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ATTORNEY GENERAL

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Dear Mr. Coltrane:

We received your letter requesting an opinion of this Office concerning Act 57 of 2023 and "the ability of local governments to utilize general fund money in the form of grants or donations to private entities for the development workforce housing." Your letter contains three questions, which we will address in turn.

Law/Analysis

1. Does section 6-4-10(4)(b)(ix) authorize the dedication of fifteen percent of the entire amount of the accommodations tax allocation to a local government, or does it authorize the dedication of fifteen percent of the "65%" fund described in 6-4-10(4)?

In order to provide some background to your question, we note that South Carolina law imposes a statewide seven percent sales tax on "the gross proceeds derived from the rental or charges for any rooms, campground spaces, lodgings, or sleeping accommodations furnished to transients by any hotel, inn, tourist court, tourist camp, motel, campground, residence, or any place in which rooms, lodgings, or sleeping accommodations are furnished to transients for a consideration." S.C. Code Ann. § 12-36-920(A) (Supp. 2022). Section 12-36-2630 of the South Carolina Code (2014) explains that two percent of this tax is "local accommodations tax, which must be credited to the political subdivisions of the State in accordance with Chapter 4, Title 6." Section 6-4-10 of the South Carolina Code (2014 & Supp. 2022) governs the allocation of such revenue in county areas collecting more than fifty thousand dollars from the local portion of the accommodations tax and reads as follows:

> (1) The first twenty-five thousand dollars must be allocated to the general fund of the municipality or county and is exempt from all other requirements of this chapter.
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> (2) Five percent of the balance must be allocated to the general fund of the municipality or county and is exempt from all other requirements of this chapter.

(3) Thirty percent of the balance must be allocated to a special fund and used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. To manage and direct the expenditure of these tourism promotion funds, the municipality or county shall select one or more organizations, such as a chamber of commerce, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program. If no organization exists, the municipality or county shall create an organization with the same membership standard in Section 6-4-25. To be eligible for selection the organization must be organized as a nonprofit organization and shall demonstrate to the municipality or county that it has an existing, ongoing tourism promotion program or that it can develop an effective tourism promotion program. Immediately upon an allocation to the special fund, a municipality or county shall distribute the tourism promotion funds to the organizations selected or created to receive them. Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them. Fees allocated pursuant to this subsection must not be used to pledge as security for bonds and to retire bonds. Also, fees allocated pursuant to this subsection must be allocated to a special fund and used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity, and not used to pledge as security for bonds and to retire bonds.

(4)(a) The remaining balance plus earned interest received by a municipality or county must be allocated to a special fund and used for tourism-related expenditures. This section does not prohibit a municipality or county from using accommodations tax general fund revenues for tourism-related expenditures.

(b) The funds received by a county or municipality which has a high concentration of tourism activity may be used to provide additional county and municipal services including, but not limited to, law enforcement, traffic control, public facilities, and highway and street maintenance, as well as the continual promotion of tourism. The funds must not be used as an additional source of revenue to provide services normally provided by the county or municipality but to promote tourism and enlarge its economic benefits through advertising, promotion, and providing those facilities and services which enhance the ability of the county or municipality to attract and provide for tourists.

"Tourism-related expenditures" include:

> (i) advertising and promotion of tourism so as to develop and increase tourist attendance through the generation of publicity;
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> (ii) promotion of the arts and cultural events;
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> (iii) construction, maintenance, and operation of facilities for civic and cultural activities including construction and maintenance of access and other nearby roads and utilities for the facilities;
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> (iv) the criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities. This is based on the estimated percentage of costs directly attributed to tourists;
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> (v) public facilities such as restrooms, dressing rooms, parks, and parking lots;
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> (vi) tourist shuttle transportation;
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> (vii) control and repair of waterfront erosion, including beach renourishment;
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> (viii) operating visitor information centers;
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> (ix) development of workforce housing, which must include programs to promote home ownership. However, a county or municipality may not expend or dedicate more than fifteen percent of its annual local accommodations tax revenue for the purposes set forth in this item (4)(b)(ix). The provisions of this item (4)(b)(ix) are no longer effective after December 31, 2030.

