HENRY MCMASTER
ATTORNEY GENERAL

February 20, 2009

Chad Prosser, Director
South Carolina Department of Parks, Recreation & Tourism
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Mr. Prosser:

We understand from your letter that the South Carolina Department of Parks, Recreation and Tourism ("SCPRT") is authorized to certify whether retail establishments qualify as extraordinary retail establishments entitling them to use sales tax revenues for the expansion or improvement of their facilities and infrastructure. As you explain in your letter, some confusion has arisen as to whether additional infrastructure improvements must be owned by the State or a political subdivision due to discrepancies between sections 12-21-6520 and 12-21-6590 of the South Carolina Code. Thus, you are requesting an opinion of this Office addressing "whether the additional infrastructure improvements cited in Section 12-21-6590 have to be owned by the State or a political subdivision to qualify for certification?"

Law/Analysis

The Tourism Infrastructure Admission Tax Act (the "Act") generally allows for a portion of the license tax paid on admission to tourism or recreation facilities to be used by counties and municipalities for infrastructure improvements related to major tourism or recreation facilities or located in a tourism or recreation area. S.C. Code Ann. §§ 12-21-6510 et seq. (2000 & Supp. 2007). Section 12-21-6520 of the South Carolina Code (2000 & Supp. 2007) provides definitions for certain terms used within the Act. This provision includes the following definition for "additional infrastructure improvement":

> "Additional infrastructure improvement" means a road or pedestrian access way, a right-of-way, a bridge, a water or sewer facility, an electric or gas facility, a landfill or waste treatment facility, a hospital or medical facility, a fire station, a school, a transportation facility, a telephone or communications system, or any similar infrastructure facility and facilities ancillary thereto. This improvement must be owned by the State or a political subdivision. For purposes of this section, it includes a publicly-owned tourism or recreation facility.

S.C. Code Ann. § 12-21-6520(1) (Supp. 2007) (emphasis added).

Section 12-21-6590 of the South Carolina Code (Supp. 2007), contained with the Act, allows for funding of additional infrastructure improvements to support extraordinary retail establishments through the use of sales tax rather than admissions tax. This provision states, in pertinent part:

> (A) The Department of Parks, Recreation and Tourism may designate no more than four extraordinary retail establishments as defined in Section 12-21-6520(14), and for purposes of this section, sales taxes must be substituted for admissions taxes wherever admission tax appears in this Tourism Infrastructure Admissions Tax Act. For purposes of this section, additional infrastructure improvements include any aquarium or natural history exhibits or museum located within or directly contiguous to the extraordinary retail establishment which are dedicated to public use and enjoyment under such terms and conditions as may be required by the municipality or county in which they are located. Additional infrastructure improvements also shall include site prep, construction of real or personal property, parking, roadways, ingress and egress, utilities, and other expenditures on the extraordinary retail establishment which directly support or service the aquarium or natural history museum or exhibits. The certification application made under this section must be executed by both the extraordinary retail establishment as well as the county or municipality.

S.C. Code Ann. § 12-21-6590(A) (emphasis added).

Because the provision of the Act pertaining to extraordinary retail establishments appears to contain its own definition of the term "additional infrastructure improvements," you wish to know whether the requirement that the State or a political subdivision own additional infrastructure improvements applies to those additional infrastructure improvements constructed for the benefit of an extraordinary retail establishment.

In order to address your question, we look to the established rules of statutory construction. "All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute." State v. Gaines, 380 S.C. 23, 32-33, 667 S.E.2d 728, 733 (2008). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sloan v. South Carolina Bd. of

Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006). "When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 362, 660 S.E.2d 264, 268 (2008).

Although section 12-21-6520 indicates that the definitions, including the definition for "additional infrastructure improvement," apply to article 27 of chapter 21 of title 12 of the South Carolina Code, we believe the Legislature intended for the definition it provided for this term in section 12-21-6590 to be exclusive of the definition provided in section 12-21-6520.

