ALAN WILSON
ATTORNEY GENERAL

July 2, 2015

Mr. David Chambers
Richland County Government
Office of Risk Management
Post Office Box 192
Columbia, South Carolina 29202

Dear Mr. Chambers:

You have requested the opinion of this Office regarding the constitutionality of what you describe as "[a]n owner controlled wrap-up insurance program . . . presented to Richland County as the most effective and least costly method of insuring several hundred million dollars in transportation projects that will take place over eight to ten years." You also indicate that "[a]ccording to the presenters the County's duties will include the claims under the $250,000 liability aggregate deductible. These claims may or may not name the County, and will include third party contractors and subcontractors. Layers above the deductible will be general liability and excess liability insurance policies." As a result of the county managing and paying claims under the $250,000 liability aggregate deductible made against the various participants in the program other than the county itself, you question whether such payment would be considered use of funds for a private purpose in violation of article X, section 11 of the South Carolina Constitution.

Law/Analysis

The type of policy that has been presented to your office, called an owner controlled insurance program ("OCIP"), has been described as "becoming increasingly popular today among the owners, general contractors, and subcontractors who participate in typically large-scale construction projects." Chad G. Marzen, OCIPS in the Future of the Insurance Industry: Legal and Regulatory Considerations, U. Miami Bus. L. Rev. 49, 49 (2011). Also called wrap-up programs, OCIPs "streamline various insurance coverages into a single consolidated program . . . through which the owner establishes and administers coverage for the general contractor and all the subcontractors on the project." Chad G. Marzen, The Wrap Up of Wrap-Ups? Owner-Controlled Insurance Programs and the Exclusive Remedy Defense, 59 Drake L. Rev. 867, 868 (2011). While OCIPs are statutorily regulated in a number of states, they have not been addressed by the South Carolina Legislature. See Chad G. Marzen, OCIPS in the Future of the Insurance Industry: Legal and Regulatory Considerations, U. Miami Bus. L. Rev. 49, 53-58 (2011) (discussing states that have enacted statutes specifically mentioning OCIPs).

Article X, section 11 of the South Carolina Constitution states in pertinent part that:

> [t]he credit of [n]either 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 except as permitted by Section 3, Article XI of this Constitution. Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation.
>
> ....

S.C. Const. art. X, § 11. This provision makes clear that neither the State, nor any of its political subdivisions, may pledge or loan its credit for the benefit of a private entity. Furthermore, this provision prohibits the State and its political subdivisions from jointly owning or becoming a stockholder in a private entity. As the later prohibition does not appear to be applicable in this instance, we focus our attention on the former prohibition against the pledging or loaning of the credit of the State or its political subdivisions for the benefit of a private entity.

Our Supreme Court has explained that the purpose of article X, section 11 (formerly article X, section 6) is "to prevent the state from entering into business hazards which might involve obligations upon the public." Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584, 588 (1923). In other words, it has been said that the intent of this constitutional limitation "is to prevent the State from being *obligated* to use State [ad valorem] tax revenues to pay off the [general obligation] bonds. Carll v. South Carolina Jobs-Economic Dev. Auth., 284 S.C. 438, 444, 327 S.E.2d 331, 335 (1985) (citing Elliott v. McNair, 250 S.C. 75, 85, 156 S.E.2d 421 (1967); Bauer v. South Carolina State Hous. Auth., 271 S.C. 219, 246 S.E.2d 869 (1978); State ex rel. Medlock v. South Carolina Family Farm Dev. Auth., 279 S.C. 316, 306 S.E.2d 605, 609 (1983)).

