987 holding that the York County Mental Retardation Board is a political subdivision within the meaning of the FLSA may not be dispositive. It is based on the finding that the Board is an entity "administered by individuals who are responsible to public officials" (Board members appointed, and subject to removal, by the Governor). NLRB v. Natural Gas, 402 U.S. 600 at 604-605, 91 S.Ct. 1746 at 1749, 29 L.Ed.2d 206 at 210 (1971). Judge Henderson neither repudiates the York County Board's non-profit corporate status nor analyzes other indicia of a section 44-21-810 board's nature, but finds "the fact of the Board's corporate status (which included owning and mortgaging property in its own name and the funding of its program by contract grants, client fees and donations rather than county funds) to be far less compelling under NLRB V. Natural Gas, supra, than the [above cited] degree of control York County and the state retain over the Board members once appointed." See also York County Fair Assn. v. South Carolina Tax Comm., 249 S.C. 337, 154 S.E.2d 361, 362 (1967), ("A 'public corporation' is an instrumentality of the state...governed by those deriving their authority from the state...").

The 1965 Attorney General Opinion No. 1896, at p. 179, discussed the nature of county mental health boards vis-a-vis tort immunity. Under the predecessor to section 44-15-10, et seq., a county mental health board, like a county mental retardation board,

> ...is composed of persons appointed by the Governor, upon recommendation of the legislative delegations of the various counties. It is, basically, the administrative agency for community mental health services programs and is eligible to receive grants of public funds from the South Carolina Mental Health Commission. In my opinion, it is clearly a public agency and is, therefore, immune from tort liability. By the provisions of § 32-1034.27, community mental health boards are declared to be "bodies corporate in deed and in law, with all of the powers incident to corporations". This does not, in my opinion, alter the status of the boards as public instrumentalities immune from tort liability.

Also, the March 9, 1988 letter of Senior Assistant Attorney General Kenneth P. Woodington to Director Purvis W. Collins of the

South Carolina Retirement System states, "...[T]his office would advise that the Georgetown County Mental Retardation Board is a political subdivision and an "employer" within the meaning of Code section 9-1-10(5)" ("the term 'employer' shall also include any county...or other political subdivision of the State, or any agency or department thereof...").

Corporations are either public or private. Coyle v. McIntire, 30 A. 728, 730 (Del. 1884); McQuillin, supra, § 2.02. There is no authority for the proposition that one entity could be both. Furthermore, as shall appear below, constitutional and statutory prohibitions against government entanglement in private corporations would suggest against a corporation being both a public and a private corporation. Note that these constitutional prohibitions against aiding corporations are aimed at private, not public, corporations, McQuillin, supra, § 39.26, and do not apply to one municipal or public corporation aiding or lending credit to another. Id., § 39.30.

Private corporations are either strictly private or "quasi-public"; i.e., privately owned but performing a public service, such as utilities and railroads. Lawfully constituted county mental retardation boards are creations of legislation and neither are, nor can be, privately owned. See article X, section 6 of the South Carolina Constitution (the State shall not become a joint owner...in any company, association or corporation). Unlike private corporations, they are created by legislation for political or governmental purposes related to the public good and civil administration, with powers to be exercised for such purposes; i.e., public corporations. McQuillin, supra, section 2.03.

Public corporations consist of municipal and "quasi-municipal" corporations. Note that the General Assembly, in some contexts, uses "municipality" to include counties, townships, school districts, cities, towns or "other public corporations"; e.g. sections 6-17-20 and 6-21-30. The relevant parts of the definitions of both municipal and quasi-municipal corporations apply to, and define, county mental retardation boards, and thus support the conclusion that they are public corporations.

> The distinguishing feature of a municipal corporation, or a quasi-municipal corporation, is that it is not only a body corporate but also a body politic, the components of which, the corporators, are endowed with the right to exercise in their collective capacity a portion of the political power of the state.

McQuillin, supra, section 2.07a.

A quasi-municipal corporation is,

> ...a corporation created or authorized by the legislature that is merely a public agency endowed with such of the attributes of a municipality as may be necessary in the performance of its limited objective. In other words, a quasi-municipal corporation is a public agency created or authorized by the legislature to aid the state in, or to take charge of, some public or state work, other than community government, for the general welfare.