Initially, we look to the language used by the Legislature in section 12-21-6590. This provision states "[f]or purposes of this section . . ." prior to giving the definition of "additional infrastructure improvements." Thus, section 12-21-6590 indicates the Legislature's intent to provide a separate definition for this term from that provided in section 12-21-6520.

We find further support for this conclusion by the fact that the definition found in section 12-21-6590 includes some of the same or similar items as the definition in section 12-21-6520. Both provisions state that additional infrastructure improvements include "roadways." Moreover, while section 12-21-6520 includes water or sewer facilities, electric or gas facilities, and rights-of-way, section 12-21-6590 includes utilities and ingress and egress. Thus, if the Legislature intended for these two definitions to be read together, we do not believe it would have been necessary to include the same or similar terms in each definition. Although, one could certainly argue that these two provisions are not mutually exclusive of each other, in order to give full meaning to the shared terms in each of these statutes, we find it best to read them as two separate definitions. Moreover, we believe if the Legislature wished to combine these definitions for purposes of extraordinary retail establishments, in section 12-21-6590, it would have provided in the statute something to the effect that "in addition to the definition provided in section 12-21-6520, additional infrastructure improvements include . . ." and then list those items provided in section 12-21-6590. However, the Legislature did not clearly state that the definition of additional infrastructure improvement included in section 12-21-6590 is in addition to that provided in section 12-21-6590.

Lastly, we also consider the Legislative history of the provisions found in article 27. For the most part, the provisions contained in the Act were passed by the Legislature in 1997. 1997 S.C. Acts 508. These provisions, as previously explained, allow for the use of admissions tax revenue to pay for infrastructure projects associated with tourism or recreational facilities. The Legislature added the provision allowing for the use of sales tax revenue to pay for infrastructure projects associated with extraordinary retail establishments in 2006. 2006 S.C. Acts 2948, 3018. Thus, while section 12-21-6590 is included under the Act, the Legislature passed this provision subsequent to the other provisions contained in the Act.

In addition to our reading the definition of additional infrastructure improvements as found in section 12-21-6590 separate from the definition provided in section 12-21-6520, we do not believe the requirement that the "improvement must be owned by the State or a political subdivision" applies to additional infrastructure improvements associated with extraordinary retail establishments. Initially, we come to this conclusion based on the fact that we are of the opinion that the definitions contained in sections 12-21-6520 and 12-21-6590 are separate from one another and section 12-21-6590 does not contain a requirement that additional infrastructure improvements be owned by the State or one of its political subdivisions. However, we find further support for this conclusion in the language used by the Legislature in section 12-21-6590. In stating that additional infrastructure improvements include aquariums and natural history exhibits, section 12-21-6590 states that these are to be "dedicated to public use and enjoyment under such terms and conditions as required by the municipality or count in which they are located."

In construing statutes, courts will "reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). If the Legislature intended for such improvements to be owned by the State or one of its political subdivisions, we do not believe it would be necessary for it to require that such improvements be dedicated for public use, as all property owned by the State or its political subdivisions is presumably dedicated for public use. Moreover, if the Legislature intended for the State or a political subdivision to maintain ownership, we do not believe the municipality or county would need for the public use and enjoyment to be under its terms and conditions. Accordingly, we do not believe the Legislature intended to require additional infrastructure improvements associated with extraordinary retail establishments to be owned by the State or a political subdivision.

Although your request asks us to interpret the provisions of the Act to determine if additional infrastructure improvements associated with extraordinary retail establishments must be owned by the State, in our review of the provisions of the Act, we are concerned with the constitutionality of section 12-21-6590, especially in light of our interpretation that such additional infrastructure improvements do not need to be owned by the State. Numerous opinions of this Office conclude that the South Carolina Constitution requires that public funds be used only for public purposes. Ops. S.C. Atty. Gen., January 11, 2006; October 8, 2003; June 27, 1988; July 24, 1984. Furthermore, our courts found:

> 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. 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.

Bauer v. South Carolina State Housing Auth., 271 S.C. 219, 228, 246 S.E.2d 869, 874 (1978).

