ALAN WILSON
ATTORNEY GENERAL

September 15, 2015

The Honorable Dean Fowler
Office of Treasurer
Florence County
180 North Irby Street, MSC-Z
Florence, SC 29501

Dear Treasurer Fowler:

Attorney General Alan Wilson has referred your letter dated August 17, 2015 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue:
Does Florence County's borrowing millions of dollars beyond the county's Constitutional debt limit of $35 million dollars (for example entering into an installment purchase lease bond agreement for $42 million dollars to acquire a new judicial center) render the Constitutional debt limit of a county a thing of the past?

Law/Analysis:
The South Carolina Constitution is clear in limiting a county's debt limit by defining a political subdivision to include a county and limiting general obligation debt to eight (8%) percent of the assessed value of all taxable property within the county. S.C. Const. art. X, § 14.[1] Our State Constitution also is clear in stating:

> 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 a less price than that for which it can be sold to individuals. …

SC Const. art III, § 31. While this Office is aware of previous cases concerning financing to avoid the Constitutional debt limit, we feel the issue is worthy of discussion. Many of those cases dealt with school renovations and additions and debt limits pursuant to Article X, § 15 of the South Carolina Constitution. See, e.g., Caddell v. Lexington County School District No. 1, 296 S.C. 397, 373 S.E.2d 598 (1988); Redmond v. Lexington County School District No. 4, 314 S.C. 431, 445 S.E.2d 441 (1994); Colleton County Taxpayers Assocation v. School District of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006).[2] The Court in Caddell suggested the South Carolina Legislature pass a new law if they disagreed with the court's interpretation. The Legislature subsequently passed Section 11-27-110 in response to

[1] Please note this is a simplified reading of Section 14. Please read the full version for other limitations, caveats and exceptions.
[2] See also Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971); Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Reese v. Talbert, 237 S.C. 356, 117 S.E.2d 375 (1960).

Caddell and Redmond, which affects political subdivisions such as counties and limits their ability to enter into financing agreements to the county's constitutional debt limit of eight (8%) percent unless the financing agreement is approved by a majority of voters in a referendum. Op. S.C. Att'y Gen., 2000 WL 1803581 (November 13, 2000)[3]; S.C. Code § 11-27-110. Our State Supreme Court then heard the Colleton case and analyzed the financing arrangement for the school district in accord with Section 11-27-110 and Article X, § 15 of the South Carolina Constitution. The Court ultimately determined that, among other things, the arrangement did not constitute a "financing statement" to make it subject to S.C. Code § 11-27-110. Colleton County Taxpayers Assocation v. School District of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006).

Regarding public property sold to third parties, this Office has previously stated:

> We caution that the applicable law requires that a public entity receive "reasonably equivalent value" for the sale of public property. [FN3] Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596, 600 (1923). In this context, we have previously said that:
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> > ... Article III, § 31 [Constitution of South Carolina, 1895, as amended] provides that 'lands belonging to or under the control of the state shall never be donated, directly or indirectly, to private corporations or individuals....' While our Court has clearly stated that neither this provision nor the Due Process Clause in themselves require public bidding or a maximum price for the sale of property, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), it is also clear that the consideration from such a sale must be of 'reasonably equivalent value ...' or 'adequately equivalent ...'. Haesloop v. Charleston, 123 S.C. 272, 283, 285, 115 S.E. 596 (1923). In determining 'what is a fair and reasonable return for disposition of its properties,' a public body 'may properly consider indirect benefits resulting to the public ...'. McKinney v. City of Greenville, 262 S.C. 227, 242, 203 S.E.2d 680 (1974). But such benefits must not be 'of too incidental or secondary a character....' Haesloop, supra. In short, when public officials sell the state's land, they are acting in a fiduciary relationship with the public and are thus held to the 'standard of diligence and prudence that [persons] ... of ordinary intelligence in such matters employ in their own like affairs.' Haesloop, 123 S.C. at 284.
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> Op.Att.Gen., August 27, 1985.

Op. S.C. Att'y Gen., 1989 WL 406229 (December 12, 1989). This Office has also previously stated that"[n]o governing body may spend public funds... beyond its corporate purpose." Op. S.C. Atty. Gen., 2014 WL 1398594 (quoting Op. S.C. Atty. Gen., 2003 WL 21790882 (July 28, 2003)). However, your situation differs from differs from the sale of property in that you are entering into a lease for the borrowing of funds and differs the education cases in that you are dealing with a different section of the Constitution and different financing terms. Based on information provided to us, without determining

[3] We recommend reading this opinion for a further discussion on the legislative history of S.C. Code § 11-27-110 in addition to an opinion dated December 9, 1985 concerning lease purchase agreements (Op. S.C. Att'y Gen., 1985 WL 166105 (December 9, 1985).

