The State of South Carolina

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The Honorable Joyce C. Hearn
Member, House of Representatives
1300 Berkeley Road
Columbia, South Carolina 29205

Dear Representative Hearn:

You have asked whether Richland County Council would have the authority to expend funds for a proposed performing arts center, if the county retains no ownership or legal interest in the facility and would have no part in its management or control. As we understand it, Richland County would, in essence, make a contribution to the construction of the facility; the land would be provided by the City of Columbia and the building owned and managed by the University of South Carolina. We would caution that we have not reviewed any particular proposal or method of funding which may have been previously suggested; indeed, we understand that there is presently no proposal pending before Council. Our comments herein are thus confined to your limited question of whether we are aware of any prohibition upon the county assisting in the funding of the project without retaining any legal interest, ownership or control in it. With that caveat, we would advise that a court would probably conclude that such would be generally permitted.

A number of cases, decided by our Supreme Court, have generally upheld a local government's expenditure of funds to another political subdivision or governmental entity for the purpose of assisting that entity in some public venture. For example, in Allen v. Adams, 66 S.C. 344 (1963), the Court upheld the Edgefield town council's issuance of bonds to construct a school building in the town. The Court concluded that, unquestionably, such construction would constitute both a corporate purpose (of the town) and a public purpose; but, it was argued

that, under existing law, the town council could have no management or control over the school's operations as such had been delegated to the school district. The Court rejected the argument, concluding that it was clear that such expenditure of funds was within the town's corporate purpose, because the presence of the school building would surely "promote the convenience, welfare and order of its inhabitants... ." 66 S.C. at 355.

In Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947), Charleston County issued bonds to purchase a site to construct the South Carolina Medical College. The Act authorizing such purchase was attacked as being violative of then Article X, § 5 of the State Constitution which provided that counties could be vested with power to assess and collect taxes for corporate purposes. The statute also allegedly violated Article X, § 6 which set forth a county's corporate purposes. As the Court characterized the thrust of petitioner's constitutional attack, the contention was that "because of State ownership and control the taxpayers and people of Charleston County have no interest as will warrant the levy of taxes or the issuance of bonds in order to provide a site for the hospital." 210 S.C. at 108. The Court answered the contention, by rejecting it as follows:

> Yet, it must be obvious that the benefits to be derived by the people of Charleston County from the establishment of a 4,000,000.00 hospital of about 325-bed capacity, as a teaching or clinical hospital in connection with the Medical College, are incalculable, when considered from the viewpoint of the public health and welfare.
>
> It is indeed true that the citizens of other counties of the State would have an equal right to obtain the services of the hospital, but in the very nature of things a decidedly large percentage of the patients who would be treated there would be persons residing in Charleston County. It may also be observed that the location of such a hospital in the county will undoubtedly be of some special and peculiar benefit to its residents, because of the fact that they will have quicker and cheaper access to it than will the people of any part of the State.

Supra. The Court further noted that it knew of nothing in the State Constitution which prohibited a county from levying a tax or issue bonds "unless the court is the sole beneficiary thereof." Because the proposed hospital "will surely promote a public service and subserve a public use ... the benefits to be derived by the County of Charleston, as distinguished from the other counties of the State, are quite sufficient to authorize the legislation in question. 210 S.C. at 109.

The Court further pointed out the obvious advantage to joint cooperative ventures among various governmental units. Noted the Court,

> It cannot be doubted that the State has power to construct the hospital, and that the County of Charleston also has the power to construct it. How can it then be logically said that the State and the County do not have the power to construct it as a joint project? For we have nothing in our Constitution which prohibits cooperation between two governmental entities, created under it, in doing what each of them might do alone.

210 S.C. at 110. And the Court observed that this "principle of cooperation between governmental entities in the joint accomplishment of a public purpose" had been upheld by it in previous cases and in cases from other jurisdictions. See, DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938); County of Livingston v. Darlington, 101 U.S. 407, 25 L.Ed. 1015 (1880). Quoting with approval from 38 Am.Jur., Municipal Corporations, 251-252, the Court stated:

> ...there is nothing unconstitutional in a statute which permits a municipality, as an inducement to the state to locate such an institution within its corporate limits, to make a donation or subscription in money, bonds, or lands, to aid in the establishment and construction of the institution in the desired place.