Article X, section 5 of the South Carolina Constitution (Supp. 2007) mandates: "Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." In addition, Article X, section 11 of the South Carolina Constitution (Supp. 2007) provides, in pertinent 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." According to State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), the South Carolina Supreme Court interprets this provision as prohibiting the expenditure of public funds for the primary benefit of private parties.

Section 12-21-6590 allows sales tax revenues to be used to fund additional infrastructure improvements associated with extraordinary retail establishments. Because public funds are employed to finance these infrastructure improvements, the constitutionality of this statute hinges upon whether the infrastructure improvements described serve a public purpose, especially when such improvements will not be owned by the State or one of its political subdivisions. From court decisions, we understand that what constitutes a public purpose is a "fluid concept which changes with time, place, population, economy and countless other circumstances." Bauer, 271 S.C. at 227, 246 S.E.2d at 873. As our Supreme Court explained in Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975):

> 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 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.

Generally, South Carolina courts give deference to a legislative body in its determination of a public purpose. WDW Prop. v. City of Sumter, 342 S.C. 6, 12-13, 535 S.E.2d 631, 634 (2000). "[T]he courts will not interfere unless it appears that the legislative body was clearly wrong."

Caldwell v. McMillan, 224 S.C. 150, 158, 77 S.E.2d 798, 801 (1953). Through case law, our courts developed a four-prong test to determine whether an act by a legislative body promotes a public purpose. This test is set forth as follows: "'The 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.'" Nichols v. South Carolina Research Auth., 290 S.C. 415, 429, 351 S.E.2d 155, 163 (1986) (quoting Byrd v. Florence County, 281 S.C. 402, 407, 315 S.E.2d 804, 806 (1984)).

In Anderson, 265 S.C. at 153, 217 S.E.2d at 43, the South Carolina Supreme Court considered whether legislation permitting a municipality to acquire real estate and lease or convey it to a private person, firm, or corporation fails to meet the public purpose requirement of the South Carolina Constitution. The Legislature did not make findings of the public purpose to be served in the legislation. Id. at 162, 217 S.E.2d at 47. However, the Court noted that during argument, the defendant argued that the purpose of the legislation was to promote slum clearance and redevelopment. Id. The Court addressed this assertion by stating:

> Slum clearance by condemnation is, of course, permitted, but the question of public purpose must be considered in the light of not only the authority of the city to condemn slum and blighted areas, but in the light of the use the city would make of the property. In McNulty v. Owens, 188 S.C. 377, 199 S.E. 425 (1938), the public purpose approved was the elimination of slums and the provision of improved living conditions for many displaced people. The profit motif was merely incidental and resulted from the fact that obviously free enterprise would build the houses. Here, the situation is grossly different. The Act undertakes to permit the city to effectually promote business undertakings to compete in free enterprise with other businesses which do not have the advantage which the Act would give. We think it a fair conclusion to say that benefit to the developer or entrepreneur, would be substantial, and the benefit to the public would be negligible and speculative.

Id. Accordingly, the Court concluded as follows:

> In our view, [the legislation] permits the city to join hands with a developer and undertake projects which would be primarily to the benefit of the developer, with no assurance of more than negligible advantage to the general public. 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.'
>
> The respondent has failed to convince this Court that the authority granted by the Act to the municipalities involves a public purpose as contrasted with a private purpose, and accordingly we hold the Act unconstitutional.

Id. at 163, 217 S.E.2d at 48.

