



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 16, 1997

Grace G. Young, Director
South Carolina Department of
Parks, Recreation & Tourism
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Ms. Young:

You have asked for an opinion concerning the Department of Parks, Recreation and Tourism's authority to create the South Carolina Heritage Corridor (the "Foundation"), a South Carolina eleemosynary corporation.

Background

You state that in 1994, PRT undertook the creation of a Heritage Program for Economic Revitalization in accord with the Governor's Executive Order 94-15. Pursuant to this Order, the State "has expended funds and has committed substantial facilities and personnel to the Heritage Tourism Program and to the establishment and implementation of the concept of Heritage Tourism as a successful economic tool." You further state that, while government has now expended considerable sums developing the Heritage Corridor Plan, and PRT remains committed to this program, through supervision, funding and management,

[p]rudent planning calls for the creation of an independent, tax-exempt public benefit corporation (the "Foundation") which will not only lessen the burdens of State Government with respect to the aforesaid current activities, but will also assume or take over many if not most of the activities that State Government would otherwise have to continue with respect to the Heritage Corridor.

You also provide the following statement of facts concerning the Foundation and its proposed operation.

[t]he Foundation will be organized and will operate as an independent and autonomous entity for the benefit of the State of South Carolina (the "State"), including PRT, the South Carolina Department of Transportation (the "Department of Transportation"), the South Carolina Department of Commerce (the "Department of Commerce") and other State agencies, by coordinating, funding, implementing and managing the operations and requirements of the Heritage Corridor and by supporting the goals and objectives of the Heritage Tourism Program. In accordance with the Heritage Corridor Plan, the foundation will assist State government in full implementation of the Heritage Tourism Program which will include the provision of several Corridor-wide management capabilities: Heritage Tourism Program direction; agency coordination; stewardship; technical assistance; coordination of Corridor-wide improvements and programs; grant development; business and economic development; project definition and support; and public information.

In connection with the aforesaid purposes, the Foundation's activities shall include the following: (1) obtaining, acquiring, receiving, constructing, erecting or otherwise providing, by fee simple purchase, easement, donation or inter-agency transfer, real and personal property; (2) improving properties to which the Foundation holds title; (3) holding, retaining, leasing, licensing, renting, managing, investing, reinvesting, selling, or otherwise disposing of or assigning the income from and/or rights in or to real and personal property; (4) entering into contracts, leases, cooperative agreements and other transactions with public agencies and private entities; (5) hiring staff and utilizing such personnel as may be required to fulfill the purposes of the Foundation; (6) creating such subsidiary organizations or entities as may be necessary to collect and disburse financial assistance through pooled or revolving loan funds; and (7) engaging in any and all lawful activities necessary or incident to the foregoing. The purposes of the Foundation are not intended in any way to limit or restrict any present or

future purpose of government or any activity that government performs or intends to perform in its separate capacity.

The initial Board of Directors of the Foundation shall consist of fifteen members. Nine members shall be appointed by the Governor and six members shall serve in ex officio capacities by virtue of their holding respectively the following offices: Director, PRT; Secretary, Department of Commerce; Chairperson, Heritage Corridor Region 1; Chairperson, Heritage Corridor Region 2; Chairperson, Heritage Corridor Region 3; and Chairperson, Heritage Corridor Region 4.

PRT intends to contract with the Foundation with respect to PRT's provision of management and facilities during the Foundation's initial operations, including the hiring of a "program manager," administrative support, and four regional field managers (one for each Heritage Corridor Region), which management and facilities shall continue for at least a twelve (12) month period (the "Incubation Period"), beginning with the date of incorporation of the Foundation. After termination of the Incubation Period, it is anticipated that the Foundation will shoulder most of the activities and expenses of management and implementation of the Heritage Corridor, thereby reducing or eliminating such activities currently engaged in by the State, and removing from State Government the burden currently expensed to and carried by the State. (emphasis added).

You are requesting an opinion based upon the following assumed facts:

1. The activities with respect to the Heritage Tourism Program, the Heritage Corridor Plan and the Heritage Corridor are activities in which PRT has been engaged for a significant period of time, which activities must be assumed by the Foundation in order for the Heritage Tourism Program to be successfully completed.
2. The Governor is authorized to direct PRT to establish South Carolina Heritage Corridor (the "Foundation") as an independent, autonomous, South Carolina public benefit corporation under Section 501(c)(3) of the Internal Revenue Code, which Foundation will assist

PRT and other key state agencies in supporting the goals and objectives of the Heritage Corridor Plan, including coordinating, funding, implementing and managing the operations and requirements of the Heritage Tourism Program.

