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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

November 13, 2003

The Honorable Dean Fowler, Jr.
Florence County Treasurer
180 North Irby Street MSC-Z
Florence, South Carolina 29501

The Honorable Thomas E. Smith, Jr.
Member, Florence County Council
Post Office Box 308
Pamplico, South Carolina 29583

Gentlemen:

By a letter dated July 7, 2003, Mr. Fowler requested an opinion of this Office as to the use of what he terms "Discretionary Funds, which have been created by the County Council of Florence County." In his letter, Mr. Fowler states that separate funds have been created for each individual district of Florence County, to be spent at the discretion of the council member for each respective district. He further indicates that the surplus funds for each district are annually carried over in the individual district's account to the next fiscal year. Mr. Fowler notes that there is collectively $1.7 million dollars in funds which currently are available for the nine council districts.

In response to Mr. Fowler's July 7 letter, Councilman Smith wrote to this Office in a letter dated July 14, 2003 to clarify the situation and provide additional facts regarding the nature of the funds which Mr. Fowler referred to as "discretionary." Mr. Smith stated that the funds of the 2003-2004 budget in dispute were appropriated by the Council following "every procedural and statutory requirement, including public hearings and the required three readings." Mr. Smith informs us that the funds in question were appropriated as follows in the 2003-2004 budget:

(1) On page 50 of the budget ordinance there is appropriated to Fund 10, Department 439 (Public Works) the sum of $420,000 for road paving.
(2) On page 108 of the budget ordinance there is appropriated to the Fund 37 (Capital Improvement) the sum of $450,000 for Infrastructure Improvements.

It appears from information provided by Mr. Fowler that these appropriations were allocated equally among the nine council districts in Florence County. Mr. Smith has indicated that during the hearings no one argued or moved to eliminate these appropriations, nor was any motion made

to eliminate the application of the "carry over" funds from the previous year for the same purposes in the current year. Mr. Smith states that the term "discretionary funds" is Mr. Fowler's term of reference for these funds, not the County Council's description. Moreover, it is Mr. Smith's position that the funds have been consistently spent in each of the nine districts for public purposes according to the policies and procedures of Florence County. He notes that these funds have been used in his district for "road improvements, public recreation, feasibility studies for water and sewer services, assistance to municipalities for their building or water projects, and for rural fire districts." He further states that the amounts and uses of these funds are matters of public record, subject to the Freedom of Information Act requests as well as internal and external audits.

In response to Councilman Smith's July 14 letter, Mr. Fowler wrote a letter dated July 22, 2003 which he copied to this Office. Mr. Fowler defended the use of the term "discretionary funds" in lieu of "infrastructure funds" in that the money is dedicated to each individual council district and is spent at "the will of each individual councilperson, for whatever project, for whomever, and whenever it is deemed appropriate by that council person." Accordingly, Mr. Fowler argues that the term "discretionary" is appropriate.

Mr. Fowler has also provided a September 3 newspaper article dealing with these funds. This article describes "discretionary funds" as being used for municipalities, charities, festivals, beautification projects, baseball teams, schools, associations as well as other entities.

Based upon the information provided, the primary question raised in this dispute can be summarized as follows:

> Does the County Council of Florence County possess the legal authority to structure particular appropriations of public funds where individual council members are given discretion as to how the funds are specifically expended within their respective council districts?

Law / Analysis

It should be noted at the outset that a county ordinance is entitled to a presumption of constitutionality. See, Rothchild v. Richland County Bd. of Adjustment, 309 S.C. 194, 420 S.E.2d 883, 856 (1992). Accordingly, while this Office may comment upon constitutional problems, only a court may declare an ordinance void as in conflict with the Constitution.

On the other hand, we have previously stated that

> [g]enerally, it is recognized that unless a statute specifically provides otherwise, legislative powers vested in the governing body of a municipality cannot be delegated to administrative officials of the municipality. However, purely administrative,

> ministerial, or executive powers may be delegated by a municipal governing body to the appropriate officer.

Op. S.C. Atty. Gen., October 8, 1985. And, in an opinion dated April 4, 1996, we recognized that "'strictly governmental powers ... cannot be conferred upon a corporation or individual.'"

