



ALAN WILSON
ATTORNEY GENERAL

August 8, 2022

The Hon. Tom Davis
South Carolina Senate
L. Marion Gressette Building, Suite 203
Columbia, SC 29201

Dear Senator Davis:

We received your request for an opinion on certain questions related to the County Greenspace Sales Tax Act. This expedited opinion sets out our Office's understanding of your questions and our response.

Issue (as quoted from your letter):

1. Does the Act provide a county with the authority to set up a preservation procurement process and to reserve unto itself the specific identification of the procurements to be made?
2. Does the Act limit the role of the advisory committee and the SCDOR to that of ensuring a county's procurements meet the requirements of the statute, or does the Act provide them with the substantive policymaking power to identify specific procurements to be made?
3. Does the Act require a county, in making preservation procurements, to lease real property?
4. Does the Act confer upon the municipalities within the county a right to receive any of the green space sales tax funds collected by the SCDOR?

Law/Analysis:

Your request letter also provided to us two memoranda. The first memorandum was authored by Kenneth M. Moffit, Assistant Clerk of the South Carolina Senate and Assistant Director, Senate Research. The second memorandum was authored by Jason P. Luther, Chief Legal Officer for the South Carolina Department of Revenue. Based on these memoranda and your communications with our Office, it appears that there is broad consensus on how this law is

intended to operate, and your constituents simply want an advisory opinion of this Office either affirming or disagreeing with that construction.

For the reasons described below, we join the consensus of the Senate and the Department of Revenue. Our Office has expedited this opinion in order to provide timely advice for your constituents.

The County Green Space Sales Tax Act was signed into law on May 16, 2022 and is codified as Title 4, Chapter 10, Article 10 of the South Carolina Code. *See* S.C. Code Ann. § 4-10-1010 *et seq.* In relevant part, the Act provides as follows:

(A) For the purposes of this article, “preservation procurements” means procuring open lands or green space for preservation, by and through the acquisition of interests in real property, including:

- (1) the acquisition of fee simple titles;
- (2) conservation easements;
- (3) development rights;
- (4) rights of first refusal;
- (5) options;
- (6) leases with options to purchase; and
- (7) any other interests in real property.

(B)(1) Subject to the requirements of this article, a county's governing body may impose a sales and use tax by ordinance, subject to a referendum, within the county area for preservation procurements.

(2) Revenues collected pursuant to this article may be used to defray debt service on bonds issued to pay for preservation procurements authorized in this article. This authorization is in addition to any other locally imposed sales and use taxes.

(A) A county governing body may impose a sales and use tax up to one percent authorized by this article, by ordinance, subject to a referendum. An enacting ordinance must specify:

(1) the purpose for which the proceeds of the tax are to be used, which may include preservation procurements located within or without, or both within and without, the boundaries of the local governmental entities, including the county, municipalities, and special purpose districts located in the county area;

(2) if the county proposes to issue bonds to provide for the payment of any costs of the preservation procurements, the maximum amount of bonds to be issued, whether the sales tax proceeds are to be pledged to the payment of the bonds and, if other sources of funds are to be used for the preservation procurements, a list of the other sources;

(3) the maximum cost of the preservation procurements, to be funded from the proceeds of the tax or bonds issued as provided in this article and the maximum amount of net proceeds expected to be used to pay the cost or debt service on the bonds, as the case may be; and

(4) the fact that preservation procurements may pertain to real property situated outside of the boundaries of the taxing jurisdiction.

(B) Upon receipt of an ordinance, a county's election commission must conduct a referendum on the question of imposing the sales and use tax in the area of the county that is to be subject to the tax. . . .

S.C. Code Ann. § 4-10-1020(A)&(B).

(1) The tax levied pursuant to this article must be administered and collected by the Department of Revenue in the same manner that other sales and use taxes are collected. The Department of Revenue may prescribe amounts that may be added to sales prices because of the tax.

(2) The county in which a referendum is passed shall assemble an advisory committee to assist the Department of Revenue with directing the distribution of the taxes collected to ensure a transparent and equal distribution within the county. The advisory committee shall include seven members:

(a) one member who is a member of the county council;

- (b) one member who is a member of the legislative delegation;
- (c) one member who is knowledgeable about the geography and condition of the county's land; and
- (d) four citizen members, each representing the northern, southern, eastern, and western portions of the county.

S.C. Code Ann. § 4-10-1040(A).