any facts, it is our understanding the sole purpose and consideration of the lease of the real property is for the private nonprofit corporation to provide funds to the county in order to build a new judicial center in the county.[4] Art. III Lease of the Real Property: Acquisition of the Project Facilities §§ 2.1(b), 3.1 (as recorded by the Florence County Clerk of Court Book B581 at Page 286 et seq.). Moreover, the County Finance Director is listed as the registered agent for the private corporation (the Lessee) and lists the county office as its address as shown on the South Carolina Secretary of State's website at www.sos.sc.gov/index. The President (as signed on some of the documents) of the Lessee (Florence County Public Facilities Corporation) advertises himself as a defense attorney who handles cases against the county (traffic violations). Available at www.jerniganlawfirm.com (as of September 8, 2015).[5] Accordingly, if the Lessee violated the terms of the lease of the judicial center to the county, we believe a court would find that the county could bring an action in equity and the court would likely impose a constructive trust on the judicial center. A court could take into consideration parol evidence to make such a determination. Nesbitt v. Cavender, 27 S.C. 1, 2 S.E. 702 (1887). This Office believes at the point a court would find a constructive trust exists for the citizens and/or the county (as opposed to the nonrenewal of a lease), the Constitutional county debt limit pursuant to Article X, § 14 would also apply because it would essentially be the property belonging to the county and the citizens thereof. Any accompanying debt on county property would count against the county's Constitutional debt limit of eight (8%) percent.

This Office has previously stated, "[t]he critical factor for purposes of determining whether the agreement constitutes indebtedness is not so much the precise verbiage used, as whether the provision substantively accomplishes the purpose of making the agreement conditional upon future appropriations." Op. S.C. Att'y Gen., 1985 WL 166105 (December 9, 1985). Moreover, it is a well-recognized principle of law that an act which is forbidden to be done directly cannot be accomplished indirectly. Ops. S.C. Att'y Gen., 2000 WL 1803581 (November 13, 2000); 1990 WL 599265 (July 31, 1990) (citing State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526 (1940); Lurey v. City of Laurens, 265 S.C. 217, 217 S.E.2d 226 (1975); Westbrook v. Hayes, 253 S.C. 244, 169 S.E.2d 775 (1969)). As the State Supreme Court cautioned in Richardson v. Blalock, 118 S.C. 438, 110 S.E. 678 (1922), "[t]hat which cannot be done directly cannot be done indirectly." As this Office previously stated, "the purpose of this rule is to prevent circumvention of the law by ruse or artifice." Op. S.C. Att'y Gen., 2003 WL 21471505 (June 10, 2003). Just as a court will look beyond words to determine whether an imposition is a tax or an assessment, this Office believes a court will look beyond the mere language of the terms of the agreements to determine if the intent of the Constitutional debt limit is violated. Jackson v. Breeland, 103 S.C. 184, 88 S.E. 128 (1916). As stated concerning Alabama's constitutional debt limit for its political subdivisions:

> Debt limit restrictions like those in § 224 [of the Alabama Constitution] were established "for the purpose of providing a safeguard against extravagant or unwise expenditure of public funds" and " 'to protect persons residing in municipalities from the abuse of their credit and the consequent oppression of

[4] This Office does not determine facts in a legal opinion. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)). However, we mention some of the terms of the arrangement as we feel it is essential to our legal analysis, though we in no way have reviewed all the terms of the agreements nor do we make any determinations of fact but are merely analyzing the information provided to us at this time.

[5] While pursuant to S.C. Code § 11-35-50 all political subdivisions of the State are required to develop their own procurement procedures, we are not aware of Florence County's procurement procedures or if they were followed in this situation.

> burdensome, if not ruinous, taxation.' " *Taxpayers & Citizens of Shelby County v. Shelby County,* 246 Ala. at 196, 20 So.2d at 39, quoting 38 Am.Jur. *Municipal Corporations* p. 99. " 'Attempted evasions of constitutional provisions as to debt limit are viewed with disfavor by the courts.' " *Id.,* quoting 38 Am.Jur. p. 107. Therefore, "care must be taken that no precedent be established which would lead to any method by which such restrictions could be circumvented." *Id.*

Taxpayers and Citizens of Shelby County v. Acker, 641 So.2d 259 (1994) (dissent). The Washington Supreme Court stated concerning a loan agreement that:

> Some of those guaranties would eventually come due, requiring the municipality to resort to taxes to pay for failed projects, the very evil against which our debt limits protect. These guaranties would transparently evade our constitutional debt limits and would frustrate not only the risk of loss concept, but also the very purpose of having debt limits in the first place. To ignore this would be to abdicate our solemn responsibility under the constitution.

In re Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities Dist., 175 Wash.2d 788, 287 P.3d 567 (2012). In utilizing a constructive trust as the test to determine ownership by the citizens, a court may determine the true obligor and the extent of the debt and the liability thereof.

Conclusion: This Office believes that where a court would find the county (or the citizens thereof) owns the judicial center (and/or has a right to lease it) via a constructive trust, any such encumbrances on the judicial center would violate the Constitutional debt limit for a county.[6] However, this Office is only issuing a legal opinion and is not making any factual determinations. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. S.C. Code § 15-53-20. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[6] A court could also conclude, depending on the terms of the agreement, that it violates S.C. Code § 11-27-110.