



ALAN WILSON  
ATTORNEY GENERAL

October 26, 2023

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Dear Mr. Gaskins:

We understand you act as general counsel for the Berkeley County School District (the "District") and wish to request an opinion of this Office on behalf of the District as to "whether a school district, which has imposed a sales and use tax pursuant to the Education Capital Improvements Sales and Use Tax Act (the "Act"), may expend revenue from such tax to build only a portion of a capital improvement in the voter-approved referendum authorizing such tax." In your request, you provide these additional facts:

In August 2022, the Board of Trustees for the District adopted a resolution to impose a sales tax under the Act, subject to the approval of the voters in the referendum. The resolution identified the specific education capital improvements of "[c]onstruction and equipping of a K-8 school in the Nexton area," among several other improvements. The referendum was included in the general election held on November 8, 2022, and the voters approved the imposition of the tax as presented on the referendum, with 71% voting in favor and 29% voting in opposition. The broad support for the referendum throughout the county indicates that no single project was material to the outcome of the vote.

Following the November 2022 election, the District appointed a new superintendent. As part of the new administration's capital planning, it reviewed the specific education capital improvements identified in the resolution and referendum and decided that it was in the best interests of the District to construct a middle school instead of building a K-8 school in the Nexton area. The administration presented its recommendation to build the Nexton middle school at the Board's February 7, 2023 meeting, and the Board approved the recommendation by a vote of 6-1.

Law/Analysis

As you mentioned in your letter, the Act allows certain school districts to impose a one percent sales and use tax to fund specific education capital improvements for a school district or districts. S.C. Code Ann. § 4-10-420 (2021). Section 4-10-425 of the South Carolina Code (2021) specifies the procedure for enacting the tax and provides:

(A) The tax authorized by this article may be imposed in the county upon the adoption of an approving resolution by the board of trustees of a school district, and the subsequent approval of the imposition of the tax by referendum open to all qualified electors residing in the county in which the question includes each specific education capital improvement included in the resolution and any incorporated memorandum of agreement.

(emphasis added). Section 4-10-425(C) specifies the contents of the ballot to be voted on and states:

(C) The ballot to be voted upon in the referendum must read substantially as follows:

EDUCATION CAPITAL IMPROVEMENTS SALES AND USE TAX ACT  
REFERENDUM FOR \_\_\_\_\_ COUNTY

Must a special one percent sales and use tax be imposed in \_\_\_\_\_ County for not more than \_\_\_\_\_ years with the revenue of the tax used to pay, directly or indirectly, the cost of the following education capital improvement projects in \_\_\_\_\_ County

- (1) \_\_\_\_\_
- (2) \_\_\_\_\_ etc.?

Yes  
No

Those voting in favor of the question shall deposit a ballot with a check or cross mark in the square after the word "Yes", and those voting against the question shall deposit a ballot with a check or cross mark in the square after the word "No".

The ballot may contain a short explanation of the question to be voted upon in this referendum.

We note that neither this provision nor any other provision of the Act specifies how and to what extent each project must be described. However, section 4-10-420(A) restricts spending on such projects in stating: “A school district board of trustees shall use the school district’s share of the distribution only to pay for those capital improvements provided in the resolution and included in the referendum question directly, or to service general obligation debt incurred by the districts for such improvements, or a combination of these purposes.” Moreover, section 4-10-440(D) of the South Carolina Code (2021) provides: “The proceeds of the sales and use tax paid to the county treasurer for the benefit of a school district must be applied only for the purposes set forth in the resolution adopted pursuant to Section 4-10-425.” Therefore, the Act makes clear that in order to fund an education capital improvement with revenue from the tax, it must include the education capital improvement in the resolution and referendum.

In prior opinions, this Office discussed the specificities of ballot questions in relation to the funding of particular projects. “Generally, ‘a ballot description must give a true and impartial statement of the purpose of the measure . . . .’ Ops. Atty. Gen. (August 30, 1996); see also Stackhouse v. Floyd, 248 S.C. 183, 149 S.E. 2d 437 (1965); Ex Parte Tipton, 229 S.C. 183, 93 S.E. 2d 640 (1956).” Op. Att’y Gen., 1998 WL 196489 (S.C.A.G. Mar. 10, 1998). “As we have stated in previous opinions ‘a ballot referendum may not confuse or mislead the voter.’” Op. Att’y Gen., 2009 WL 2844866 (S.C.A.G. Aug. 19, 2009) (quoting Op. Att’y Gen., 2003 WL 21108486 (S.C.A.G. May 8, 2003)). In a 2004 opinion we addressed the ballot requirements for the imposition of a sales tax pursuant to section 4-37-30. Op. Att’y Gen., 2004 WL 2052167 (S.C.A.G. Sept. 13, 2004).

We have advised with respect to § 4-37-30 in particular that “the purpose of the enacting ordinance, like the ballot question, is to educate the public about the substance of the pending referendum,” Op. S.C. Atty. Gen., November 7, 2001. Thus, we have observed that there should be

... as much disclosure to the public as practicable. Thus, although project categories may be sufficient, [we] ... would advise against identifying the projects only [by] reference to a pre-existing program list. The identification and description of the project categories should be adequately detailed in the enacting ordinance.