McQuillin, supra, section 2.13.

Herein, the "corporators" "exercise the powers..., aid the state in, or take charge of" administration and service delivery for county mental retardation services funded in whole or in part by the Department's State appropriation or other sources under its control. This meets the definition of a quasi-municipal corporation, if not of municipal corporation, as well.

A body "corporate" created for the sole purpose of performing one or more municipal functions is a quasi-municipal corporation and in common interpretation should be deemed a municipal corporation. Augusta v. Augusta Water Dist., 63 A. 663, 664, 101 Me. 148 (1906).

All of the attributes of a lawfully constituted board are those of a public corporation, as opposed to a private corporation, and all other indications are that such a board is public. Nor is there any authority for the proposition that such a board has the power to acquire a charter as a private corporation, or that such acquisition would alter its true nature as a public corporation. The question then, is whether public or municipal corporations have the power to borrow or mortgage.

Powers of Public Corporations

The powers of municipal corporations may be classified as (1) governmental and municipal (private); (2) executive, legislative, judicial or quasi-judicial; (3) mandatory and directory or discretionary; and (4) intramural and extramural. They can also be characterized according to their form as express, inherent, incidental, or implied powers. McQuillin, supra, § 10.04.

Governmental agencies or corporations, municipal corporations, counties and other political subdivisions can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly, inherently or impliedly. Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E.2d 531 (SC 1987); cf. Banks v. Batesburg Harding Co., 202 S.C. 273, 24 S.E.2d 496 (1943); 64 Am.Jur.2d, Public Works

and Contracts, section 8; 56 Am.Jur.2d, Municipal Corporations, Counties and other Political Subdivisions sections 493, 494.

Neither the power to borrow money nor the power to create indebtedness are incidents of local government, and such powers cannot be exercised unless they are conferred either expressly or by necessary implication. The prevailing view is that, in the absence of an express grant of power, a municipality has no inherent power to borrow money, nor is such power implied by the conferring of the power to incur indebtedness, or from the mere authority to purchase property and erect buildings. McQuillin, supra, § 39.07.

The powers to mortgage, borrow or incorporate privately have not been expressly granted by either section 44-21-840 of the Code of Laws of South Carolina, 1976, or by county ordinance. The power to promote and accept financial support from a variety of sources would not include the power to borrow money, as the power to "raise" money does not include the power to borrow money. McQuillin, supra, § 39.07, citing Wells v. Salina, 119 N.Y. 280, 23 N.E. 870 (1890).

Nor is there South Carolina authority for the proposition that borrowing money or mortgaging real estate is an implied or inherent power of a public corporation. On the contrary, the Supreme Court in Luther v. Wheeler, 73 S.C 83, 52 S.E. 874 (1905) held that "[a]ny fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the powers denied"; and that a municipal corporation's power to borrow money does not exist to make public improvements unless it was expressed, or duties or powers had been expressed which "manifestly could not be exercised at all without borrowing money." 52 S.E. at 875 and 876 citing Dillon on Municipal Corporations. Bolton v. Wharton, supra; Craig v. Bell, 211 S.C. 473, 46 S.E.2d 52, 57, (1948) (provision of statute making it unlawful for trustees of any school district in Barnwell County to borrow money for any purpose or create any indebtedness for and on behalf of, school district unless such loan or indebtedness has first been approved by the County Board of Education and County Auditor does not imply the power to borrow). A fortiori, if there is no power to incur particular indebtedness, there is no power to execute a note therefor. McQuillin, supra, § 39.09. See Hyams v. Carroll, 146 S.C. 470, 144 S.E. 153 (1928) (Commissioners of Department of Public Works denied power to issue notes without special election).

Implied or incidental corporate powers are those which are essential to corporate existence, those which are reasonably necessary to execution of the corporation's express powers, not those which are merely convenient or useful. Lovering v. Seabrook Island Property Owners Association, 352 S.E.2d 707, 291 S.C. 201 (1987). Creech v. South Carolina Public Service Authority, 200 S.C. 127, 20 S.E.2d 645 (1942). The Supreme Court in Creech held

that the express statutory power of the Public Service Authority (a "public corporation in the nature of a quasi-municipal corporation, exercising certain governmental functions as an agency of the State") to "develop" rivers and "to produce, distribute and sell electric powers" did not imply the power to purchase existing power plants as it was not "directly and immediately appropriate to the execution of the specific power granted."