In determining what is meant by "credit" as used in article X, section 11, it has been explained that "[t]here is no lending of the State's credit unless its general credit and taxing powers are pledged." Medlock, 279 S.C. at 320, 306 S.E.2d at 608. Put differently, "[t]he limitation imposed ... by Article X, § 11... 'relates solely to general obligation bonds payable from the proceeds of ad valorem tax levies.'" Carll, 284 S.C. at 443-44, 327 S.E.2d at 335 (quoting Elliott v. McNair, 250 S.C. 75, 85, 156 S.E.2d 421, 426 (1967)); see also Clarke v. South Carolina Public Service Auth., 177 S.C. 427, 181 S.E. 481, 489 (1935) ("This Court has also constantly held that bonds issued by the state or its political subdivisions which are payable out of special funds do not create debts of the state or its political subdivisions . . ."); Elliott, 250 S.C. at 86, 156 S.E.2d at 427 ("[T]he word 'credit' as here used was intended to protect the state against pecuniary liability . . . ."). Looking to several cases decided outside of our jurisdiction for guidance, this Office has previously recognized and discussed in detail the distinction between the expenditure of present appropriations and the loaning of the state's credit. See Op. S.C. Att'y Gen., 2003 WL 22050883 (Aug. 29, 2003). We specified the difference between purchases made through the issuance of general obligation bonds on a deferred basis and a completed transaction using appropriated funds. Id. at *9 (citing Betz v. Jacksonville Transp. Auth., 277 So.2d 769, 772 (Fla. 1973)). While you have not indicated how any potential claims under the aggregate deductible will be paid pursuant to the OCIP, if appropriated and quantifiable funds are used, in our view, such payment would likely not constitute a pledge or loan of credit for purposes of article X, section 11.

It is also worthy of noting that, in regards to a comprehensive general liability insurance policy, our Supreme Court, quoting Rowland H. Long, L.L.M., *The Law of Liability Insurance*, § 3.06[1] (2001), summarized that:

> [t]his type of insurance "is not intended to insure business risks, *i.e.*, risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage." *Id.* § 10.01 [1]. Specifically, "[t]he policies do not insure [an insured's] work itself, but rather, they generally insure consequential risks that stem from that work." *Id.*

Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002), overruled on other grounds by, Crossman Communities of North Carolina, Inc. v. Harleyville Mut. Ins., 395 S.C. 40, 717 S.E.2d 589 (2011). From this general description, it does not appear that obtaining a general liability insurance policy would in any way equate to a "business hazard" that article X, section 11 aims to protect against.

Analysis under article X, section 11 does not stop here. As noted in a prior opinion of this Office, we have "always concluded that Article X, § 11 is violated when public funds are appropriated to a private entity and such appropriation is not 'for a public purpose.'" Op. S.C. Att'y Gen., 1985 WL 259146 (March 19, 1985) (citations omitted). We have also stated that "[t]his section (formerly Art. X, § 6) has been construed by the Court to prohibit the expenditure of funds 'for the primary benefit of private parties.'" Id. at *4. Such interpretation is "consistent with the general constitutional requirement that all legislation and taxes levied must be for a public purpose." Id. Accordingly, we look next at whether claims under the deductible paid by the county, against participants other than the county and pursuant to the terms of the OCIP, would classify as public funds expended for a public purpose.

In Nichols v. South Carolina Research Auth., 290 S.C. 415, 429, 351 S.E.2d 155, 163 (1986), our Supreme Court affirmed the test for the determination of whether a public purpose exists. The Court provided as follows:

> "[t]he 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."

Id. (citing Byrd v. Florence County, 281 S.C. 402, 407, 315 S.E.2d 804, 806 (1984)). The Supreme Court has also instructed that:

> [a]s 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 [i.e., relative to the expenditure of funds] 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.

Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975).

Furthermore, it is consistently recognized that a "[p]ublic purpose is not easily defined" and is a "fluid concept which changes over time, place, population, economy and countless other circumstances." South Carolina Pub. Serv. Auth. v. Summers, 282 S.C. 148, 151, 318 S.E.2d 113, 114 (1984) (citing Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953)) (internal quotations omitted). Thus, each case must be determined on its own peculiar circumstances. Id. (citing Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1948), overruled on other grounds by, Nichols v. South Carolina Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986)). Furthermore, 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, 250 S.C. 75, 89, 156 S.E.2d 421, 428 (1967).

In prior opinions of this Office we have acknowledged the Supreme Court's recognition that transportation clearly serves a public purpose. See Op. S.C. Att'y Gen., 2012 WL 2484919 (June 19, 2012); Op. S.C. Att'y Gen., 1984 WL 249926 (July 12, 1984). In both opinions we summarized as follows:

> [i]n 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). 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:
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> > 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.

Op. S.C. Att'y Gen., 2012 WL 2484919 (June 19, 2012); Op. S.C. Att'y Gen., 1984 WL 249926 (July 12, 1984).

