



ALAN WILSON
ATTORNEY GENERAL

April 29, 2020

Mr. Steve Willis
County Administrator
P.O. Box 1809
Lancaster, SC 29721

Dear Mr. Willis:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

I am writing to seek an opinion of your Office regarding whether a county grant program with the parameters described below that is intended to assist local businesses with payroll expenses, operational costs, and interest servicing on debts related to business operations violates Section 5 and 11 of Article X of the South Carolina Constitution?

Lancaster County is aware of various grant programs that are under consideration by local governments during the COVID-19 pandemic. My review of these grant programs reveals that the grant programs typically require that the applicant has applied for, and exhausted, federal relief funds available to the applicant business. The grant programs also require that the applicant demonstrate financial hardship as a result of the COVID 19 pandemic. The grant programs I am aware of are not restricted to particular categories of business but are open to all, limited in eligibility only on the basis of the number of employees at the business.

I am aware of that our Supreme Court has ruled that, “[i]n deciding whether governmental action satisfies a public purpose, we look to the object sought to be accomplished.” Carll v. S.C. Jobs-Econ. Dev. Auth., 284 S.C. 438, 443 (1985). Further it appears that, “[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 of all the inhabitants or residents, or at least a substantial part thereof.” Anderson v. Baehr, 265 S.C. 153, 162 (1975).

I am also aware that in Bauer v. South Carolina State Housing Authority, 271 S.C. 219 (1978), the public purpose doctrine was defined as follows:

‘All legislative action must serve a public rather than a private purpose,’ [Elliott v. McNair], 250 S.C. [75] at 86 [1967]. ‘In general, 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....’ Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798, 801 (1953).... It is a fluid concept which changes with time, place, population, economy and countless other circumstances. It is a reflection of the changing needs of society.

I have found no legal authority that directly addresses the legality of a grant program of the type described in this letter. I seek your opinion regarding the propriety of these grant programs in light of the current declared state of emergency and the economic hardships that have been brought about by the COVID-19 pandemic.

Law/Analysis

This Office understands the request letter is primarily concerned with whether a grant program designed to support the solvency of local businesses within a political subdivision would be found to satisfy the “public purpose” requirement for expenditures of public funds. As noted in the request letter, the prohibitions in sections 5 and 11 of Article X of the South Carolina Constitution set parameters on how public funds may be spent. Section five of article X states, “No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.” S.C. Const. art. X, § 5. This section has been interpreted to mean that any expenditure of public funds must be made for a public purpose. See S.C. Pub. Interest Found. v. S.C. Dep’t of Transportation, 421 S.C. 110, 123, 804 S.E.2d 854, 861 (2017). Further, section eleven of article X 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.” S.C. Const. art. X, § 11. This section has been construed to prohibit the expenditure of public funds or resources for the primary benefit of private parties. See State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), *overruled on other grounds by* WDW Prop. v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000).

This Office’s December 11, 2019 opinion explained that the determination of a legislative act’s public purpose is made by the legislative body:

As we stated in several opinions, the determination of whether a specific expenditure is for a public purpose is a question of fact. Op. Att’y Gen., 1997 WL 569010 (S.C.A.G. July 16, 1997); Op. Att’y Gen., 1995 WL 803662

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(S.C.A.G. May 19, 1995). This Office cannot make factual determinations in a legal opinion. Op. Att’y Gen., 1995 WL 803662 (S.C.A.G. May 19, 1995). However, as stated by the Supreme Court: “It is uniformly held by courts throughout the land that the determination of public purpose is one for the legislative branch. This has been made manifest in a long line of decisions of this Court.” Nichols v. S.C. Research Auth., 290 S.C. 415, 426, 351 S.E.2d 155, 161 (1986).

Op. S.C. Att’y Gen., 2019 WL 7205898 (December 11, 2019). Accordingly, the County must decide whether its local business grant program would serve a public purpose considering the prohibitions in both sections 5 and 11 of article X.

