ALAN WILSON
ATTORNEY GENERAL

October 14, 2014

Kathryn Long Mahoney, Esq.
Childs & Halligan, P. A.
P. O. Box 11367
Columbia, SC 29211

RE: Attorneys' Fees in Criminal Matter

Dear Ms. Mahoney:

It is our understanding that on March 12, 2013 and May 13, 2014, the Berkeley County School Board authorized the use of public funds to pay the attorney fees for one or more Board officials who are the subject of a criminal investigation. This criminal investigation remains ongoing. One of these officials has been indicted on two separate occasions. Furthermore, we understand that public funds may be used to pay the attorney's fees for a non-employee witness in the pending criminal investigation.

Enclosed are prior opinions of this Office which conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings. These opinions (enclosed) conclude that such expenditures represent the use of public funds for a private purpose in violation of the South Carolina Constitution.

We would suggest that you carefully review these opinions and the legal authorities referenced therein. This Office is reviewing the possibility of legal action to recover the public funds expended for this purpose. Please advise as to the legal basis for such expenditures. It is difficult to understand how the Board concluded that these officials acted in good faith when the criminal investigation remains ongoing.

Yours very truly,

John W. McIntosh
Chief Deputy Attorney General

CC: Berkeley County School Board Members, via email to:
Dr. Kent Murray, MurrayKe@bcsdschools.net
Mr. Phillip Obie, II, ObieP@bcsdschools.net
Ms. Shannon Lee, LeeShannon@bcsdschools.net
Ms. Kathy Schwalbe, SchwalbeKa@bcsdschools.net
Ms. Wilhelmina Moore, MooreW@bcsdschools.net
Mr. Frank Wright, WrightFr@bcsdschools.net
Mr. Jim Hayes, HayesJ@bcsdschools.net

RC/JWM/ds

1995 WL 606050 (S.C.A.G.)

Office of the Attorney General
State of South Carolina

*1 September 14, 1995

The Honorable Harold Gene Worley
Member, House of Representatives
P. O. Box 296
North Myrtle Beach, South Carolina 29582

Dear Representative Worley:

You have asked whether a county school superintendent can continue to serve upon indictment for common law misconduct in office. As I understand the situation, the underlying facts of the indictment allege that the superintendent unlawfully "rigged" or "fixed" bids in contravention of state law. The Indictment specifically charges the following facts:

> [t]hat Gary Smith and Richard Heath, while public officers and public officials holding positions of public trust and having a duty of accountability to the people of Horry County and the State of South Carolina imposed by the common law and statutory laws upon public officers and assumed by them as a matter of law upon their entering public office, did in Horry County between September, 1993 and January, 1995 breach that duty in that Gary Smith and Richard Heath did knowingly, willfully, dishonestly and corruptly violate the procurement laws of the State of South Carolina and of the Horry County School District by "fixing bids" in the purchase of computers, thereby, damaging the integrity of the School District and the bidding process. Further, Gary Smith and Richard Heath did receive and accept gratuities of travel and lodging from favored vendors in violation of Section 8-13-720 of the State Ethics Act, all being against the peace and dignity of the State of South Carolina and the Common Law in such cases made and provided.

Article VI, Section 8 of the South Carolina Constitution (1895 as amended) provides in pertinent part:

> [a]ny officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial Branches, who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment if permitted by law may be suspended by the Governor, until he shall have been acquitted. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law. (emphasis added)

This Office has often concluded that a county school superintendent is an officer. Op. Atty. Gen. August 9, 1991, affirming Op. Atty. Gen. April 5, 1991; Op. Atty. Gen. February 27, 1991. It makes no difference whether the superintendent is appointed or elected; he is still an officer. Thus, the question is whether the indictment charges a crime of moral turpitude. It is my conclusion that it does.

Here, the Indictment alleges the dishonest and corrupt "fixing of bids" in the purchase of computers for the school district. Moreover, the Indictment contends that there occurred a violation of S.C. Code Ann. Sec. 8-13-720, as part of the alleged misconduct in office.Section 8-13-720 proscribes any public official, public

member or public employee from soliciting or receiving "money in addition to that received by the public official, public member or public employee in his official capacity for advice or assistance given in the course of his employment as a public official, public member or public employee."In this instance, the Indictment charges that the superintendent received and accepted certain gratuities from favored computer vendors.