While it is well established that public transportation systems, and the construction and operation thereof, constitute a public purpose, whether procurement of an OCIP for a public construction project, under which the county would be responsible for payment of claims below the policy's aggregate deductible for all participants including contractors and subcontractors, would constitute a public purpose, is a more narrow issue that, to our knowledge, has never been addressed in South Carolina. The Legislature has provided the manner in which political subdivisions[1] are able to purchase liability insurance for protection against instances where immunity has been waived under the Torts Claims Act. This process is set forth in S.C. Code Ann. § 15-78-140 (Supp. 2014), subsection (A) providing as follows:

> The political subdivisions of this State, in regard to tort and automobile liability, property, and casualty insurance shall procure insurance to cover risks for which immunity has been waived by: (1) the purchase of liability pursuant to Section 1-11-140; or (2) the purchase of liability insurance from a private carrier; or (3) self-insurance; or (4) establishing pooled self-insurance liability funds, by intergovernmental agreement, which may not be construed as transacting the business of insurance or otherwise subject to state laws regulating insurance. A pooled self-insurance liability pool is authorized to purchase specific and aggregate excess insurance. A pooled self-insurance liability fund must provide liability coverage for all employees of a political subdivision applying for participation in the fund. If the insurance is obtained other than pursuant to § 1-11-140, it must be obtained subject to the following conditions:
>
> (1) if the political subdivision does not procure tort liability insurance pursuant to Section 1-11-140, it also must procure its automobile liability and property and casualty insurance from other sources and shall not procure these coverages through the Insurance Reserve Fund;
>
> (2) if a political subdivision procures its tort liability insurance, automobile liability insurance, or property and casualty insurance through the Insurance Reserve Fund, all liability exposures of the political subdivision as well as its property and casualty insurance must be insured with the Insurance Reserve Fund;
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> . . . .

S.C. Code Ann. § 15-78-140 (Supp. 2014).

When purchasing an insurance policy, we have cautioned that purchasing a policy in excess of liability under State law "could be viewed by a court as using public funds for private purposes in violation of article X section 11 of the South Carolina Constitution. . . ." Op. S.C. Att'y Gen., 2011 WL 1444706 (March 18, 2011). In the context of construction projects, typically contractors and subcontractors obtain their own workers' compensation and

[1] S.C. Code Ann. § 15-78-30(h) (2005) provides the definition of "political subdivision" for purposes of the Torts Claims Act, which includes counties.

commercial general liability insurance. However, as we will discuss below, the cost of such insurance is generally included in the contractor's bid, meaning the costs are passed to the owner of the project. A comparison of this traditional process of insuring a construction project to that of an OCIP has been discussed by several authorities outside of our jurisdiction. Of the authorities that we have discovered, in all instances except for one, a public body's procurement of insurance pursuant to an OCIP for public construction projects has withstood scrutiny. Although the arguments presented within these jurisdictions differ from the questions raised in this opinion, they nevertheless provide a deeper understanding of the benefits of an OCIP for purposes of our public purpose analysis.

In Indep. Ins. Agents of Oklahoma, Inc. v. Oklahoma Turnpike Auth., 876 P.2d 675 (1994) the Oklahoma Supreme Court addressed whether a public body could provide insurance by way of an OCIP for the construction of four turnpikes in Oklahoma. The Court began by discussing OCIPs generally, noting as follows:

> [b]efore beginning construction, the Authority considered implementing an Owner-Controlled Insurance Program (OCIP) for the projects. Under an OCIP, the owner of a large construction project purchases and provides for consolidated "on-site" public liability and workers' compensation insurance coverage during the construction period. The owner is the "insured" and policy coverage is extended to all who work "on-site" under a contract with the owner. As the Authority notes, this concept differs from the practice of contractors and subcontractors buying such insurance coverage piecemeal and then passing the costs to the owner by including them in their bids and contracts. Not only is a typical OCIP designed to reduce the cost of insurance premiums, it allows for a coordinated risk management and safety program for workers and visitors to the construction site. An OCIP also provides for insurance premium rebates to the policy owner for good construction safety records.

Id. at 676.