Moreover, in another opinion, dated March 6, 1980, we recognized that "[i]t has long been the law in this State that no municipality may by contract part with the authority delegated it by the State to exercise the police power." Likewise, in Op. S.C. Atty. Gen., January 7, 1985, we stated that while "[d]uties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated" by a municipal corporation or a county governing board to an agent, employee or servant, by contrast, "[p]owers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated ...." Quoting 20 C.J.S., Counties, § 89. As was noted in that opinion, "[t]he law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer or department or governing body in which the power is vested, and the performance of merely ministerial duties by subordinates or agents." Citing, McQuillin, Municipal Corporations, § 10.41.

These principles have also been adopted by our own Supreme Court. In G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980), for example, the Court recited the rule that "[a] municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise." 266 S.E.2d at 85. See also, City of Bft. v. Bft.-Jasper County Water and Sewer Auth., 325 S.C. 174, 480 S.E.2d 728 (1997) [contested clause in contract represents an unlawful delegation of governmental power by water authority]; see also, Op. S.C. Atty. Gen., Op. No. 85-81 (August 8, 1985) [administrative body cannot delegate quasi-judicial, discretionary functions].

In this same regard, it is well established that a municipal council may not delegate discretionary duties to individual members of council. It has thus been recognized as the governing rule that

> [a] municipal governing body cannot delegate to a municipal officer or even to one of its own committees the power to decide legislative matters properly resting in the judgment and discretion of that body or to one member of the governing body. Thus, acts by individual members of a public body cannot bind the municipality unless officially sanctioned in accordance with a statute. The members of the governing body are chosen by the people to represent the municipality and they are charged with a public trust and the faithful performance of their duties and the public is entitled to the judgment and discretion of each member although the governing body may refer matters coming before it to a committee for examination and fact-finding.

56 Am.Jur.2d, Municipal Corporations, § 134.

In addition, as we emphasized in Op. S.C. Atty. Gen., Op. No. 84-111 (September 6, 1984), "[i]t is a well established rule in this State, as well as other States, that where the Legislature has committed a matter to a board, bureau or commission on other administrative agency, such ... must act thereon as a body at a stated meeting, or one properly called, and of which all the members of such board have notice, or of which they are given an opportunity to attend .... [A]greement by the individual members acting separately, and not as a body ... is not sufficient." See, Gaskin v. Jones, 198 S.C. 509, 18 S.E.2d 454 (1942) [in the absence of statute or other controlling provision, the common law rule that a majority of a whole body is necessary applies]. In Abbeville v. McMillan, 52 S.C. 60, 72 (1897), our Supreme Court quoted with approval the language used by the United States Supreme Court in Cooley v. O'Connor, 12 Wall. 391 at 398 (1871):

> [i]t is true that when an authority is given jointly to several persons, they must generally act jointly or their acts are invalid .... The commissioners were public agents, clothed with public authority. They were created to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number.

Several cases support the foregoing legal principles. For example, in Northern Boiler Co. v. David, 105 N.E.2d 451 (Ohio 1952), affd., 106 N.E.2d 620 (1952) the Ohio Court held that an ordinance which provided that no permit shall be granted to the Director of Public Service to cut the curb within any ward of the city over the objection of the council member for that ward was unconstitutional. Referencing the general rule cited above, the Court found that such ordinance unlawfully delegated the legislative power of the municipal council to a single member thereof:

> [t]here is no doubt that the council of a municipal corporation is authorized ... to regulate the streets and highways of such municipal corporation. But in exercising that right they cannot act in an arbitrary manner. So, in delegating the right to grant or effectively prevent a property owner to cut the curb as a necessary step in constructing a driveway to provide ingress and egress to a public highway from such abutting property, the rule or policy in determining the basis on which such permit will be granted or withheld must be determined by the Council. Such a matter is legislative in character. The ordinance under consideration, as above indicated, fails to provide such legislative policy and in delegating the right to one of its members, to prevent a property owner of cutting the curb, so that ingress or egress may be provided from his property to the public thoroughfare upon which it abuts, for whatever reasons he deems sufficient, without spelling out the legislative policy with regard thereto, constitutes the delegation of legislative authority to such councilman, and such ordinance is, for that reason, unconstitutional and of no legal effect.

