1984 WL 249926 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 12, 1984

***1** Helen T. Zeigler
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Office of the Governor
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Dear Ms. Zeigler:
You have asked whether state and federal funds may be expended to support the Coastal Rapid Public Transit Authority We would advise that such expenditures would probably not be in conflict with relevant constitutional provisions concerning expenditures for public purposes.

Apparently no state law or local ordinance creates the Coastal Rapid Public Transit Authority. Instead, the Authority operates as a nonprofit corporation, chartered as such by the Secretary of State; its purpose is 'to provide public transportation to Horry and Georgetown counties.' The Horry County Council has, however, designated the Authority 'as an entity in Horry County to provide transportation to its citizens.' The Authority receives federal money in addition to funding appropriated to it by the General Assembly. Your question is whether such funding comports with Article X, § 11 of the State Constitution.

Article X, § 11 as amended in 1977 retains substantially the provisions of former Section 6 of Article X and provides in pertinent part:
The credit of neither the State nor any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation or any religious or other private education institution . . ..

This office, in opinions by former Attorney General McLeod, has consistently stated that the foregoing provision of the Constitution is violated when public funds are appropriated to a nonprofit corporation unless those funds '[are] appropriated for a public purpose' within the meaning of Article X, § 11. Op. Atty. Gen., December 18, 1979; Op. Atty. Gen., April 28, 1971. And only recently, this office stated:
This section (formerly Art. X, § 6) has been construed by the Court to prohibit the expenditure of public funds 'for the primary benefit of private parties.' State ex rel. McLeod v. Riley, 276 S.C. 323, 329-30, 278 S.E.2d 612, 615-16 (1981); Feldman Co. v. City Council of Charleston, 23 S.C. 57 (1886).

Op. Atty. Gen., November 16, 1983.

However, in the same 1979 opinion of Attorney General McLeod, cited above, it was also concluded that where funds were appropriated to a nonprofit corporation for a valid public purpose, Article X, § 11 was not infringed. Attorney General McLeod there stated:
Public funds may be appropriated to a private nonprofit, nonsectarian organization if the funds are to be expended in the promotion of a valid public purpose.

It was determined in that same opinion that the South Carolina Supreme Court case of Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954) was controlling in such a situation. Attorney General McLeod wrote in that regard:

In brief, this case recognizes the validity of appropriation of public funds for the performance of a public function through the agency of a nonprofit, nonsectarian entity, such as organizations which provide health services, welfare services, and other public purposes for which appropriations are made.

***2** Op. Atty. Gen., December 18, 1979, at 1.

And in a recent opinion, this office followed the 1979 opinion, again in the context of public aid to nonprofit corporations; there, we noted that

courts in other states with similar constitutional provisions have permitted appropriations to private entities which use those public funds to perform a proper 'function for the State.' Dickman v. Defenbacher, 128 N.E.2d 59 (Ohio, 1955); Bedford Co. Hospital v. Browning, 225 S.E.2d 41 (Tenn. 1949); People v. Green, 47 N.E.2d 465 (Ill. 1943); Hager v. Kentucky Childrens Home Society, 83 S.W. 605, 609 (Ky. 1904). See also, Tosto v. Pennsylvania Nursing Home Loan Agency, 331 A.2d 198, 205 (Pa. 1975). The appropriation of public funds to these private entities is, in effect, an exchange of value which results in the performance by those entities of a public function for the State.

Op. Atty. Gen., November 16, 1983.