Thus, the Court concluded that the project served a valid public and corporate purpose despite the fact that the county retained no control over the hospital, once constructed; the venture was, therefore, upheld. But the Court was not unmindful

of the county's need to maintain a continuing interest in the venture as a result of its expenditure of tax monies:

> We do not overlook the suggestion that the title to the hospital will be in the State and the control thereof in the Board of Trustees of the Medical College, a State institution; and that hence the County of Charleston has no assurance that the hospital will be maintained as contemplated, and continue so to be maintained to the end that the county may receive the anticipated benefits. While it is true that there is no express contract between the State and the County of Charleston ... we hold that, to the extent needed to justify the joint project, the State holds title and exercises control on behalf of Charleston County, the latter being of course a component part of the State. In other words, there is a clearly implied obligation on the part of the State to operate the hospital as planned and to continue so to do or else to make just compensation to the county. We cannot assume that such an obligation would be disregarded in any respect. (emphasis added).

210 S.C. at 118.

A number of other decisions of our Supreme Court have also upheld contributions of funds by a county to another governmental entity to assist in a public venture. Cothran v. Mallory, 211 S.C. 387, 45 S.E.2d 599 (Spartanburg County and City of Spartanburg jointly built auditorium); Shelor v. Pace, 151 S.C. 99, 148 S.E. 726 (Oconee County issued bonds for school purposes); Gray v. Vaigneur, 243 S.C. 604, 135 S.E.2d 229 (Jasper County issued bonds for school district); Stackhouse v. Floyd, 248 S.C. 183, 149 S.E.2d 437 (Dillon County issued bonds for school district); Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (Florence County donated $1,000,000 to Pee Dee Regional Health Service District to build hospital). And in a previous opinion, this Office concluded that the issuance of bonds in the amount of $200,000 by Richland County in order to make a contribution for the construction of the Carolina Coliseum even though "title to the

Coliseum will be in the University and control thereof will be by the University...." 1967 Op. Atty. Gen., Op. No. 2225, p. 23, 24.

It is true that the majority of the foregoing decisions were rendered prior to the adoption of new Article X of our Constitution and before the enactment of the Home Rule Act. See, § 4-9-10 et seq. However, it would appear that these prior decisions are consistent with the aforesaid newly adopted provisions of law. Article X, § 14(4) provides in pertinent part:

> (4) General obligation debt may be incurred only for a purpose which is a public purpose and which is a corporate purpose of the applicable political subdivision. (emphasis added).

As our Supreme Court recently stated in Byrd v. County of Florence, ___ S.C. ___, 315 S.E.2d 804, 805 (1984), in interpreting new Article X, § 14(4):

> Public purpose is not easily defined. It is oftentimes 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.

The Court further commented that when a county issues general obligation bonds, in order for such issuance to serve a valid public purpose:

> 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.

Supra at 806. Each case must be "determined on its own peculiar circumstances." Supra at 805.

Since we are not empowered to make factual determinations, see, Op. Atty. Gen., December 12, 1983, we cannot say with certainty whether a court would conclude that a particular proposal for construction of the proposed arts center serves a valid public purpose. County council would have to evaluate the particular proposal concerned in light of the foregoing test articulated in Byrd. 1/ However, generally speaking, our Supreme Court has upheld the construction of public auditoriums and concert halls. In Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 98, ___ S.E.2d ___ ( ), for example, our Court stated:

> That a publicly owned and operated auditorium serves a useful public purpose will not be gainsaid in this day. It is common knowledge that large assemblages are frequently in the public interest and courthouses are often no longer able to accommodate them in these times of large centers of population, easy and inexpensive travel and short work hours. This court has not had the direct question before, but others of high standing have held an auditorium to be a proper public purpose and we agree.

Likewise, in Cothran v. Mallory, supra, the court concluded that the construction of the Spartanburg Memorial Auditorium constituted a valid public purpose. While we cannot say with certainty that a particular proposal would pass the test articulated in Byrd, we doubt, based on the foregoing cases, that a court would conclude the construction of the proposed arts center does not serve a public purpose. And, based on the reasoning in Smith v. Robertson, supra, we also doubt that the fact that the county

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1/ Again, we do not address herein any requirements which might accompany a specific proposal for raising revenue by the county such as the issuance of bonds. Such would have to be evaluated by the county when there is a more concrete proposal available. We have addressed your question generally, not whether the county could lawfully raise revenue by a particular method. See, § 4-15-10 et seq.

would not have title to or an interest in the building would cause a court to conclude that the project does not meet the public purpose test. 2/

We also believe a court would conclude that such a project serves the corporate purpose of the county. Clearly, as we have shown, our Court has previously concluded that the building of a public auditorium would fulfill the corporate purpose of the county. Cothran v. Mallory, supra. Moreover, § 4-9-30(5) [Home Rule Act] provides "that each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof:

> (5) to assess property and levy ad valorem property taxes and uniform service charges ... and make appropriations for functions and operations of the county, including, but not limited to ... recreation ... . (emphasis added).

