



ALAN WILSON
ATTORNEY GENERAL

July 29, 2014

Timothy E. Meacham, Esquire
Coastal Carolina University Counsel
P.O. Box 261954
Conway, SC 29528-6054

Dear Mr. Meacham:

Attorney General Alan Wilson has referred your letter dated May 14, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue: May Coastal Carolina University establish a research foundation to process grants, contracts and other documents?

Law/Analysis:

As stated in your letter, *"Coastal Carolina University is a comprehensive public institution of higher education established pursuant to Title 59 of the Code of Laws of South Carolina. It is also a public agency of the State of South Carolina. As such, the institution is prohibited from accepting grants or signing agreements containing indemnification and stipulations to out[-]of[-]state jurisdiction[s]. Similarly, Coastal Carolina University is insured through a state agency, the Insurance Reserve Fund. Policy language excludes coverage should the entity accept via contract indemnification or out[-]of[-]state jurisdiction. Many public institutions have established independent research foundations, separately insured, to process grants and contracts. These research foundations have separate governing boards through the Secretary of State and are established pursuant to Section 501c(3) of the Internal Revenue Code. These research foundations are affiliated with the university in the sense that the mission and purpose is to serve the institution. This is the only legal affiliation. They have their own distinctive by-laws, liability coverage, meeting schedules, and have separate counsels. ... Coastal Carolina University is interested in establishing a research foundation to process grants, contracts and other documents. The purpose of which is to transfer all liability for the grant to the foundation away from the state to the private carrier for the foundation. Secondly, as research foundation enables the institution more flexibility as some of these contracts may contain indemnification."*

This Office has issued numerous opinions concerning whether State agencies or universities may create an eleemosynary nonprofit corporation such as one Coastal Carolina University is hoping to create. In a 1997 opinion this Office opined that the South Carolina Department of Parks, Recreation and Tourism ("PRT") could create a nonprofit foundation for the benefit of the State and for PRT. *Op. S.C. Atty. Gen.*, 1997 WL 87934 (January 16, 1997). In a 1977 opinion this Office opined that the State Housing Authority had the power to establish a non-profit corporation based on its broad powers. *Op. S.C. Atty. Gen.*, 1977 WL 24406 (February 28, 1977). A 2004 opinion opined that the Hunley Commission could create a nonprofit corporation based on prior opinions from this Office that concluded governmental entities are not prohibited from creating nonprofit corporations to further their statutory purposes. The

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opinion also cited an Indiana case upholding as private funds private donations received by a university foundation for the benefit of a state university. Op. S.C. Atty. Gen., 2004 WL 2451471 (October 22, 2004) (citing State Board of Accounts v. Indiana Univ. Foundation, 647 N.E.2d 342 (Ind. 1995)). In a 1994 opinion this Office opined the Patriot's Point Development Authority ("PPDA") could establish a nonprofit corporation to further its purposes given by statute. Op. S.C. Atty. Gen., 1994 WL 703275 (November 15, 1994). While that opinion acknowledged that such an entity was a creature of statute, it went on to state:

Having reviewed the enabling authority of the PPDA, we are unable to locate any specific authority allowing the PPDA to create a nonprofit corporation. However, in examining the statutorily authorized powers of the PPDA, it would appear that the statute gives PPDA very 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." § 51-13-760(7). Further, the PPDA has 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)."

Even though the State Legislature has not expressly delegated PPDA power to create a nonprofit corporation, the Legislature has, however, given PPDA the power "to do any and all things necessary to accomplish the purposes to the[e] article." § 51-13-770(10). The fact that the State has given this specific authority to PPDA is an indication that the power to create a nonprofit corporation would be consistent with the Legislature's intent of the Act.

The 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, Act No. 38-1, 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) & (2).

Therefore, based on the foregoing, it is the opinion of this Office that the PPDA should be permitted to create a nonprofit corporation. The power to establish such a corporation can be derived from the express power to regulate the manner in which the business of the PPDA is to be transacted and the express power to do any and all things necessary to accomplish the purpose of the Act. §§ 51-13-770(8) & (10). Further, the creation of such a corporation is apparently deemed a necessary tool to the improvement and development of the Patriot's Point area over which the PPDA has jurisdiction.

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Id. Moreover, a 2009 opinion by this Office concluded that while there was no express authority in the enabling legislation for the Office on Aging to create a nonprofit corporation, as long as the nonprofit corporation furthers the purposes of the Office on Aging it could create a nonprofit corporation. Op. S.C. Atty. Gen., 2009 WL 276743 (January 7, 2009).

While the prior opinions by this Office address the creation of a nonprofit corporation by a State agency or other such governmental entity, let us address directly nonprofit corporations. Looking at the law concerning nonprofit corporations, South Carolina Code § 33-31-301 (1976 Code, as amended) states:

- (a) Every corporation incorporated under this chapter has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation.
- (b) A corporation engaging in an activity that is subject to regulation under another statute of this State may incorporate under this chapter only if incorporation under this chapter is not prohibited by the other statute. The corporation is subject to all limitations of the other statute.

It should also be noted a nonprofit corporation must elect to be a public benefit, mutual benefit or religious nonprofit corporation. S.C. Code § 33-31-202(a)(2).¹ Furthermore, a Virginia Attorney General opinion stated that nonprofit foundations that are organized on behalf of state universities “need only comply with the laws that govern such corporations.” Op. Va. Atty. Gen., 1996 WL 658746 (September 3, 1996) (citing 1984-1985 Op. Va. Atty. Gen. 46, 47). Therefore, it appears as long as the foundation is in compliance with all laws concerning nonprofit corporations, there would be no hindrance to such a foundation created as a nonprofit corporation. The issues seem to be in the relationship the foundation has the university or state agency with which it is associated. While you did not ask, it should be noted that this Office has issued previous opinions concluding that public funds may not be issued to private foundations or other such corporations except payment for goods and services unless the university has specific statutory authority. Ops. S.C. Atty. Gen., 2000 WL 1205928 (May 1, 2000); 1993 WL 720111 (May 21, 1993); 1976 WL 23033 (August 3, 1976); 1973 WL 21052 (August 10, 1973).² As a further aside note, our State Supreme Court has previously held such university foundations may be subject to the South Carolina Freedom of Information Act (FOIA). Weston v. Carolina Research & Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991).

Conclusion: Therefore, as long as there is transparency in the transfer of funds allocated to any such foundation and that any such transfer is in compliance with the law, it is likely a court will find a university may establish a nonprofit foundation corporation. Nevertheless, there are many other sources and authorities you may want to refer to for a further analysis. For a binding determination, this Office would recommend seeking a declaratory judgment from a court on these matters, as only a court of law can interpret statutes. S.C. Code § 15-53-20, et al. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only a legal opinion on how this Office believes a court would

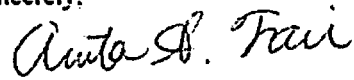
¹ Please also note S.C. Code § 33-31-150 outlines what a private foundation (as defined in Section 509(a) of the Internal Revenue Code) may and may not do.

² This Office is also statutorily responsible for investigating nonprofit corporations operating in South Carolina and may determine whether any such nonprofit corporation may have violated its own regulations or any laws of this State. S.C. Code § 33-31-171.

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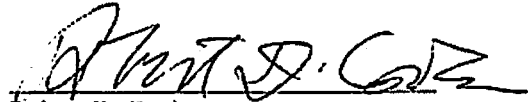
interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General