105 N.E.2d at 453. (emphasis added).

On appeal, the Supreme Court of Ohio noted that "[a]n uncontrolled discretion has invariably been held to be a delegation of legislative power." 106 N.E.2d at 623. The Court rejected the contention that appeal could ultimately be had to the council for review and that, therefore, no unlawful delegation was present. Referencing 9 McQuillin, Municipal Corporations, § 26.203, the Court upheld the lower court's ruling that the ordinance in question unlawfully delegated authority to the single member of council, observing that "[a]n ordinance conferring upon officials unrestricted discretion in the granting or refusal of building permits is a denial both of equal protection and due process of law." 106 N.E.2d at 624.

Likewise, our own courts have generally not been supportive of a subdelegation of discretionary functions to individual members of a public body or to agents or employees of that body. In Pettiford v. S.C. State Bd. of Ed., 218 S.C. 322, 62 S.E.2d 780 (1950), our Supreme Court held that an administrative board or body, when acting in a quasi-judicial capacity, must itself consider all the evidence before rendering a decision. In the Supreme Court's opinion, while the Board of Education could delegate to Board members the authority to take testimony and hear witnesses, the Board could not subdelegate its decision-making authority.

Moreover, in Dawson v. State Law Enforcement Division, 304 S.C. 59, 403 S.E.2d 124 (1991), the Supreme Court articulated the following reasoning:

> [w]e further conclude the Grievance Committee, as the final administrative authority, may not delegate its role as final decision-maker to the Personnel Director. See Bradley v. State Human Affairs Comm'n., 293 S.C. 376, 360 S.E.2d 537 (Ct. App. 1987). Once an appeal is forwarded to the Grievance Committee, the Committee has exclusive jurisdiction to decide all issues.

403 S.E.2d at 125.

In Bradley, the Court of Appeals held that the State Employee Grievance Committee chairperson could not delegate quasi-judicial powers of the Committee to the Committee's attorney, notwithstanding that a specific statute provided that the attorney could assist the Committee in preparation of its findings of fact, statements of policy and conclusions of law. The Court of Appeals concluded:

> [a] reading of the statute makes it clear that the job of a committee attorney is only advisory to the committee. (Not all committee members are lawyers and as such are not familiar with procedural and evidentiary matters.) However, the role of decision maker cannot be delegated. Kerr-McGee Nuclear Corporation v. New Mexico Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (1981)

(administrative bodies cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character or which require the exercise of judgment). Cf. South Carolina Department of Social Services v. Bacot, 280 S.C. 485, 489, 313 S.E.2d 45, 48 (Ct. App. 1984) (family court's duty to decide issue of paternity cannot be delegated to expert or anyone else). Here, the committee chairman took it upon himself to delegate decision making to the attorney. This was error. 360 S.E.2d at 539. ...

In addition, Carll v. South Carolina Jobs-Economic Development Authority (JEDA), 284 S.C. 438, 327 S.E.2d 331 (1985) is instructive. In Carll, it was contended that the Act creating JEDA constituted an unlawful delegation of legislative power. The Court, rejecting the argument, analyzed the Act as follows:

> [a]ccording to the provisions of the Act the Authority may delegate the implementation of the loan programs to lending institutions, but retains ultimate responsibility for the programs through regulations and contractual agreements with the institutions, and the Authority must provide proper oversight for implementation of the programs. Each loan made by the lending institution must be to someone in the beneficiary class and must comply with all of the Authority's regulations. Further, the lending institution must submit evidence satisfactory to the Authority that all loans satisfy the conditions and regulations of the Authority.
>
> A careful review of these provisions shows the Authority maintains final control over the implementation and management of loan programs. Given the Authority's control over and involvement in the implementation of these programs, the Authority's power to delegate ministerial responsibility by contract pursuant to the Act and the Authority's regulations constitutes a constitutionally permissible delegation.
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> 327 S.E.2d at 336-337. (emphasis added).