Our Supreme Court has also recognized generally that where the expenditure of public funds is 'primarily for the benefit of the State . . .' there is no violation of Article X, § 11. South Carolina Farm Bureau Marketing Assn. v. South Carolina State Ports Authority, 278 S.C. 198, 293 S.E.2d 854, 857 (1982). And in State v. Warehouse Comm., 92 S.E. 81 at 93, where an act establishing and expending State funds for a State warehouse system was attacked on Article X, § 6, grounds, the Court stated that '[t]his ground is disposed of, by the conclusion that the act was intended as a police measure, and therefore, necessarily related to a subject that was public in its nature.' This is consistent with the mandate that legislation must serve a public, rather than a private purpose. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). Even where the Court found a violation of the Constitution in the context of loans to private citizens to aid them for losses incurred by fire, the Court still implicitly recognized the general principle that where the use of public funds serves a public purpose it is valid; the Court in Feldman & Co. v. City Council, supra, stated:

Our next inquiry is, whether the purpose for which the bonds in question were issued, and which necessarily involved the power to levy taxes for their payment was a public purpose. The purpose, as declared by the ordinance, which has been ratified by the act of the legislature, was 'to make loans of said bonds to such applicants as will build up and rebuild the waste places and burnt districts of the City of Charleston, or erect improvements upon their lots.' That this was a private, and not a public purpose, seems to us clear. The real object was to loan the credit of the city to private individuals to afford them aid in repairing their losses occasioned by a disastrous fire. It was practically nothing more nor less than lending the credit and funds of the city to private individuals to aid them in building on their own lots, dwellings, stores, warehouses, or such other structures . . . for their own individual use, and to promote their own individual comfort or gain. There was nothing in it of a public nature . . . [the structures] were for the sole use, and under the exclusive control of the individual owners, precisely like any other private property owned by any other private individuals . . ..

***3** 23 S.C. at 64. Thus, the primary inquiry here must be whether public expenditures to the Coastal Rapid Public Transit Authority serve a public purpose within the meaning of Article X, § 11.

The Court has recognized that public purpose is not easily defined and is 'a fluid concept which changes with time, place, population, economy and countless other circumstances.' South Carolina Public Service Authority v. Summers, Op. No. 22132, June 27, 1984, quoting Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). Each case must be determined on its own peculiar circumstances. Byrd v. County of Florence, Op. No. 22082, April 10, 1984. Whether an act is for a public purpose is primarily a task for the Legislature and the courts will not interfere unless the determination is clearly wrong. Elliott v. McNair, supra. 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 merely because some individual makes a profit as the result of the enactment.

Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43 (1975).

We believe that the purpose of the Coastal Rapid Public Transit Authority, to provide public transportation to Georgetown and Horry Counties, is a valid public purpose. First, we note that Article IX, § 1 of the South Carolina Constitution authorizes the General Assembly to provide for the appropriate regulation of common carriers 'serving the public as and to the extent required by the public interest.' It would appear that this provision of the Constitution recognizes that public transportation is a matter of public concern in South Carolina.

Moreover, on several occasions our Supreme Court has recognized that transportation clearly subserves a public purpose. In Charleston Co. Aviation Authority v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982), the Court held that the construction and operation of an airport constitutes a public purpose, recognizing the public benefit of air transportation. Other decisions have noted that air transportation is a matter 'of state concern,' important to 'a large segment of the population of the State.' Kleckley v. Pulliam, 265 S.C. 177, 185, 187, 217 S.E.2d 217 (1975). See also, Evatte v. Cass, 217 S.C. 62, 59 S.E.2d 638 (1950); Berry v. Milliken, 234 S.C. 518, 109 S.E.2d 354 (1959).[1] And in State v. Whitesides, 30 S.C. 579 (1888) the Court, noting that absent constitutional limitation, the General Assembly's power to tax was plenary, concluded that the operation of the railroads in this State, constituted a public purpose. The Court in Whitesides, upheld as constitutional an act which provided for the payment of township bonds, issued in aid of railroads in this State. Relying principally upon Feldman v. City Council, supra, the Court stated:

***4** We think there can be no doubt that the general assembly has the power to authorize taxation for any public purpose . . .. Now, was the act in question passed to promote a public purpose, and within the domain of legislative action? . . . The object of the act was to aid the building of certain railroads in the State . . ..