*2 As our Supreme Court has previously held, "moral turpitude" is defined as

> an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man .... Moral turpitude implies something immoral in itself, regardless of whether it is punishable by law as a crime....

State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263 (1978); Op. Atty. Gen., February 9, 1995. It does not appear that this Office has ever considered the issue of whether offenses involving the fixing of bids are crimes or moral turpitude.

However, in O'Halloran v. DeCarlo, 162 N.J.Super. 174, 392 A.2d 615 (1978), the Court held that a count in an indictment for "willfully and knowingly" conspiring "to pervert the due administration of the laws of the State of New Jersey pertaining to the requirements for public advertisement for bids and public bidding in public contracts" and "to violate the criminal laws of the State of New Jersey pertaining to the misconduct in office of public officials" constituted moral turpitude. The lower court, which the referenced decision affirmed, stated the public policy considerations underlying this conclusion as follows:

> [t]this "partnership in criminal purposes" to violate the public bidding laws is in itself a fraud upon the State. The public's right to the benefits of public advertising and bidding were defeated, other contractors were cheated of their right to equal bidding opportunity, and the public was cheated of its right to have public officials conduct its affairs with propriety and in accordance with law.

156 N.J.Super. 249, 383 A.2d 769, 771 (1978). While the actual charge in these cases was a conspiracy to commit the offense, the result would undoubtedly be the same as to the substantive crime.

Moreover, the Indictment alleges a violation of the State Ethics Act wherein it is contended that the Superintendent accepted certain gratuities from vendors. Violation of a statute which proscribes the retention of fees or compensation in addition to those allowed by law has been held to constitute a crime of moral turpitude. In State ex rel. Griffin v. Anderson, 230 P. 315, 317 (Kan. 1924), for example, the Supreme Court of Kansas stated:

> [w]e hold that the law forbidding a public officer to retain any reward other than that allowed by law for doing anything appertaining to his duties as such, both in its general scope and as applied to the situation here presented, involves turpitude, within the meaning of the phrase as used in the statute quoted.

In view of the foregoing, it is my opinion that the Indictment charges a crime of moral turpitude and thus the Governor is empowered to suspend the individual in question pursuant to his constitutional authority.

You have also asked whether the school board is authorized to retain an attorney to represent the superintendent in the foregoing prosecution, or to pay the costs of the superintendent's legal defense in those criminal proceedings. I am enclosing a copy of an opinion of this Office, dated February 15, 1985 which discusses at length the authority of a political subdivision to employ independent counsel to represent a particular member of the body. There, we specifically noted that a public body may not employ counsel or **pay** counsel with **public funds** as to **matters** in which the body is not directly interested or which involved a private purpose. Op. at p. 4. Express statutory authority is necessary for expenditure of **public funds** in **criminal** proceedings (e.g. public defender).

*3 By analogy, S.C. Code Ann. Sec. 1-7-50 only permits the State to **pay** for the defense of government employees in **criminal** actions if they acted in "good faith". Where, however, a grand jury has returned an indictment against a public official, this Office has concluded that Section 1-7-50 does not apply. We have previously stated:

> ... our Office has often taken the position that no defense will be provided where a judicial forum has made a finding of probable cause [which an indictment is] since this runs counter to the "good faith" finding specified in the statute. Under those circumstances, the employee is primarily responsible for selecting an attorney to provide a defense and for payment of any attorney fees and costs.

Letter from Nathan Kaminski, Executive Assistant for Administration, to Sally M. Walker, dated September 2, 1993. While Section 59-17-110 permits school districts to employ counsel in criminal proceedings for acts done in good faith in the course of employment, the grand jury here has found probable cause of "fixing bids", which would be clearly beyond the scope of a superintendent's duties.People v. Mehilic, 504 N.E.2d 1310.