The previous opinions of this Office are also in accord with the above-referenced South Carolina court decisions. In Op. Atty. Gen., 89-45 (April 13, 1989), the question addressed was whether the administrative functions of a town's water and sewer department could be lawfully delegated to a single commissioner of public works. In concluding that such subdelegation was not authorized we stated:

> [t]he general law, applicable in this situation, is that authority vested in a board or commission for public purposes may be exercised by a majority of the members if all have had notice and opportunity to act and a quorum, or the number fixed by statute, are present. The presence and vote of a quorum is necessary, and the action of less than a quorum of a public body is void. 1 Am.Jur.2d Administrative Law Sec. 196. Unless otherwise provided by statute, the authority of a commission may not be exercised by a single member of such body, or less than a majority. 73 C.J.S. Public Administrative Law and Procedure Sec. 20. Therefore, the response to your question is that the elected commissioner has no individual authority to single-handedly make decisions concerning direction and control of the water and sewer department. Instead, all such decisions must be made by a majority vote of a quorum of the commissioners of public works, except where the Town ordinance provides otherwise. See also, Pettiford v. S.C. State Board of Education, supra, as to what constitutes an unlawful delegation of power. (emphasis added).

And in an Opinion, dated April 6, 1989, we addressed the issue of the Workers' Compensation Commissioners' authority to delegate the approval of settlement agreements. We referenced previous opinions, dated August 2, 1985 and December 1, 1986. In the April 6, 1989 Opinion, we stated:

> [w]e believe that the August 2, 1985, Opinion made clear that the approval of workers' compensation settlements is a quasi-judicial function involving an exercise of discretion by an official who maintains quasi-judicial power under the Compensation Act and is non-delegable in the absence of express statutory authority. In the event that any doubt remains, I reference a recent State court decision [which recognized that] ... administrative bodies cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character or which require the exercise of judgement .... Bradley v. State Human Affairs Comm., 296 S.C. 376, 360 S.E.2d 537, 539 (S.C. App. 1987).

Furthermore, in an Opinion dated August 25, 1983, we said that "[i]t would appear, then, that the Director of SLED has the authority to delegate the responsibilities for conducting hearing to a separate hearing officer so long as the final decision on the matter is made by him."

Also pertinent to the issue here is the case of Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972). In Gunter, our Supreme Court struck down as unconstitutional a statute which delegated to the county legislative delegation the authority to approve or disapprove any tax increase adopted by the board of trustees of the school district. The Court's reasoning is pertinent to the present situation. Concluding that the General Assembly possessed no constitutional authority to delegate the approval or disapproval of tax increases to the delegation, the Gunter Court's reasoning may be summarized as follows:

> [u]nder Act No. 685, the Board of Trustees was granted the general power to levy taxes for school purposes in the district. After conferring this power on the Board, the Legislature passed Act No. 542 which attempted to amend the previous Act by granting to the Cherokee County Legislative Delegation the authority to approve or disapprove any tax increase adopted by the Board. This in effect, constituted the County Legislative Delegation a committee of the Legislature to determine not only when a tax increase was proper but also to take such action with regard to the increase as that committee might deem proper.
>
> That the determination of the amount of the tax levy in the school district may be a legislative function delegable to the corporate authorities of the School District under Article X, Section 5 of the Constitution is beside the point. The Act does not and cannot authorize the members of the delegation to participate in this determination as legislators, for they may exercise legislative power only as members of the General Assembly. (emphasis added).

192 S.E.2d at 474.

We turn now to the application of the foregoing principles to the so-called "discretionary fund" presently being used in Florence County. It appears that the principal dispute concerning these funds surrounds the fact that the funds are placed in separate accounts, are expended at the virtually uncontrolled discretion of each individual member of Florence County Council, and may be carried forward each year. Council members are apparently authorized to expend these funds with virtually absolute discretion so long as they are expended for the general purposes established by county council as part of the appropriations process, i.e. for road paving or infrastructure improvement.[1]

However, the central problem here is the redelegation or subdelegation by Florence County Council to each individual member of Council to determine in that member's discretion how his or her share of the funds appropriated are to be spent. In our opinion, a court would likely conclude that such discretionary decisions may not be delegated to individual members of county council.

Courts have held that one of the most fundamental legislative powers bestowed upon a municipal council is the spending power. Vermont Dept. of Public Service v. Massachusetts

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[1] There is evidently some dispute as to whether all expenditures are for a public purpose, however. We have been provided a news article appearing in the News Journal, dated September 3, 2003 which presents certain information that some expenditures may have been for private purposes. An opinion of the Attorney General cannot determine factual disputes. See, Op. S.C. Atty. Gen, December 12, 1983. Thus, we make no conclusion regarding whether or not all expenditures from this fund have been for a public purpose.