3. PRT is authorized to establish the Foundation as described in Paragraph 2 above.
4. The Governor is authorized to appoint members of the Board of Directors of the Foundation.
5. PRT is authorized to provide the Foundation with State/Departmental resources, including facilities and personnel, at no expense to the Foundation, during the Incubation Period. (emphasis added).

Law / Analysis

Our analysis must necessarily begin with an examination of the authority of the Department of Parks, Recreation and Tourism.¹ S.C. Code Ann. Section 51-1-10 provides that

[t]here is hereby created the Department of Parks, Recreation and Tourism which shall be a body corporate. The department shall be headed by a Director to be appointed by the Governor with the advice and consent of the Senate. The director shall be selected with special reference to his executive ability and experience and shall be vested with the

¹ You indicate that the Governor will direct that PRT create the nonprofit corporation in the Executive Order. The Governor's authority in this matter would consist largely of his control over the agency as part of Restructuring, wherein he was given appointment authority with respect to the Director of PRT. See, § 1-30-80. It is true that § 1-30-10 (1) provides that "[t]he governing authority [of the agency] has the power to create and appoint standing or ad hoc advisory committees in its discretion or at the direction of the Governor to assist the department in particular areas of public concern or professional expertise as is deemed appropriate." Still, as it is obvious that PRT must itself possess the requisite authority to lawfully create the proposed corporation, we will treat that issue as the central question involved here.

duty and authority to oversee, manage and control the operation, administration and organization of the department subject only to the laws of this State and the United States. The director is subject to removal by the Governor as provided in Section 1-3-240(B).

Section 51-1-60 enumerates the various specific powers of the Department. Among these is the authority to contract, be contracted with, use a common seal, and make and adopt regulations. The Department is further empowered to accept gifts, and acquire by gift, purchase or otherwise real estate and other property, subject to the provision that no real estate may be purchased or disposed of without the approval of the Budget and Control Board.

In addition, PRT is required pursuant to this enabling provision, to (1) promote, publicize and advertise the state's tourist attractions; (2) promote the "general health and welfare of the people" by developing and expanding new and existing recreational areas; (3) develop "a coordinated plan" for use to the best advantage of the natural facilities and resources of the State as a tourist attraction; (4) include in such plan "the preservation and perpetuation of our state's rich historical heritage by acquiring and owning, recognizing, marking and publicizing areas, sites, buildings and other landmarks and items of national and statewide historical interest and significance to the history of our State ..."; (5) use services of various agencies in the management of timber and game; (6) lease its land or convey its property to municipalities or other political subdivisions to aid in carrying out their responsibilities to provide parks and recreation facilities; (7) borrow; (8) enter into contracts with the federal government to assist in carrying out its functions; (9) allocate funds other than funds specifically allocated to it by legislative appropriation or bond authorization to carry out its purposes. Pursuant to Section 51-1-80, the Department is authorized to cooperate and enter into certain contracts with the political subdivisions of the State.

Section 51-1-300 creates the Division of Community Development within the Department. Section 51-1-310 mandates as the mission of this Division to "promote economic diversity in all areas of the State by extending to them the full benefits of tourism and recreation development." The Division is given the task to "coordinate and act as a liaison with regional tourism organizations, local chambers of commerce, development agencies and other federal, state, regional and local agencies and organizations to promote economic and business development, the expansion of tourism, recreation, cultural, retirement, and heritage events."

It is evident from the foregoing review that the Department is bestowed with broad authority to carry out its mission, summarized in Section 51-1-60(a), to "promote, publicize and advertise the State's tourist attractions." The word "promote" is particularly

broad in scope, meaning to contribute to the growth, enlargement or prosperity of, to forward, further, encourage and advance. Code Beach Marina, Inc. v. City of Bayou LA Batre, 284 Ala. 718, 228 So.2d 468. In previous opinions of this Office, we have examined the Department's enabling authority in a variety of contexts, almost invariably concluding that such authority was sufficient to permit the proposed action by the Department in question. See Op. Atty. Gen., August 17, 1972 [the Department may enter into a contract with the Army Corps of Engineers to lease lands on the South Carolina side of the proposed Trotter Shoals project]; December 4, 1975 [Department may enter Settlement Agreement issued by FPC]; Op.No. 4394 (July 14, 1976) [PRT may operate retail establishment in State parks].

Apparently, however, we have never addressed the question of the authority of PRT to create a nonprofit corporation to assist it in carrying out its duties. But in previous opinions, we have reviewed and approved the authority of other state and local agencies to create eleemosynary entities for such purposes.

