1980 WL 121032 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 18, 1980

***1** Honorable T. Ed Garrison
Chairman
Governor's Advisory Council on Alcohol Fuels
Division of Energy Resources
1122 Lady Street
Suite 1130
Columbia, South Carolina 29201

Dear Senator Garrison:
You have asked the opinion of this Office on two questions:

(1). The constitutionality of Section 6, Act 518 of 1980 (Amendments to the Capital Improvement Bonds Act of 1977);

(2). Whether $2 million dollars of the $5 million authorized for promotion of alcohol fuel development may be expended for the development of alcohol fuel production facilities by State and local governmental agencies.

Use of public funds for alcohol fuel development was first authorized in the 1979 Bond Act (Act 194 of 1979) as follows:

2. BUDGET AND CONTROL BOARD

Executive Director's Office

1. Gasohol Development Loan Program $5,000,000

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Provided, Further, That the authorization for ‘Gasohol Development Loan Program’ shall be contingent on the development and formal adoption by the Budget and Control Board, after review by the Bond Review Committee created by Act 761 of 1976, of policies regarding the maximum amount of Loans, the interest rate and repayment schedule on Such loans, the minimum qualifications for applicants, and such other policies and guidelines as the Board may deem appropriate.

Provided, Further, That no loan may be made under this Program which has not been reviewed by the Bond Review Committee created by Act 761 of 1976 and approved formally by the Budget and Control Board.

Because of constitutional issues involved, as well as the unsettled bond market, no action was taken on this matter in 1979.

In 1980, the General Assembly further expanded the provisions in the 1979 Act, as follows:
Section 6. Item (f) of Section 3 of Act 1377 of 1968, as last amended by Section 1 of Part I of Act 194 of 1979, is further amended by striking sub-subitem 1, under ‘Executive Director's Office’, of subitem 2 ‘Budget and Contrl Board’ and inserting: ‘1. Alcohol Fuel Development Loan Program 5,000,000’, and by adding after ‘Total, Executive Director's Office 5,000,000’.

Provided, that the General Assembly finds that the promotion of the alcohol fuel development loan program authorized in Item 2 of Section I, Part I of Act 194 of 1949 will subserve a public purpose by promoting the planting of grain crops and the development of a substitute for gasoline. It intends that monies authorized by Act 194 be made available through the private banking system by authorizing the Budget and Control Board (hereinafter 'the Board') in consultation with the Joint Bond Review Committee and the Governor's Advisory Council on Alcohol Fuels to purchase loans made by any lending bank to any individual or corporation for the sole purpose of producing components which would be convertible into fuel grade alcohol from renewable resources or for the purpose of constructing facilities which would themselves produce fuel-grade alcohol from renewable resources. To that end, the Board shall be empowered to purchase loans for such purpose made by any bank organized and existing under the laws of South Carolina or of the United States and having its principal office in South Carolina on such terms and conditions as it shall approve except that no more than 90% of any loan so made shall be purchased. In addition, the Budget and Control Board may agree to pay the banking institution making any such loan a reasonable annual fee for collecting the principal and interest on such loan and providing other services with respect thereto.

***2** Seen loans shall bear interest at a rate to be prescribed by the Budget and Control Board which will relate to the rate borne by the issue of bonds from which proceeds the appropriation set forth in Act 194 is made available. All such loans shall be secured in such manner as the lending bank shall prescribe with the approval of the Board.

The Board in consultation with the Joint Bond Review Committee and the Governor's Advisory Council on Alcohol Fuels is further authorized to take any and all steps which may be required to fully implement the loan program to the extent of the appropriation set forth in Act 194.

Provided, that not less than two million dollars of the five million dollars authorized above for the Alcohol Fuel Development Loan Program shall be available for the development of alcohol fuel production facilities by South Carolina municipalities and counties and by agencies and institutions of the South Carolina state government.

QUESTION 1

Whether Section 6 of the Act of 1977, as amended above, is constitutionally valid is doubtful, especially the provisions as to purchase by the State from banks of loans made by the banks to private individuals or corporations.

Whenever bonds of the State are to be issued for any purpose, it must first be determined that it is a 'public purpose,' as required by Article X, Section 11, of the Constitution which provides in pertinent part:

§ 11. Credit of State and political subdivisions.

The credit of neither the State nor of 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.
(Section 3, Article XI, refers to public education.)

The fact that the Act states 'the promotion of the alcohol fuel development loan program . . . will subserve a public purpose' is not dispositive of the issue. Our Supreme Court stated recently in Bauer v. S. C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978):
It is true that the Legislature cannot under the guise of public purpose enact a law that in its realistic operation benefits, not the enumerated public purpose, but essentially private interests. State Ex Rel. Warren v. Nusbaum, 59 Wis. (2d) 391, 208 N.W.

(2D) 780 (1973). Or, as stated in Anderson v. Baehr, supra, 'It is not sufficient that an undertaking bring about a remote or indirect public benefit to categorize it as a project within the sphere of 'public purpose", 265 S.C. at 163, 217 S.E.(2d) at 48.

The Court went on to conclude that the financing of adequate housing for the public outweighed the fact that benefits would accrue to private individuals because of the overriding threat to the public health and welfare posed by the critical shortage of safe and sanitary housing.