It is clear that a section 44-21-810 board would not have the power to borrow money unless a county ordinance expressly gave it such a power. It is also clear that a county ordinance could not give a board any greater powers than the county itself possesses. Hyams v. Carroll, supra, 144 S.E. at 154, citing Union v. Sartor, 91 S.C. 248, 74 S.E. 496 (1912). Whether such a board would have the implied power to mortgage, under certain circumstances, is less clear, but it probably would not.

Attorney General Opinion No. 87-38 advised that, in the absence of express statutory authority to mortgage its property, a state agency could not do so; primarily because of the general rule that such agencies can exercise only those powers conferred upon them by the General Assembly and because the General Assembly had conferred the power to mortgage in analogous statutes where it intended the particular agency to have such a power. Essentially, the same analysis would apply herein, except that the agency under consideration in that opinion had not been granted "all powers incident to incorporation", and that, herein, the county enabling ordinance could give a 44-21-810 board a limited power to mortgage its property, expressly, or, possibly, by implication from another express power, as is discussed below.

Furthermore, it is generally held that, in the absence of express legislative authority to do so, a municipal corporation has no power to mortgage or pledge property owned by it and any attempt to do so is invalid. McQuillin, supra, § 28.41 ("as this power is not essential to the declared objects of the corporation"). Annot., 71 A.L.R. 828 and cases cited therein and in later case service; but see Edey v. Shreveport, 26 La.Ann. 636 holding that a city, having a right to purchase land, had a power to secure the unpaid portion of the purchase price with a mortgage, since such mortgage was merely an incident of the contract of purchase.

By the same token, the express power to purchase generally includes the power to incur indebtedness in making such purchase; i.e., the power to purchase on credit. McQuillin, supra, § 39.17. Additionally, "[a]s to private property, it would seem that a municipality has the power, in the absence of a statute or charter provision to the contrary, to mortgage or pledge it to secure any obligation it is authorized to contract". Id., § 28.41, citing Dillon, Mun. Corp. (5th Ed.) § 996, p. 1591.

However, there can be no implied power independent of an express power. Luther v. Wheeler, supra; Bolton v. Wharton, supra; McQuillin, supra, § 10.12. No powers can be implied except as are necessary to the exercise and enjoyment of those expressly granted. Cumberland Telephone & Telegraph Co. v. City of Evansville, 127 F. 189, 191 (1903). The questions thus become whether a section 44-21-810 board has the express power to purchase real estate or buildings, and whether property held by such a board would be public or private.

Section 44-21-840 does not specify the power to purchase and hold real estate or buildings, although it does specify some particularized powers such as promoting and accepting local financial support, employing personnel, expending a budget for the direct delivery of services, and contracting with service vendors or other human service agencies. Furthermore, the General Assembly frequently expresses the power to purchase and hold real estate in addition to "all powers incident to incorporation." See, e.g., 44-15-70(1), which was an amendment to Section 44-15-70, further indicating that "all powers incident to incorporation" does not include the power to purchase real estate. That expressly granting the power to purchase real estate could be in recognition of the prerequisite that a given power be expressed in order for another power to be implied therefrom, would presuppose extraordinary complexity in the approach of the legislature.

Although most American jurisdictions have held that municipal corporations have no inherent powers, especially as to governmental matters, McQuillin, supra, § 10.11, South Carolina Courts have stated in dicta that municipal corporations have inherent powers in Lomax v. Greenville, 225 S.C. 289, 82 S.E.2d 191 (1954), and Douglas v. Greenville, 92 S.C. 374, 75 S.E. 687 (1912).

The powers to purchase and hold real estate, and erect and maintain buildings have long and generally been held to be such inherent or incidental powers of municipal corporations. At common law, a municipal corporation, unless restrained by its charter or some applicable statute, possesses power to purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically conferred, or essential to those purposes of municipal government for which it was created. McQuillin, supra, § 28.02 and § 10.11 citing Blackstones Commentaries, (Cooley), 475, 476. The power to take property is an inherent power of a municipal corporation. Congdon v. Congdon, 200 N.W. 76, 87, 160 Minn. 343 (1924); In re Lloyds of Texas, 43 F.2d 383, 389 (Tex. 1930).