Only recently, in Op.No. 94-69 (November 15, 1994), we examined the authority of Patriots Point Development Authority "to establish a nonprofit corporation to carry out the purposes set forth in its enabling legislation ...". We noted that PPDA was by statute deemed a "body politic and corporate" and an "instrumentality of the State" created "to carry out an area of public interest - the development and improvement of the Patriots Point area." We also noted that

[a]s a creation of state statute, the PPDA derives its entire existence, nature and powers therefrom. It is well known that governmental agencies or corporations, municipal corporations, counties and other political subdivisions can exercise only those powers conferred upon them expressly, inherently or impliedly by their enabling legislation or a constitutional provision. If a power is not expressed or necessarily implied, it does not exist. South Carolina Electric and Gas Co. v. Public Serv. Comm., 275 S.C. 487, 272 S.E.2d 733 (1980); Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E.2d 531 (1987).

Implied or incidental corporate powers are those which are essential to corporate existence and which are reasonably necessary to the corporations express powers. Implied or incidental corporate powers are not those which are merely convenient or useful. There can be no implied power independently of an express power. Lowering v. Seabrook

Island Property Owners Ass'n., 291 S.C. 201, 352 S.E.2d 707 (1987); see also, Op. Atty. Gen. 87-38.

The opinion could locate no express authority enabling PPDA to create the nonprofit corporation. However, the opinion noted that PPDA's enabling statute gave the agency "broad and general powers 'to do and perform any act or function which may tend to or be useful toward the development and improvement of Patriot's Point.'" Moreover, PPDA's authorization included the power "to do any and all other acts and things authorized or required to be done by the article, whether or not included in the general powers mentioned in § 51-13-770(9)." Based upon these provisions, we opined:

[t]he law of South Carolina generally does not prohibit the state agencies or authorities from establishing nonprofit corporations. [See Op. Atty. Gen., February 28, 1977, where the State Housing Authority was found to have the power to create a nonprofit organization as included among its "necessary, proper, incidental, or useful" powers. Since the State Housing Authority could issue bonds to finance the construction of low cost housing, it could choose to form a nonprofit organization that would carry out that task. See also South Carolina Nonprofit Corporation Act No. 384, May 10, 1994.]

Here, the entrepreneurial character of the PPDA and the broad powers conferred upon it would seem to allow the PPDA to create a nonprofit corporation. The PPDA has the power "to sue and be sued, to make contracts and to adopt and use a common seal ... and to acquire, lease, mortgage and dispose of personal and real property." §§ 51-13-770(1) and (2).

And in addition to the 1994 and 1977 opinions, cited above, on March 17, 1981 we issued another opinion based upon the same reasoning, concluding that the Housing Authority of the City of Greenville could validly create a nonprofit corporation for the purpose of financing public housing.

Relying upon these authorities, it is my opinion that PRT may create the proposed Foundation (pursuant to the Governor's Executive Order) for the purposes outlined above. PRT's enabling authority is similar to that of PPDA as reviewed in Op.No. 94-69. PRT, like PPDA, is a body corporate and possesses virtually all of the corporate attributes possessed by PPDA. While it is true that PPDA is given specific power to "do any and all things necessary to accomplish the purposes" of its enabling Act, this is simply a

specific statement of the general rule that an agency possesses all implied powers which stem from the specific powers granted. Moreover, as stated above, PRT is empowered to "promote, publicize and advertise the state's tourist attractions" and to "promote the general health and welfare of the people of the State by developing and expanding new and existing recreational areas ...". Clearly, in my judgment, this would include the necessary and implied authority to create the nonprofit corporation, described above, to assist in carrying out the functions of PRT.

Of course, a state agency, such as PRT, must act with a public purpose in mind. See, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). The Supreme Court of South Carolina has stated that a public purpose

has for its objective the promotion of the public health, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division, so that whatever is necessary for the preservation of the public health and safety is a public purpose, and if an object is beneficial to the inhabitants and directly connected a public purpose, it will be considered a public purpose ...

Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798, 801 (1953), In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), the Court set the following standard for the "public purpose" requirement to be 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.

Applying these standards, "[i]t is settled that expenditures of public funds for historical and recreational purposes are for recognized public purposes." Op. Atty. Gen., Op.No. 88-58 (August 2, 1988), citing Timmons v. South Carolina Tricentennial Commission, 254 S.C. 628, 175 S.E.2d 805, Mims v. McNair, 252 S.C. 64, 165 S.E.2d 355. Likewise, the promotion of tourism by the State or its localities serves a valid public purpose. Op. Atty. Gen., October 31, 1985.

