



HENRY McMASTER
ATTORNEY GENERAL

June 30, 2006

Gary T. Culbreath, Chairman
South Carolina Museum Commission
Post Office Box 100107
Columbia, South Carolina 29202-3107

Dear Mr. Culbreath:

By letter, you request an opinion of this Office on behalf of the South Carolina State Museum Commission (the "Commission") concerning the legality of a proposed agreement between the South Carolina Museum Foundation (the "Foundation") and the South Carolina State Museum (the "Museum"). In your letter, you provided us with the following information:

The South Carolina Museum Commission has as an adjunct the South Carolina Museum Foundation of which the sole and exclusive purpose is to financially support the South Carolina State Museum. We are proposing the attached agreement which we feel better defines the roles of each organization. This agreement clearly outlines that the Commission, which is appointed by the Governor, is the entity that is accountable for the operation and performance of the responsibilities of the State Museum as outlined in the organizing statute. This arrangement is reflected in the attached document which is provided for your review and comment.

You also informed us that

[p]rior to drafting this document, the Commission sought the counsel of the Office of Human Resources to determine what, if any state employment regulations might be affected. That contact concluded there would be no adverse impact. At the same time, the Museum Foundation sought an opinion as to whether or not this change in structure would affect the tax exempt status the South Carolina Museum Foundation and the opinion of counsel to the Foundation was that it would not.

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Although your letter indicates you desire this Office to review the agreement for violation with State law, we informed you in a telephone conversation that such an endeavor is beyond the scope of an opinion of this Office. Thus, as discussed, we will limit the scope of this opinion to a review of the provisions of the agreement to determine if the Commission possesses the requisite authority to perform as provided under the agreement.

Law/Analysis

As you mentioned in your letter, this Office issued several opinions addressing the formation of nonprofit corporations by governmental entities. Op. S.C. Atty. Gen., October 22, 2004 (discussing the establishment of the Friends of the Hunley by the Hunley Commission); January 16, 1997 (addressing the formation of a foundation by the Department of Parks, Recreation and Tourism); November 15, 1994 (finding the Patriot's Point Development Authority may establish a nonprofit corporation). Reviewing to the enabling legislation of the governmental entities discussed in these opinions, we found they have broad authority with regard to the performance of their statutory functions. Id. In addition, we found no statute prohibiting the formation of nonprofit corporation. Id. Accordingly, these opinions concluded although not specifically provided for by statute, these state agencies or governmental entities have implied authority to establish eleemosynary entities to assist them with their statutory functions. Id.

We find our opinion dated October 22, 2004 particularly relevant in addressing your request. This opinion dealt with whether the Hunley Commission is authorized to establish the Friends of the Hunley, a nonprofit corporation created to raise funds necessary for the implementation of Hunley project. Op. S.C. Atty. Gen., October 22, 2004. We acknowledged the authority of a governmental entity is limited to that provided by statute. Id. However, we stated: "a governmental body possesses not only such powers as are conferred upon it by the laws under which it operates but also possesses such powers which must be inferred or implied so as to enable such entity to effectively exercise its express powers." Id. (citing Beard-Laney, Inc., et al. v. Darby, et al., 213 S.C. 380, 389, 49 S.E.2d 564, 567 (1948)). Therefore, citing a 1977 opinion of this Office, we stated "[e]xpress authority to delegate is not necessary in all cases" Id. (quoting Op. S.C. Atty. Gen., November 9, 1977). Furthermore, we concluded "our courts, as well as opinions of this Office, have consistently recognized the State or its subdivisions may contract with private entities in the carrying out of a public purpose." Id. (citing Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954)). We cited the test for public purpose as established by Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), 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. Applying these standards, we concluded the expenditure of funds for historical and recreational purposes are valid public purposes, thus finding the Friends of the Hunley served a valid public purpose. Id. Furthermore, quoting a prior opinion of this Office, we stated “[i]t is well established that the State may properly maintain supervision and control through the use of a contract.” Id. (quoting Op. S.C. Atty. Gen., August 8, 1985). Based on these determinations and several of the opinions mentioned above, we concluded:

it is our opinion that the Hunley Commission possesses the power to create the nonprofit corporation known as the Friends of the Hunley to further its statutory duties to provide for the recovery, excavation and conservation of the Hunley. The authority of the Commission to implement the Legislature’s purpose in preserving and displaying the Hunley carries with it the authority to create a nonprofit corporation to raise funds and assist in that effort.

Id.

Your request deals not with whether the Commission may form the Foundation, as the Foundation already exists, but rather whether the Commission is authorized to enter into an agreement with the Foundation providing certain functions are to be performed by the Commission and the Foundation. However, in examining the Commission’s authority as it pertains to the provisions contained in the agreement, we find it helpful to discuss the Commission’s general authority with respect to the Foundation.

As noted in the discussion of our 2004 opinion, “An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.” Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995). Chapter 13 of title 60 of the South Carolina Code governs the Commission. In our examination of the Commission’s enabling legislation, we found the Commission, like the Hunley Commission, does not have specific statutory authority to create a nonprofit corporation. However, we believe such authority is implied.