The subject matter, then of this act was within the range of a public purpose . . ..
30 S.C. at 584.

A number of courts in other jurisdictions have also recognized that public transportation serves a public purpose. One court has observed that the providing of low-cost mass transportation services
fulfills a public purpose not only in promoting the economy in areas of employment and commerce through facility of travel, but also in reducing traffic congestion, air pollution, and the excessive devoting of land to automobile-related uses, caused by the proliferating use of individual automobiles.[2]

Youtsey v. County Debt Commission, (Ky.), 501 S.W.2d 266, 268 (1973). In Advisory Opinion . . ., 401 Mich. 686, 259 N.W.2d 129, 134 (1977), the court concluded that a system of public transportation services constituted a valid public purpose. And in In Re Opinion of the Justices, (Mass.), 152 N.E.2d 90, 93 (1958), the Massachusetts Supreme Court noted that cash payments to railroad companies in the Boston area 'are expenditures for a public purpose.'

Additionally, as stated earlier our Court has observed that a finding of public purpose is primarily a legislative determination and the court will not interfere unless the Legislature's finding is clearly wrong. Elliott v. McNair, supra. Such legislative determination need not be express. State ex rel. Douglas v. Thone, 204 Neb. 836, 286 N.E.2d 249 (1979); Anderson v. Baehr, supra. The General Assembly is presumed to have investigated the facts warranting an appropriation. 81A C.J.S., States, § 207 at pp. 747-748. In this instance, the General Assembly, by appropriating funds to the Authority, has evidently determined that such serves a public purpose. This office certainly cannot say the Legislature's finding is clearly wrong.

Nor is the fact that the Authority is a nonprofit corporation, rather than a public entity or that such a corporation may be incidentally benefitted controlling. As stated earlier, the opinions of this office emphasize that our Supreme Court has held that public funds may be given in aid of a nonprofit corporation in order to 'procure' public services. Op. Atty. Gen., December 18, 1979; Op. Atty. Gen., November 16, 1983; see, Bolt v. Cobb, supra; Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976). Clearly, where the purpose is public, the use of a private entity as an 'instrumentality of the government agency for the accomplishment of the purpose' is not prohibited. S.C. Public Serv. Auth. v. Summers, Slip Op. at 7; see also, 81A C.J.S., States, § 207 at 746-747. In this instance, even though the Authority is not a governmental agency, it has been designated by Horry County as the entity to provide public transportation in the area.

***5** Our opinion of December 12, 1979 is not inconsistent with the conclusions expressed herein. In that opinion, we noted that a contract obligating State funds to subsidize the financial losses of a nonprofit or a profit oriented corporation constitutes a violation of Article X, § 11. This opinion appears to be consistent with the holdings of many courts which have concluded that such a constitutional provision is clearly contravened where there exists an existing suretyship or loan guaranty arrangement on behalf of a private corporation and in which the State is involved. 63A Am.Jur.2d, Public Funds, § 3. That was apparently the situation in the December 12, 1979 opinion.

Here, the proposal seems more in line with the previous Attorney General opinions (November 16, 1983; December 18, 1979) discussed earlier and with Bolt v. Cobb, supra; here, federal and state monies are being appropriated to the nonprofit corporation for what is deemed an overriding public purpose. And while there is authority elsewhere that simple appropriations or grants of funds by the General Assembly do not themselves pledge or loan the credit of the State, In Re Interrogatories, (Colo.), 566 P.2d 350 (1977); In Re Opinion of The Justices, supra, we assume herein that such use of tax monies would in this instance constitute a pledge or loan of the State's credit. Elliott v. McNair, supra (any pecuniary liability); Feldman v. City Council, supra; State ex rel. City of Charleston v. Sims, 132 W.Va. 826, 54 S.E.2d 729 (1949); 81A C.J.S., States, § 207. Nevertheless, where the public purpose involved is so apparent as here and the county appears in this instance to be using the nonprofit corporation to procure necessary services, Bolt v. Cobb, supra, such would indicate that public funds may probably be expended in support thereof. [3]