S.C. Code Ann. § 6-4-10 & 57 S.C. Acts 2023 (emphasis added).

You ask whether section 6-4-10(4)(b)(ix) allows a local government to spend fifteen percent of the entire accommodations tax it receives under section 12-36-2630(a) on the development of workforce housing or whether it may only spend fifteen percent of the sixty-five percent of accommodations tax allocated to the special fund created under section 6-4-10(4)(a). To answer your question, we must employ the rules of statutory construction, the primary of which to effectuate the intent of the Legislature. Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 272, 802 S.E.2d 794, 797 (2017). As you mentioned in your letter, the Legislature added section 6-4-10(4)(b)(ix) to section 6-4-10 via act 57 of 2023 to allow local accommodations tax revenue to be for the development of workforce housing. Certainly, either interpretation could serve this purpose.

Thus, we turn to the statute to determine which interpretation a court is likely to find correct. As our Supreme Court instructs:

> "If a statute's language is plain, unambiguous, and conveys a clear meaning[,] 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Id. (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "On the other hand, where a statute is ambiguous, the Court must construe the terms of the statute." Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015) (citation and internal quotation marks omitted). "Moreover, it is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." Beaufort County v. S.C. State Election Comm'n, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011).

Id. at 272, 802 S.E.2d at 797-98.

The Legislature laid out the allocation of funds by numbering the order of the allocation (1) through (4), clearly noting that the first twenty-five thousand goes to the local government's general fund. Of the remaining balance, the Legislature instructs that five percent of that balance also goes to the local government, thirty percent goes to a special fund for advertising and promotion, and the remaining amount, which mathematically amounts to the remaining sixty-five percent after the initial twenty-five-thousand-dollar allocation, is allocated to a special fund to be used from "tourism-related expenditures." The Legislature then provides a definition of what is considered "tourism-related expenditures" in section 6-4-10(4)(b). Act 57 added to this list "development of workforce housing." Therefore, given the design of section 6-4-10 as laid out by the Legislature and reading section 6-4-10(4)(b)(ix) in the context of the provision as a whole, a court will likely find the Legislature intended any allocations for the development of workforce housing be included in the sixty-five percent allocation allowed for "tourism-related expenditures." However, we do not believe the fifteen percent limitation is based on this amount.

Section 6-4-10(4)(b)(ix) clearly states local governments "may not expend or dedicate more than fifteen percent of its annual local accommodations tax revenue for the purposes set forth in this item (4)(b)(ix)." A plain reading of this provision indicates the fifteen percent limitation is calculated based on the total annual local accommodations tax a local government receives, not on the amount allocated for tourism-related expenditures. As such, we believe the plain language of the statute best expresses the intent of the Legislature to base the fifteen percent limitation on the annual local accommodations tax received rather than the amount allocated for tourism-related expenditures under section 6-4-10(4)(a).[1]

[1] The basis for this calculation of the allowable amount for workforce housing under section 6-4-10(4)(b)(ix) does not change the amount allocated under section 6-4-10(4)(a). However, we note section 6-4-10(4)(a) specifies "[t]his

2. May a local government allocate all or any part of the fund described in section 6-4-10(4)(b)(ix) to a non-profit organization to be used to develop workforce housing, so long as the non-profit organization complies with the requirements of the statute?

Initially, we note in section 6-4-10(3), pertaining to the thirty percent allocation for advertising and promotion, the Legislature specifies that the local government must select an organization to manage and direct the expenditure of these funds and that it must be organized as a nonprofit organization. The allocation of funds for tourism-related expenditures in section 6-4-10(4) does not contain such a requirement and simply provides that such funds must be allocated to a "special fund" and must be spent within two years receipt unless certain requirements are met. Therefore, section 6-4-10(4) does not specifically allow or require the allocation of tourism-related expenditures to non-profit organizations.