Bodies created or existing by virtue of statutory authority and variously designated as quasi-corporations, or quasi-municipal corporations, may take and hold property in accordance with their statutory powers, and incidental to their statutory purpose, and such an entity, for purposes of holding property, may be deemed a

municipal corporation," although it would not qualify as a municipal corporation in the strict or technical sense of the term. McQuillin, supra, § 28.09.

Generally, a municipal corporation has the power to acquire, erect and maintain buildings for municipal purposes. It need not have express power to erect a fire-engine house, or a jail or any necessary municipal building. This power "is a necessity, incident to the administration of every municipal government, without which it would be impossible to carry out the objectives and purposes of the incorporation." McQuillin, supra, § 28.13.

It would appear, therefore, that section 44-21-840's grant of "all powers incident to corporation" would be a grant of the inherent or incidental powers to purchase and hold real estate, and to erect and maintain buildings, insofar as such are necessary for the fulfillment of the powers and responsibilities expressly granted such statutory boards. It would not appear, however, that these are express powers within the meaning of the implied powers doctrine because they are not expressly stated in section 44-21-840, whereas other particular powers are, and these particular powers are expressed in analogous statutes. Consequently, the power to incur indebtedness or take a purchase money mortgage cannot be implied from section 44-21-840.

Simons v. City Council of Charleston, 181 S.C. 353, 187 S.E. 845 (1936) which McQuillin cites at § 41.33 for the proposition that a municipal corporation does not create an indebtedness by obtaining property to be paid for wholly out of the income of the property, cites Luther and Dillon for the rule that borrowing money is not an inherent or incidental power of a municipal corporation, but holds that the municipal corporation had the discretion to adopt an ordinance pledging its income from utility rates for the payment of bonds. However, the issuance of those bonds, the borrowing involved, was not in issue and had been duly authorized pursuant to a petition of the majority of the freeholders of the city and an election. Furthermore, the corporate right to construct, operate and maintain the utility had been expressly granted by article 8, section 5 of the Constitution and section 728 and 732 of the Code of 1932. 187 S.E. at 545. Further, Pond on Public Utilities, Third Edition, 16, on which the Simons' court relied, states, "The municipal corporation in its private proprietary and essentially business or commercial aspects acts as a property owner...and may exercise its business powers very much in the same manner as a private individual or corporation." Herein there is no election authorizing the borrowing (bonds) or ordinance authorizing the mortgaging (pledge), and the Board is not authorized to engage, or engaging, in proprietary and essentially business or commercial activity. It is also noteworthy that the type of pledge involved in Simons has been expressly authorized by section 11-23-10 et seq. of the Code since 1975 for political subdivisions or public bodies of this State which are authorized by law to issue general

obligation bonds. Furthermore, it is clear that the authorities generally use the terms "credit", "indebtedness" and "debt" in the context of constitutional and statutory limitations on pledging the credit of the state and its subdivision in terms of the taxing powers, not in their usual and ordinary meaning; cf. Elliot v. McNair, 250 S.C. 75, 156 S.E.2d 421, 427 (1967).

Unlike Simons, there is no authorization by law for a section 44-21-810 board to do anything related to borrowing money. Nor is there express authority to purchase or improve property to serve as a basis for an implied power to take a purchase money mortgage to enable such a purchase. Although such powers would be convenient and useful to execution of the powers expressed by section 44-21-830, they cannot be said to be necessary or essential to such execution or to the Board's existence. In the absence of express authorization by county ordinance, a 44-21-810 board would not have borrowing and mortgaging powers, with the possible exception of a purchase money mortgage with a non-recourse note payable solely from the revenues generated by the property purchased if the power to purchase property were expressly granted by county ordinance. (See Special Fund Doctrine, infra.).