Moreover, case law supports the idea that the payment of **public funds** for the defense of a public official in a **criminal** action is not an expenditure for a public purpose, but a private one. Holtzendorff v. Housing Authority of Los Angeles, 250 Cal.App.2d 596, 58 Cal.Reptr. 886 (1967); Bowling v. Brown, 57 Md.App.248, 469 A.2d 896 (1984). See also, Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975) [legislative findings of public purpose usually necessary]. In Bowling v. Brown, supra, the Court found that reimbursement of the town manager and town engineer for attorney expenses in defense against charges of official misconduct was not for a public purpose. The Court cited numerous authorities in support of this position:

> [i]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct.Board of Chosen Freeholders v. Conda, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillen, Municipal Corporations (3d ed. 1973 rev.), § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See, e.g., Chapman v. New York, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that **public funds** of municipalities cannot properly be devoted to private **uses**, even when expressly authorized by the legislature.City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Wilson v. Board of County Commissioners, 273 Md. 30, 327 A.2d 488 (1974).

Continuing, the Court of Bowling recognized:

> [a] New Jersey case presented a fact situation similar to that in the instant case. See Township of Manalapan v. Loeb, 126 N.J.Super. 277, 314 A.2d 81,aff'd per curiam131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of $200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and failing to take the necessary steps to see that the township was reimbursed for the amount of the calls. The indictment was dismissed against the mayor and administrator, and a jury found the committeeman not guilty. In spite of the favorable termination of the legal proceedings, the court in the declaratory judgment action held that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct.314 A.2d at 83 citing 56 Am.Jur.2d, Municipal Corporations, Etc., § 208, at 266, and 64 C.J.S., Municipal Corporations, § 183, at 341. In reference to Defendants' 'public purpose' argument in the present case, this Court adopts the words of the Manalapan court: 'Here, under no circumstances can it be said that

the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality." 314 A.2d at 82.

*4 469 A.2d at 902.

In conclusion, it is our opinion that the Indictment charges an officer with a crime of moral turpitude and, thus the Governor may suspend in this instance. Secondly, it is also our opinion that a political subdivision, such as a school district, is without authority to **pay** an employee's expenses of representation in a **criminal** proceeding. The foregoing authorities clearly hold that such expenditures are not for a public purpose. It is for the protection of the public that our Constitution requires that **public funds** be spent for public purposes. Just as the Court recognized in the Manalapan case, referenced above, "under no circumstances can it be said that the acts charged ... in the indictment were for the benefit of" the public. Accordingly, there may not be an expenditure of **public funds** for the legal expenses or costs in the referenced **criminal** proceedings.

Sincerely,
Charles Molony Condon
Attorney General

1995 WL 606050 (S.C.A.G.)

END OF DOCUMENT

1997 WL 323769 (S.C.A.G.)

Office of the Attorney General
State of South Carolina

*1 May 13, 1997

The Honorable Tracy R. Edge
Member
House of Representatives
326A Blatt Building
Columbia, South Carolina 29211

Dear Representative Edge:

You note that in an opinion dated September 14, 1995, this Office concluded that a school district is without authority to **pay** a school board member's or an employee's expenses of representation in a **criminal** proceedings. You inquire as to "[w]hat legal remedies would be available when **public funds** continue to be expended for this unlawful purpose?"

Law / Analysis

In the September 14, 1995 opinion, we addressed the issue of "whether the school board is authorized to retain an **attorney** to represent [the school board officials or employees] ... in the foregoing prosecution, or to **pay** ... [their] legal defense in those **criminal** proceedings."We referenced therein an earlier opinion, dated February 15, 1985, wherein we opined that a public body may not employ counsel or **pay** counsel with **public funds** as to **matters** in which the body is not directly interested or which involved a private purpose. We also stated in the September 14, 1995 opinion that "[e]xpress statutory authority is necessary for expenditure of **public funds** in **criminal** proceedings (e.g. public defender)."

