

1981 WL 157868 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 15, 1981

*1 Harris A. Marshall, Jr., Esquire
Orangeburg County Attorney
Post Office Box 21
Orangeburg, South Carolina 29115

Dear Mr. Marshall:

In response to your request for an opinion from this Office regarding certain aspects of Orangeburg County's proposed acquisition of office space, I can advise you as follows:

1. On whether or not Orangeburg County can obligate itself on a long term lease, the general rule is that: With respect to the power of a municipal council to enter, . . . , into a contract which will extend beyond the term for which the members of the council were elected, a distinction is drawn based upon the subject matter of the contract—whether legislative or governmental, or whether business or proprietary Under this distinction, it is generally held that a municipal council may . . . lease its property for a term extending beyond the term of the council, or it may lease property from others. 56 AM.JUR.2d Municipal Corporations, Counties and Other Political Subdivision § 154 at 207-8.

Cf., [Newman v. McCullough](#), 212 S.C. 17, 46 S.E.2d 252 (1948). I am also enclosing a copy of an earlier opinion which discusses the subject of long-term leases entered into by the State.

2. On whether or not such a lease would be construed as indebtedness of Orangeburg County against its debt limitation, my opinion is that it would not be so construed under the following definition of 'general obligation debt' contained in [Article X, Section 14\(3\) of the South Carolina Constitution](#):
'General obligation debt' shall mean any indebtedness of the political subdivision which shall be secured in whole or in part by a pledge of its full faith, credit and taxing power; . . .

The authorities distinguish among the types of leases involved in determining if a long-term lease creates a present indebtedness, to wit:

Even though a lease may not involve an option to purchase, the question may still be presented whether the aggregate of rent for the entire period covered by a lease granted to a municipality is a present indebtedness within organic debt limitations. The few cases involving this question do not warrant any generalization as to the law applicable thereto. It has been held that a lease to a municipality for a term of years does not, so far as it provides for the payment of rent at times beyond the current fiscal year, contravene a charter provision prohibiting the creation of any obligation for the payment of which money is not available at the time of incurring or authorizing the obligation. Unaccrued rent, according to this view, is not a debt or present obligation. It has also been held that a lease which obligates the lessee municipality for only a one-year period, with exclusive right and option in the municipality to extend and re-extend the lease for a period of several years, cannot be held to create an indebtedness of the municipality for more than such yearly term; if the rental amount for the yearly term comes clearly within the anticipated revenue and income of the municipality for the year in which the lease is made in such manner, the constitutional provision forbidding a municipality to incur any liability for any purpose exceeding in any year its income and revenue is not violated. Such constitutional provision is regarded as violated, however, where a lease is created for a fixed term of several years and creates a present debt for the amount of its aggregate rental. Such is the effect of a lease providing that it shall extend over a

specified period of years beginning upon the date when the building to be erected shall be complete and ready for occupancy, with an annual rental not in excess of a specified sum, payable in semiannual instalments.

*2 An ingenious plan of financing has been evolved to enable municipalities or counties which have reached the limit of indebtedness permitted by constitution or statute to acquire public building or utilities without pledging their credit therefor beyond the constitutional or statutory limit. Although this scheme varies in its application, its characteristic features are the leasing of property to a municipality or county for a certain period, in consideration of a periodical rental which does not exceed the debt limit, with an option to purchase the property at a certain price. The underlying theory of this plan is that the only 'indebtedness' or 'liability' assumed by the municipality or other public body is its agreement to pay rent, and that it is assured of the opportunity of acquiring ownership of the property if and when its financial condition will permit, and in the meantime to have the use of the property. Such a plan is based upon two principles, the first of which is that continuing service contracts or analogous agreements payable in instalments do not violate the debt limit (and in the few jurisdictions which deny the foregoing principle, and treat the total amount payable under such a contract as a present indebtedness of the municipality or county, the difficulty is sought to be circumvented by making the lease for one year, or a term short enough to keep the total rentals within the constitutional limits, with the option in the public body to renew the same for additional periods), and the second of which is that an option to purchase property, or to renew a lease thereon, does not create an indebtedness or liability for the proposed purchase price or rentals until and unless the municipality or county elects to exercise such option, on the reasoning that if a public body is contingently liable to pay money, and the arising of the contingency is solely in its own control and can occur only by its subsequent choice voluntarily made, no indebtedness, either present or future, can be said to have been created, because in such case there is no obligation, and that an option to purchase falls in the category of contingencies of this nature, since an option imposes no obligation, and may or may not be exercised.

Where a so-called lease is, in fact, intended as a lease, and the rentals are in fact such, rather than payments on the purchase price, the courts, without exception, hold that such a lease of property by a municipality or county, with an option to purchase the same at a fixed price in addition to the rentals, does not create an indebtedness or liability within the meaning of a constitutional or statutory limitation of indebtedness. Some of the cases have reached this conclusion even where the rentals paid are to be applied or credited on the amount of the purchase price in the event the public body elects to exercise the option to purchase. In a few instances it has been applied even though the rentals were sufficient to cover the entire purchase price without the payment of any further sum. On the other hand, where the rentals are in fact instalment payments on the purchase price, the transaction clearly should be treated as a purchase, rather than a lease, and is not entitled to the protection accorded bona fide rentals payable periodically, which do not become due until earned, and which therefore do not constitute a present indebtedness in the aggregate. A contract which, although denominated and purporting to be a lease with option to purchase, is in fact a contract of purchase by payments in instalments, has usually been treated as a contract of purchase rather than as a lease. According to most of the courts, the fact that the so-called rentals are sufficient, if paid throughout the term of the lease, to cover the entire purchase price, and to enable the municipality or county to acquire the property without further payment, renders the contract one of purchase rather than lease, and gives rise to an indebtedness, within the meaning of a constitutional or statutory debt limitation. *Id.*, §§ 664-665 at 711-14.

*3 *Cf.*, [Bolton v. Wharton](#), 163 S.C. 242 at 257-8, 161 S.E. 454, 86 A.L.R. 1101 (1930) ('the most important elements of the 'bonded debt' of a political subdivision of this State, . . . , are that such a debt must be a primary obligation of the political subdivision involved and must be secured primarily by a tax levied upon all the taxable property therein'); *see also*, [United States Rubber Products v. Batesburg](#), 183 S.C. 49, 190 S.E. 120, 110 A.L.R. 144 (1936); [Haddon v. Cheatham](#), 161 S.C. 384, 159 S.E. 843 (1931); [Evans v. Beattie](#), 137 S.C. 496, 135 S.E. 538 (1926); *cf.*, [Thomson v. Christopher](#), 141 S.C. 92, 139 S.E. 178 (1927).

3. On whether or not Orangeburg County can jointly own a building with a private owner, although [Section 4-9-30\(2\), CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, authorizes a county to acquire real property without limitation as to the nature of its ownership interest, such an arrangement may result in an unconstitutional expenditure of public funds for private benefit in violation of [Article X, Section 11 of the South Carolina Constitution](#). *See also*, 56 AM.JUR.2d [Municipal Corporations, Etc.](#), § 218 at 278 ('[w]hile it is generally held that municipal corporations may join with each other, or with

the state, or other political subdivisions thereof, in engaging in business enterprises of a public nature, it is generally held that a contract whereby a municipal corporation engages jointly with a private individual or corporation in the construction of an improvement for joint use is invalid as being a loan of the municipal credit for private benefit’).

With kind regards,

Karen LeCraft Henderson
Senior Assistant Attorney General

1981 WL 157868 (S.C.A.G.)

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.