It would also appear that any property lawfully acquired by a section 44-21-810 board would be governmental or public, as opposed to private property. The powers and purposes the statute expresses for such a board are entirely governmental or public, rather than proprietary or private. Public health is a state or governmental affair, rather than a municipal or proprietary affair. In the performing of its duty to protect the public health, a municipal corporation does not act in a private or proprietary capacity, but instead in a governmental capacity. McQuillin, supra, § 4.99. If the power conferred has relation to public purposes and is for the public good, it is generally classified as governmental in its nature. McQuillin, supra, § 10.05.

In the public, governmental or political character and power, the municipal corporation acts as an agency of the state. Where a municipal corporation is performing a governmental function, it is none the less so because it is done by the instrumentality of some administrative agency, such as a board, commission, or even a corporation set up for that purpose. Id.

Since a section 44-21-840 board is entirely governmental or public in power and purposes, it can only act as a public or municipal corporation, not as a "corporate legal individual", Herkimer County v. Village of Herkimer, 295 N.Y.S. 629, 633, 251 App.Div. 126 (1937). As it would only be authorized to purchase and hold real estate and erect and maintain buildings as a public corporation in furtherance of those public powers and purposes, such real estate and buildings in its possession would be public property, as opposed to private property. Brooks v. One Motor Bus, 190 S.C. 379, 3 S.E.2d 42, 44 (1939) citing Carter v. City of Greenville,

175 S.C. 130, 178 S.E. 508 (1935) (political subdivisions "property is held in trust for the public and for public use..."). Thus, they could not be mortgaged or pledged as private property. As public property, they could only be mortgaged or pledged if the county ordinance creating the board expressly, or by necessary implication, so provides; cf. Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596, 600 (1923); and see, e.g., section 59-53-1620(4) giving the Richland-Lexington Counties Commission for Technical Education the power to:

> acquire by purchase, give, devise, lease, or otherwise any real or personal property and to hold, use, lease or mortgage such property, or any interest therein; provided, that before any mortgage is executed, approval by the governing bodies of Lexington and Richland Counties shall first be obtained.

Note, also, that Attorney General Opinion No. 87-38 concluded that the General Assembly's determination that such powers required expression indicates that, where they were not so expressed, they did not exist. These commissions had not been granted "all powers incident to incorporation", however.

Sources of Board Funding and Their Implications

"It is well established and illustrated that municipal corporations are rigidly restricted as to their faculty to raise and expend money to the officers and channels authorized by law, and cannot transcend the bounds thus imposed." McQuillin, supra, § 39.17, citing Bolton v. Wharton, supra.

Section 44-21-810 et seq.

The county mental retardation board's express powers imply that their funds are to come from "State appropriations to the South Carolina Mental Retardation Department or other sources under the Department's control," "local financial support...from private sources such as United Fund, business, industrial and private foundations, voluntary agencies and other lawful sources, and...public support from municipal and county sources." Section 44-21-840, "Power and duties of Boards." Section 44-21-850, "Duties of Department", also refers to "county mental retardation programs funded in part or in whole by State appropriations to the Department or through other fiscal resources under its control...[and for the Department to] determine priorities for funding plans or portions of such plans subject to available funds." Finally, section 44-21-860 "Funding of County plans", provides expressly for such funding without any mention of borrowing. Although it encourages the county boards "to utilize all lawful sources of funding", this would appear to refer to the sources listed or implied in section 44-21-840; i.e., financial "support" rather than loans. McQuillin, su-

pra, § 39.09. Further, specific reference is to funding by the Department or sources under its control, and, subject to the department's approval, to state or federal funds administered by other state agencies and other federal government agencies' funds.

The presence of all of these express provisions for funding would further militate against the necessity of the power to borrow to carrying out the Board's "administrative, planning, coordinating, and service delivery" powers and duties. The legislature's expression of numerous means of funding county mental retardation boards would also tend to exclude methods of funding, such as borrowing, which can not be encompassed within the means expressed; i.e., the legislature's expression of one thing excludes the other which it does not express. Home Building & Loan v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938),. Black, Construction and Interpretation of Laws §72 (2d Ed. 1911); Sutherland, Statutory Construction section 491.94 (2d Ed. 1904).

Section 44-21-1010 et seq.

If the county mental retardation boards are under the jurisdiction of the department, this same rule of statutory construction would also indicate that they do not have the power to borrow to make capital improvements to their facilities, in that section 44-21-1010 et seq. expressly empowers the South Carolina Mental Retardation Commission to construct and reconstruct buildings of the state's mental retardation facilities, and raise money therefor, through the issuance of bonds or contractual agreements.

