

The State of South Carolina



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April 29, 1988

The Honorable Herbert Kirsh
Member, House of Representatives
532-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Kirsh:

By your letter of March 14, 1988, you have enclosed a copy of questions posed on a referendum ballot in York County in 1981 and have inquired as to the legality of the referendum questions, since it was provided that no county taxes could be used to implement the systems in question. For the reasons following, it is the opinion of this Office that the referendum questions were valid; if it should be desired that county taxes be used in conjunction with the systems, another referendum would be required.

Referendum Questions

The questions presented to the electorate of York County in 1981, concerning the county's acquisition or purchase, operation and maintenance of water and/or sewer systems, were as follows:

Question No. One

Shall the County Council of York County, South Carolina, be authorized to acquire by initial construction or purchase, establish, implement, operate and maintain a water system or systems provided that no county taxes shall be used to support the system or systems; and provided further that the sole funds so utilized shall be: (a) money from Federal and State grants, (b) revenue earned from the operation of such water system or

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systems, (c) bonds payable out of the revenues earned from the operation of such water system or systems?

Question No. Two

Shall the County Council of York County, South Carolina, be authorized to acquire by initial construction or purchase, establish, implement, operate and maintain a sewer system or systems provided that no county taxes shall be used to support the system or systems; and provided further that the sole funds so utilized shall be: (a) money from Federal and State grants, (b) revenue earned from the operation of such sewer system or systems, (c) bonds payable out of the revenues earned from the operation of such sewer system or systems?

You have advised that the voters approved both questions.

Constitutional Provision

The referendum was held pursuant to Article VIII, Section 16 of the Constitution of the State of South Carolina, which provides as follows in relevant part:

Any county or consolidated political subdivision created under this Constitution may, upon a majority vote of the electors voting on the question in such county or consolidated political subdivision, acquire by initial construction or purchase and may operate water, sewer, transportation or other public utility systems and plants other than gas and electric; provided this provision shall not prohibit the continued operation of gas and electric, water, sewer or other such utility systems of a municipality which becomes a part of a consolidated political subdivision.

Discussion

You have inquired as to the legality of the referendum since no county tax funds were authorized to be used to support the water and/or sewer systems. We can locate no authority

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which would require county tax funds to be used for these purposes; indeed, the referendum questions specified three alternate sources of revenue for operation and maintenance of the water and/or sewer systems to be established upon the success of the referendum. It is apparent that the referendum questions are valid, at least facially.

We have located an opinion dealing with an analogous situation in which a special tax district being created pursuant to Section 4-9-30(5) of the Code of Laws of South Carolina (1976, as revised) was required to establish, among other things, the maximum level of taxes authorized to be levied in a referendum. In the opinion dated June 5, 1980, enclosed, it was stated that

a special tax district created pursuant to one of the three methods set forth in Section 4-9-30(5) cannot impose uniform service charges or user fees in lieu of ad valorem taxes to finance services provided. The statute speaks of the level of "taxes" to be levied and, indeed, the district created is denominated a special "tax" district.

A footnote adds, "Arguably, the 'maximum level of taxes authorized to be levied' to be voted on under Section 4-9-30(5)(b) could be zero millage." Thus, it is possible to approve such a manner of providing water or sewer services without providing a taxing mechanism. The special tax district contemplated by Section §4-9-30(5) of the Code is not the same scheme contemplated by Article VIII, Section 16 of the Constitution, it must be noted.

To change from levying no county taxes to establishing a millage level if York County should decide to implement water and/or sewer services under the favorable 1981 referendum would, in our opinion, require another referendum to either remove the present limitation or establish a maximum or minimum level of taxation, whichever would be most acceptable to those involved in the decision-making process. As stated in 6 McQuillin, Municipal Corporations, §21.11, "Where initiative and referendum prevail, a usual restriction is that ordinances or amendments thereto, when adopted by the electors, cannot be repealed by the council or other municipal legislative body." In Allen v. Hollingsworth, 246 Ky. 812, 56 S.E.2d 530 (1933), the Kentucky Court of Appeals stated:

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Municipal councils and substituted bodies represent the inhabitants in their corporate capacity. ... They are but the servants of the people and when the people register their will in respect to things directly submitted to them, that will is controlling. ... [C]ity councils are bound to observe every provision of the submission of the question of bond issues whether required by statute or not, upon the theory that to hold otherwise would open the door to fraudulent submissions and for obtaining without fraud a grant of power that might otherwise have been denied.

Id., 56 S.E.2d at 533. Based on the foregoing, the will of the electorate as expressed in the 1981 referendum must be effectuated if the authority conferred by the successful referendum is acted upon. See also Op. Atty. Gen. dated July 9, 1985, enclosed.

This Office notes that a special tax district to be called Water West, as approved by the voters in the affected area, is presently the subject of litigation in state and federal courts. This opinion deals only with questions related to the 1981 referendum and does not comment upon the subsequent referendum. Of course, whether to implement the 1981 referendum and in what manner remain questions for the York County Council.

With kindest regards, I am.

Sincerely,

Patricia D. Petway

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Assistant Attorney General

PDP:sds
Enclosures

REVIEWED AND APPROVED BY:

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