Municipal Wholesale Electric Co., 151 Vt. 73, 558 A.2d 215, 220 (1988). Moreover, as was stated in Syrtel Building, Inc. v. City of Syracuse, 78 Misc. 780, 358 N.Y.S.2d 627, 630 (1974) "[w]here the exercise of judgment and discretion and the power to burden the public treasury have been so vested by the Legislature, they may not be delegated wholesale."

In this same regard, our own Supreme Court has determined that the Legislature may not delegate authority to members of the legislative delegations to determine how so-called "C" funds may be spent in the county. Tucker v. South Carolina Dept. of Highways and Public Transportation, 309 S.C. 395, 424 S.E.2d 468 (1992). Likewise, the Court has held that the delegation of the spending power to a committee made up of members of the General Assembly unlawfully delegated legislative power to a committee of the Legislature. State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982). While the express rationale of the Court in Tucker and McInnis is that the delegation of the power to make the expenditures constituted a violation of the separation of powers requirements of Article I, § 8 of the State Constitution, these cases are also instructive with respect to the situation at hand. The decisions also stand for the proposition that legislative power resides in the hands of the General Assembly and may not be delegated to a committee of the Legislature. McInnis, supra.[2] Similarly, the legislative authority bestowed upon county council to determine how taxpayers' monies are spent may not be subdelegated to individual members of county council.

In an opinion dated January 11, 1985, we analyzed the role of the county administrator and county council in the budget process. We emphasized in that opinion the broad discretion which county council possesses in the spending and appropriation of county funds. We summarized the process this way:

> Article X, Section 7(b) of the Constitution of South Carolina mandates that a county, as a political subdivision, "prepare and maintain annual budgets which provide for a sufficient income to meet its estimated expenses for each year ... . Section 4-9-140, Code of Laws of South Carolina ... provides additionally, in part:
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> > County Council shall adopt annually and prior to the beginning of the fiscal year operating and capital budgets for the operation of county government ... .

[2] The constitutional principle of separation of powers applicable to state government by Article I, § 8 of the Constitution has been held inapplicable to local political subdivisions of the State. Gaud v. Walker, 214 S.C. 451, 53 S.E.2d 316 (1949). County Councils typically exercise the powers of all three branches of government. See, Op. S.C. Atty. Gen., September 10, 1973. Nevertheless, the legislative and discretionary decision-making authority may not be delegated.

> Clearly, the ultimate responsibility for adopting and maintaining the annual budgets and insuring that adequate revenue is generated to meet expenses lies with ... County Council.

In another opinion dated March 31, 1997, we recognized that "[c]ounty council has 'general authority over the county treasury.'" Thus, an agreement whereby the Sheriff's Department might sell certain weapons with the proceeds going directly to the Sheriff's Office could not restrict county council in the appropriations and spending process. And in Op. S.C. Atty. Gen., October 22, 1996, we noted that "[i]t goes without saying that the decision to spend money by a county council involves considerable discretion." Citing, State ex rel. Snyder v. State Controlling Board, 464 N.E.2d 617 (Ohio 1983). Finally, in Op. S.C. Atty. Gen., Op. No. 90-8 (January 17, 1990), we emphasized that any expenditure of proceeds by a law enforcement agency for an item that would have a recurring expense "must be approved by the governing body before the purchase."

Moreover, in the January 17, 1990 opinion we referenced § 4-9-30(6), further concluding that "only county council" could properly allocate county funds (gambling proceeds) to pay a county employee's moving expenses. In that same vein, an opinion dated July 20, 1981 found that Aiken County Council is not authorized to allocate monies "from the county general fund for distribution and disbursement by individual members" of County Council.

Just as the latter opinion suggests, there appears to be no statute which authorizes a county council to delegate spending authority to its individual members. While § 4-9-100 authorizes additional administrative duties to be delegated to the chairman and to receive additional compensation therefor, no state law appears to authorize subdelegation to individual Council members such broad discretion as is present here to determine how the funds in question are to be spent. The fact that the General Assembly authorized subdelegation to a specific council member (chairman) in the limited circumstances defined by § 4-9-100 (administrative duties) strongly suggests that the subdelegation of authority to individual council members to expend funds from the so-called "discretionary fund" is not present. Absent such statutory authority being expressly provided by the General Assembly, it is our opinion that a court would conclude, just as the July 20, 1981 opinion so concluded, that this authority is lacking.