You have also asked whether Article X, § 11 is violated when the State, in receiving federal grant monies on behalf of the corporation, agrees as a condition thereof that all terms of the grant will be met and the State will be responsible therefor to the federal government if the Authority deviates from those conditions. It is our understanding that it is the State directly which receives the funds and is the grantee thereof; in turn, the State grants those funds to the Authority. All promises to the federal government are made by the State and not the Authority.

There are decisions elsewhere to the effect that the credit of the State is not loaned or pledged on behalf of a private corporation where the State assumes direct, as opposed to secondary, liability. 81A C.J.S., States, § 210 at p. 758; 63A Am.Jur.2d, Public Funds, § 3; State v. Dammann, supra; State v. Giessel, 271 Wis. 15, 72 N.W.2d 577 (1955). Likewise, cases hold that where there exists no prior indebtedness, the credit of the State is not pledged or loaned. Cf., Edge v. Brice, 113 N.W.2d 755 (1962). Under those authorities, therefore it might be argued that any obligation to reimburse the federal government is direct and not secondary and thus Article X, § 11 is not even applicable.

***6** However, in similar circumstances involving federal grant monies, in Harris v. Fulp, 178 S.C. 332, 182 S.E. 158 (1935), our Supreme Court, relying upon several decisions of the United States Supreme Court, has concluded that upon receipt by the State, Federal grant monies become State funds. See also, § 132 of Act No. 151 of 1983. These monies, upon becoming State funds and properly appropriated, are then granted to the Authority in the same manner as those funds, discussed earlier, which are appropriated directly in support of the Authority. For purposes of Article X, § 11, therefore we assume as before that their expenditure constitutes a pledge or loan of the credit of the State. However, again Bolt v. Cobb and the December 18, 1979 opinion of this office indicate that, since such expenditures serve a valid public purpose, they do not violate Article X, § 11. See also, State ex rel. Jardon v. Ind. Devel. Authority, (Mo.), 570 S.W.2d 666 (1978); 81A C.J.S., States, § 210 at pp. 762-763;

Op. Atty. Gen., November 16, 1983.[4] For purposes of Article X, § 11, we see no difference between the grant of federal funds and the State's appropriation of its own monies.

While, it is our opinion that a court would conclude that the Authority serves a public purpose and public funds thus may be spent in support thereof, our prior opinions have also concluded that 'some public control is also required on those expenditures by the private entities in order for the constitutionality of the appropriation to be upheld.' Op. Atty. Gen., November 16, 1983. We have further advised that such control could be 'accomplished, at least in part, by including in each such appropriations act the provision set out in § 135 of the 1983-84 General Appropriations Act, which requires those private organizations to submit to certain accounting and review procedures by the State.' Id. If such is not provided for in the 1984-85 Appropriations Act, it is suggested that the Authority still submit during the fiscal year to some form of accounting and review procedures by State officials, such as the Governor's Office.

CONCLUSION

In conclusion, it is our opinion that expenditures of State and federal funds to the Coastal Rapid Public Transit Authority would probably be in fulfillment of a public purpose and would thus be in compliance with constitutional provisions concerning expenditures of public funds for public purposes.[5]

If we can be of further assistance, please let us know. With kindest regards, I remain
Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 Thus, constitutional provisions prohibiting special legislation (Article III, § 34) or laws for a single county (Article VIII, § 7) would probably not be violated. See, Kleckley, supra (Article VIII, § 7 not infringed where matter is one of regional or statewide concern rather than local); see also, § 58-25-20 et seq. (transportation concerns are deemed by the General Assembly as regional, rather than predominantly local in nature). Expenditures for public transportation would therefore be in fulfillment of a proper State purpose. See, State v. Dammann, 280 N.W. 698 (1938). Moreover, Article III, § 34 would undoubtedly have to be read in conjunction with Article IX, § 1. cf., Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975); State v. McCaw, 77 S.C. 351, 58 S.E. 145 (1907). Accordingly, the General Assembly's determination to act in fulfillment of what it considers a public need, by appropriating funds to the Coastal Rapid Public Transit Authority, must be given considerable deference. cf., Mills Mill v. Hawkins, 232 S.C. 515, 103 S.E.2d 14 (1957).

