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The State of South Carolina

Office of the Attorney General

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April 2, 1987

Robert M. Bell, Esquire
Aiken County Attorney
Post Office Drawer I
Langley, South Carolina 29834

Dear Mr. Bell:

By your letter of January 26, 1987, on behalf of Aiken County Council, you have asked that this Office address the following questions:

1. May Aiken County allocate public funds to civic organizations or assist in the construction or installation of permanent structures on property not owned by the County, for recreation purposes? Aiken County Council and Aiken County Recreation Commission receive numerous requests throughout the year for such financial or other assistance from civic organizations or other governmental units or entities.

2. Aiken County has received a request from an unincorporated municipality to help it in a "clean up" campaign. May Aiken County provide prisoners or county maintenance personnel or equipment to collect trash and remove unsightly vegetation? A portion of the property to be cleaned up belongs to a railroad company, it should be noted.

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

Question 1

In the memorandum of law submitted with the request letter, your office stated the legal principal that public funds may be expended for only public purposes, by virtue of Article X, Section 11 of the State Constitution. Whether a particular expenditure meets the public purpose test may be determined by applying

the four-point test enunciated in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984), cited with approval in Nichols v. South Carolina Research Authority, Op. No. 22632 filed November 17, 1986 in the state Supreme Court (overruling a part of Byrd). The four factors which Aiken County Council and the Recreation Commission must consider include:

1. The ultimate goal or benefit to the public intended by the project;

2. Whether public or private parties will be the primary beneficiaries;

3. The speculative nature of the project; and

4. The probability that the public interest will ultimately be served and to what degree.

Your memorandum included other correct considerations from such leading cases as Anderson v. Baehr, 269 S.C. 153, 217 S.E.2d 43 (1975); Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978); State ex rel. McLeod v. Riley, 276 S.C. 323, 278 S.E.2d 612 (1981). And, as you conclude, recreation is a public purpose. See Op. Atty. Gen. dated January 21, 1985.

You have advised that the property to be assisted would be owned by either another governmental unit or entity, a civic organization, or a private individual. Assuming that Aiken County Council finds that a public purpose exists for spending public funds, we concur with your conclusion that Article VIII, Section 13 of the State Constitution would permit the joint administration of such recreation functions:

> Any county, incorporated municipality or other political subdivision may agree with the State or any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof.
>
> Nothing in this Constitution shall be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State.

Thus, as to joint administration of recreation functions between Aiken County and another county, incorporated municipality, or political subdivision (special purpose or public service district, for example), there seems to be no constitutional difficulty in Aiken County appropriating funds or using personnel or equipment in such a manner.

A more difficult case is presented by civic clubs or property owned by private individuals. This Office has advised against expenditures of public funds which would result in benefits to only the members of civic organizations such as the Salvation Army (Op. Atty. Gen. dated April 13, 1971) or Boys' Club (March 31, 1981, and May 28, 1981). But see Ops. Atty. Gen. dated April 20, 1982 and November 16, 1983 (enclosed), as to ways in which public funds may be utilized to assist Boy Scouts and private entities promoting tourism under the auspices of the Department of Parks, Recreation and Tourism.

Your conclusion was that Aiken County Council could either appropriate funds or supply material or labor to various civic organizations for the purpose of providing recreational facilities, assuming that all of the facilities so served would be open and free to the public. This conclusion would be in accordance with an opinion issued August 23, 1977 concerning a municipality contracting with local non-profit organizations to provide recreation facilities:

> [I]f the "specified recreational program and activities" ... are designed primarily for the benefit of the individual organizations and their members, and will provide only a negligible and speculative benefit to the public, any contributions or expenditures by the City of Dillon for such recreational programs would be made for a private, rather than public, purpose and would be unlawful. On the other hand, if the objective of these programs is to provide recreational services for the direct and immediate benefit for all or a substantial portion of the residents of the City, the expenditures by the City for these recreational programs would be for a public purpose, and would not be illegal.

A copy of the opinion is enclosed for the guidance of Aiken County Council in making the necessary determination that a public purpose would be served by an expenditure of public funds or provision of materials or labor for recreation facilities to

be provided by a civic organization. See also Op. Atty. Gen. dated November 16, 1983 for further guidance and suggestions if Council decides to follow this course of action.