While the County would determine whether a local business grant program serves a public purpose, this opinion will provide a framework that the county may use to make such an evaluation. Because the grant program is described in general terms and no explicit statement of public purpose is given, this opinion will assume that a primary objective for such a program would be to protect the county’s economic welfare. The South Carolina Supreme Court explained in Nichols v. S.C. Research Auth., 290 S.C. 415, 425, 351 S.E.2d 155, 161 (1986), the scope of those activities encompassed under public purpose “reaches perhaps its broadest extent under the view that *economic welfare* is one of the main concerns” of government. The Nichols Court, extensively discussed the dissent in Byrd v. Florence Cnty., 281 S.C. 402, 315 S.E.2d 804 (1984), to recognize industrial development is a valid public purpose.

As pointed out in the vigorous dissenting opinion of now Chief Justice Ness in Byrd, funds to be expended under Ordinance 14–82–83 may be equated with General Assembly expenditures for the State Development Board. Other legislative appropriations include millions of dollars to the State Board for Technical and Comprehensive Education to operate special labor-training programs for industries committed to locating in South Carolina. While the direct benefit accrues to the private industry, the funds expended stimulate the economy and, in the process, generate revenues for the benefit of the general public. ...

It would be anomalous to hold that a government which expends hundreds of millions to alleviate the suffering of its indigent population through multiple social and humanitarian programs, and properly so, is proscribed from providing jobs for the unemployed, who, once employed, contribute tax revenues in support of those very programs.

290 S.C. at 428–29, 351 S.E.2d at 162-63 (footnotes omitted). While overruling the holding of Byrd, the Court retained its four-point standard to evaluate public financing of industrial development.

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.

290 S.C. at 429, 351 S.E.2d at 163 (emphasis in original).

In WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000) the Court applied the Byrd four-point standard to uphold a state economic development program that used proceeds of tax-exempt bonds to loan funds to a developer renovating retail and commercial properties.

[W]e apply the *Nichols* test in this case. First, the ultimate benefits to the public are to increase the number of available jobs, improve the appearance of rundown buildings in Sumter's downtown, attract new businesses, and reinvigorate a downtown area that has been classified by the local and federal governments as economically distressed. Second—deferring to the Legislature's determination in establishing the JEDA program—the public will be the primary beneficiary, although the developers certainly will benefit from a more favorable loan rate. Third, the project is speculative, as is any redevelopment effort, but it is not so speculative that it violates the public purpose doctrine. And fourth, the public interest is likely to be served to a substantial degree through the creation of jobs, the reinvigoration of the downtown area, and benefits, both tangible and intangible, that should result from that reinvigoration.

342 S.C. at 16, 535 S.E.2d at 635–36. Because the Court in Nichols explicitly held that industrial development is a public purpose and in WDW Properties emphasized job creation to find an economic development program served a public purpose, a court may well hold that a local business grant program designed to preserve existing jobs and protect the economic welfare of the County also serves a public purpose.

Conclusion

It is this Office's opinion that a court would grant consideration to the County's legislative findings regarding whether its local business grant program serves a public purpose. See WDW Properties v. City of Sumter, 342 S.C. 6, 16, 535 S.E.2d 631, 636 (2000) ("We now take a broader view of the public purpose doctrine and give substantial weight to legislative determinations of the issue."). As is discussed more fully above, our state courts have held that industrial development and economic growth are valid public purposes. See Nichols v. S.C. Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986); WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000). Assuming that a primary objective for such a program would be to protect the county's economic welfare, a court may well find such a local business grant program serves a public purpose. However, the determination of whether a specific expenditure is for a public purpose is a question of fact. Op. S.C. Att'y Gen., 1997 WL 569010 (July 16,

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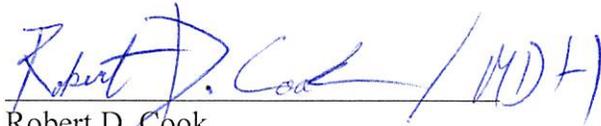
1997). This Office cannot make factual determinations in a legal opinion. See Op. S.C. Att'y Gen., 1989 WL 508567, at *4 (July 17, 1989). Accordingly, the County should initially decide whether its local business grant program would serve a public purpose as required by the South Carolina Constitution. See S.C. Const. art. X, §§ 5, 11.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General