In a 2003 opinion, we addressed using accommodations tax revenue allocated for tourism-related expenditures for the construction, maintenance, and operation of facilities owned by a nonprofit entity. Op. Att'y Gen., 2003 WL 21043497 (S.C.A.G. Apr. 2, 2003). We noted the fundamental rule that "the expenditure of public funds must be for a public purpose" and further explained:

> This Office has consistently recognized that "[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. See Op. S.C. Atty Gen., dated July 12, 1984. This opinion is based on and supported by decisions of our Supreme Court. In Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954), the Court recognized the validity of the appropriation of public funds for the performance of a public function through the agency of a nonprofit, nonsectarian entity, such as organizations which provide health services, welfare services, and other public purposes for which appropriations are made. Moreover, in Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), the Court established the following four part test to determine the constitutionality of a statute for financing industrial development:
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> > 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.
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> In the August 2, 1988 opinion referenced above, this Office concluded that an expenditure of accommodation tax revenues by the City of Charleston for the

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section does not prohibit a municipality or county from using accommodations tax general fund revenues for tourism-related expenditures." Therefore, a local government may use the funds it receives under sections 6-4-10(1) and (2) on tourism-related expenditures including the development of workforce housing.

> protection of the facade of a privately owned building was a "tourism related expenditure" and was primarily related to a public purpose. The opinion concluded that the expenditure met the standard established by the Court in Nichols even though there would be some benefit to the private owner as the historical nature of the building promoted tourism thereby principally benefitting the public. See also Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975). Further, in an opinion dated October 9, 1989, this Office concluded that the expenditure of Accommodations Tax monies to a non-profit corporation was permissible as a "tourism-related expenditure," so long as the organization involved was "non-sectarian in nature and nonprofit and ... perform[ed] a service which the political subdivision is authorized to perform."
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> Additionally, the Accommodations Tax statute does not appear to prohibit disbursing funds to nonprofit, nonsectarian organizations for the purpose of constructing, maintaining, or operating facilities that are used for civic and cultural activities. Nor does it seem that the Constitution would prohibit such a disbursement. An opinion of this Office dated, April 17, 1985, noted that the South Carolina Supreme Court has approved the expenditure of public funds to procure public services from a non-profit corporation in cases such as Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976); Elliott v. McNair, 123 S.C. 272, 115 S.E. 596 (1967); and Haesloop v. City of Charleston, 123 S.C. 272, 115 S.E. 596 (1923). Specifically, this Office noted that the case of Bolt v. Cobb, supra, holds that county funds can be used to build a hospital to be leased to a nonprofit, nonsectarian corporation, at no cost to the corporation, without infringing any constitutional provisions. The Court stated that the county was merely using the instrumentality of such a corporation to accomplish a legitimate purpose. See Op. Atty. Gen., January 6, 1970.

Id. We noted whether to disburse Accommodations Tax funds to a nonprofit is ultimately the decision of the municipality or the county. Id. However, we concluded "it is our opinion that a municipality possesses the discretion, pursuant to the state Constitution and the Accommodations Tax statute, to disburse funds to a nonprofit, nonsectarian organization to be used in furtherance of 'tourism-related expenditures' such as you describe in your letter." Id.

While the Legislature amended section 6-4-10(4) to specify that development of workforce housing is a "tourism-related expense," we believe the reasoning of our 2003 opinion applies and a local government may allocate such funds to a non-profit, nonsectarian organization so long the allocation complies with the four-part test expressed in Nichols and satisfies the requirements under section 6-4-10(4).

You ask whether the answer to this question changes if the entity is for-profit. We do not believe it does. While we have not addressed this question in an opinion, we found a 2005 decision by the South Carolina Administrative Law Court (the "ALC") discussing whether a municipality could

disburse accommodation tax revenues to entities that were not organized as a non-profit. City of Myrtle Beach v. Tourism Expenditure Review Committee, No. 04-ALJ-30-0382-CC, 2005 WL 3308567 (Nov. 7, 2005). The ALC noted the purpose of section 6-4-10 as expressed by the Court of Appeals in Thompson v. Horry County, 294 S.C. 81, 362 S.E.2d 646 (Ct. App. 1987):

> "In our view, the statute reflects a practical recognition by the Legislature that expenditures which promote tourism will generally enlarge the economic benefits for an entire geographic area of the county without regard to municipal boundarylines.... For this reason, it makes sense to give counties some flexibility as to how and where they spend accommodations tax revenues." Id. at 648.