Id. See also, Op. S.C. Atty. Gen., August 30, 1996 [“A ballot description must give a true and impartial statement of the purpose of the measure in such language as not intentionally to be an argument or to be likely to create prejudice either for or against the measure.” 42 Am.Jur.2d, Initiative and Referendum, § 46 (1969).”]

Id. In that opinion, we also noted that governing bodies are given broad discretion as to the expenditure of funds within those projects listed. We cited to a 2001 opinion in which we stated:

However, although the statute requires that the governing body notify the public of the intended uses of the proceeds of the tax, the county may maintain some discretion in the expenditure of the funds for [the] best interests of the public. For example, in Ramsey v. Cameron, 245 S.C. 189, 139 S.E.2d 765 (1965), the Supreme Court of South Carolina found that pursuant to the Municipal Bond Act, the effect the referendum question is to limit the use of funds for the purposes set forth in the referendum question. How those funds are spent and the precise improvements to which the proceeds are applied are decisions within the discretion of the municipal governing body. Id. In Sarrat v. Cash, 103 S.C. 531, 88 S.E. 256 (1916), the Supreme Court addressed the allegation by voters that they had approved a bond referendum based on representations made by school trustees that a school would be built in a certain location; upon approval of the referendum, the school trustees decided to build the school elsewhere. The court denied the plaintiffs' request to enjoin the trustees from building the school at a different locality, upholding the trustees' right to exercise discretion in the matter:

[The trustees] could not, therefore, bind themselves by promises or representation, so as to divest themselves of the right to a free and untrammelled exercise of their judgment and discretion for the best interests of their district at the time they were required to act as a body.... It would be contrary to public policy to allow public officers who are charged with the duty of exercising their judgment and discretion ... to bind or fetter themselves by promise or presentation to individuals or to electors of ... the district so that they could not, at all times, act freely and impartially.... The power was conferred upon them for public purposes, and it could not be lawfully bartered away to influence ... votes in the election. The electors are presumed to have known this. Therefore they had no legal right to reply upon the alleged representations, or to be influenced by them in ... voting in the election.

Id. at 535-36, 88 S.E. at 258.

Op. Att'y Gen., 2001 WL 1736760 (S.C.A.G Nov. 7, 2001).

We believe the reasoning behind these opinions holds true regarding referendums conducted pursuant to the Act. Like the referendums discussed in the opinions cited above, we believe the purpose of a referendum held pursuant to the Act is to educate voters on the specific education capital improvements funded by imposition of the sales and use tax so they can make an informed decision as to whether to vote for or against the imposition of a sales and use tax. To that end, the Act specifically restricts expenditures of the tax for only those projects included in the list in the resolution and approved by the voters. However, following the Supreme Court's holdings in

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Ramsey and Sarrat, the District likely has some discretion in expending funds within the scope of the projects listed.

We understand the voters approved a referendum which included “Construction and equipping of a K-8 School in the Nexton area” as one of the education capital improvements to be funded by the tax. Subsequent to the approval of the referendum, the District found it was in its best interest to construct a middle school rather than a K-8 school. While we do not know exactly what grades will be housed in the middle school, we presume it will encompass some, but not all, grades within the specified K-8. Whether or not the construction of a middle school is within the scope of the education improvement project listed in the resolution is a question of fact, which can only be determined by a court. Op. Att’y Gen., 2023 WL 4401925 (S.C.A.G. June 30, 2023) (stating “this Office does not have the ability to make factual determinations.”). However, we believe a court could find the description provided in the resolution and approved by the voters remains sufficient to inform the voters as to the intended use of revenue generated from the tax. Moreover, we believe a court could find reducing the scope of this education capital improvement is within the District’s discretion as described by our Supreme Court in Ramsey and Sarratt. In which case, the District could expend revenue from the tax to build a school that houses fewer grades but is still within the scope of what the voters approved.

### **Conclusion**

The Education Capital Improvements Sales and Use Tax Act allows for the imposition of a one percent sales and use tax to fund specified education capital improvements, which must be included in the resolution approved by the voters. Based on prior opinions of this Office, these education capital improvements must be described in such a way and with adequate detail to educate the public as to how the revenue will be spent so the public can decide whether to approve the referendum. Once approved, the Act requires that the District expend revenue generated from the tax only for such education capital improvements as are included in the referendum. However, in Ramsey and Sarrat, our Supreme Court indicated governing bodies have some discretion as to expenditures within those projects listed.

In regard to the District, we understand it wishes to build a school encompassing some, but not all, of the grades described in an education capital improvement listed in the resolution and approved by the voters. We believe a court could find the District is simply decreasing the scale of the project approved by the voters and such a modification is within the District’s discretion following Ramsey and Sarrat. Nonetheless, as we stated above, determining whether this modification satisfies the requirements of the Act is a factual determination, which only a court may decide with finality.

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Sincerely,



Cydney Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General