Section 12-21-6590(A) provides the additional infrastructure improvements to be funded with sales tax revenue include aquariums, natural history exhibits, "site prep, construction of real or property, parking, roadways, ingress and egress, utilities, and other expenditures on the extraordinary retail establishment which directly support or service the aquarium or natural history museum or exhibits." Like the legislation in Anderson, this provision does not express what public purpose will be served by using sales tax revenues to fund these types of improvements. We can imagine that if such improvements, like roadways and utilities will serve the public, they very well may satisfy the public purpose requirement if they primarily benefit the public. However, improvements such as aquariums, exhibits, and site preparation will likely be viewed by a court as primarily benefitting the retail establishment, especially in cases in which aquarium or the exhibit is used to boost the foot traffic and sales of the retail establishment or when, the city or county uses sales tax revenue to prepare land for the construction of a retail business. Moreover, the broad terms of the statute appear to go so far as to allow sales tax to be used for the actual construction of a portion of the retail establishment. To further complicate matters, employing our interpretation of the language of section 12-21-6590, because the city or county is not required to maintain ownership of these improvements, taxpayer funds can be used to finance the construction of facilities owned and maintained by a private for profit entity.

Under the Court's analysis in Anderson, we believe this legislation permits a select few retail establishments to obtain an advantage allowing them to compete in free enterprise with other businesses that are not allow such an advantage. Nonetheless, without the benefit of the facts surrounding a particular extraordinary retail establishment and the infrastructure projects associated with it that may be paid for using sales tax revenue, we cannot definitively determine whether or not the constitutional public purpose requirement is being served. However, the legislation certainly creates the potential for tax revenue to be used to promote a business undertaking and thereby serve a primarily private interest. Accordingly, we must caution you that a court would likely find this legislation to be unconstitutional.

In addition to our concerns as to the use of public funds to fund infrastructure projects associated with extraordinary retail establishments satisfy the public purpose requirement, in our

review of section 12-21-6590, we are also concerned as to whether this provision constitutes special legislation. Article III, section 34 of the South Carolina Constitution (1976) prohibits special legislation when "a general law can be made applicable," except in certain specified circumstances. In Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996), our Supreme Court considered whether legislation giving counties a local option to determine the legality of nonmachine cash payouts from coin-operated video gamming machines is unconstitutional special legislation. In examining the local option, the Court provided the following test to determine whether legislation is unconstitutional special legislation:

> In determining whether an act of the legislature is unconstitutional special legislation, this Court will examine the practical operation of the act as well as its form. Elliott v. Sligh, 233 S.C. 161, 103 S.E.2d 923 (1958); Town of Forest Acres v. Town of Forest Lake, 226 S.C. 349, 85 S.E.2d 192 (1954) . . . Under Thompson v. S.C. Comm'n on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976), the inquiry is whether the effect of the local option law is unconstitutional special legislation.

Id. at 185, 478 S.E.2d at 273.

In 2004, the Supreme Court considered the constitutionality of an amendment to the municipal incorporation law allowing municipalities to use marshes and waterways previously annexed by another municipality to satisfy the contiguity requirement. Kizer v. Clark, 360 S.C. 86, 600 S.E.2d 529 (2004). In its analysis, the Court stated as follows:

> A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class. McKiever v. City of Sumter, 137 S.C. 266, 135 S.E. 60 (1926). A law that is general in form but special in its operation violates the constitutional prohibition against special legislation. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1938). The fact that a law operates to affect only one person or one locale, however, does not necessarily make it special legislation. Kalk v. Thornton, 269 S.C. 521, 238 S.E.2d 210 (1977); Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970).FN1
>
> > FN1. Further, the fact that a law was enacted as a result of lobbying does not transform it into special legislation. Kalk, 269 S.C. at 526, 238 S.E.2d at 213.

> If the legislation does not apply uniformly, the essential inquiry is whether the legislation creates an unlawful classification. McKiever, supra. The mere fact that a statute creates a classification does not make it special legislation. Elliott v. Sligh, 233 S.C. 161, 103 S.E.2d 923 (1958); Duke Power Co. v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 326 S.E.2d 395 (1985). The constitutional prohibition against special legislation operates similarly to our equal protection guarantee in that it prohibits an unreasonable classification. Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976); see also Duke Power Co., supra. A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it. Elliott v. Sligh, supra.
>
> On the other hand, the legislature may use a classification "if some intrinsic reason exists why the law should operate upon some and not upon all, or should affect some differently from others." Id. at 165, 103 S.E.2d at 926. Where a special law will best meet the exigencies of a particular situation, it is not unconstitutional. Med. Soc. of South Carolina v. Med. Univ. of South Carolina, 334 S.C. 270, 513 S.E.2d 352 (1999). We will not overrule the legislature's judgment that a special law is necessary unless there has been a clear and palpable abuse of legislative discretion. Id.