Referencing by analogy a state statute -- Section 1-7-50 -- which permits the State to **pay** for the defense of government employees if they acted in "good faith", we recognized that an indictment constituted a probable cause finding of **criminal** conduct and thus it represented the policy of this Office that "'the employee is primarily responsible for selecting an **attorney** to provide a defense and for payment of any **attorney** fees and costs."' Further, we noted that while Section 59-17-110 permits school districts to employ counsel in **criminal** proceedings for acts done in good faith in the course of employment, where a grand jury has found probable cause of "fixing bids," however, such "would be clearly beyond the scope of a superintendent's duties."

Furthermore, we concluded that there exists a body of case law which "supports the idea that the payment of **public funds** for the defense of a public official in a **criminal** action is not an expenditure for a public purpose but a private one."We particularly referenced the case of Bowling v. Brown, 57 Md.App. 248, 469 A.2d 896 (1984) wherein the Court found that reimbursement of the town manager and town engineer for attorney expenses in defense against charges for official misconduct was not for a public purpose. We quoted from this case at length as follows because the Court had cited numerous authorities in support of this position:

[i]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct.Board of Chosen Freeholders v. Conda, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillin, Municipal Corporations (3d ed. 1973 rev.), § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See e.g. Chapman v. New York, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Wilson v. Board of County Commissioners, 273 Md. 30, 327 A.2d 488 (1974) ... .

*2 New Jersey [case law] presented a fact situation similar to that in the instant case. See Township of Manalapan v. Loeb, 126 N.J.Super. 277, 314 A.2d 81,aff'd. per curiam131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of $200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and failing to take the necessary steps to see that the township was reimbursed for the amount of the calls. The indictment was dismissed against the mayor and administrator, and a jury found the committeeman not guilty. In spite of the favorable termination of the legal proceedings, the court in the declaratory judgment action held that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 83, citing 56 Am.Jur.2d, Municipal Corporations, Etc., § 208, at 266, and 64 C.J.S., Municipal Corporations, § 183, at 341. In reference to Defendant's 'public purpose' argument in the present case, this Court adopts the words of the Manalapan court: 'Here, under no circumstances can it be said that the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality." 314 A.2d at 82.

469 A.2d at 902.

Thus, our September 14, 1995 opinion concluded that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding."

The Supreme Court of Illinois recently concurred with the body of case law which has concluded that it does not constitute a public purpose to indemnify public officials for expenses incurred in the defense of a criminal prosecution. In Wright v. Danville, 174 Ill.2d 391, 675 N.E.2d 110 (1996), the Court held that a city ordinance was invalid to the extent it attempted to indemnify officials convicted of crimes for their attorneys fees and costs incurred in their unsuccessful criminal defense. The Court's view of the ordinance consisted of the following analysis:

[a]lthough plaintiffs are correct in their assertion that courts in some jurisdictions have determined that defending a public official from criminal charges may be a proper public purpose, it is generally held in these jurisdictions that a valid public purpose exists only when the authority of the municipality is limited to the reimbursement of legal expenses incurred in a successful defense. See Lomelo v. City of Sunrise, 423 So.2d 974, 976-77 (Fla. App. 1983) (costs of defending public official for misconduct charges served public purpose only because official was acquitted of charges); Ellison v. Reid, 397 So.2d 352, 354 (Fla. App. 1981); Snowden v. Anne Arundel County, 295 Md. 429, 439, 456 A.2d 380, 385 (1983) (indemnity ordinance served public purpose primarily because it limited reimbursement to only those public officials who had successfully defended themselves against criminal charges); Bowens v. City of Pontiac, 165 Mich.App. 416,