Annually, and only in the month of June, funds collected by the Department of Revenue from the county green space sales tax, which are not identified as to the governmental unit due the tax, must be transferred, after reasonable effort by the Department of Revenue to determine the appropriate governmental unit, to the State Treasurer's Office. The State Treasurer shall distribute these funds to the county treasurer in the county area in which the tax is imposed, and the revenues must be only used for the purposes stated in the enacting ordinance. The State Treasurer shall calculate this supplemental distribution on a proportional basis, based on the current fiscal year's county area revenue collections.

S.C. Ann. § 4-10-1060.

We address each of your presented questions in turn, reiterating that this is an expedited opinion on a new statute and should be read in the context of other relevant prior opinions and generally-applicable law.

Questions 1 and 2 ask essentially the same question, in that they center on the authority to identify lands for preservation procurements:

1. **Does the Act provide a county with the authority to set up a preservation procurement process and to reserve unto itself the specific identification of the procurements to be made?**
2. **Does the Act limit the role of the advisory committee and the SCDOR to that of ensuring a county's procurements meet the requirements of the statute, or does the Act provide them with the substantive policymaking power to identify specific procurements to be made?**

We believe that the county retains the authority to identify what property it wishes to target for preservation procurements and to elect what type of interest in real property it seeks to

acquire. Ultimately, it is the county governing body that is levying the tax and procuring the property interests. S.C. Code Ann. § 4-10-1020. The Department of Revenue and the statutory Advisory Committee each have a role in this process: the stated role of the Advisory Committee under the statute is to “to assist the Department of Revenue with directing the distribution of the taxes collected to ensure a transparent and equal distribution within the county.” S.C. Code Ann. § 4-10-1040(A)(2). The role of the Department is to administer and collect the tax “in the same manner that other sales and use taxes are collected.” S.C. Code Ann. § 4-10-1040(A)(1).

We quote here from the Memorandum of the Assistant Clerk of the South Carolina Senate, which describes the role of Advisory Committee within the statutory framework and generally applicable law:

The procedures established in the Act are fairly standard with other similar sales taxes authorized in the S.C. Code - with one exception.

Unlike other similar sales and use taxes, the Act requires that upon a successful referendum a County “shall assemble” an Advisory Committee The Advisory Committee plays an important role in making sure that the tax revenue raised pursuant to the additional levy is spent on appropriate projects because unlike other special sales and use tax levies for specific projects the referendum does not have to list the particular projects that are to be funded with the additional sales and use tax. . . .

Therefore, the Act does not result in a County ceding all control over the Advisory Committee’s functions. County governing bodies have the authority to enact ordinances “not inconsistent with the Constitution and general law of this State” that are “necessary and proper for the security, general welfare, and convenience of the counties or respecting or for preserving the health, peace, order and good government in them.” (S.C. Code Ann. § 4-9-25) Given the limited scope of authority vested with the Advisory Committee in the “general law,” the Counties have wide latitude to affect the activities of an Advisory Committee so long as the County does not attempt to change the composition of an Advisory Committee or interfere with the Advisory Committee’s interactions with the Department of Revenue.

Therefore, it is my opinion that Beaufort County has the statutory authority to establish a procedure or protocol for identifying and recommending which open lands or green spaces should be procured for preservation. The Advisory Committee can play a role in making those recommendations if County

Council so chooses - but County Council is not compelled to use the Advisory Committee for that purpose.

Memorandum of Kenneth M. Moffit. Similarly, the Memorandum from the Department of Revenue describes how the Department intends to administer this program:

In [DOR's] view, the Department's primary role is to collect the tax revenues and distribute them to the county. The Department does not interpret [the County Greenspace Sales Tax Act] to require the agency to delve into the details of which properties a county should purchase for purposes of green space usage, nor does the Department intend to take an active role in the selection process. . . . [T]he Department will rely on the advisory committee to provide a transparent plan that equally distributes the funds within the county; once that plan is approved by the county council, the Department will acknowledge the plan and the county may move forward with expending the funds.

Memorandum of Jason P. Luther. The Department goes on to note it retains general audit authority as with other taxes it administers and collects.

Reading the two Memoranda together, we believe that a court would find that the statutory construction set out in the quoted portions is consistent with the plain language and obvious legislative intent of the Act. Furthermore, because the Department is the agency tasked by statute with administering this statute, a court would likely grant deference to the Department's interpretation of the Act. *See Kiawah Development Partners. II v. South Carolina Department of Health & Environmental Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (“[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations.”).

Beyond this, for the purpose of this expedited opinion we will simply observe the following: the underlying purpose of this advisory committee is to promote transparency and fairness in the process – in essence, to ensure the Greenspace Sales Tax funds do not become a “slush fund” that is used inappropriately. Within the statutory framework set out in the Act, many of the details of exactly how this purpose is accomplished – for example, what role the advisory committee plays in identifying possible acquisitions – might be decided on a local level, consistent with Home Rule. *See* S.C. Code Ann. § 4-9-25.