It is true that § 4-9-30(6) authorizes county councils to establish such agencies and departments as are necessary and proper. Thus, it could perhaps be argued that the Florence County system allowing individual members of county council to possess the sole discretion to determine how these county funds are spent is no different from the creation of county agencies with the accompanying discretion necessary to implement the County Council's appropriations.

This argument, in our judgment, fails for the simple reason that Florence County Council may not delegate legislative or such broad discretionary power whether it be to an agency of the county or to individual members of Council itself. McInnis, supra. State law requires county council

as a body, not individual members thereof, to determine how county funds are expended. Moreover, as we recognized in Op. S.C. Atty. Gen., June 24, 1997 a statute (or ordinance) "which in effect reposes an absolute, unregulated and undefined discretion in another body bestows arbitrary powers and is an unlawful delegation of legislative powers." Citing, South Carolina State Highway Dept. v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955); State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972); Schryver v. Schirmer, 171 N.W.2d 634 (S.D. 1969). And, as the Supreme Court recently stressed in Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002), a law or enactment must "declare[] a legislative policy, establish[] primary standards for carrying it out, it lay[] down an intelligible principle to which the administrative officer must conform, with a proper regard for the protection of the public interests ...." See also, Bauer v. S.C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978); Cole v. Manning, 240 S.C. 160, 125 S.E.2d 621 (1962).

In Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955), the Supreme Court applied this test to a municipal ordinance, declaring that such ordinance unlawfully delegated legislative power. There, consistent with an Act of the General Assembly, the City Council of Columbia delegated to the Commission for Urban Rehabilitation and/or the Rehabilitation Director the authority to determine whether a dwelling "is unfit for human habitation if conditions existing in such dwelling or dwelling unit are dangerous or injurious to the health, safety or morals of the occupants of such dwelling or dwelling unit, the occupants of neighboring dwellings or other residents of the City ...." Certain minimal conditions were specified in the ordinance to make a dwelling fit for human habitation. Other conditions were enumerated which would make a dwelling unfit. Nevertheless, the Court struck down this portion of the ordinance as constituting an unlawful delegation of legislative authority. The Court reasoned as follows:

> [t]he sixth point is that the statute and ordinance contain an unconstitutional delegation of legislative authority. The recent case of South Carolina State Highway Department v. Harbin ... sustains appellants with respect to the portions of section 9 of the ordinance which are italicized in the quotation of it hereinabove and those provisions must be stricken down as unconstitutional. They do not contain a sufficiently definite standard or yardstick, just as in the Harbin case it was held that the attempted delegation of authority to the Highway Department to suspend or revoke a driver's license for cause satisfactory to it was invalid.

88 S.E.2d at 691. In Harbin, the Court, in striking down the statute in question, noted that "... in the grant of this authority [to Highway Department to revoke or suspend driver's license for cause satisfactory to the Department], there is no standard except the personal judgment of the administrative officers of the Department." 226 S.C. at 596.

Likewise, the only apparent standard here regarding the expenditure of the funds in question by individual members of Florence County Council is that such funds be for road paving or infrastructure improvements. Otherwise, such expenditures lie within the sole discretion or the

"personal judgment" of the member of Florence County Council. Harbin, supra. In our opinion, based upon the foregoing authorities, a court would likely determine that such constitutes an unconstitutional delegation of the legislative power.

Conclusion

Of course, the Florence County Ordinance creating the so-called "discretionary fund" would be entitled to a presumption of validity. Only a court could declare such ordinance to be unconstitutional. However, it is our opinion that the delegation of discretion to individual members of County Council to determine how such funds may be spent in their district constitutes an unlawful delegation of legislative power. Rather than this being a delegation of mere administrative or ministerial functions, Florence County Council has delegated legislative authority without the necessary governing standards or guidelines to avoid serious constitutional questions regarding these expenditures. As our Supreme Court recognized in Harbin v. S.C. Highway Dept., supra, "an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary power and is an unlawful delegation of legislative powers."

In our opinion, the so-called "discretionary fund" most likely falls into this category. A previous opinion of this Office concluded that the authority to make distribution of funds could not be delegated by County Council to individual council members. We reaffirm this conclusion today. Accordingly, in our opinion, a court would likely conclude that the delegation of discretion to individual members of county council to determine how these funds are spent is unconstitutional.

Yours very truly,

Henry McMaster

HM/an