ALAN WILSON
ATTORNEY GENERAL

November 5, 2020

John P. Cribb
Berkeley County Supervisor
Berkeley County Administration Building
PO Box 6122
Moncks Corner, SC 29461-6120

Dear Mr. Cribb:

You have requested an opinion from this Office regarding the appropriateness of the Berkeley County Chamber of Commerce using Berkeley County facilities for a nominal rent amount. You inform us that the Berkeley County Chamber of Commerce ("Chamber") rents a building owned by Berkeley County ("County"). The original lease provided for a rent payment in the amount of five dollars ($5.00) per year, but the Chamber is now in a month to month lease as all lease agreements have expired.

You acknowledge that our Office has previously concluded that the contribution of county funds to a chamber of commerce or the waiving of rental fees for a chamber of commerce is violative of Article X, Section 11 (formerly Section 6 before 1977) of the South Carolina Constitution of 1895, as amended. See Ops. S.C. Atty. Gen., 1977 WL 37410 (July 27, 1977); 1999 WL 387069 (May 24, 1999). You also recognize that the Nichols test, provided for in Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), is the appropriate test to determine if public funds are being used for a public purpose.

You are asking the following:

> [a]s this situation does not include the direct payment of funds by the County to the Chamber or the waiving of established rental fees, the County is requesting your opinion on whether the Chamber may rent a building owned by the County that never had a rent amount established. If the County is not permitted to do so, must the County determine what the fair market rental rate would be for the building and require payment from the Chamber in that amount?

LAW/ANALYSIS:

To provide some background, the South Carolina Constitution provides that "[t]he 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 . . . .[1]" S.C. Const. art. X, § 11. In a February 3, 2005 opinion, we explained:

> [t]his office has repeatedly recognized that public funds must be used for public and not private purposes . . .While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described by our Supreme Court in Anderson v. Baehr, 265 S.C. 153. 217 S.E.2d 43 (1975) as follows:
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> > (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 for 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.
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> An opinion of this office dated December 18, 2000 commented that the constitutional requirement of "public purpose . . . was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises." . . . . In Nichols,[2] the court established the following test to determine whether the "public purpose" requirement has been met:
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> > (t)he Court should first determine the ultimate goal or benefit to the public intended by the project.

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[1] S.C. Const. art. XI, § 3 provides:

> The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable.

[2] Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986).

> 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.

Op. S.C. Atty. Gen., 2005 WL 469070 (Feb. 3, 2005) (citations omitted).

Berkeley County ("County") operates under the council-supervisor form of government. Berkeley County, S.C. Code of Ordinances, ch. 2, § 2-1 (April 9, 2020). Under this form of government, Berkeley County Council ("County Council") has the power "to acquire real property by purchase or gift; to lease, sell or otherwise dispose of real and personal property; and to acquire tangible personal property and supplies." S.C. Code Ann. § 4-9-30 (1976 Code, as amended). This Office has previously opined:

> It is the opinion of this Office that an agency on [or] institution having the statutory power and authority to own and lease real property, may lease same to a private individual, partnership, or corporation, provided the benefits to the public equal the fair market value of such lease. Indirect benefits resulting to the public, such as furtherance of the public purposes of the agency or institution, may be considered in making such transactions. Elliott v. McNair, 250 S.C. 75, 156 S.W.2d 241 (1967) . . .

Op. S.C. Atty. Gen., 1982 WL 189134 at 1 (Jan. 11, 1982) (emphasis added).

Furthermore, the court, in Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923), determined that a city council was empowered to lease real property to a private person or corporation for its fair market rental value or its equivalent monetary value:

> The right of the city council, under the powers conferred to sell this land to a private person or corporation for a private use for its market value in money, or to lease it to a private person or corporation for a private use for its rental value in money, or to exchange it for other property of equivalent value in money, is unquestionable . . . . Since the city council has the right to sell or lease for money, ... we think there can be no doubt of their right to dispose of it for money's worth . . . . --that is, for a consideration of reasonably equivalent value in money . . .

