



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

October 8, 2003

The Honorable William C. Mescher  
Senator, District No. 44  
P. O. Box One  
Pinopolis, South Carolina 29469

Dear Senator Mescher:

In a letter to this office you raised several questions regarding the Pimlico Special Tax District (PSTD) which you indicated was created by ordinance by the Beaufort County Council in 1989. Included in the ordinance is the finding that the PSTD "...will serve a necessary and valid public purpose." As set forth by the ordinance, the PSTD

...shall provide...the following services including, but not limited to, maintenance and improvement or construction of Lake Dennis and Lake Hastie, boat landings, civic club structures, street signs, entrance posts and recreational facilities; cleanup and maintenance of areas within the Special Tax District and other administrative services as necessary to accomplish the purposes stated herein.

In your first question you asked whether the PSTD is within its authority in transferring monies collected as fees on tax bills to private organizations such as a civic club. You referenced that the civic club charges a membership fee, is not a home owners association and represents only a small portion of Pimlico residents. You next asked whether the civic club can use tax monies obtained from the PSTD to pay legal fees resulting from litigation brought by the civic club against Pimlico residents for matters such as not cleaning ditches or erecting fences. You also asked whether the PSTD can request, take and accept bids for a civic club project and then forward tax monies to the civic club to pay for the civic club project.

This office has repeatedly recognized that public funds must be used for public and not private purposes. See, e.g., Opinion of the Attorney General dated August 29, 2003 citing decisions of the State supreme court in Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E.2d 596 (1923). That opinion stated as follows:

...the Due Process Clause of the Constitution (federal and state) requires that public funds must be expended for a public purpose. Moreover, Article X, Section 5 of the State Constitution requires that taxes (public funds) be spent for public 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:

(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.

See also: WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000); Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986); Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985); Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). 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." Furthermore, Article X, Section 11 of the State 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 private education institution except as permitted by Section 3, Article XI of this Constitution.

Such provision proscribes 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 (1981). The term "credit" has been construed as any "pecuniary liability" or "pecuniary involvement". Elliott v. McNair, supra.

In Nichols, the court established the following test to determine whether the "public purpose" requirement has been met:

(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.

318 S.E.2d at 163. In Bauer v. S.C. State Housing Authority, 271 S.C. 219, 256 S.E.2d 869 (1978), the supreme court warned that "(i)t 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."

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An opinion of this office dated December 18, 1979 commented that as to the question as to whether it is legal to give public funds to a private organization, "(p)ublic funds may be appropriated to a private nonprofit, nonsectarian organization if the funds are to be expended in the promotion of a valid public purpose." An opinion of this office dated August 23, 1977 dealt with the question of a municipality contracting with local, nonprofit organizations for the purpose of providing specified recreational programs and activities for the city. The opinion concluded that the city was empowered to contract for the provision of recreational services by such organizations "assuming that these recreational programs in fact subserve a public purpose." That opinion stated

(i)f the "specified recreational program and activities" ...are designed primarily for the benefit of the individual organizations and their members, and will provide only a negligible and speculative benefit to the public, any contributions or expenditures by the city...for such recreational programs would be made for a private, rather than public, purpose and would be unlawful. On the other hand, if the objective of these programs is to provide recreational services for the direct and immediate benefit for all or a substantial portion of the residents of the city, the expenditures by the city for these recreational programs would be for a public purpose, and would not be illegal.

Another opinion of this office dated April 2, 1987 indicated that this Office advised against expenditures of public funds which resulted in benefits only to members of civic organizations. However, an opinion of this office dated December 18, 2000 commented that

this office has recognized that the expenditure of public funds to a non-profit corporation may constitute a valid public purpose, particularly where the government entity has contracted with the non-profit corporation for the performance of a proper governmental function...In such cases, the direct appropriation of public funds to these private entities is, in effect, an exchange of value which results in the performance by those entities of a public function of the State.

See also: Ops. Atty. Gen. dated April 20, 1982 and November 16, 1983 where this office recognized the manner in which public funds may be utilized to assist Boy Scouts and private entities promoting tourism under the auspices of PRT. The December 18, 2000 opinion commented further that "... 'public purpose' is not easily defined. Each case must be decided with reference to the objective sought to be accomplished and to the degree and manner in which that objective affects the public welfare."

Consistent with the above, it appears that the PSTD would not be authorized to transfer monies collected as fees to private organizations such as a civic club unless the civic club performs some designated public function. As stated in your letter, the civic club is not composed of all residents of the district but is a membership based organization. Similarly, as to your third question, the PSTD would not be generally authorized to use tax monies to pay for civic club projects unless those projects meet the public purpose test. Such is consistent with the statement set forth in the

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ordinance creating the PSTD that it "serve a necessary and valid public purpose." The order creating the PSTD authorizes the maintenance, improvement and construction of civic club structures and the cleanup and maintenance of areas within the PSTD. However, the outright transfer of monies to a civic club would not be permitted unless it can be shown that the monies would be utilized for a public purpose. The use of tax monies for civic club projects would also be required to meet the public purpose test.

As to your question regarding use of tax monies for payment of legal fees incurred by members of the civic club for litigation, prior opinions of this office have commented that the payment of legal fees incurred by private parties does not generally qualify as a public purpose. See: Op. Atty. Gen. dated July 28, 2003; May 13, 1997. An opinion of this office dated July 1, 1997 determined that reimbursement of attorneys' fees of private citizens who initiated a lawsuit against a railroad company in order to prevent the destruction of a bridge depended upon the finding that the matter involved a public purpose and public benefit. Therefore, unless it can be shown that the legal fees were incurred for the benefit of the public generally, payment of such would not be authorized.

You also commented that the PSTD ordinance creates a five-member PSTD Advisory Committee. You questioned that if a vacancy occurs on the advisory committee, is it within the authority of a member of county council, the county attorney or the council as a whole to require that the replacement must have previously served on the Advisory Committee.

The Advisory Commission is established pursuant to Section IV of the ordinance establishing the PSTD. Relevant provisions of the ordinance are silent as to any requirement mandating prior service on the Advisory Committee. As a result, any requirement of prior service on the Advisory Committee cannot be read in as a requirement for service.

If there is anything further, please advise.

Sincerely,



Charles H. Richardson  
Senior Assistant Attorney General