



HENRY McMASTER
ATTORNEY GENERAL

October 28, 2008

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Laurens County
Office of the County Attorney
Post Office Box 786
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Dear Mr. Cruickshanks:

We received your letter requesting an opinion on behalf of James A. Coleman, a member of the Laurens County Council (the "Council"), regarding an economic development project Laurens County is considering funding. The project is described in your letter as follows:

Presbyterian College desires to renovate an existing, vacant tax exempt facility in the downtown area of Clinton for use as a school of pharmacy. The City desires to acquire the facility with funds from its own sources. In addition, the City has requested a contribution of \$750,000 from Laurens County for public parking facilities to accommodate 250 or more cars in the downtown area of the City. Presbyterian College has agreed to invest approximately \$4.5 million in the renovations of the facility and to invest an additional \$8 to \$14 million in start up costs and funding for the faculty, staff, equipment and other needs of the pharmacy school (the "Pharmacy School"). The Pharmacy School, according to the college, would attract some 250-300 students to the local area, 30 or more faculty members, plus other staff. In reviewing the potential venture, County officials as well as City officials are cognizant and aware of the Constitutional limitations and restrictions on aiding faith-based organizations and the pledging of public credit for private uses.

You informed us that the Council is considering funding the \$750,000 needed for the project through general obligation bonds.

Based on this information, according to your letter, Council Chairman Coleman asks the following question: "Under the terms set forth in Ordinance #669, may Laurens County issue a General Obligation Bond, the proceeds of which would be used for the construction, paving,

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landscaping, lighting and purchase of real property for the perpetual use as public parking in and with the City of Clinton?” More specifically, you phrase the question posed to us as follows:

Can the County Council provide bond proceeds from a County-issued general obligation bond to the City, which is located within the County, for it to use in fostering an economic development project in the downtown area, and what limitations are placed on the use of these bond proceeds from the County to: 1) make public improvements that directly benefit citizens and may indirectly or incidentally aid the Pharmacy School and; 2) to assist in the construction, paving, landscaping, lighting, and purchasing of real property to be perpetually used for public parking in the downtown area of Clinton, without violating the constraints of the SC and US Constitutions, statutory or legislative acts of this state?

Law/Analysis

We begin with the presumption that ordinances are presumed valid and enforceable and will not be struck down by a court unless they are “palpably arbitrary, capricious or unreasonable.” U.S. Fidelity & Guar. Co. v. City of Newberry, 257 S.C. 433, 438-39, 186 S.E.2d 239, 241 (1972) (citations omitted). Our courts employ a two-step process to determine the validity of a local ordinance. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

The first step is to ascertain whether the county had the power to enact the ordinance. If the state has preempted a particular area of legislation, then the ordinance is invalid. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the county had the power to enact the ordinance, then the Court ascertains whether the ordinance is inconsistent with the Constitution or general law of this state.

South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006).

Section 4-9-25 of the South Carolina Code (Supp. 2007) gives counties the authority “to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them” Moreover, article X, section 14 of the South Carolina Constitution (Supp. 2007) authorizes counties to incur general obligation bonded indebtedness. However, this provision limits a county’s authority

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by requiring that “[g]eneral obligation debt may be incurred only for a purpose which is a public purpose and which is a corporate purpose of the [county].” S.C. Const. art. X, § 14.

According to the ordinance, the purpose of the project is

the promotion of economic development through (a) facilitating the creation of jobs during a \$14 Million to \$20 Million development project, including up to \$6 Million in construction work (b) revitalizing the downtown area of the City, (c) generating economic activity by the attraction of significant numbers of additional students, faculty and staff to the City and County, and (d) providing the availability of adequate parking facilities for those members of the public who will be working or studying in the downtown area, thereby alleviating traffic congestion and parking problems.

Our courts give great weight to a legislative body’s determination as to what constitutes a public purpose. Carll v. South Carolina Jobs-Econ. Dev. Auth., 284 S.C. 438, 443, 327 S.E.2d 331, 334 (1985). With this principle in mind, we note that section 4-9-30(5)(a) of the South Carolina Code (Supp. 2007), giving counties the authority to levy taxes and fees and expend such revenues, specifically recognizes economic development as purpose for which county governments can assess and levy taxes. In addition, our courts recognize economic development as a legitimate public purpose. Ed Robinson Laundry and Dry Cleaning, Inc. v. South Carolina Dep’t of Revenue, 356 S.C. 120, 588 S.E.2d 97 (2003) (recognizing the government’s interest in fostering economic development); Nichols v. South Carolina Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986) (finding industrial development is a valid public purpose). Moreover, section 4-9-30 gives counties the authority to appropriate funds for “general public works,” which we presume includes parking facilities open to the public. S.C. Code Ann. § 4-9-30(5)(a). Our courts also recognize providing parking open to the public serves a public purpose. Cameron v. City of Chester, 253 S.C. 574, 172 S.E.2d 306 (1970). Accordingly, giving deference to the County’s determination that the project serves a public purpose, we believe it is authorized to issue bonds for the purpose of funding economic development projects and acquiring and constructing parking facilities to be used by the public.

Finding the County has the authority to fund such projects, we must determine whether the funding of such projects is inconsistent with the Constitution or the general law of this State. In our conversations with you, we understand you are particularly concerned with the fact that the parking facilities to be funded by the County will benefit Presbyterian College, a religion-based institution of higher learning. As such, councilmembers are concerned with whether funding the parking facilities violates the establishment clauses contained in the United States and South Carolina Constitutions; article III, section 31; article X, section 11; and article XI, section 4 of the South Carolina Constitution.

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Beginning with the Establishment Clause, the first amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. Similarly, the South Carolina Constitution contains the following provision:

The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances.