Ultimately concluding that the public body could insure the transportation project by way of an OCIP, the Court rejected several arguments presented by the Independent Insurance Agents of Oklahoma that the OCIP obtained by the Authority was in violation of Oklahoma law. Id. at 677. First, it found that the OCIP did not violate an Oklahoma statute prohibiting an agency from requiring a contractor to obtain insurance from a particular insurer; it indicated that the Authority was only providing on-site coverage and thus, it did not dictate that the contractors' required off-site insurance be obtained from any particular insurance company. Id. at 677-78. It also discredited the argument that contractors, under Oklahoma law, were required to provide *all* insurance, finding that statute only required the contractor to provide insurance in reasonable amounts which it did under its off-site policy. Id. at 678-79. The final argument the Court declined to accept was that an OCIP was a public construction contract requiring procurement by competitive bidding under the Public Competitive Bidding Act. Id. at 679. The Court found that the provision of insurance was merely a preliminary step necessary for the construction process to be put into operation. Id. Accordingly, based on the ruling in Independent, the use of OCIPs

by a public body for a construction project appears permissible in the state of Oklahoma despite arguments to the contrary.

To our knowledge, the Offices of the Virginia, Alabama, Connecticut, and Hawaii Attorneys General have spoken on the legality of OCIPs implemented by a public body. See Op. V.A. Att'y Gen., 1999 WL 631115 (June 18, 1999); Op. Ala. Att'y Gen., 1996 WL 34908575 (Feb. 27, 1996); Op. Conn. Att'y Gen., 1983 WL 181204 (Aug. 16, 1983); Op. Haw. Att'y Gen., 1986 WL 80019 (March 31, 1986). The Virginia Office of the Attorney General addressed whether a political subdivision of the state that planned to purchase and expand a convention center could obtain insurance through an OCIP for the project. Op. V.A. Att'y Gen., 1999 WL 631115 (June 18, 1999). Similar to Oklahoma Turnpike Authority, the Attorney General opinion distinguished between the procurement of insurance for a construction project by customary means from an OCIP as follows:

> [t]he Authority will incur substantial expenses to secure insurance coverage against construction-related losses and claims, as well as coverage for its operation of the expanded Richmond Centre. In such large construction projects, contractors and subcontractors typically obtain their own workers' compensation and commercial general liability insurance policies. Every contractor includes, as part of its bid on the project, the cost of such insurance policies and a significant markup added to the actual cost of the policies. The owner of the construction project typically subsidizes these insurance costs.
>
> The Authority desires to depart from the typical manner in which insurance is purchased on large construction projects and use an OCI program to obtain all insurance coverage necessary for the expansion and operation of the Richmond Centre. Owners of large construction projects have used OCI programs to produce significant savings on insurance costs while providing improved insurance coverage.

Id. at *1.

The opinion also emphasized additional advantages of an OCIP, stating that [t]he owner may achieve a substantial cost savings from the use of an OCI program resulting in lower administrative costs, credits for volume insurance purchasing, coordinated safety and claims programs, and elimination of contractor policy cost markups" and that "[t]he use of an OCI program can increase the participation of such contractors in the overall construction project by relieving them of the responsibility for procuring individual insurance coverages." Id. at *2.

Concluding that the political subdivision at issue was permitted under Virginia law to acquire insurance through an OCIP, the opinion clarified its Office's belief that such authority was within those proscribed by statute to the political authority, that the purchase of an OCIP would satisfy the statutory duty of a contractor to provide and maintain workers' compensation insurance, and that the political subdivision would be classified as the "statutory employer," within the definition of the Virginia Workers' Compensation Act. Id. at *2-5.

The Office of the Alabama Attorney General has also discussed whether the State, through the Department of Transportation, was permitted to purchase insurance through an OCIP for road construction projects. Op. Ala. Att'y Gen., 1996 WL 34908575 (Feb. 27, 1996). Like the other authorities discussed above, the Alabama Attorney General's Office distinguished between traditional coverage compared to an OCIP, stating that:

> Regardless of who obtains the coverage, it is without question [it is] the state that pays the cost of the insurance. In the past, the cost of obtaining this coverage was submitted as a part of the bid on the project. Under your proposal, the state, rather than the bidder, will provide coverage directly.

Id. at *1. The Office of the Alabama Attorney General concluded that an OCIP provided directly to the Department of Transportation for road construction projects, rather than obtained on a contract-by-contract basis by the contractor, could be administered if found to be in the best interest of the state pursuant to a provision in the Alabama Code of Laws permitting the Director of Finance and the Governor of the state to make such a determination. Id. at *2.

