

MUNICIPAL GRANTS TO NON-PROFIT ORGANIZATIONS

The predominant rule in the United States is that appropriations of public funds must be for a public purpose. See, generally, 63C Am Jur 2d, Public Funds, section 58. The benefit to the public must be primary or direct and not merely incidental. See 63C Am Jur 2d, Public Funds, section 60. This rule of public purpose and primary benefit to the public applies even if the funds have been derived from sources other than taxation. 63C Am Jur 2d, Public Funds, section 58. All funds of the municipality should be considered (and treated) as “public funds” regardless of source.

The general rule in the United States is that public officers who have the charge of public funds (such as municipal council members) occupy the status of trustees or agents with respect to such funds. See 63C Am Jur 2d, Public Funds, section 2. Public officers who intentionally or carelessly misappropriate public funds or authorize or make illegal payment of public funds may be personally liable for such misappropriation or illegal payment. See S.C. Attorney General Opinion of February 21, 2003, 2003 S.C. AG LEXIS 13, p. 2, and cited authorities therein. South Carolina follows these general rules.

Two provisions of the South Carolina Constitution may come into play. Article X, section 11, provides, in part, that “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 [public schools and State- established public institutions of learning].” This provision has been construed as relating to pecuniary obligations against general credit or proceeds of ad valorem tax levies. See Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331, 334-335 (1985). Article XI, section 4, has a broader applicability to all public funds. It states that “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.”

In the 1975 case of Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43, 47-48 (1975), the State Supreme Court set out a general definition of “public purpose” by stating that 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
Legislation does not have to benefit all the people in order to serve a public purpose. At the same time legislation is not for a private purpose merely because some individual makes a profit as a result of the enactment....

...Many objects may be public or beneficial in the general sense that their attainment will benefit or promote the public convenience. It 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”.

Three years later, the Court, in Bauer v. South Carolina State Housing Authority, 217 S.C. 219, 246 S.E.2d 869 (1978), reaffirmed these principles and reiterated the rule, stated in earlier cases, that “All legislative action must serve a public rather than a private purpose.” 246 S.E.2d at 873. The

Court in Bauer also recognized that there must be “a reasonable relationship between the public purpose to be achieved and the means chosen to effectuate that purpose...” 246 S.E.2d at 875.

These general principles have been reexamined and discussed in subsequent court decisions such as Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986) and WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631(2000). In both those cases, the Court used a four-part test in the analysis of whether the public purpose doctrine was violated:

- (1) What is the intended ultimate goal or benefit to the public?
- (2) Are public parties or private parties the primary beneficiaries?
- (3) Is the benefit to the public speculative?
- (4) What is the probability that the public interest will be ultimately served and to what degree?

A municipal council’s decisions on which donations are for a true public purpose should involve a similar analysis.

In addition to the State Attorney General Opinion mentioned above, there have been a number of reported Opinions from that office on the issue of the “public purpose” of donations by governments to non-profit organizations or other governmental or quasi-governmental agencies. In several Opinions, the Attorney General’s office questioned whether appropriations by local governments to the Chamber of Commerce were for a public purpose. (See, for example, 1975 S.C. AG LEXIS 290, 1977 S.C. AG LEXIS 329, 1999 S.C. AG LEXIS 42). These Opinions appear to rest on the circumstance that the Chamber of Commerce is a purely private organization which performs no governmental function. Similarly, a school board’s donation to a private education association (1977 S.C. AG LEXIS 743), and a municipality’s expenditure of tax revenues to support a local non-profit development corporation (1977 S.C. AG LEXIS 719), were viewed as improper and invalid expenditures. Distinguished, and viewed as appropriate, were appropriations by a local government to the Riverbanks Park Commission for use in the operation of a zoo (1976 S.C. AG LEXIS 341) and a town’s donation to the non-profit corporation which administered and cared for a local cemetery (1977 S.C. AG LEXIS 553). Zoos and cemeteries, those Opinions noted, were recognized as a valid public purpose and a proper governmental purpose.

A 1985 State Attorney General Opinion (1985 S.C. AG LEXIS 197) concluded that local governments could contract with the local Chamber of Commerce for the provision of services which might otherwise be provided by the government, such as for industrial recruitment and economic development. That Opinion referenced additional prior opinions which had questioned the legality of outright contributions for support of non-profits. The author of that Opinion distinguished those opinions on the basis that, in the situation of the contract, the local government was receiving specified services for the expenditure of public funds, rather than making a contribution or supporting a non governmental entity.

The additional Opinions following this summary illustrate other specific situations. The January 1991 Opinion (1991 S.C. AG LEXIS 8) viewed, as questionable, a contribution by a school board to a local development corporation because it appeared that the non-profit’s intended use of the money was to acquire real estate for its own use. This appeared to the author of the Opinion to be a situation in which the public benefit (despite the overall general good purpose of the non-profit) was only incidental and speculative.

The May 1999 Opinion (1999 S.C. AG LEXIS 42) concluded that a public university's donation to the local Chamber of Commerce was "of doubtful constitutionality". The December 2000 Opinion (2000 S.C. AG LEXIS 161) concluded that a county grant of Accommodations Tax funds to a local labor council was unconstitutional. That Opinion also referenced other opinions which had "advised against" expenditures of public funds "which would result in benefits only to members of civic organizations such as the Salvation Army... or Boys' Club..." The Opinion noted that some expenditures had been considered appropriate when "The direct appropriation of public funds...is, in effect, an exchange of value which results in the performance by those entities of a public function of the State." The Opinion emphasized that, when expenditures had been upheld, the AG's office had "stressed the importance of maintaining adequate controls to insure a public purpose."

In contrast, the two 1988 Opinions (1988 S.C. AG LEXIS 56 and 1988 S.C. AG LEXIS 123) refer to situations in which the grants were viewed as appropriate. These were by the State to a performing arts center for building construction and by a county to a non-profit dedicated to helping abused children for operation of its shelter. It appears that these were viewed as appropriate because the private entities were performing functions which the governments could have performed.

The office of the current Attorney General also has addressed this issue of the "public purpose" of grants in at least two opinions (2003 S.C. AG LEXIS 136 and 2003 S.C. AG LEXIS 158).

In view of this legal background, municipal councils should take the opportunity presented by the budget process to reevaluate the "public purpose / public benefit" basis for expenditures for any outside organizations. Future grants should not be made just because past grants were made. This evaluation certainly should include a recognition of the controlling general legal principles discussed above:

- (1) grants without restrictions (unrestricted grants) should be avoided;
- (2) the four-part analysis used in the cases discussed above should be used to consider whether there is the requisite public interest and benefit, whether the expenditure merely or predominately benefits the membership of the private organization, and whether the means reasonably effectuates the desired public purpose;
- (3) performance-based contracts for specific services should be considered as the appropriate vehicle for any funding; and
- (4) controls should be put in place for any expenditures (such as specifications, conditions and contingencies).

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