However, it is doubtful that county boards are "under the 'jurisdiction' of the Department or Commission for the purposes of section 44-21-1010, et seq. See, e.g., 1976-77 Opinion of Attorney General, No. 77-177, p. 138. (Social mental health programs and clinics established pursuant to section 44-15-10's predecessor are not "State Agencies" within the meaning of the Act requiring state agencies to lease real property through the Division of General Services.) They are public, administrative bodies of the county created or established by county ordinance. Section 44-21-1020, "Recognition of jurisdiction of mental retardation facilities," refers to sections 44-19-10 to 60 giving the Department jurisdiction over all the State's mental retardation hospitals, centers and other facilities. So does section 44-19-10 itself. Furthermore, section 44-19-40 gives the Department's Commissioner the power to appoint superintendents of each "institution," and, as section 44-21-840 gives the power to employ personnel for county boards' activities and facilities to the boards themselves, this would indicate the county board's facilities are not institutions under the jurisdiction of the department, within the meaning of 44-21-1010(c). The requirement that the county board's services and facilities be licensed as the Department may require would also suggest that such facilities are not State facilities under the

Department's jurisdiction, as it would not license its own facilities.

There are contrary indications, however. Section 44-21-30's definition of "Department" in that article includes the Department "and various facilities and services under its jurisdiction and control", whereas section 44-21-820's definition of "Department" is limited to the Department. This is probably merely a result of there being no need for reference to "facilities and services under its control" in the article dealing with county boards. Sections 44-21-840, 850 and 860 do give the Department considerable apparent authority and control over the county board's annual plan, budget and funding.

In view of these contradictory indications of whether county boards are agencies, or their facilities are institutions, under the jurisdiction of the Commission/Department, the interpretation of the Department, as the agency charged with administering section 44-21-1010, et seq., would be entitled to considerable weight. Although the Department apparently has not applied for capital improvement bonds for county boards under this article, neither has it, nor any other body, ruled on this question. The greater weight of the indicia available, however, would suggest that a court in a proper case would rule that county boards are county, as opposed to State, institutions, and are not under the Department's jurisdiction within the meaning of section 44-21-1010.

County Authority

Section 44-21-840 empowers boards to promote and accept "local financial support...from private sources, other lawful sources and municipal and county sources," which would include appropriations from county or city councils. Such county sources would also include the proceeds of County bonds pursuant to the procedure of section 4-15-10 et seq. of the Code. The provisions of sections 4-15-30, 40, 50 and 150 thereof, and the applicable Constitutional provisions referred to, are also illustrative of the policy reasons why public corporations do not have the power to borrow unless such power is expressly granted by the people's representatives. These provisions' requirements of notice of election, an election, and declaration of election indicate legislative recognition of the importance and necessity of the consent of the political subdivision's electors prior to the pledging of their government's credit, and, as provided by section 4-15-150, their taxes. Section 4-15-30 also refers to and incorporates the constitutional debt limitations.

Again, section 4-9-30(6) empowers counties to "establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof...". Thus, pursuant to section 4-9-30(6) and 44-21-830 or 835, a county could establish a county mental retardation board and

prescribe its functions and powers, including those related to finance, such as borrowing and mortgaging property, as long as any such are not inconsistent with the provisions of section 44-21-810 et seq., and statutory and constitutional limitations on the county's powers. Hyams v. Carroll, supra. Simons and the general law of public corporations indicate that such authorization would be lawful and effective.

It would appear from the above analysis, and from Attorney General Opinion No. 77-264, at page 197, that counties are not expressly or impliedly, authorized to enter into long term borrowing agreements by the "home rule" legislation; and that, pursuant to Article X of the South Carolina Constitution, as amended, a county is only authorized to incur indebtedness through the "bonded debt" route (section 4-15-10 et seq.) or through a revenue producing project or special source. (See Special Fund Doctrine infra). Consequently, an ordinance granting a section 44-21-810 board the power to borrow should so limit said power. See, e.g., section 59-53-53 empowering technical and vocational education and training area commissions to borrow for capital improvements so long as no funds other than revenue from a specially imposed fee are pledged for repayment.