The court explained:

> In the sense that all powers of municipal corporations are held in trust for public use, all property held by such corporations is held in a fiduciary capacity. Property held by such corporation for strictly governmental purposes or which has been devoted to a special public use may be sold or disposed of only under express legislative authority; but property acquired and held for general municipal purposes is subject to the corporation's discretionary power of use and disposal. It is universally conceded, however, that such discretionary power of use and disposal does not include the authority to donate municipal property to a strictly private use, for the obvious reason that a transfer or release of such property by a municipality to a private ownership without receiving in return some consideration of reasonably equivalent value would amount to a palpable breach of the trust upon which it is held.

Id (citations omitted). The court added, however, that a court of equity "will not interfere at the suit of a taxpayer to restrain the authorities of a municipal corporation in the exercise of their discretionary powers with regard to the control or disposition of property of the municipality, in the absence of illegality, fraud, or clear abuse of their authority." Id.

In Powell v. Thomas, 214 S.C. 376, 52 S.E.2d 782 (1949), the court concluded that the construction of a war memorial did not meet the criteria for a public purpose pursuant to former Article X, Section 6 of the South Carolina Constitution.[3] The proposed war memorial was to be partially used for meetings of the American Legion, a private organization. The court found that the American Legion was "not a public body which may be supported or aided by the levy of county taxes." Id.

In response to the argument that the American Legion had raised money for the construction which would be comparable to the value of the space it would use, the court pointed out that the building would be "constructed on a lot owned by the county, presumably will be kept in repair, and light, heat and janitor service furnished by the county, and will be exempt from taxation." Id.

The court in Powell partially relied on Darby v. Otterman, 122 Kan. 603, 252 P. 903 (1927), for its conclusion. In Darby, a taxpayer brought suit to enjoin the mayor and city council in Kansas City, Kansas from leasing part of a memorial hall to the Veterans of Foreign Wars, a private corporation, for $1 per year for twenty (20) years. The court determined:

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[3] Pursuant to former Art X, sec. 6 of the South Carolina Constitution, cities and counties could only be authorized to levy taxes and issue bonds for certain enumerated public purposes, which included the construction of a public building.

> Taxes must be levied to pay for the upkeep of the building, for janitor services in it, for repairs to it, and for heat and light for it. The purposes for which the Veterans of Foreign Wars is incorporated has no connection with the business of the city. The uses to which Veterans of Foreign Wars will put that portion of the building leased to that organization will be for the benefit of a private corporation, although organized for public and patriotic purposes. The service it will render will be wholly independent of, separate from, and outside the control of any department of the city government of Kansas City. Taxes cannot be levied for such purposes.

Id.

Similarly, the Powell court relied on Kingman v. City of Brockton, 153 Mass. 255, 26 N.E. 998 (1891). In Kingman, the Brockton City Council voted to appropriate money for the construction of a memorial hall and public library building. A portion of the building was to be used by a Grand Army of the Republic[4] post. The court found that the Grand Army of the Republic post was "not a public body, but is an association of individuals." Id. The court held:

> The right of taxation by a city or town extends only to raising money for public purpose and use. There is no definition of public purpose or use which can include the maintenance and support of a Grand Army post.

Id (emphasis added).

CONCLUSION

We do not believe that Berkeley County can rent the county building to the Berkeley County Chamber of Commerce for a nominal rent amount. As discussed above, an entity which is statutorily authorized to own and lease real property can lease the property to a private organization for fair market value or its equivalent value in money, which includes indirect benefits resulting to the public. In Ashmore et al. v. Greater Greenville Sewer District et al., 211 S.C. 77, 44 S.E.2d 88 (Aug. 28, 1947), the court stated that chambers of commerce were "purely private organizations, performing no governmental function." Because taxes must be levied to pay for the maintenance, utilities, and janitorial services of the county building, it is our opinion that Berkeley County must determine the fair market rental rate of the building and require

[4] "Grand Army of the Republic (GAR), patriotic organization of American Civil War veterans who served in the Union forces, one of its purposes being the 'defense of the late soldiery of the United States, morally, socially, and politically.'" See Encyclopaedia Britannica at https://www.britannica.com/topic/Grand-Army-of-the-Republic.

payment from the Berkeley County Chamber of Commerce, a private organization, in that amount or its equivalent monetary value.

Sincerely,

Elinor V. Lister

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Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General