Id. Following the rules of statutory construction, the ALC determined:

> The Court does not find that § 6-4-10(4) is ambiguous. It contains no reference to any limitation upon the type of entity which may receive disbursements of accommodations tax revenues under that subsection; it only requires that expenditures there under be "tourism-related." Thus, the logical interpretation of the plain language of the statute is that no such limitation exists.
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> Furthermore, our Supreme Court enunciated the Latin principal of *ital ex scripta est* ("so the law is written") in Beaty v. Richardson, 56 S.C. 173, 180, 34 S. E. 73, 76 (1899), stating that "the legislature must have intended to mean what it has plainly expressed, and consequently there is no room for construction...Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be." Section 6-4-10(4) is plain and clear. The application of its words will not lead to an absurd result. It is not appropriate for this Court to search for legislative intent beyond the borders of the statute. A logical interpretation is that an expenditure must be "tourism-related" but is not required to be made to a non-profit organization. In the present case, the plain language of the statute does not contain any requirement that the funds in question be disbursed to a non-profit entity. If the legislature had intended to restrict the expenditure of funds in question to non-profit corporations it could have easily done so. In fact, the legislature did restrict the expenditure of certain funds to organizations specifically organized as non-profit organizations in the section immediately preceding the section in question. Cf. S.C. Code Ann. §§ 6-4-10(3) & 6-4-10(4)(a). Petitioner correctly contends that Respondent is not authorized to create additional restrictions on the discretionary authority of local governments in connection with disbursing accommodations tax funds.

> In Thompson, supra, the Court of Appeals interpreted an earlier version of the accommodation tax statutes. That case involved taxpayers' challenge to Horry County's expenditure of accommodation tax funds in certain geographical areas. The appellate court found the legislature had prescribed two requirements for expenditures from the special fund: (1) they must be "tourism-related" and (2) they must be made "primarily in the geographical areas of the county in which the proceeds of the tax are collected where it is practical." Id. The circuit court had held most of the challenged expenditures were unlawful because, in its opinion, the Act prohibited the County from spending taxes collected in the unincorporated areas of the county. The appellate court reversed the trial court finding no such prohibition appeared in the text of the statute. Id. The appellate court further found that if the Legislature had intended to restrict the expenditure of accommodation tax funds to certain geographical areas it could have easily done so. In light of the foregoing, I conclude that Section 6-4-10(4) does not preclude disbursements of accommodations tax revenues to entities that are not organized as "non-profit." However, the Court agrees that it is reasonable for Respondent to question expenditures that result in public funds being distributed to private interests unrestrained by the limitations applicable to non-profit entities.

We agree with the ALC's analysis finding no evidence that the Legislature intended to restrict disbursements of tourism-related expenses, including those for the development of workforce housing, to non-profit entities. Nonetheless, as we concluded regarding disbursements to non-profit entities, we stress that the local government must ensure compliance with the four-part test expressed in Nichols and satisfy the requirements under section 6-4-10(4)(ix).

3. May a local government allocate all or any part of the fund described in section 6-1-530(A)(7) to a non-profit organization to be used to develop workforce housing, so long as the non-profit organization complies with the requirements of the statutes?

You ask this question as a sub-part to your prior question, but we find it is important to address it separately because it is part of a different statutory scheme. In addition to the state-wide accommodations tax, which includes a local component as previously discussed, South Carolina law also provides local governments with the ability to impose their own local accommodations tax of up to three percent. S.C. Code Ann. § 6-1-520 (2004). Section 6-1-530 of the South Carolina Code (2004), as amended by act 57 of 2023, addresses the use this locally imposed accommodations tax and provides as follows:

> (A) The revenue generated by the local accommodations tax must be used exclusively for the following purposes:
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> (1) tourism-related buildings including, but not limited to, civic centers, coliseums, and aquariums;

> (2) tourism-related cultural, recreational, or historic facilities;
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> (3) beach access, renourishment, or other tourism-related lands and water access;
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> (4) highways, roads, streets, and bridges providing access to tourist destinations;
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> (5) advertisements and promotions related to tourism development;
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> (6) water and sewer infrastructure to serve tourism-related demand; or
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> (7) development of workforce housing, which must include programs to promote home ownership. However, a county or municipality may not expend or dedicate more than fifteen percent of its annual local accommodations tax revenue for the purposes set forth in this item. The provisions of this item are no longer effective after December 31, 2030.