Section 60-13-30 of the South Carolina Code (1990) sets forth the primary function of the Commission.

The primary function of the Commission shall be the creation and operation of a State Museum reflecting the history, fine arts and natural history and the scientific and industrial resources of the State,

mobilizing expert professional advice and guidance and utilizing all available resources in the performance of this function.

(emphasis added). This provision appears to give the Commission broad authority with respect to creating and operating the Museum by allowing it to utilize all available resources in the performance of this function. In addition, section 60-13-40 of the South Carolina Code (1990) provides an enumerated list of powers specifically afforded to the Commission. This list includes the power to "Accept gifts, bequests and endowments for purposes consistent with the objectives of the Commission" S.C. Code Ann. § 60-13-40(7). Therefore, like the enabling legislation described in the opinions cited above, we believe this provision, along with section 60-13-30, may be read to give the Commission the implied power to form and contract with the Foundation for the performance of duties such as the acceptance of gifts and bequests. Furthermore, you state the purpose of the Foundation is solely "to financially support the South Carolina State Museum." In a prior opinion of this Office, addressing whether the Commission may provide office space free of charge to the Foundation, we concluded: "Since the State Museum operates for a valid public purpose, it would seem that a private, non-profit corporation established solely to benefit the State Museum would also operate for a valid public purpose." Op. S.C. Atty. Gen., May 1, 2000. Thus, we presume contracting with the Foundation for financial support is in accordance with a public purpose.¹ Additionally, in accordance with our opinions cited above, the Commission's power to contract with the Foundation includes the power to contract for the proper supervision and control over the Commission's duties as carried out by the Foundation.

With these principles in mind, we now examine select provisions of the agreement between the Commission and the Foundation.

¹We also note the relationship between the Commission and the Foundation does not appear to violate article X, section 11 of the South Carolina Constitution (Supp. 2005). Our Courts have interpreted this provision as prohibiting joint ventures between political subdivisions and private entities. See Nichols v. South Carolina Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986) (holding the South Carolina Research Authority is prohibited pursuant to article X, section 11 from entering into joint ventures with private firms). However, as we recently stated: "In several cases, the South Carolina Supreme Court determined these constitutional provisions were not violated when public funds were expended for the benefit of a nonprofit organization." Op. S.C. Atty. Gen., January 11, 2006 (citing Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954) (finding the nonprofit served a public function)). Because we found the Foundation serves a public function, we also find no violation of article X, section 11.

CAPITOL IMPROVEMENTS

The prioritization, planning, design and construction of all Capitol improvements related to the State Museum must be carried out by the Commission. The Foundation will, from time to time, be asked to raise funds in support of Capitol improvements and exhibits approved by the Commission; and the Foundation will use its best efforts to cooperate in this effort.

Section 60-13-30, as cited above, states the primary function of the Commission is the "creation and operation of the State Museum." Furthermore, section 60-13-40(1) of the South Carolina Code places the responsibility for the establishment of a plan for the creation and operation of the Museum in the Commission. Based on these provisions, the Commission is authorized to carry out its duties under this term of the agreement. Moreover, given that the Foundation, as we previously determined, is authorized to raise funds and accept gifts on behalf of the Museum, we find the delegation of the Commission's authority in this respect is authorized under State law.

BUDGET

The Commission and the Foundation shall, on an annual basis, collaborate in the development of their respective budgets. These budgets will be designed to implement the goals and plans of the Commission. The Commission's Director of Finance shall coordinate this effort. In the event that either the Commission or the Foundation increases, reduces or otherwise materially alters any of the items pertaining to their respective budgets, each party will notify the other of such alteration prior to its implementation so that disputes may be avoided and a common objective may be maintained

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PLANNING

Annually, at a mutually agreed upon time, the Development Director of the Foundation will provide for approval of the Museum's Executive Director, the Commission and the Foundation's Board of Directors, a comprehensive plan for development activities, consistent with the strategic plans of the Museum. The plans shall include specific plans for all phases of fundraising, stewardship, management information systems, foundation operations and a revenue and expense budget for the Foundation

Budgeting and planning are integral parts of the Museum's operations. Accordingly, we believe these provisions are also in accordance with the Commission's primary function of creating and operating the Museum. Furthermore, we find these activities, as performed by the Commission, are in accordance with its enumerated powers set forth in section 60-13-40 of the South Carolina Code.

To carry out its assigned functions, the Commission is authorized to:

(1) Establish a plan for, create and operate a State Museum;

...

(6) Control the expenditure in accordance with law of such public funds as may be appropriated to the Commission;

(7) Accept gifts, bequests and endowments for purposes consistent with the objectives of the Commission;

(8) Make annual reports to the General Assembly of the receipts, disbursements, work and needs of the Commission; and

(9) Adopt policies designed to fulfill the duties and attain the objectives of the Commission as established by law.

S.C. Code Ann. 60-13-40.