420, 419 N.W.2d 24, 26 (1988) (Shepherd, J., concurring); Sonnenberg v. Farmington Township, 39 Mich. App. 446, 449, 197 N.W.2d 853, 854 (1972); Korschel v. City of Afton, 512 N.W.2d 351, 355 (Minn. App. 1994); Valerius v. City of Newark, 84 N.J. 591, 596, 423 A.2d 988, 991-92 (1980); Beckett v. Board of Supervisors, 234 Va. 614, 619 n. 7, 363 S.E.2d 918; 921 n. 7 (1988).Still, other states have held that the cost of defending a public official from criminal or official misconduct charges is never a proper public purpose. See Hall v. Thompson, 283 Ark. 26, 28-29, 669 S.W.2d 905, 906-07 (1984); Bowling v. Brown, 57 Md.App. 248, 260, 469 A.2d 896, 902 (1984); Corning v. Village of Laurel Hollow, 48 N.Y.2d 348, 353-54, 398 N.E.2d 537, 540-41, 422 N.Y.S.2d 932, 935-36 (1979); Township of Manalapan v. Loeb, 126 N.J.Super. 277, 278-79, 314 A.2d 81, 81-82 (1974) (no authority for indemnification of municipal officer for costs of defending criminal charges which amount to official misconduct); Silver v. Downs, 493 Pa. 50, 55-57, 425 A.2d 359, 362-64 (1981); see also 56 Am.Jur.2d Municipal Corporations § 208 (1971) (municipality has no power to reimburse an official for expenses incurred in defense of official misconduct charges); 63A Am.Jur. Public Officers and Employees § 406 (1984) (members of governing body may not expend public funds to shield themselves from consequences of own unlawful and corrupt acts); 3 McQuillin on Municipal Corporations § 12.137.10 (3d rev. ed. 1990) (municipality cannot expend money to reimburse its officer for expenses incurred in defending official misconduct charges). Under the principles of all these cases, plaintiffs would not be able to recover the expenses of the unsuccessful criminal defense of the commissioners and corporation counsel from the city.

*3 Further, the purpose of indemnification, so as not to inhibit capable individuals from seeking public office, has no relevance in the context of the criminal conduct involved in this case. No official of public government should be encouraged to engage in criminal acts by the assurance that he will be able to pass defense costs on to the taxpayers of the community he was elected to serve. See Powers v. Union City Board of Education, 124 N.J.Super. 590, 596, 308 A.2d 71, 75 (1973).To the contrary, holding public officials personally liable for the expenses incurred in unsuccessfully defending charges of their **criminal** misconduct in office tends to protect the public and to secure honest and faithful service by such servants. Indeed, allowing expenditure of **public** **funds** for such **use** would encourage a disregard of duty and place a premium upon neglect or refusal of public officials to perform the duties imposed upon them by law. Bowling v. Brown, 57 Md.App. 248, 258, 469 A.2d 896, 901 (1984) ("[T]o reimburse [convicted public officials] for their legal expenses would not encourage the 'faithful and courageous discharge of duty on the part of public officials.' [Citation.] On the contrary, it would encourage the reverse"). The types of individuals who are drawn to these corrupt practices should not be given any incentive to seek public office.

675 N.E.2d at 115-116 (emphasis added).

A number of Attorneys General in other jurisdictions have reached the same conclusion as these courts. For example, in Minn. Op. Atty. Gen. 125-A-25, 1980 WL 119580 (Minn. A.G.), (July 28, 1980), the Minnesota Attorney General concluded that a county was "without authority to reimburse" a deputy for the cost of his legal defense arising out of a criminal charge against him. While acknowledging that there might be instances where public policy considerations "might be advanced in favor of permitting payment of criminal defense costs ..., the authority to do so should derive from proper statutory or charter authorization with respect to such reimbursement."Likewise, in La. Atty. Gen. Op. No. 89-401, 1989 WL 454326 (La. A.G.) (August 14, 1989), the Louisiana Attorney General found that a coroner performing medical experimentation upon infants "is not within the course and scope of his duty to investigate cause and manner of death is not entitled to attorneys fees for successful legal defense of criminal and civil proceedings against him."And in N.M. A.G. Op. No. 85-23, 1985 WL 190691 (N.M. A.G.) (September 16, 1985), it was concluded by the New Mexico Attorney General that "no authority exists which would empower the Risk Management Division to spend money from the Workmen's Com-

pensation Retention Fund, the Public Liability Fund or any of the other statutorily created funds which the Division administers to either employ attorneys to provide a criminal defense for public employees or to purchase insurance for that purpose."