Further, our Courts and this Office have consistently recognized that the State or its subdivisions may contract with private entities in the carrying out of a public purpose. Our Supreme Court stated in Bolt v. Cobb, 225 S.C. 408, 415, 82 S.E.2d 789 (1954) that

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a county may validly contract with a private entity for the "performance of a public, corporate function" [providing a hospital]. Moreover, we have concluded that Beaufort County Council could "allocate public funds to the Child Abuse Prevention Association, albeit a private nonprofit corporation" because such expenditure "would constitute a valid public purpose." Op. Atty. Gen., Op.No. 88-52 (June 27, 1988). In Op. Atty. Gen., Op.No. 93-44 (June 23, 1993), we noted that " ... the courts of this State have looked favorable at the use of public funds with respect to nonprofit (eleemosynary) corporations serving public purposes" Citing Bolt v. Cobb, supra and Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976). See also, Ops. Atty. Gen., January 16, 1978; April 20, 1982, July 12, 1984; March 1, 1991.

And in Op.No. 85-81 (August 8, 1985), we concluded that the law did not absolutely prohibit the Department of Corrections from contracting with a private corporation to assist in the management of a State corrections facility. We opined that so long as the State does not unlawfully delegate its statutory and legal authority, such a contract would be valid. In our judgment, it was clear "that the administration of the prison system constitutes an unmistakable public purpose." Moreover, we stated that

[i]t is well established that the State may properly maintain supervision and control through the use of a contract. As a general matter, any employment contract contemplates supervision and control by the employer over his employee. More specifically, a private corporation "may be employed to carry a law into effect." 16 C.J.S., Constitutional Law, Sec. 137. As stated in Amer. Soc. P.C.A. v. City of N.Y., 199 N.Y.S. 728, 738 (1933),

While it is true that strictly governmental powers cannot be conferred upon a corporation or individual ... still it has been held by a long line of decisions that such corporations may function in a purely administrative capacity or manner.

While "an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties" Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5th Cir.1957); see also, 73 C.J.S.,

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Public Adm. Law and Procedure, Sec. 53; McQuillin, Municipal Corporations, Sec. 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) (contract between a city and private company for the control, management and operation of waterworks plant is valid).

Compare, Op. Atty. Gen., April 4, 1996 (MUSC needs enabling statute to turn over its duties to a private for-profit corporation).

Accordingly, based upon the foregoing authorities, it is my opinion that the proposed Foundation may be created by PRT and that such Foundation may contract with PRT and other agencies to carry out the above-described purposes. Moreover, such contract would be for a valid public purpose -- the promotion of tourism and historical development. The use of agency employees as part of their prescribed duties to assist the Foundation would also be for a valid public purpose, presuming the agency maintains sufficient supervision and control over the employees of its agency. In that regard, we have stated previously that

[c]ourts in other states with similar constitutional provisions have permitted appropriations to private entities which use those public funds to perform a proper 'function for the state.' Dickman v. Defenbacher, 128 N.E.2d 59 (Ohio, 1955); Bedford County Hospital v. Browning, 225 S.E.2d 41 (Tenn. 1949); People v. Green, 47 N.E.2d 465 (Ill. 1943); Hager v. Kentucky Childrens Home Society, 83 S.W. 605, 609 (Ky. 1904). See also Tosto v. Pennsylvania Nursing Home Loan Agency, 331 A.2d 198, 205 (Pa., 1975). The 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 for the state Cromer v. Peoria Housing Authority, 78 N.E.2d 276, 284 (Ill. 1948). Generally, however, some public control is also required on those expenditures by the private entities in order for the constitutionality of the appropriation to be upheld. O'Neill v. Burns, 198 So.2d 1, 4 (Fla. 1967); Dickman v. Defenbacher, *supra*; State v. City of New Orleans, 24 So. 666, 671 (La. 1898).

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Op. Atty. Gen., November 16, 1983. The same reasoning of the above Opinion also would apply as well to the use of an agency's employees by a nonprofit corporation for a public purpose. Of course, the agency or agencies in question must at all times maintain adequate supervision and control over such employees in carrying out the assigned tasks and you would want to avoid the situation where the Foundation or nonprofit corporation possesses ultimate control over state employees.

Moreover, in carrying out this proposal, I would advise that you must be careful to insure that all State Personnel regulations and statutes are complied with in full. I would suggest that you may wish to speak with legal counsel at State Personnel in this regard. While I am satisfied that PRT possesses sufficient legal authority to create the nonprofit corporation and agency employees can be used in carrying out the public purpose enumerated above, so long as supervision and control is maintained, the day to day details of carrying out the project would need to be carefully monitored by your own counsel as well as State Personnel officials to insure that all pertinent rules and regulations are complied with.²

With kind regards, I am

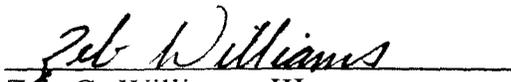
Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an

REVIEWED AND APPROVED BY:


Zeb C. Williams, III
Deputy Attorney General

² Obviously, we cannot comment upon each and every aspect of this proposal, but only address the issues highlighted herein.