A county could also create a special tax district for the purpose of building and maintaining county mental retardation facilities or providing such public health service by following the procedures of section 4-9-30(5). Furthermore, local governments, including counties, municipalities and special service or tax districts, may enter into contractual agreements through their governing bodies to provide joint public facilities and services. Section 6-1-20 of the Code. See also section 11-15-10 et seq., Bonds of Political Subdivisions.

Note that article X, section 5 of the Constitution prohibits counties, municipal corporations or other political subdivisions of the State "authorized to contract debt by law" (another indication that the power is neither inherent nor implied) from incurring debts exceeding eight percent of the assessed value of all taxable property in the subdivision. Furthermore, where more than one political subdivision in a given geographical area is authorized by law to incur debt, they must exercise said lawful power so that the territory's total local governmental debt does not exceed fifteen percent of the value of all taxable property in the territory.

Special Fund Doctrine

Note, however, that bonds issued by political subdivisions which are payable from special funds (revenue from a given income producing source) are not "debts of the State or its political subdivisions" within the meaning of the debt limitations of article

X, sections 5 and 6. See, cases annotated at note 7, article X, section 7. Whether any Board facilities would produce income or produce income sufficient to make the requisite payments on bonds issued for building or purchasing such facilities, is a question of fact which is not before this Office. If they would, and the county enabling ordinance expressly authorized a section 44-21-810 board to purchase or hold real estate, the limited power to incur indebtedness to that extent and to take a purchase money mortgage for the purpose of purchasing property for the board's public functions may be implied that express power.

If an obligation is payable out of a special fund only, such as from the income of property, and the municipality is not otherwise liable; there is no indebtedness within the meaning of constitutional debt limitations. McQuillin, supra, § 41.31 citing Simons v. Charleston, supra, and Clark v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935). The court in Cathcart v. Columbia, 170 S.C. 362, 170 S.E. 435 (1933), held that constructing a stadium and issuing therefor bonds payable solely from the revenue derived from the stadium did not violate the constitutional provisions limiting the "bonded" debt of the municipality. It also held that no such "bond debt" was created where Columbia issued, without the approval of voters, bonds for extension of its water works system secured by pledge of revenue from the extension and the present revenue of the department. Similarly, bonds payable from the income of a housing authority did not increase the bonded indebtedness of the city. McNulty v. Owens, 188 S.C. 377, 199 S.E. 425 (1938).

It is essential, however, that the public corporation is not liable to maintain the special fund out of its general funds or from it or its parent's tax levies, if the revenue generated specifically for the special fund proves insufficient. McQuillin, supra, § 41.31 citing Simons, supra, and Clark, supra. If such financing contracts provide for general liability of the public body or pledge the faith and credit of the body, they come within the inhibitions of the statute or constitution and are void. Id., citing Robinson v. White, 256 S.C. 410, 182 S.E.2d 744 (1971). However, in some cases where the revenues provided for the special fund are reasonably sufficient to pay the principal and interest of the obligations incurred, it has been held that the bonds payable from such special funds do not create a debt, even though full faith, credit and taxing powers are pledged. Id., citing State v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951).

There is also authority, and reason, suggesting that, if such a note is secured by property of the public body other than that purchased by the note, it does create an indebtedness within the constitutional debt limitations. Elliott v. McNair, supra, 156 S.E.2d at 429. McQuillin, supra, § 41.34.

Other Constitutional Limitations

The limitations of article X, section 6 of the constitution illustrate another reason county boards cannot be private corporations. Section 6 prohibits the pledging of the State's credit for any such corporation, which, despite the public purpose doctrine, would tend to contradict most of the funding sources expressly provided in sections 44-21-840 and 860, particularly if section 41-21-1010 bonds are available, if lawfully established boards could be private corporations. ("State", herein includes political subdivisions of the state. Elliott v. McNair, supra, 156 S.E.2d at 427. Elliott also indicates that the public purpose doctrine avoids these constitutional restrictions where a "special fund" is involved.) Section 6 also prohibits the General Assembly's authorization of the counties' or township's levying of taxes or issuance of bonds except to "...build and repair public...building...", which would contradict other funding sources of 44-21-840 and 860 if the boards could be private corporations. However, since a lawfully established board is a public body and corporation, its buildings would be public, and the county could levy taxes or issue bonds to repair or build such.