Similar to section 6-4-10(4), this provision does not expressly restrict a local government from allocating its local accommodations tax revenue to a non-profit entity. Therefore, we similarly conclude that if the expenditure satisfies the public purpose requirement as well as the Nichols factors and the requirements set forth in section 6-1-520(A)(7), we believe it is within the local governments discretion to allocate funds to a non-profit, nonsectarian entity.

4. Would making a donation or grant from the local government's general fund to a non-profit entity that develops affordable housing for the workforce (i.e., Habitat for Humanity or similar) meet the public purpose requirement of article X, section 5 of the South Carolina Constitution?

5. Would making a donation or grant from the local government's general fund to a non-profit entity that develops affordable housing for the workforce (i.e., Habitat for Humanity or similar) violate the prohibition against pledging the credit of the State set out in article x, section 11 of the South Carolina Constitution?

We find it useful to address these questions together. Article X, section 5 of the South Carolina Constitution (2009) provides:

> 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.

Article X, section 11 of the South Carolina Constitution (2009) provides in pertinent part:

> 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 . . . .

In 2009, we summarized various prior opinions addressing the ability of local governments to allocate funds to private entities under these provisions. Op. Att'y Gen., 2009 WL 3658276 (S.C.A.G. Oct. 6, 2006).

> In each opinion, we stressed that our Constitution, pursuant to article X, section 5 and article X, section 11, requires that public funds only be used for public purposes. Ops. S.C. Atty. Gen., July 28, 2008; March 20, 2007; January 11, 2006. However, our courts recognize that public funds may be expended for the benefit of private non-profit entities without violating our Constitution, so long as the non-profit uses such funds for the performance of a public function. See Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976) (finding a grant by Florence County to a private, non-profit corporation for the purpose of building a hospital served a public function of Florence County); Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954) (determining that Anderson County could issue general obligation bonds for the benefit of the Anderson County Hospital Association, a non-profit corporation, because it provided "a public, corporate function").

Id. In that opinion, we cited a 1983 opinion further explaining that should a local government transfer funds to a private entity, it must maintain oversight to ensure the constitutionality of the appropriation. Id.

> "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). In our opinion, such control could be accomplished, at least in part, by including in each such appropriations act the provision set out in § 135 of the 1983-84 General Appropriations Act, which requires those private organizations to submit to certain accounting and review procedures by the State."

Id. (quoting Op. Att'y Gen., 1983 WL 182057 (S.C.A.G. Nov. 16, 1983)).

In accordance with this opinion, if the donation to the non-profit entity is for a public purpose and facilitates accomplishment of what is a public function in keeping with the local government's authority, it would likely not violate sections 5 or 11 of article X of the South Carolina Constitution. However, as we explained in our 2009 opinion, the local government must maintain some control over these expenditures to ensure the funds are used for the purposes for which they are expended.

Conclusion

Based on the analysis provided above, the plain language of section 6-4-10(4)(b)(ix) indicates the Legislature's intent for the fifteen percent limitation on expenditures of accommodation tax revenue on the development of workforce housing to be based on fifteen percent of the annual local accommodations tax revenue allocated to the local government under section 6-4-10, rather than the amount of funds allocated just for tourism-related expenditures. We are also of the opinion that a local government can allocate funds for the development of workforce housing to non-profit and for-profit entities so long as the expenditure satisfies the four-part test expressed by our Supreme Court in Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986) and the expenditure complies with the requirements set forth in section 6-4-10(4)(b)(ix). We also come to the same conclusion regarding the expenditure of accommodation tax revenues imposed by the local government pursuant to section 6-1-520 of the South Carolina Code. Lastly, we believe a donation or grant to a non-profit entity for the development of workforce housing from a local government's general fund is permissible under sections 5 and 11 of article X so long as the donation or grant serves a public purpose and the funds are used in the performance of a public function which is within the authority of the local government and the local government maintains some level of control to ensure the funds are used for the purposes for which they were allocated.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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