3. Does the Act require a county, in making preservation procurements, to lease real property?

A lease is one option given to a county by the Act. However, a county may well choose another option instead.

Section 4-1-1010(A) defines a preservation procurement for purposes of the Act:

For the purposes of this article, “preservation procurements” means procuring open lands or green space for preservation, by and through the acquisition of interests in real property, including:

- (1) the acquisition of fee simple titles;
- (2) conservation easements;
- (3) development rights;
- (4) rights of first refusal;
- (5) options;
- (6) leases with options to purchase; and
- (7) any other interests in real property.

S.C. Ann. § 4-10-1010(A). The evident intent here is to give counties a “toolbox” with a variety of options, any one of which a county may elect to use in a particular situation if deemed appropriate. Under this statute, open lands could be preserved through a lease with an option if appropriate. But a county may be deemed that counterproductive, and instead pursue a conservation easement or acquiring the fee simple title. Any interest in real property might be acquired as a preservation procurement; no one type of interest in particular is required over another by this statute.

4. Does the Act confer upon the municipalities within the county a right to receive any of the greenspace sales tax funds collected by the SCDOR?

Ultimately, it is the county governing body that is levying the County Greenspace Sales Tax and procuring the property interests. S.C. Code Ann. § 4-10-1020. The revenues are only to be used for preservation procurements made pursuant to the county ordinance. S.C. Code Ann. § 4-10-1020(A)(1), -1030(C), -1060. Therefore, it appears that a municipality within the county would only receive County Greenspace Sales Tax funds incidental to a county preservation procurement.

Municipalities are entitled to specific information pursuant to section 4-10-1050, which reads in full:

The Department of Revenue shall furnish data to the State Treasurer and to the county treasurers receiving revenues for the purpose of calculating distributions and estimating revenues. The information that must be supplied to counties and municipalities upon request includes, but is not limited to, gross receipts, net taxable sales, and tax liability by taxpayers. Information about a specific taxpayer is considered confidential and is governed by the provisions of Section 12-54-240. A person violating this section is subject to the penalties provided in Section 12-54-240.

S.C. Code Ann. § 4-10-1050 (emphasis added).

Conclusion:

In conclusion, we reiterate that this is an expedited opinion. With that caveat, we answer your questions as follows in this expedited opinion:

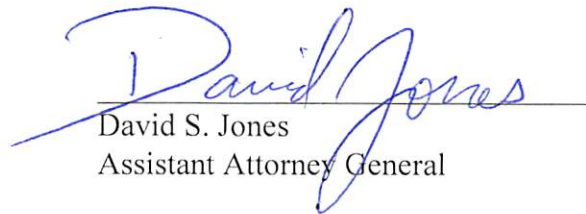
First, the county retains the authority to identify what property it wishes to target for preservation procurements and to elect what type of interest in real property it seeks to acquire. Ultimately, it is the county governing body that is levying the tax and procuring the property interests. S.C. Code Ann. § 4-10-1020. The Department of Revenue and the statutory Advisory Committee each have a role in this process: the stated role of the Advisory Committee under the statute is to “to assist the Department of Revenue with directing the distribution of the taxes collected to ensure a transparent and equal distribution within the county.” S.C. Code Ann. § 4-10-1040(A)(2). The role of the Department is to administer and collect the tax “in the same manner that other sales and use taxes are collected.” S.C. Code Ann. § 4-10-1040(A)(1).

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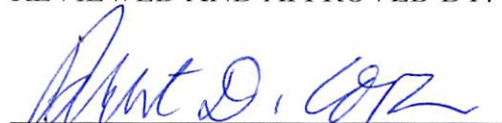
Second, a lease is one of several options under the Act that a county may pursue, in the discretion of the county, to establish a preservation procurement. Any interest in real property might be acquired as a preservation procurement; no one type of interest in particular is required over another by the Act. S.C. Ann. § 4-10-1010(A).

Finally, it appears that a municipality within the county would only receive County Greenspace Sales Tax funds incidental to a county preservation procurement. Ultimately, it is the county governing body that is levying the County Greenspace Sales Tax and procuring the property interests. S.C. Code Ann. § 4-10-1020. The revenues are only to be used for preservation procurements made pursuant to the county ordinance. S.C. Code Ann. § 4-10-1020(A)(1), -1030(C), -1060. Municipalities are entitled to specific information pursuant to section 4-10-1050.

Sincerely,


David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:


Robert D. Cook
Solicitor General