Id. at 92-93, 600 S.E. 2d at 532-33.

Although the trial court in Kizer found the provision in question "created a class consisting only of James Island," the Supreme Court acknowledged that "at least three other unincorporated areas in the State are so configured and could use [the section in question] to establish contiguity for incorporation." Id. at 94, 600 S.E. 2d at 533. Thus, the Supreme Court concluded that the section in question did not create a classification limited to James Island. Id. However, the Court continued with the opinion and ultimately found the classification in question to be arbitrary because "there is no rational reason to allow certain geographic areas to use territory belonging to a neighboring municipality to enable incorporation." Id. at 95, 600 S.E.2d at 534.

Section 12-21-6590 allows for the creation or "no more than four" extraordinary retail establishments. Section 12-21-6520(14) provides the following definition of an "extraordinary retail establishment:"

> An extraordinary retail establishment is a single store located in South Carolina within two miles of an interstate highway or in a county with

> at least three and one-half million visitors a year, and it must be a destination retail establishment which attracts at least two million visitors a year with at least thirty-five percent of those visitors traveling at least fifty miles to the establishment. The extraordinary retail establishment must have a capital investment of at least twenty-five million dollars including land, buildings and site preparation costs, and one or more hotels must be built to service the establishment within three years of occupancy. Only establishments which receive a certificate of occupancy after July 1, 2006, qualify.

Section 12-21-6590 appears general in form as it does not specifically limit the benefits provided under this provision to one entity in particular. However, pursuant to the case law cited above, a court must look beyond the statute's form to its operation to determine whether it is unconstitutional special legislation. While the legislation does not limit the status of extraordinary retail establishment to just one entity, we are concerned that it limits this status to only four entities. We cannot comment as to the reason behind the Legislation's decision to limit status as an extraordinary retail to only four entities because our comments would be purely speculative, but if a court were to examine the constitutionality of this legislation, evidence must prove that this limited classification is not arbitrary. Moreover, while the requirements necessary to be classified as an extraordinary retail establishment may very well further the Legislature's intent to limit the benefits provided under section 12-21-6590 to those retail establishments drawing tourists from other states or areas of South Carolina, they may also be read as further limiting the entities that could qualify for status as an extraordinary retail establishment down to less that four. As such, we believe a court would likely find section 12-21-6590 to be unconstitutional special legislation.

Conclusion

To answer the question presented in your request, we believe section 12-21-6590 provides a separate definition for the term "additional infrastructure improvement." Furthermore, given the language used in section 12-21-6590, we do not believe the Legislature intended for the requirement that additional infrastructure improvements be owned by the State or a political subdivision, as provided for under the definition of this term in section 12-21-6510, to apply to additional infrastructure improvements associated with extraordinary retail establishments.

Only a court, not this Office, may declare a statute unconstitutional. Op. S.C. Atty. Gen., March 27, 2006. Thus, regardless of our opinion as to the constitutionality of section 12-21-6590, unless and until a court declares this legislation unconstitutional, it remains valid and in effect. Nonetheless, in interpreting the provisions of the Act, we must advise you that by allowing public funds to be used to provide the additional infrastructure improvements, as defined in section 12-21-6510, a court may well conclude that such legislation fails to satisfy the public purpose requirement

of the South Carolina Constitution, especially considering that such funds could be used for improvements that will not be owned by the State or one of its political subdivisions. In addition, given the fact that the provisions of section 12-21-6590, providing the use of sales tax revenue to aid private entities, is restricted to only four extraordinary retail establishments, a court would likely conclude that this provision constitutes special legislation in violation of the South Carolina Constitution.

Very truly yours,

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