*4 The thrust of your question is what remedies are available where a school board continues to ignore this body of case law and indemnifies a fellow school board member or other school officials for the costs and expenses of a criminal prosecution. A number of remedies are available, of course, the most obvious one--including the ballot box. However. I gather that your question is focused more upon a remedy which would halt this practice and possibly allow for recovery to the public the monies expended by the Board for this purpose.

A leading South Carolina case in this is Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985). There, the town of Greenwood reimbursed spouses of the City Council for attendance of the 1982 National League of Cities Convention in Los Angeles, California. A taxpayer of the Town brought a declaratory judgment action challenging such expenditures.

The initial question before the Supreme Court was whether a taxpayer possessed sufficient legal standing to contest these payments. The Court held that he did. Concluding that "taxpayers ... have an interest in seeing that city officials disburse funds in a lawful manner ...[,]" the Court found legal standing to be present. Further the Court found that there existed "no public purpose in this case because the factual circumstances are too remote ... ."

Likewise, in Tucker v. S.C. Dept. of Highways and Pub. Transp., 309 S.C. 395, 424 S.E.2d 468 (1992), the Supreme Court allowed a taxpayer action to challenge a statute requiring approval of county legislative delegation for expenditure of construction funds and allowing the delegation to contract for improvements. The Court subsequently held that the statute violated the constitutional separation of powers provision.

Courts have also permitted taxpayers to bring an action for a declaratory judgment that a town council had acted beyond its powers in approving reimbursement for expenses incurred in the defense of a criminal prosecution. Bowling v. Brown, supra provides considerable guidance in this area.

The Bowling decision first concluded that the municipality possessed no authority to authorize reimbursement for criminal defense expenditures. Said the Court:

> [i]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct.Board of Chosen Freeholders v. Conda, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillen, Municipal Corporations, (3d ed. 1973 rev.) § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See e.g., Chapman v. New York, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Wilson v. Board of County Commissioners, 273 Md. 30, 327 A.2d 488 (1974).
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> *5 A New Jersey case presented a fact situation similar to that in the instant case. See Township of Manalapan v. Loeb, 126 N.J.Super. 277, 314 A.2d 81,affd. per curiam131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of 200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and fail-

> ing to take the necessary steps to see that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 82, citing 56 Am.Jur.2d, Municipal Corporations, Etc., § 208, at 266, at 64 C.J.S., Municipal Corporations, § 183, at 341. In reference to Defendants' 'public purpose' argument in the present case, this Court adopts the words of the Manalapan court: 'Here, under no circumstances can it be said that the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality.' 314 A.2d at 82.

Id. at 901.

The Court then noted that "[o]nce the Plaintiff has established that the expenditures were not for a public purpose, the burden shifts to Defendants to justify relieving them of personal liability for the amounts expended."Defendants argued, however, that they were performing a "discretionary function" and were thus immune from suit under Maryland law. The Court rejected this argument, concluding that

> [a]s the Plaintiff correctly argues, if the funds expended by the Town Council ... were not for a public purpose, the expenditure was an ultra vires act outside the scope of Defendant's employment and [the immunity statute] ... does not apply.

Id. at 903.Likewise, the Court found that the doctrine of qualified immunity "applies to actions for tort and has no application to acts which are ultra vires." Id. Moreover, the Court refused to hold that the defendants should not "be personally liable for the funds expended because they exercised good faith in authorizing the expenditures." Unsure, however, that the appropriate standard to qualify for immunity was one of "due diligence" in authorizing the expenditures or one of strict liability the Court noted that there was clearly law favoring both standards:

> [t]his Court is not sure whether the Maryland Court of Appeals will follow the lead of the California Court and adopt the due care standard. In a similar case, the Court of Appeals declined to consider the question of good faith, because it found that the defendants had acted within the scope of their authority. See, Smith v. Edwards, 292 Md. 60, 437 A.2d 221, 228 n. 5 (1981). This Court does not reach the question of whether the due care standard should apply in Maryland, because the Defendants have failed to present sufficient evidence of due care to bring the question into play. The Court does note that ... Defendants should show evidence of both good faith and due care to present a serious challenge to the continued utility in Maryland of the strict liability standard set forth in Gloyd v. Talbott [221 Md. 179, 156 A.2d 665 (1995)]. ... The Court holds that the Defendants did exceed their authority as Town Commissioners as the Plaintiff has established that the expenditure of town funds by Defendants to reimburse town employees for legal expenses incurred defending themselves from criminal charges of misconduct in office was not an expenditure for a public purpose. Even if the Court assumes that the Court of Appeals would adopt the reasonable care doctrine as previously discussed in this Opinion, the Defendants have failed to establish that they used reasonable care in consulting their attorney about the expenditures subjudice and therefore are personally liable for the funds expended....

*6 469 A.2d at 904-905.

The law in South Carolina is supportive of liability for public officers who perform ultravires acts. Our Supreme Court has held, for example, that

> [t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.Sligh v. Bowers, 62 S.C. 409, 40 S.E. 885;Mauldin v. City Council of Greenville, 33 S.C. 1, 11 S.E. 434, 8 L.R.A.; 291; McCullough v. Brown, 41 S.E. 220, 19 S.E. 458, 23 L.R.A. 410,Pom. Eq. Jur.

277, Sec. 260, 2 Dill. Mun. Corp. Sec. 736.
Kirk v. Clark, 191 S.C. 205, 210, 4 S.E.2d 13 (1939). In Chandler v. Britton, 197 S.C. 303, 310, 15 S.E.2d 344 (1941), the Court stated that "in the absence of any statutory law to the contrary a public official is not liable for the loss of funds deposited with him if he has exercised that degree of care and prudence in the management of funds which a person of ordinary care and prudence would exercise in his own business." The Court, in Long v. Seabrook, 260 S.C. 562, 568, 197 S.E.2d 659 (1973) concluded that "[t]he failure of a public official to comply with the laws governing and regulating his powers and duties may give rise to liability." And in Sumter Co. v. Hurst, 189 S.C. 316, 1 S.E.2d 242 (1939), the Court said that "[w]e think that there can be no dispute of the proposition that when a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended." Id. at 319.

Moreover, in Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923), our Supreme Court recognized the following general principle:

> ... In the sense that all powers of municipal corporations are held in trust for public use, all property held by such corporations is held in a fiduciary capacity. ... Property held by such corporations for strictly governmental purposes or which has been devoted to a special public use may be sold or disposed of only under express legislative authority; but property acquired and held for general municipal purposes is subject to the corporation's discretionary power of use and disposal. ... It is universally conceded, however, that such discretionary power of use and disposal does not include the authority to donate municipal property to a strictly private use, for the obvious reason that a transfer or release of such property by a municipality to a private ownership without receiving in return some consideration of reasonably equivalent value would amount to a palpable breach of the trust upon which it is held.

115 S.E. at 600.

Thus, it would appear to me that the most feasible remedy available with respect to your situation is a taxpayer action concerning the expenditure of **public funds** for a private purpose. The question of the **use** of **public funds** to indemnify a public official for defense of a **criminal** action has never been addressed by our courts, to my knowledge. Nonetheless, as indicated above, a number of courts in other jurisdictions have concluded that such expenditures do not constitute a public purpose even where the defense of the criminal action is ultimately successful. Here, the issue of the validity of § 59-17-110 would also have to be addressed in any such action. See Wright v. Danville, supra.An action for declaratory judgment would be the type of action typically brought by a taxpayer. In addition, the remedy of injunction against future expenditures of such funds for such purpose as well as reimbursement for past expenditures would be possible as well. It is thus my opinion, consistent with the opinion of **Attorney** General Condon, dated September 14, 1995 that our courts would conclude that a school district may not expend **public funds** to **pay** a school board member's or an employee's expenses of representation in **criminal** proceedings. It is also my opinion that a taxpayer action of the type described above would be the most effective remedy.

*7 With kind regards, I am

Very truly yours,
Robert D. Cook
Assistant Deputy **Attorney** General

Reviewed and Approved by:

Zeb C. Williams, III
Deputy **Attorney** General

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