

The State of South Carolina



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August 1, 1986

The Honorable D. M. McEachin, Jr.
Member, House of Representatives
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Florence, South Carolina 29503

Dear Representative McEachin:

By your letter of July 9, 1986, you have asked that this Office examine an agreement entered into between Florence County and Cane Creek Farms and High Hill Corporation and opine as to the use of public funds ("C" funds) for the paving of roads in a project of this nature. As discussed more thoroughly below, the expenditure of these funds is most probably permissible if certain requirements, noted below, are met.

The so-called "C" funds are moneys which accrue under the provisions of Section 12-27-240, Code of Laws of South Carolina. Section 12-27-400 of the Code provides that "moneys collected by the [Tax] Commission pursuant to the provisions of § 12-27-240 shall be deposited with the State Treasurer and expended on the State Highway Secondary System for construction, improvements, and maintenance" Sections 57-5-740 et seq. of the Code make further provisions for expenditures of "C" funds. We have been advised by the Department of Highways and Public Transportation (DHPT) that a road would, of necessity, be a secondary road which would become a part of the state secondary road system; further, the road must be a public way and must serve a public purpose. With these considerations in mind, applicable law and the aforementioned agreement must be examined.

Once a road is paved with "C" funds, it becomes part of the state secondary road system; thus, the roadway must be dedicated (in fee or by a right-of-way) to the State. Section 8 of the agreement states that the owner of the property will deed the right-of-way to Florence County or its designate the right-of-way for all public roads. To remove any question, we suggest that Florence County designate the State of South Carolina,

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acting through DHPT, to receive the right-of-way if "C" funds are to be used.

The fact that the roadway reverts to the property owner should also be considered, since an easement for a roadway would continue as long as the road is used by the public and the public nature of the roadway continues. The Department of Highways and Public Transportation would have to be consulted if reversion is anticipated, since the road would have become a portion of the secondary road system upon its being paved with "C" funds. If no portion of the lands covered by the agreement were sold within the twenty-year term of the agreement, resulting in the road never having been used by the public, then the issue of whether public funds may have been used for a private purpose may arise. While this issue will be discussed more fully below, we would note that the agreement provides for certain cost recoveries and returns on investments which may remove any possible long-range question of expending public funds for a private purpose.

The ultimate question which must be answered is whether the roadway is a public way and a public purpose is being served by the proposed roadway. While this Office cannot make the necessary determinations of fact, we can point out considerations in the agreement and applicable law as to expenditure of public funds. We must leave application of law to facts to the Florence County Legislative Delegation, in particular the determination that the roadway is a public way.

In this regard, we note that Florence County Council has adopted an ordinance to encourage industrial development; in effect, Florence County Council has recognized the public purpose inherent in industrial development. In Ordinance # 22-84/85, the findings of Florence County Council indicate that stable and useful employment and economic development are among the highest priorities for the citizens of Florence County; thus, the ordinance which provides for industrial park development would promote the health, prosperity, and welfare of its citizens. This is further recognized within the agreement; within section 7(d) it is stated:

Such basic improvements [as roads, water and sewer facilities, and storm drainage improvements] will be given high priority by Developer [Florence County] due to the fact that it is recognized that the existence of these amenities is necessary for the recruitment of industrial development at the site.

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The agreement and the ordinance pave the way for finding that the roadway would be a public way and that it would serve a public purpose, particularly since a court considering the issue would most probably give great weight to these specific findings. Bauer v. S. C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978).

According to the agreement, the owner of the land will have it available for sale for industrial development for twenty years, though early termination is possible after five years. The land is designated an Industrial Park Development District, although title to the property remains with the property owner until said property is sold to an industry. The owner may continue to use the land for agricultural or farming purposes until it is sold; he will continue to pay taxes, as well. If no purchasers are found, the agreement terminates in twenty years, unless terminated earlier as noted above.

The test for expenditure of public funds for a public purpose is found in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975):

As a general rule, 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. Our courts have held that, generally speaking, industrial development is a proper public purpose for expenditure of public funds. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 43 (1967). See also Ops. Atty. Gen. dated June 15, 1981 (industrial development is a public purpose) and October 17, 1978 (stimulation of industrial development is an important state concern).

Where, as here, an immediate benefit to the public at large, as opposed to private individuals, may not be readily apparent, our Supreme Court has nevertheless been inclined in most cases to find a public purpose. In Medlock v. S. C. State Family Farm Development Authority, 279 S.C. 316, 306 S.E.2d 605 (1983), the validity of the Family Farm Development Act was challenged. It was argued that issuance of bonds by the

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Authority to generate funds for loans for low to moderate income farm families violated Article X, Section 11 of the State Constitution, which prohibits pledging of the State's credit for the benefit of private individuals. There was, in this case, no pledging of the credit since no general credit or taxing powers were pledged. Furthermore, a public purpose was found:

The public purpose is not destroyed merely because benefits will accrue to private individuals, nor is it necessary for the legislation to serve all the people The program will directly benefit a substantial segment of the State's farmers and the State as a whole by improving the farm economy. We hold the Act serves a valid public purpose.

Id., 279 S.C. at 321. See also Bauer v. S. C. State Housing Authority, supra, which reached similar results using the same reasoning. Following the reasoning of these cases, expenditure of "C" funds for paving in the Industrial Park Development District would most likely be for a public purpose. 1/

We do not believe Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984), alters this conclusion. In Byrd, the Court held that a county ordinance authorizing the issuance of general obligation bonds for acquisition and development of an industrial park was unconstitutional. The test for public purpose was not met since the project was highly speculative; no commitments had been received from any industry to locate within the park; no contracts with any industry had been entered into; and primary beneficiaries at this point would be private businesses, with benefits to the taxpayers being only speculative.

Here, while it may be argued that the primary beneficiaries at this point would be the property owner rather than the taxpayers of Florence County, since no purchaser or tenant has been identified, we have been advised that there are at least seven industries who have already expressed a desire to locate in the industrial park at this time. We must thus presume that the public will ultimately benefit, particularly where Florence

1/ We would further note that apparently only expenditure of "C" or other public funds is contemplated. We have not been advised that "general credit and taxing powers" of either Florence County or the State of South Carolina, as discussed in Medlock v. S. C. State Family Farm Development Authority, supra, would be involved in this undertaking.

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County has so found and where industrial prospects may have already been located.

The Byrd decision is further distinguishable from the present situation in that Byrd was based upon an interpretation of Article X, Section 14 and the fact that general obligation bonds would be issued to finance an industrial development. In the instant situation, no bond issuance is contemplated and there is simply involved the expenditure of public funds. Thus, the instant case may be more analogous to the reasoning of Elliott v. McNair, supra, than to the Byrd decision. ^{2/} Furthermore, interest in the industrial park has been expressed, a factor not present in Byrd.

Accordingly, we believe that the expenditure of "C" or public funds is, in this particular situation, most probably permissible. Further, we deem the Byrd decision to be distinguishable, and thus it appears that the roadway could be found to be a public way and that expenditure of "C" or public funds would be for a public purpose.

Sincerely,

Patricia D. Petway

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PDP/an

REVIEWED AND APPROVED BY:

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^{2/} The South Carolina Supreme Court has been asked to reexamine its decision in Byrd in the now-pending case of Nichols v. South Carolina Research Authority, Supreme Court docket number 85-699, in which arguments were heard quite awhile ago. In light of numerous court decisions to the contrary, Byrd seems anomalous but its holding must be considered unless and until it is modified or overruled, even though it is distinguishable from the instant situation.