2 Our court has upheld, as constituting a valid public purpose, the elimination or diminishing of air pollution, Harper v. Schooler, 258 S.C. 486, 189 S.E.2d 284 (1972), as well as the promotion of the economy. Elliott v. McNair, supra.

3 While we believe our opinion here and the December 18, 1979 opinion of former Attorney General McLeod is not inconsistent with the December 12, 1979 opinion cited above, to the extent that any inconsistency exists, the December 18, 1979 opinion and this opinion herein must be deemed controlling.

We might add here that this situation could also probably be upheld under a slightly different analysis. It is generally recognized that where there exists adequate consideration, the credit of the State is not unlawfully pledged on behalf of a private corporation. 81A C.J.S., States, § 207. A public body may properly consider indirect benefits resulting to the public as consideration. See, Sadler v. Lyle, 254 S.C. 535, 176 S.E.2d 290 (1970); Elliott v. McNair, supra; McKinney v. City of Greenville, 262 S.C. 227, 203 S.E.2d 680 (1974); Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923). Where the General Assembly has evidently made such a determination to consider public benefit as a consideration, this office must defer to such a determination. Cf., Elliott v. McNair, supra. Further, there may be more, additional consideration of which we are unaware.

4 We must advise, however, that there are decisions of our Supreme Court which clearly indicate that Article X, § 11 does not permit any pledge or loan of the State's credit on behalf of a corporation. For example, Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362 (1970) appears to distinguish Feldman v. City Council, supra, at least in part, on the basis that 'the only funds pledged for the payment of bonds are lease rental payments to be made by the Baptist College at Charleston.' 244 S.C. at 82. Thus, the Court concluded that 'the

State's credit can never be adversely affected.' 255 S.C., supra. Yet, in another part of its opinion, the Court in Hunt had recognized that there was a public purpose involved. 255 S.C. at 79.

Likewise, in Elliott v. McNair, supra, the Court in reliance upon Benjamin v. Housing Authority of Darlington, 198 S.C. 79, 15 S.E.2d 737 (1941), was careful to note that the Act in question did not authorize a pledging of the State's credit. Again, public purpose was viewed as a separate question altogether. Other cases have analyzed Article X, § 11 similarly. See, Casey v. S.C. State Housing Authority, 264 S.C. 303, 215 S.E.2d 184 (1975); Bauer v. S.C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978).

But, in a concurring opinion in Bauer, Justice Gregory noted that by holding that the act in question 'serves a valid public purpose, we remove the constitutional impediment to funding this project with tax revenues.' 271 S.C. at 237. And this appears to be the Court's analysis in Part I of the opinion in State ex rel. McLeod v. Riley, supra. 278 S.E.2d at 615-616.

Thus, you should be advised that there is not complete harmony in the Court's decisions construing Article X, § 11 or in the views of the members of the Court itself. Because however the prior opinions of this office have construed the Court's decisions to authorize expenditures similar to here, Op. Atty. Gen., December 18, 1979 and because this office must adhere to the view that all reasonable doubt must be resolved in favor of the constitutionality of an act of the General Assembly, State ex rel. McLeod v. Riley, supra, we conclude that the expenditures about which you inquire are probably not in conflict with Article X, § 11.

5 We assume for the purpose of this opinion that all other relevant provisions of state and federal law are being complied with.

1984 WL 249926 (S.C.A.G.)

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