

The State of South Carolina



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December 2, 1987

The Honorable Olin R. Phillips
Member, House of Representatives
Post Office Box 206
Gaffney, South Carolina 29340

Dear Representative Phillips:

By your letter of October 31, 1987, you have asked for the opinion of this Office on the following question:

Should an Act of the General Assembly (Act #1005 of 1970) be declared unconstitutional by the court, would the Act it amended (Act #198 of 1967) become effective, and/or applicable as provided therein?

Act No. 1005, 1970 Acts and Joint Resolutions, amended Section 21-1816 of the Code of Laws of South Carolina (1962), relative to tax levies for Chester County schools, so that Section 21-1816 presently reads in relevant part:

The auditor of Chester County shall levy the school taxes as provided in this chapter. All levies shall be set by the auditor as directed by written instructions from the board of trustees signed by the chairman and secretary and approved in writing by a majority of the members of the county legislative delegation. In the event such approval is not given in any year, the levy shall be the same as the preceding year, except that upon the unanimous written approval of the delegation the levy may be less than the preceding year. ...

The underlined portion reflects the addition to the statute made by Act No. 1005 of 1970. Without the underlined language, the statute would read as it was adopted by Act No. 198, 1967 Acts and Joint Resolutions.

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As you may be aware, the role of the legislative delegation in approving tax levies for school purposes has been challenged in several counties and held to be unconstitutional as violative of the doctrine of separation of powers. Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972); Aiken County Board of Education v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980). In Gunter and Knotts, statutes substantially similar in form and identical in substance to Section 21-1816 of the 1962 Code were declared to be unconstitutional. It must be noted that if a court were to consider the constitutionality of Section 21-1816, the statute would most likely be declared to be violative of Article I, Section 8 of the State Constitution (separation of powers).

In Knotts supra, the court examined the remaining portions of the statutory requirements for levying taxes for school purposes after declaring that portion of the statute concerning participation of the legislative delegation unconstitutional; therein the court stated:

The remaining portions of the statute, which concern the general powers of the Board, its preparation of a proposed budget, the conducting of a public hearing on such budget, and the levy of taxes if not in excess of taxes for the current fiscal year, is separate and distinct from the remaining unconstitutional portions of the statute. The principle that a statute may be constitutional and valid in part and unconstitutional and invalid in part is generally recognized. The case of Townsend v. Richland County, 190 S. C. 270 at 280-81, 2 S. E. (2d) 777 at 781 (1939) sets forth the criteria for applying this principle:

The rule is that where a part of a statute is unconstitutional, if such part is so connected with the other parts as that they mutually depend upon each other as conditions and considerations for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the legislature would not have passed the residue independently of that which is void, the whole act is void. On the other hand, where a part of the statute is unconstitutional,

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and that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution, then the courts will reject that which is void and enforce the remainder. (Citations omitted.)

Id., 274 S.C. at 150-151.

Applying the foregoing to the question which you have raised, a court considering the question would examine the requirements of Section 21-1816 to determine whether each requirement is mutually dependent upon the others so that all requirements must be given effect; if that is the case, the entire Code section will be held unconstitutional. On the other hand, if that portion of the Code section underlined above should be held unconstitutional but the remaining provisions are capable of being executed independently, then the remaining portions would be allowed to stand. There is also authority for the proposition that an original act remains in effect when an amendment thereto is declared to be unconstitutional. State ex rel. Thornton v. Wannamaker, 248 S.C. 421, 150 S.E.2d 607 (1966). The final determination would, of course, remain with the court considering the issue of constitutionality of Section 21-1816, which we believe to be doubtful as discussed above.

We trust that the foregoing will respond satisfactorily to your inquiry. Please advise if you need clarification or additional assistance.

Sincerely,

Patricia D. Petway

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PDP/rhm

REVIEWED AND APPROVED BY:

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