Likewise, the Connecticut Office of the Attorney General also provided its opinion that the Department of Transportation had the authority to obtain an OCIP for construction to take place on an airport, citing Employees Mutual Liability Inc. Co. v. Premo, 152 Conn. 610 for support. Op. Conn. Att'y Gen., 1983 WL 181204 (Aug. 16, 1983).

However, contrary to the above authorities, the Hawaii Attorney General's Office concluded that its state did not permit an OCIP purchased by the owner of a public construction project providing workers' compensation coverage to each contractor and subcontractor on a project site. Op. Haw. Att'y Gen., 1986 WL 80019 (March 31, 1986). It reasoned that because its Workers' Compensation Act was a full-coverage statute requiring the employer to cover "the entire liability" of the employer to his employees, the OCIP would not be permitted under Hawaii law since it only covered project site liabilities. Id. at *1.

While each state's discussion of OCIPs differ based on the arguments before it and the applicable state law, a common thread emphasized among several of the authorities is that under the traditional method where contractors and subcontractors obtain their own workers' compensation and commercial general liability policies, the costs of such are passed on in the contractor's bid submitted to the project owner. Furthermore, we draw from many of these authorities that an OCIP is a means of reducing the costs of insurance premiums, for allowing for a coordinated risk management and safety program for workers and visitors to the construction site, and, often times, for providing insurance premium rebates to the policy owner for good construction safety records. As a result of the cost savings and streamlined safety programs, in addition to the general purpose of facilitating the construction of a transportation project, it is our opinion that the purchase of an OCIP to insure public transportation projects would serve a public purpose. However, as we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts. See, e.g., Op. S.C. Att'y Gen., 2007 WL 2459748 (July 17, 2007). Thus, while we believe insuring public transportation projects in this manner, and thus paying claims under the aggregate deductible naming participants other

than the county, would serve a public purpose, such a determination involves a question of fact, which is ultimately a matter for a court to decide.

Conclusion

OCIPs have become increasingly popular in recent years among owners, general contractors, and subcontractors participating in large scale construction projects as providing a means of streamlining various coverages into a consolidated program. Although Richland County, as the owner of the program, would establish and administer coverage for the general contractor and subcontractors on the project and would pay claims under the aggregate deductible pursuant to the policy presented, we believe a court would find that the OCIP would withstand scrutiny under article X, section 11 of our State's Constitution.

Article X, section 11 aims to prevent the State and its political subdivisions from entering into business hazards which might involve obligations of the public. It therefore prohibits the loaning or pledging of credit of the State or of a political subdivision, which has been interpreted as the issuance of general obligation bonds backed by the proceeds of ad valorem tax levies. Should the policy be purchased and claims under the deductible be paid from quantifiable, appropriated funds, it is our opinion that "credit" of the county, pursuant to article x, section 11 would not be pledged or loaned.

Furthermore, it is our option that use of funds to procure insurance through an OCIP and to pay claims naming participants other than the county under the aggregate deductible would constitute a public purpose. Although we have and continue to caution counties from purchasing liability insurance in excess of their liability under state law, construction projects are unique in that workers' compensation and general liability insurance costs are generally passed to the owner of the project within the contractor's bid. In addition to being a step towards putting the public transportation project into operation, the cost benefits and streamlined safety procedures also appear to support this conclusion. Likewise, case law and the majority of opinions issued by various Offices of other Attorneys General outside of our jurisdiction have sided in favor of its state and its political subdivisions implementing OCIPs for various public construction projects despite arguments to the contrary. However, as this inquiry involves questions of fact, we caution that a court, applying the factors outlined in Nichols as discussed above, is the only entity that can conclusively decide this issue.

We also caution that this opinion only addresses your questions of constitutionality pursuant to article X, section 11. As reflected by the authorities summarized above, we are confident other arguments would likely be presented in opposition of implementing an OCIP for public construction projects. We therefore encourage the Legislature to speak to the issue, as a number of other states have, through legislative enactment, to provide additional guidance in this area of the law that has been described as a "no man's land" or legal uncertainty and confusion."[2]

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[2] See Chad G. Marzen, OCIPS in the Future of the Insurance Industry: Legal and Regulatory Considerations, U. Miami Bus. L. Rev. 49. 76 (2011).

Very truly yours,

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General