Important as development of alcohol fuel may prove to be to the economic welfare of the State, and the promotion of agriculture, it cannot be concluded from the cases decided by the Supreme Court that the proposed alcohol fuel program would be a valid exercise of constitutional power. Casey V. S. C. State Housing Authority, 264 S.C. 303, 215 S.E.2d 184 (1975); Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975); Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). Certainly, bond attorneys should be most reluctant to issue their certification that public bonds may be issued for such purpose without the declaratory judgment of the Court to that effect.

***3** Further, Section 6 of the 1980 Bond Act contains no provision insulating the State or its political subdivisions from liability for the losses which might be sustained from failure of borrowers to repay loans made under the proposed program. In upholding the validity of a similar loan purchase program by the State Housing Authority, the Court pointed out that the credit of the State and its political subdivisions specifically was not pledged to secure the housing bonds. Bauer v. S. C. State Housing Authority, supra, 231 S.C. at p. 231, states:

Under her next exception, the appellant contends that the Act pledges the credit of the State for the benefit of private individuals and corporations in violation of express language in the S. C. Constitution that the credit of the State shall not be pledged or loaned for the benefit of any private individual or entity. We find the appellant's position to be without merit.

Section 10 of the Act provides:

The notes, bonds or other obligations of the authority shall not be a debt or grant or loan of credit of the State or any political subdivision thereof and neither the State nor any political division thereof shall be liable thereon, nor shall they be payable out of any funds other than those of the authority and all notes, bonds and other obligations issued pursuant to this chapter shall contain on the face thereof a statement to such effect.

In view of this express provision, it is difficult to understand how the Act in any manner pledges the credit of the State for the benefit of any private individuals or entitles. The constitutional language relied upon by the appellant has been interpreted to mean that when the State is not subject to 'pecuniary liability', the State's credit has not been pledged. Elliott v. McNair, supra. Section 10 of the Act in unambiguous language makes it clear that the State is not, and cannot in the future, be subjected to any pecuniary liability. Any attempt in the future, whether by the Legislature or otherwise, to fund any program authorized by this Act, either directly or indirectly, from tax revenues would be constitutionally prohibited. (Emphasis added.)

In the absence of a carefully circumscribed statutory scheme, such as that provided in the State Housing Authority Act of 1977, Code §§ 31-13-60, et seq., Code of Laws, 1976, as amended, which insulates the public from pecuniary liability, it is our opinion that the proposed loan purchase program provided in Section 6 of Act 518 of 1980 would be held invalid, even if it is assumed that promotion of alcohol fuel development otherwise subserves a valid public purpose.

QUESTION 2

The final proviso to Section 6 of Act 518 of 1980 states:

Provided, that not less than two million dollars of the five million dollars authorized above for the Alcohol Fuel Development Loan Program shall be available for the development of alcohol fuel production facilities by South Carolina municipalities and counties and by agencies and institutions of the South Carolina state government.

***4** It is our opinion that this language is clear and unambiguous and, therefore, must be given its ordinary meaning. Martin v. Ellisor, 266 S.C. 377, 223 S.E.2d 415 (1976). Of the $5 million total bond funds authorized, $2 million are reserved for development of facilities by State agencies, institutions, municipalities and counties. There is no implication of an intent to authorize $2 million above the $5 million total.

We do not conclude, however, that the expenditure of such funds by counties, municipalities or State agencies and institutions for development of alcohol fuel production facilities is any less constitutionally suspect than the loan purchase program. In fact, it may be more so.

The General Assembly has not acted under The provisions of new Article VIII of the Constitution (the 'Home Rule' provisions) to empower counties and municipalities to erect or operate alcohol fuel facilities. See especially §§ 1 and 9, of Article VIII. Under prior constitutional provisions (former Article VIII), the Court has carefully restricted activities by counties and municipalities to those which subserve a clear 'public purpose.' Elliott v. McNair, supra; Evatte v. Cass, 217 S.C. 62, 59 S.E.2d 638 (1950); Marshall v. Rose, 213 S.C. 428, 49 S.E.2d 720 (1948); Irvins v. Greenwood, 89 S.C. 511, 2 S.E. 228 (1911). The promotion of industry is a proper public purpose under Elliott v. McNair; but the Industrial Revenue Bond Act held valid in that case insulated the public from pecuniary loss and (as in the Housing Authority Act) the credit of the State and the county was specifically not pledged to secure the bonds.

While Article VIII, Section 19 of the Constitution, as amended in 1973, (Formerly Art. VIII, Sec. 5) permits municipalities to acquire and operate public utilities, only a court opinion could establish the operation of an alcohol fuel production facility as being permitted by that Constitutional provision.

A reasonable argument may be made for the State Budget and Control Board authorizing use of up to $2 million of these general obligation bond funds by public educational institutions of the State to construct pilot alcohol fuel production facilities for educational purposes and to aid in the promotion of industrial and agricultural expansion for the public benefit, because the credit of the State may be pledged for educational purposes which directly benefit individuals, under Article XI, Section 3. But in our opinion this is the only action suggested by Section 6 of the 1980 Bond Act which appears legally sound, and its validity is not free from doubt.

CONCLUSION

It is the opinion of this Office:

(1). Section 6 of Act 518 of 1980 is constitutionally suspect, and the question of its validity may be resolved only by the declaratory judgment of the courts;

(2). Of the $5 million bond funds authorized by the Act, $2 million are reserved for legally permissible alcohol fuel production facilities to be developed by counties and municipalities and by State agencies and institutions.

Very truly yours,

***5** Frank K. Sloan
Deputy Attorney General

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