Question 2

Your second question concerns the use of County equipment or prisoners to participate in a "clean up" campaign of an unincorporated municipality, in part on property owned by a railroad company. As you stated in your memorandum, the relevant portions of state law are found in Sections 24-3-30 and 24-3-35 (county prisoners) and 24-3-20 (prisoners under the control of the South Carolina Department of Corrections), Code of Laws of South Carolina (1986 Cum. Supp.). In particular, Section 24-3-35 provides:

> The governing body of any county in this State may allow prisoners under the county's jurisdiction who are housed in a county prison facility and who are serving a sentence of ninety days or less to perform litter removal functions within the county. The governing body of each county by ordinance shall be authorized to and shall establish guidelines for such litter removal by prisoners, which guidelines shall include a provision for a reduction of the sentence of the prisoners so used not to exceed a one-day reduction of the sentence for each two days of litter removal work performed.

If the guidelines required by this statute are adopted by Aiken County Council, then prisoners under the jurisdiction of Aiken County, housed in Aiken County's prison facility who are serving sentences of ninety days or less may be utilized to perform litter removal functions within the county.

For prisoners serving sentences in the Aiken County facility at the designation of the South Carolina Department of Corrections as permitted by Section 24-3-30 of the Code, the following portion of that statute is applicable:

> Each county administrator, or the equivalent, having charge of county prison facilities, may, upon the Board's designating the county facilities as the place of confinement of a prisoner, use the prisoner assigned thereto for the purpose of working

> the roads of the county or other public work. ...

In addition, Section 24-30-20(c) permits prisoners to be assigned to litter control details but places certain requirements upon such a program:

> Notwithstanding the provisions of § 24-3-10 or any other provisions of law, the board shall make available for use in litter control and removal any or all prison inmates not engaged in programs determined by the board to be more beneficial in terms of rehabilitation and cost effectiveness. Provided, however, that the Board of Corrections shall not make available for litter control those inmates who, in the judgment of the board, pose a significant threat to the community or who are not physically, mentally or emotionally able to perform work required in litter control. No inmate shall be assigned to a county prison facility except upon written acceptance of the inmate by the chief county administrative officer or his designee and no prisoner may be assigned to litter control in a county which maintains a facility unless he is assigned to the county prison facility.

In addition, the South Carolina Department of Health and Environmental Control (DHEC) is authorized to enter into contracts with counties to have litter removed by prison inmates from public roads and beaches; Section 44-67-120 of the Code provides in part:

> [DHEC] shall contract with as many counties as funding permits for litter removal along public roads and beaches using prison inmates subsidized by the State on a per mile or per square mile basis. Participation by the counties shall be entirely voluntary. The rate of subsidy per mile or per square mile shall be negotiated between [DHEC] and the counties, ...

This is another mechanism which may be used by the counties, subsidized by DHEC, to utilize prison inmates in litter control programs.

As discussed in your memorandum, where prison inmates may be utilized must be considered. If the county is under contract with DHEC to use inmate labor, clearly Section 44-67-120 restricts the litter removal to public roads and beaches. Under any other project set up by Aiken County for litter removal, we concur with your conclusion that such project or program must be restricted to public property. See Article X, Section 11 and cases cited relevant thereto in your memorandum.

This Office has opined on numerous occasions that county equipment and personnel (which would include prison inmates working in a county litter control program) may not be used for work on private property. See Ops. Atty. Gen. dated June 11, 1975; January 9, 1976; October 26, 1977; February 10, 1975; September 12, 1975; December 9, 1975; March 12, 1979; and January 31, 1980, among many others. If, however, payment in full for such services should be made in advance for work to be done on private property (such as that owned by a railroad company), such payment would remove the constitutional difficulty of using public funds or equipment for private purposes. See Op. Atty. Gen. dated January 9, 1976, enclosed. Thus, we generally concur with your conclusion that Aiken County may use inmate labor for litter control on public property and easements located in Aiken County, but not for litter control on private property unless payment is made for such assistance in advance to the County.

We trust that the foregoing is responsive to your inquiries. Please advise if you need clarification or additional assistance.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

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