ALAN WILSON
ATTORNEY GENERAL

May 16, 2019

Mr. Larry C. Smith, Esquire
Attorney for Richland County
Post Office Box 192
Columbia, South Carolina 29202

Dear Mr. Smith:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

> Richland County ("County") has sewer customers on several different systems within the county. Until now, those users paid a user fee based on the necessities of that particular system. In an effort to comply with State law and following a rate study, Richland County is raising its sewer utility rates for all users and making those rates uniform across the entire county. This increase will affect users of the systems differently, with those users historically paying lower rates seeing a higher increase than other users.
>
> Many of the users in certain areas affected more dramatically by the rate increase are lower income citizens. In an effort to limit the financial effects on those lower income citizens, the Richland County Council would like to implement a program whereby citizens meeting Federal poverty level income requirements would receive a "discount" or "credit" on each bill in the form of a subsidy paid out of the General Fund. This "discount" or "credit" would be phased out over a certain period of time (ex. 3 year limit).
>
> The question posed is whether the subsidy would violate the prohibition against using public funds for a private purpose.

Law/Analysis

It is this Office's opinion that a court would likely find the proposed subsidy would violate the prohibition against using public funds for a private purpose. In the seminal case of Feldman & Co. v. City Council of Charleston, 23 S.C. 57, 62 (1885), the South Carolina Supreme stated, "It seems to be universally conceded, even by those who are disposed to enlarge the taxing power of the legislature to its greatest extent, that a law authorizing taxation for any

other that a public purpose is void." Although, the Feldman decision predates the current South Carolina Constitution, the framers of our Constitution enshrined this principle in its text. Article X, Section 5 of the South Carolina Constitution states, "No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." S.C. Const, art. X, § 5. Further, Article X, Section 11 of the South Carolina Constitution provides, in relevant part, "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 ..." S.C. Const, art. X, § 11. This Section has been interpreted to prohibit the expenditure of public funds or resources for the primary benefit of private parties. See State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), *overruled on other grounds by* WDW Prop. v. City of Sumter, 342 S.C. 6, 535S.E.2d631 (2000).

Because the request letter explains that the proposed subsidy would be paid out of the County's unrestricted general fund and there is no indication that these funds are otherwise specifically allocated, this opinion will assume that the subsidy would likely be found to be paid from tax revenues rather than a direct rebate from the uniform sewer utility fee revenues.[1] Therefore, this opinion must next consider whether a court would likely find this subsidy program serves a public purpose.

Initially, the question of whether a legislative act serves a public purpose is primarily a legislative determination and courts will not interfere unless that determination is clearly wrong. See Elliott v. McNair, 250 S.C. 75, 88, 156 S.E.2d 421, 156 (1967). In Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), the South Carolina Supreme Court explained how our state courts have approached the question of whether a legislative act serves a public purpose as follows:

> The courts have, as a rule, been reluctant to attempt to define public purpose as contrasted with a private purpose, but have generally left each case to be determined on its own peculiar circumstances. As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general

[1] Cf. Brown v. Cty. of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992)

> In Emerson, supra, the Massachusetts Supreme Court held that when the revenue from fees is destined for the general fund this indicates that the fee is a tax. The Horry County ordinance provides that the fees are to go into the general fund but that they are to be specifically used for the maintenance and improvement of county roads. Therefore, because the money collected is specifically allocated for road maintenance, we hold that the fee is service charge.

308 S.C. at 185, 417 S.E.2d at 568.

> 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. 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.

265 S.C. at 162, 217 S.E.2d at 47. The Anderson Court cautioned, "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; see also Feldman, 23 S.C. at 63 ("It is the essential character of the direct object of the expenditure which must determine its validity as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community ...").

The request letter does not contain a statement of legislative intent which could assist this Office in evaluating the public purpose sought to be served by the proposed subsidy plan. Presumably, such a statement would describe a benefit to public health related to improvements in sanitation services and that subsidizing the increased sewer utility fees paid by low income county residents would benefit the economic security of a substantial portion of the County's population. Regardless of the reasons which may be assigned, the proposed subsidy would essentially distribute unallocated tax revenue from the County's general fund to private citizens who pay for sewer service. Certainly, such a plan would directly benefit the private citizens who receive such a subsidy. Presumably, the County would be attempting to address the very real economic impact of higher costs borne by low income households as a result of increased sewer utility rates. There are any number of ways the increased economic security provided to these citizens may benefit the County, but such a benefit could only be characterized as indirect. Because the Anderson Court stated an indirect public benefit is not sufficient to satisfy the requirement of a "public purpose," it is this Office's opinion that a court would likely find the proposed subsidy would violate the prohibition against using public funds for a private purpose.

Conclusion

As discussed more fully above, it is this Office's opinion that a court would likely find the proposed subsidy would violate the prohibition against using public funds for a private purpose. See S.C. Const, art. X, §§ 5, 11; Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1885). Because the request letter explains that the proposed subsidy would be paid out of the County's unrestricted general fund and there is no indication that these funds are otherwise specifically allocated, a court would likely find that the subsidy would be paid from tax revenues. Cf. Brown v. Cty. of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992). Further, because the subsidy would benefit private citizens directly and would only indirectly benefit the County, a court would likely find that the subsidy does not serve a public purpose. See Anderson v. Baehr, 265 S.C. 153, 163 217 S.E.2d 43, 48 (1975) ("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.'").

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General