Other Financing Mechanisms

Section 44-21-840's "local financial support from private sources" would also include such support from private non-profit corporations, including one organized and chartered to support the purposes of one or more county mental retardation boards, such as the current board, which does have the powers to borrow and mortgage pursuant to section 33-31-100(2). Although a board established by the county under 44-21-830 or 835 does not have the power to so incorporate or change its nature in this manner, the requisite number of individuals can, of course, and foundations for such purposes are commonly connected with educational and service delivery agencies. The questions then involve the structuring of the relationship between the non-profit organization and the public body to survive constitutional muster. This is particularly problematic if the structuring of the relationship and any bonds issued by the private non-profit corporation also seek to take advantage of public bonds' tax free status but see State v. Byrnes, supra.

Various lease with option to purchase and building authority mechanisms for avoiding constitutional debt limitations, which could perhaps circumvent the power to borrow requirement as well, have been upheld in some of the states which have addressed them, often depending upon how artfully they were structured. However, whether one such arrangement violates these constitutional provisions in South Carolina is a question of first impression presently before our Supreme Court in Caddell v. Lexington County School District 1, which was heard in June, 1988. Circuit Judge Walter Bristow had adopted the position that such a building authority lease-purchase arrangement, which did take advantage of public

bond's tax free status, was unconstitutional borrowing by the School District. There is also a maxim of law that one cannot do indirectly what one can't do directly. Lurey v. City of Laurens, 265 S.C. 217, 217 S.E.2d 226 (1975); Westbrook v. Hayes, 253 S.C. 244, 169 S.E.2d 775 (1969). See also, Jon Magnusson, Lease-Financing by Municipal Corporations as a Way Around Debt Limitations, 25 George Washington L.R. 377 (1957). (lease-financing "is borrowing by another name".)

In that same vein, the court, in a state where some of these arrangements are approved, commented that one such was "a scheme which would fool only a lawyer." In the Matter of Constitutionality of Chapter 280, Or. Laws 1974 v. Oregon Building Authority, 276 Or. 135, 554 P.2d 126 (1976). A state statute created a separate building authority to rent buildings to the state. The state was unconditionally required to make lease payments until the bonds were paid in full and the bonds were supported by the state's full faith and credit. The court held the scheme created unconstitutional debt and liability, and the revenue bond exception did not apply. See also, C. Robert Morris, Jr., Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions, 68 Yale L.J. 234 (1958). ("Absent such peculiar facts which in themselves would exempt the debt from the constitutional limit, the building authority device constitutes a flagrant violation of state constitutions.")

However, Renven Mark Bisk, State and Municipal Lease-Purchase Agreements: A Reassessment, 7, No. 2 Harvard Journal of Law and Public Policy 521 (1984), analyzes lease-purchase financing, especially from the accounting-economic perspective, and concludes that lease-purchase financing is a sorely needed financial tool. To be constitutional, the lease-purchase should contain a nonappropriation clause. Bisk concludes,

> ...if state and municipalities include a nonappropriation mechanism in their lease-purchasing contracts to protect the public from fiscal extravagance, lease-purchase financing is both constitutionally justified and economically advantageous.

Hopefully, our Supreme Court's Caddell decision, will clarify the question of the constitutionality of building authority/lease-purchase arrangements. Consequently, and because of the multiplicity of ways these "schemes" can be structured, it would be inappropriate for this Office to address these issues.

CONCLUSION

It is clear that a section 44-21-810 et seq., county mental retardation board must be "established/created" by county council; would be a public, municipal or quasi-municipal corporation; and

would not have the power to privately incorporate or to borrow per se. Any enabling ordinance could only empower such a board to borrow directly pursuant to the special fund doctrine. Nor would such a board have the power to mortgage property unless the enabling ordinance expressly granted that power, or, at least, the power to purchase or hold real property or to erect and maintain buildings. It is also clear that, due to its nature as a public, administrative agency of the county, a variety of sources are available for funding improvements to, and acquisitions of, such a board's facilities for providing mental retardation services.

Sincerely,

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