

1983 WL 182037 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 25, 1983

*1 The Honorable William D. Boan
Member
House of Representatives
Post Office Box 145
Heath Springs, South Carolina 29058

Dear Representative Boan:

The Attorney General has reassigned your letter of August 8, 1983, to me for response. By your letter you have asked whether a county school board composed of both elected and appointed members may be delegated taxing authority by the General Assembly without violating [Article X, § 5 of the Constitution of South Carolina](#), which Article prohibits taxation without representation. The Lancaster County Board of Education is composed of three members elected at large and one member appointed by and chosen from the memberships of each of the four elected boards of trustees. Act No. 848, Acts and Joint Resolutions, 1976, as amended by Act No. 350 of 1977.

The South Carolina Supreme Court, in [Crow v. McAlpine](#), 277 S.C. 240, 285 S.E.2d 355 (1981), found delegation of taxing power to an entirely appointed county board of education to be a violation of [Article X, § 5](#), resulting in taxation without representation. At issue now is whether taxing authority may be delegated to a county school board, four members of which are indirectly elected. We have located no case which considers this issue as to a similarly constituted body. We advise that the following opinion is not free from doubt and that the opinion is offered as a precautionary response, as we have attempted to address this complex and novel issue as we believe a court would.

In [Crow](#), the members of the Marlboro County Board of Education were appointed by the Governor for five year terms upon the recommendation of the Marlboro County Legislative Delegation. The court stated that [Article X, § 5](#) is violated when taxing authority is 'delegated to a body composed of persons not assented to by the people nor subject to the supervisory control of a body chosen by the people.' 277 S.C. at 244, 285 S.E.2d at 358. The power should 'only be conferred upon a body which stands as the direct representative of the people to the end that an abuse of power may be directly corrected by those who must carry the burden of the tax.' 277 S.C. at 245, 285 S.E.2d at 358 (emphasis added).

The purpose of an election is to 'ascertain and declare the will of the majority,' [Easler v. Blackwell](#), 195 S.C. 15, 10 S.E.2d 160, 162 (1940), and to obtain 'a fair and true expression of the popular will.' [McKnight v. Smith](#), 182 S.C. 378, 189 S.E. 361, 363 (1937). Further, courts have distinguished the elective and appointive processes:

The term 'election' carries with it the idea of a choice in which all who are to be affected with the choice participate [...] . . . As distinguished from an election, an appointment is generally made by one person, or by a limited number, acting with delegated powers, while an election is the direct choice of all the members of the body from whom the choice can be made [the electorate].

*2 [Wickersham v. Brittan](#), 93 Cal. 34, 28 P. 792, 793 (1892) (emphasis added); see also [Board of Education of Boyle County v. McChesney](#), 235 Ky. 692, 32 S.E.2d 26 (1930).

As to the three members of the Lancaster County Board of Education elected at large, there is no problem in the delegation of taxing authority. Each of these three members is a direct representative of the people, who may directly correct any abuse of power by failing to re-elect the member if he should seek re-election when his term on the board expires.

The difficulty of this matter arises when the status of the four remaining members is considered. While each of the four is elected to his board of trustees, he is then appointed by and from that board to serve on the county board. As to the board of trustees, the member would be directly responsible to the electorate. As to the county board, however, the member would be directly responsible to the appointing board of trustees and only then to those who elected him to the board of trustees. Further, the selected member has been chosen by a group of persons rather than by all of those who will be affected by the choice, the electorate. At best, the electorate merely chooses a list of candidates for the county board, from whom the board of trustees makes the ultimate appointment. The only real distinction between this situation and that in Crow would be the fact that the selected member in this situation is a member of the body which makes the appointment to the county board; this distinction would be inconsequential, however.

Based on the above discussion, it is the opinion of this office that taxing authority should not be delegated to a county school board composed of members who are in part elected at large and in part appointed by boards of trustees. Such a delegation would very likely be found to be taxation without representation, in violation of [Article X, § 5 of the Constitution of South Carolina](#), if a court were to consider the issue.

We apologize for the length of time taken to respond to your inquiry. You have presented a novel and complex question for which there is very little authority to guide us. Please contact us if further assistance is needed in this matter.

Sincerely,

Patricia D. Petway
Staff Attorney

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