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Office of the Attorney General

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August 2, 1985

Wesley L. Brown, Esquire
Cherokee County Attorney
Post Office Box 936
Gaffney, South Carolina 29342

Dear Mr. Brown:

By your letter of July 12, 1985, you have asked for the opinion of this Office on the following two questions:

1. To what extent, if any, can county resources (cash, services, personnel, equipment, etc.) be employed to induce private industry to locate in Cherokee County? More specifically, can the county use its resources to make improvements upon property owned or to be acquired by private industry and/or provide cash or other resources directly to the industry for such improvements on the condition that the industry will locate in the county? Does the same conclusion follow if the industry is existing and intends to expand or relocate within the county?

2. Can the positions of Delinquent Tax Collector and Director of Civil Defense and Disaster Preparedness be combined and held by a single individual with corresponding compensation?

Each of your questions will be addressed separately, as follows:

Question 1

As you stated in your letter, this Office has ruled on numerous occasions that public funds or other resources could

not be used to perform work or otherwise improve private property. See, for example, Ops. Atty. Gen. dated June 11, 1975; September 12, 1975; December 9, 1975; October 26, 1977; March 12, 1979; January 31, 1980; and numerous other opinions. The basis for these opinions is Article X, Section 11 of the State Constitution, which provides in part:

> The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, [or] corporation... .

While there is a question of whether a grant or appropriation to a private corporation would involve a pledge of credit, see, Ops. Atty. Gen. dated March 19, 1985 and July 12, 1984 (copies enclosed), the test of an expenditure of public monies for a public purpose must nevertheless be met. In Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), the Supreme Court stated that

> a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment.

265 S.C. at 162. The Supreme Court has also stated as to promotion of individual interests:

> The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The

> incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation ... . It is the essential character of the direct object of the expenditure which must determine its validity as justifying a tax ... .

Feldman & Co. v. City Council, 23 S.C. 57, 63 (1883), quoting from Lowell v. City of Boston, 111 Mass. 454, 15 Am.Rep. 45. Thus, Cherokee County Council must determine whether the public is being served directly or only incidentally if public funds or other resources are to be used to assist private industry in locating in Cherokee County.

While development of industry has been viewed as a public purpose, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), not every expenditure of public monies to attract industry has been approved by our Supreme Court. Most recently in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984), the Supreme Court struck down a plan for industrial development, to be financed by general obligation bonds to be repaid from proceeds from ad valorem taxes to be imposed on Florence County property owners, as speculative and because the primary beneficiaries would be private parties, notwithstanding that two industries, promising 750 jobs, would consider locating in the Florence area. The factors considered by the court in Byrd, similar to the factors noted in your letter, were not sufficient to meet the public purpose test. See also Anderson v. Baehr, supra. As to permissible expenditures by using revenue bonds, which do not involve taxing power of the issuing authority, see Elliott v. McNair, supra; Harper v. Schooler, 258 S.C. 486, 189 S.E.2d 284 (1972); and Bauer v. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978).

While this Office has not examined any proposed expenditure of funds or use of other resources, we would advise that any expenditure or use which will benefit primarily private individuals, companies, or corporations would be suspect, in light of the strong language in Byrd. A direct provision of cash or a loan to private industry would most likely be prohibited in view of the authority cited. No distinction would be made between a new industry and one which would be relocating to or expanding its facilities in Cherokee County.

While you did not inquire about other constitutional measures, we would point out that the recently approved amendment to Article X, Section 3(g) would permit Cherokee County to exempt from ad valorem taxation all manufacturing establishments, locating or making additions to facilities in Cherokee County, which otherwise meet the specified requirements as to date and cost. This exemption from ad valorem taxation could be beneficial in attracting industry (i.e., manufacturing establishments) to Cherokee County.

Question 2

You have asked whether the positions of Delinquent Tax Collector and Director of Civil Defense and Disaster Preparedness can be combined and held by one individual with corresponding compensation. The response depends upon how each of the positions were initially created, along with the provisions of Section 4-9-30(6) of the Code.

Section 4-9-30(6) empowers county councils

> 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 and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title. ...

In an opinion of this Office dated February 7, 1978, construing this Code section, it was stated:

> That language does not empower the [County] Council to modify or regulate existing county offices created either by statute or by the State Constitution as the case may be, except in the areas hereinabove specified. ...

Thus, such proposed merger of the two positions depends upon how each was created: if each office were created by County Council subsequent to Home Rule implementation, then such merger would be permitted as Section 4-9-30(6) has been interpreted.

This Office does not know how the position of Delinquent Tax Collector was created. However, Act No. 608, 1973 Acts and Joint Resolutions, which created the Cherokee County Civil Defense and Disaster Advisory Commission, authorized the Commission to employ personnel, including a director of the county program. If the status of this Commission is unchanged, it is unlikely that the position of director could be merged with another county position, as this Office has interpreted Section 4-9-30(6).

We would advise that additional research on how each position was created is necessary, in part to identify how the position of Delinquent Tax Collector was established. We would also note that in several counties, councils have adopted ordinances subsequent to Home Rule which have effectively recreated disaster preparedness commissions. If that be the case in Cherokee County, the position of director of the agency may well be one subject to the merger or modification provisions of Section 4-9-30(6); however, without additional information, this Office cannot respond definitively.

We trust that the foregoing has satisfactorily responded to your inquiries. Please advise us if additional assistance or clarification should be necessary.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

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