There is little doubt that "recreation" includes such activities as dancing, plays, etc. See, McKinney v. Bd. of Zoning Adjustment of K.C., 308 S.W.2d 320, 325 (1957); McClure v. Bd. of Ed. of City of Visalia, 176 P. 711; Beard v. Bd. of Ed. of North Summit School Dist., 16 P.2d 900, 905 (Utah 1932); 76 C.J.S., Recreation. Thus, a facility which has the purpose of housing such activities would likely fall within the corporate purpose of spending funds for recreation.

Moreover, we see no reason why a court would not follow the reasoning of our Supreme Court in Smith v. Robertson, supra, and conclude that such a project serves a valid corporate purpose even though the county retains no interest or control over the building or its operation. Of course, we would note that it would further insure the validity of such proposal if the county does indeed maintain some control over the center or at least its management. We note that Section 4-9-150 of the Home Rule

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2/ Obviously, the Byrd test would have to be applied to the specific factual circumstances.

Act provides that county council "shall provide for an independent annual audit of all financial records and transactions of the county and any agency funded in whole or in part by county funds and may provide for more frequent audits as it deems necessary." It would also appear that the county could attach whatever conditions were necessary to its expenditure of funds to insure that the public and corporate purpose were being maintained. As the Court stated in Smith v. Robertson, supra, another governmental entity, such as the State or a political subdivision, "has a clearly implied obligation" to operate the venture in which the county has invested "as planned and to continue so to do or else make just compensation to the county." 210 S.C. at 118. See also, Op. Atty. Gen., November 17, 1983. 3/

In this same regard, we would call to your attention Article X, § 13 of the State Constitution, adopted after the cases cited above were decided, and which provides in pertinent part:

> Any county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of costs thereof.

In a previous opinion, this Office cautioned that the foregoing provision "might not be construed to include what amounts to a donation on the part of one political subdivision to another entity, especially where the donor already performs the function." Op. Atty. Gen., October 23, 1978.

On the other hand, Article VIII, § 13 also provides that

> Nothing in this Constitution shall be construed to prohibit the State or any of its counties ... from agreeing to share the lawful cost, responsibility and administration of functions with any one or more government, whether within or without the State.

3/ We assume herein that only governmental entities are involved. See, Smith v. Robertson, 210 S.C. at 117. See however, Op. Atty. Gen., November 17, 1983; Op. Atty. Gen., July 12, 1984.

Moreover, Article VIII, § 17 provides that the powers of counties "shall be liberally construed in their favor" and shall include those powers "not prohibited" by the Constitution. Reading these two provisions together, a court could still conclude that the framers of Article VIII, § 13 did not intend to prohibit two or more governmental entities from entering a joint venture where at least one of the entities (here, the County) merely provides some of the "costs" of the venture, but does not jointly "administer" the project. This conclusion is supported by the fact that such an arrangement has been consistently upheld by our Court prior to the adoption of Article VIII, § 13; if the framers of Article VIII, § 13 had intended to remove such longstanding power, it would appear such would have been done expressly. 4/

Accordingly while the question you have raised is not free from doubt, see Op. Atty. Gen., October 23, 1978, we believe a court would more than likely conclude that, because the proposed center probably serves a public purpose and a corporate purpose of the County, the county could contribute funding to such a project even if the county technically maintained no interest or control in the center or its operation. As a matter of caution and policy, however, council may wish to insure, as part of any expenditure of funds and as to any agreement with other governmental entities involved, that some form of interest or control, as outlined above, be maintained. See, Smith v. Robertson, supra; Op. Atty. Gen., November 17, 1983.

I hope this adequately responds to your inquiry. In view of the very limited time which we have had to review your question and the apparent complexity as to any particular proposal, we would suggest of course that the county attorney be consulted

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4/ Moreover, the text of Article VIII, § 13 enumerates "costs" as an item separate from "responsibility" or "administration of functions". In such instances, such is usually read disjunctively, see, 1A Sutherland Statutory Constructon, §§ 21.14, 21.15. Obviously however, there is certain ambiguity in the provision. See, Op. Atty. Gen., October 23, 2978; 1A Sutherland, supra.

regarding any problems he might have as to this or any other aspect of the proposal. If we may be of further assistance to you, please let us know.

Sincerely,

Robert D. Cook
Executive Assistant for Opinions

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