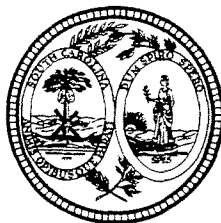


7871 *Gilman*



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

November 18, 2004

Charlie J. Blake, Jr., Esquire
Florence County Attorney
City County Complex
180 North Irby Street
MSC-SS
Florence, South Carolina 29501

Dear Mr. Blake:

In a letter to this office you referenced that Florence County has imposed by ordinance a thirty dollar road system maintenance fee which is collected throughout the year along with the payment of vehicle taxes. A portion of the revenue collected goes into the county general fund and is used to assist in the funding of the Public Works Department. The remaining revenue goes to a special revenue fund which is divided among Florence County Council members to be spent within their respective districts pursuant to a set of guidelines subject to the approval of a majority of the Florence County Council. Surplus funds for each district are carried over annually in the individual's district account to the next fiscal year. You have requested an opinion on the legality of the carryover of the surplus road system maintenance fee funds to the next fiscal year.

A prior opinion of this office dated November 13, 2003 dealt with the matter of discretionary funds in Florence County. That opinion concluded that a court would likely conclude that decisions as to the use of discretionary funds should not be delegated to individual county council members. Instead, the opinion determined that "State law requires county council as a body, not individual members thereof, to determine how county funds are expended." You indicate that the decisions as to the spending of the discretionary funds referenced in your letter are subject to the approval of a majority of the County Council.¹

¹In Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992) the State Supreme Court determined that a fifteen dollar road maintenance fee charged on motor vehicles in Horry County was a valid service charge authorized by S.C. Code Ann. § 4-9-30. The Court further determined that since the fee was specifically allocated for road maintenance, it was a service charge rather than a tax.

Rembert C. Dennis

Mr. Blake
Page 2
November 18, 2004

The referenced November, 2003 opinion also recognized "the broad discretion which county council possesses in the spending and appropriation of county funds." That opinion referenced a prior opinion dated October 22, 1996 which noted that "(i)t goes without saying that the decision to spend money by a county council involves considerable discretion." Another opinion dated March 31, 1997 also recognized the "broad discretion" of county councils in the spending and appropriation of county funds.

As to the matter of discretionary spending by county council members which results in a surplus being created, my research has not found any authority or statute suggesting that a surplus itself is inherently illegal. Indeed, the Idaho Supreme Court in its decision in V-1 Oil Company v. State Tax Commission, 733 P.2d 729 (Idaho, 1987) determined that a statute authorizing counties to carry forward a surplus from year to year instead of reducing taxes was constitutional. Instead of being illegal, the matter of a surplus appears to be a discretionary matter allowed or authorized by the governing body itself. In this instance, by not prohibiting any surplus, the council, which controls spending, has allowed a surplus to exist.

Prior opinions of this office have recognized the legitimacy of carrying forward surplus funds by county governing bodies in certain situations. An opinion dated March 17, 1978 determined that

There are no statutes or constitutional provisions presently in force which require that the entire amount of a tax levy collected for school purposes, even though in excess of the school board's requirements, must be paid over to the school board in the fiscal year in which it was collected...(I)t is our opinion that the carrying forward of the surplus school funds to use in a subsequent fiscal year for school purposes does not constitute...an impermissible diversion.

Another opinion dated March 16, 1983 determined that not only was a county council permitted to carry over unappropriated surplus funds to the school board budget for the following year, it was required to do so by statute. But see: Op. Atty. Gen. dated June 24, 1980 ("We find no authority that permits the collection of a charge, fee or tax without a need therefor...Fees or charges...for the use of its landfill should not be retained from year to year so as to constitute surplus funds for investment purposes.").

In an opinion of this office dated June 3, 2003 it was indicated that the carrying forward of a surplus "did not constitute...an impermissible diversion." As stated at 64A C.J.S. Municipal Corporations § 1632, "(a)n appropriation is not a mandate to spend." In Parker v. Bates, 216 S.C. 52, 56 S.E.2d 723, 726 (1949), the State Supreme Court determined that "(g)enerally, where a surplus remains after the accomplishment of the purpose for which an appropriation is made, it may be diverted to other causes..." Similarly, in Cox v. Bates, 237 S.C. 198, 116 S.E.2d 828, 835 (1960), the Court ruled that "...it is generally the law...that where a surplus remains after payment of appropriations, it may be appropriated to other purposes."

Mr. Blake
Page 3
November 18, 2004

Consistent with the above, in my opinion, members of the Florence County Council in making decisions regarding spending possess the discretion to control and direct spending in their respective county as they see fit. Such decisions regarding spending would include maintaining a surplus where funds allow. However, while having allowed a surplus to exist, the County Council would not be precluded from ending such practice. As determined in a prior opinion of this office dated March 24, 1989, one of the most basic rules is that one legislature may not bind its successors by its legislative acts. Similarly, one council cannot bind another council in discretionary spending. Therefore, a future council would be authorized to make spending decisions which would eliminate any surplus if such was desired. Such discretion would range from utilizing any surplus to fund specific appropriations or projects or to reduce taxes if such is what the particular council would prefer.

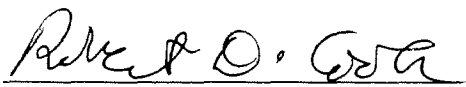
If there are any questions, please advise.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General