S.C. Const. art. I, § 2 (1996).

The United States Supreme Court adopted the following test to determine whether legislation runs afoul of the Establishment Clause:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive government entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations and quotations omitted). Our State Supreme Court adopted this test in Hunt v. McNair, 258 S.C. 97, 187 S.E.2d 645 (S.C. 1972).

The purpose, according to the ordinance, is to promote economic development and to provide adequate parking facilities in the City. Thus, analyzing the ordinance under the first prong of Lemon, we believe the ordinance serves a secular purpose. Moreover, fostering economic development and providing parking services does not, in our minds, advance or inhibit religion. Lastly, we do not believe providing public parking, which may be used by those affiliated with a religious-based institution, creates an excessive government entanglement with religion. Accordingly, we do not believe the ordinance runs afoul of the Establishment Clause.

Article III, section 31 of the South Carolina Constitution (1976) provides:

Lands belonging to or under the control of the State shall never be donated, directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations,

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or associations, for a less price than that for which it can be sold to individuals. This, however, shall not prevent the General Assembly from granting a right of way, not exceeding one hundred and fifty feet in width, as a mere easement to railroads across State land, nor to interfere with the discretion of the General Assembly in confirming the title to lands claimed to belong to the State, but used or possessed by other parties under an adverse claim.

In reading the ordinance, we do not find a provision calling for the donation of the property acquired by the County to private corporations or individuals. The ordinance does not contemplate a transfer of ownership of the property purchased in connection with the project to any other entity or individual. From the ordinance, we understand that the County plans to enter into an agreement with the City to operate and maintain the parking facilities, but that the County will maintain ownership of the property. Thus, we do not believe the ordinance violates article III, section 31.

Article X, section 11 of the South Carolina Constitution (Supp. 2007) states:

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.

Our courts interpret this provision as prohibiting the expenditure of public funds for the primary benefit of private parties. *State ex rel. McLeod v. Riley*, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981). Moreover, in prior opinions, this Office concluded that this provision is violated “when public funds are appropriated to a private entity and such appropriation is not for a public purpose.” Op. S.C. Atty. Gen., March 19, 1985 (citations and quotations omitted). First, the ordinance does not provide for appropriating funds to a private entity. Second, as explained above, we believe the project serves a public purpose. Moreover, we do not believe the revenue from the bonds will be used in a manner that primarily benefits Presbyterian College. The ordinance clarifies that while the County anticipates that the parking facilities purchased and constructed will benefit the faculty, students, and staff of the Pharmacy School, the use of the facilities is not limited to those persons. Therefore, we do not believe the Pharmacy School is the primary beneficiary of the bond proceeds. Accordingly, we do not believe the ordinance is contrary to article X, section 11.

Lastly, article XI, section 4 of the South Carolina Constitution (1976) provides, in pertinent part: “No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.” (emphasis added). Prior opinions interpreting this provision examined the constitutional history of article XI, section 4. According to an opinion issued by this Office in 2003, a constitutional amendment modified this provision, formerly codified as article XI, section 9 of the

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South Carolina Constitution, in 1973. Op. S.C. Atty. Gen., January 7, 2003. Previously, article XI, section 4 stated, in pertinent part:

The property or credit of the State of South Carolina . . . , or any public money, from whatever source derived shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

S.C. Const. art. XI, § 9 (1962) (emphasis added). We explained the changes between the current version of article XI, section 4 and the previous version in an opinion issued in 1974. Op. S.C. Atty. Gen., January 4, 1974. According to this opinion,

[a] comparison of the amended version and the original provision, contained in Article XI, Section 9, reveals that the amended version is much less restrictive in prescribed connections between the State and private religious educational institutions, to wit: Section 4 no longer contains a prohibition against the “property” of the State being used in aid of any religious or sectarian institution. Likewise, the word “indirectly,” referring in the original provision to the use of State property, credit or money in aid of religious or sectarian institutions, has been deleted from the amended Article XI, Section 4.

Id.

We also considered the comments of the framers of the Constitution with regard to the revisions to this constitutional provision. These comments provide: “‘By removing the word ‘indirectly’ the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs” Id. (citing Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 99 (1969)). Based on these modifications, we opined that article XI, section 4 only prohibits the State and its political subdivisions from providing a direct benefit to religious or other private educational institutions. Id. As such, numerous opinions of this Office opine that indirect benefits to religious or private educational institutions do not violate article XI, section 4. See Ops. S.C. Atty. Gen., January 9, 2007 (finding a pre-kindergarten program providing funding to faith-based preschools does not violate article XI, section 4); April 29, 2003 (bill allowing the use of lottery funds to contract with institutions of higher education to provide opportunities to low-income, educationally disadvantaged students does not violate article XI, section 4); September 27, 1995 (State funding of

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the South Carolina Institute of Leadership for Women at Converse College does not run afoul of article XI, section 4); March 19, 1985 (tuition assistance for students attending private for-profit colleges does not violate article XI, section 4).

As we previously explained, the ordinance describes the purpose of the proposed parking facilities as both to promote economic development and provide much needed parking for those who work and travel to downtown Clinton. Furthermore, the ordinance states that the parking facilities will be open to all members of the public. Certainly, faculty, staff, and students of Presbyterian College will receive a benefit from the proposed parking facility. However, we do not view this as a direct benefit. Accordingly, we do not believe that the ordinance is contrary to article XI, section 4.

Conclusion

Based on our analysis above, we believe the County has the authority to pass the proposed ordinance. Moreover, we do not believe the ordinance is contrary to the Establishment Clauses contained in the United States or South Carolina Constitutions; article III, section 31; article X, section 11; and article XI, section 4 of the South Carolina Constitution.

Very truly yours,

Henry McMaster
Attorney General



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