The State of South Carolina

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The Honorable Bob Dominick
Mayor, City of Laurens
Post Office Box 519
Laurens, South Carolina 29360

Dear Mayor Dominick:

With reference to a situation in which the City of Laurens wishes to convey approximately 38 acres of land to Wal-Mart Stores, Inc., for the purpose of industrial development, you have asked the following two questions:

1. May the City of Laurens convey the property for less than fair market value to Wal-Mart, in effect donating the property for industrial development?

2. May the Laurens City Council amend the ordinance proposing to convey the land upon second reading? Or, if the consideration to be paid by Wal-Mart is to be amended, must the ordinance adoption procedure begin again?

Each question will be addressed separately, as follows.

Question 1

The City of Laurens proposes to transfer a 37.8 acre tract of land to Wal-Mart Stores, Inc., to complete a site at which the company will locate a major distribution center. You have advised that the industrial development will result in providing about 600 jobs in Laurens County, a county hit hard by the

decline in the textile industry. Whether City Council may convey this property to Wal-Mart for consideration which will amount to less than fair market value of the property, or in effect a donation, is your first question. For the reasons following it is the opinion of this Office that City Council may so convey the property.

The use of resources belonging to a political subdivision such as a city or county to attract industry to the area has been addressed several times by this Office. Ops. Atty. Gen. dated August 1, 1986 and August 2, 1985; see also Ops. Atty. Gen. dated July 24, 1984; October 17, 1978; April 20, 1967; and others. The question common to each of these opinions is whether public monies are being expended for private purposes, in violation of 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 the recent decision of Nichols v. South Carolina Research Authority, Op. No. 22632, filed November 17, 1986 (South Carolina Supreme Court) affirmatively holds that a transfer of a quantifiable piece of property does not constitute a pledging of the State's credit, 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, Laurens City Council must determine whether the public interest is being served directly or incidentally if public funds were to be used to assist industry in locating within the City.

Development of industry has been viewed by our courts as constituting a public purpose. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). More recently, in Nichols v. South Carolina Research Authority, industrial development was expressly held to be a public purpose. Nichols overruled Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984), which had held that industrial development was not a public purpose for which public revenues could be appropriated and expended.

In Nichols, a four-point test formulated in Byrd by which a statute for financing industrial development could be

tested for constitutionality was upheld. The test provides:

> 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 added.]

Byrd, 281 S.C. at 407. This test is useful to Laurens City Council as it suggests what findings that body may wish to make in its ultimate determination to convey the property to Wal-Mart.

Also, in Nichols, the transfer of property for less than its full market value was discussed. Article III, Section 31 of the State Constitution provides:

> Lands belonging to or under the control of the State shall never be donated, directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations, or associations, for less price than that for which it can be sold to individuals. ...

While this constitutional provision is applicable only to the State and not to municipalities, McKinney v. City of Greenville, 262 S.C. 227, 203 S.E.2d 680 (1974), the Court's reasoning in Nichols is nevertheless helpful in the situation faced by the City of Laurens. The Court said:

> This Court consistently has construed S. C. Const. art. III, § 31, to allow the State to consider indirect benefits accruing to it in determining whether a grant of State property amounts to a proscribed donation. [Citations omitted.]

> In McKinney v. City of Greenville, 262 S.C. 227, 203 S.E.2d 680 (1974), we stated: "It is established beyond question by the decisions of the Supreme Court of South Carolina that a public body may properly consider indirect benefits resulting to the public in determining what is a fair and reasonable return for disposition of properties without running afoul of the constitutional prohibition against donations." [Emphasis supplied]. 262 S.C. at 242-243, 302 S.E.2d at 688. See also, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) (no requirement that maximum price be obtained).

Nichols, Op. No. 22632 (Davis' Advance Sheets, pages 35-36). The Supreme Court has thus permitted indirect benefits accruing to the political subdivision to be considered when the subdivision is determining the fair and reasonable return for the disposition of its properties.

The answer to your first question is thus found within Nichols, that indirect benefits to the City may be considered in City Council's determining whether to convey its property for less than full or fair market value to Wal-Mart Stores, Inc. Such indirect benefits could be, for example, the effect which the industrial development will have on the economy of the City of Laurens. If Laurens City Council wishes to follow through on the conveyance, Council may wish to set forth specific findings of public purpose in the conveyance, as well as its findings under the test formulated in Byrd, supra.

Question 2

You have also asked whether Laurens City Council may amend an ordinance at the time of second reading. Section 5-7-270 of the Code of Laws of South Carolina (1976) provides:

> Every proposed ordinance shall be introduced in writing and in the form required for final adoption. Each municipality shall by ordinance establish its own rules and procedures as to adoption of

> ordinances. No ordinance shall have the force of law until it shall have been read two times on two separate days with at least six days between each reading.

A "reading" can consist of an oral recitation of the title of a proposed ordinance, or it can be done in any manner which will apprise the legislative body of the action it is about to take. Ops. Atty. Gen., dated March 14, 1978; March 27, 1986.

Section 5-7-270 is silent as to the amendatory procedure of proposed ordinances. It neither specifically authorizes nor prohibits such amendments. The legislature apparently left such an action to the discretion of a municipality's governing body by the establishment of rules relative to the adoption of ordinances. In an opinion of this Office dated March 17, 1976, enclosed, it was stated:

> Section [5-7-270] goes on to allow each municipality to establish its own rules and procedures as to the adoption of ordinances and, [in the writer's opinion], there is no language in that Section which would prohibit a municipality from providing in its rules and procedures that proposed ordinances may be amended on second reading. ...

You have advised that Laurens City Council has not formally adopted rules and procedures relative to the adoption of ordinances; however, Council has on numerous occasions elected to amend ordinances on second reading. At least implicitly, if not explicitly, Council has authorized amendment at the time of second reading. Council would be in the best position to interpret its own rules, and courts will give great deference to that interpretation. Cf., Allen v. Bergland, 661 F.2d 1001 (4th Cir. 1981).

We note that while Article III, Section 18 of the State Constitution requires that bills or joint resolutions must be read three times in each house before they may have the force of law. Both House Rule 9 and Senate Rule 28, adopted pursuant to Article III, Section 12, permit the appropriate house to amend a bill upon third reading, which reading is equivalent to the second reading given municipal ordinances.

Based on the foregoing, and especially upon the prior practices of Laurens City Council, we would conclude that amendment of a municipal ordinance upon second reading would be permissible.

We trust that the foregoing satisfactorily responds to your inquiries. Please advise if you should need clarification or additional information.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosures

REVIEWED AND APPROVED BY:

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