This statute clearly establishes the Commission's authority to institute a budget process and develop plans for all aspects of the Museum's operations. Furthermore, as previously established, the Foundation is created in an effort to transfer the fundraising aspects of the Museum to a separate entity. Thus, in mandating the Foundation and Commission collaborate in the development of their budgets and in requiring the Commission's and its Executive Director's approval of the Foundation's comprehensive plan for development activities, the Commission validly exercised its authority to contract for the performance of these functions. Moreover, these provisions seek to allow the Commission to maintain supervision and control over the performance of these activities via contract with the Foundation. Thus, we believe this portion of the agreement is within the Commission's authority.

FOUNDATION OPERATIONS

In order to operate these aligned organizations as efficiently as possible:

1. The Commission and the Foundation shall work cooperatively together to identify qualified candidates to serve concurrently in the capacity of the Foundation's Executive Director and the Commission's Director of Development. After a consultation with the Foundation Executive Committee, the Executive Director of the Commission will select a qualified candidate to serve in the aforementioned position. This position will report operationally and programmatically to the Executive Director of the Commission as outlined in the By-Laws of the Foundation. The parties acknowledge that this will not be a fulltime State employee position but rather a temporary grant funded/time limited position. Any other employees, whose selection will be overseen by the Executive Director of the Commission who has been delegated such responsibility from the Foundation Board of Directors, as jointly deemed necessary to carry out the business of the Foundation, will also be retained by the Commission as temporary grant funded/time limited position(s).
2. The Foundation shall annually reimburse the Commission for all expenses related to the employment of these personnel based on the prorated time expended by Museum personnel to attend to Foundation business.
3. The Commission shall also lease the Foundation office space within the Museum facility reasonably required by the Foundation to conduct its activities in support of the Museum Commission.

With regard to the appointment of the Director of Development for the Commission, although the Commission's enabling legislation does not specifically provide for this position, section 60-13-40(4) affords the Commission the authority to "appoint, on the recommendation of the Director, all other members of the staff" In addition, section 60-13-40(7) allows the Commission to accept gifts and bequests, which appears to be the function of this position as it also

serves as the Foundation's Executive Director. Thus, the appointment of a Director of Development is within the Commission's authority.

Next, in regard to the reimbursement of the Commission by the Foundation for expenses related to the employment of the Director of Development/Foundation Executive Director and their staff, we find this provision to be authorized under the Commission's right to contract with the Foundation.

Finally, with regard to the Commission's lease of office space to the Foundation, we also find this to be a valid exercise of the Commission authority to contract and in furtherance of its function to operate the Museum.

FUNDRAISING

The Foundation has been granted non-assignable rights by the Commission to be the exclusive entity, besides the Commission, authorized to accept gifts on behalf of the Museum, as well as the exclusive rights to promote a membership program on behalf of the Museum. Those rights are in effect only while this Agreement is operational. The Foundation is responsible for all non-State of South Carolina granted fundraising activities for the Museum, including, but not limited to, federal grants, corporate sponsorships, exhibit sponsors and private donations. All fundraising shall be for activities specifically approved by the Commission; and such fundraising shall be supervised by the Commission's Executive Director.

MEMBERSHIP PROGRAM

The Foundation shall, under the oversight of the Executive Director of the Commission, continue to develop an appropriate, dynamic membership program designed to balance the need to broaden public support through a large state-wide membership base while optimizing operating revenue for the South Carolina State Museum. Before implementation, the yearly membership program (including, but not limited to, membership dues and benefits) once approved by the Foundations's Executive Committee, shall be presented to the Commission for approval.

As previously noted, the Commission possesses express statutory authority to accept gifts and bequests. S.C. Code Ann. § 60-13-40(7). Furthermore, the Commission is authorized to utilize

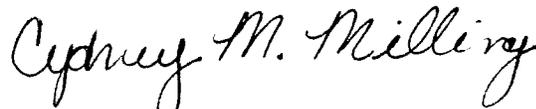
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all available resources in an effort to operate the Museum. S.C. Code Ann. § 60-13-30. Based on this authority, we also determined the Commission has the authority to contract with the Foundation for the performance of its fundraising activities. Thus, we surmise the Commission is authorized to grant exclusive rights to the Foundation for the performance of this function and to vest authority in the Foundation to undertake the Museum's membership program. Furthermore, based on the Commission's authority to maintain supervision and control through the use of a contract, we also find the provisions allowing for supervision of the Foundation's fundraising activities by the Commission's Executive Director and the Commission's retention of authority to approve the yearly membership program developed by the Foundation appropriate.

Conclusion

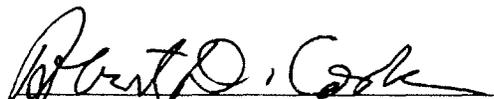
According to our analysis above, we believe the Commission has implied authority pursuant to its enabling legislation to contract with the Foundation to raise funds for the support the operation of the Museum. Furthermore, we believe the Commission, in delegating this function to the Foundation, also has authority to establish supervision and control over the Foundation by contract. With these determinations in mind, we reviewed the specific provisions of the proposed agreement between the Commission and the Foundation and found the Commission appears to have the requisite authority to perform under these terms.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General