



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
 ATTORNEY GENERAL

September 13, 2004

The Honorable Glenn F. McConnell
 President *Pro Tempore*
 The Senate
 P. O. Box 142
 Columbia, South Carolina 29202

Dear Senator McConnell:

You seek an opinion "as to the upcoming referendum in Charleston County for a sales tax ordinance and the ballot question to be used in the referendum." By way of background, you provide the following information:

[a]s you may be aware, the Supreme Court voided the last referendum on the grounds that the ballot question failed to conform to the statutory requirements of §4-37-30. After the Supreme Court voided the election, Governor Sanford issued an Executive Order to conduct a new election in conformity with state and federal law.

Since the Election Commission is charged with drafting the ballot question and concerns have been raised about the legality of drafting, we believe that it would be beneficial for your interpretation of applicable law so that they might know the legal parameters under which they have to operate in this regard. Hopefully, by taking this course of action we can perhaps avoid litigation on this matter, which could subject the taxpayers of Charleston to unnecessary expense as well as raise doubts as to the validity of the referendum. Therefore, we would respectfully request your opinion on the following issues that are relevant to the referendum.

First, does Section 4-37-30 require a separate question for each project on the ballot? Section 4-37-30(3) provides that "A separate question must be included on the referendum ballot for each purpose which purpose may, as determined by the governing body of a county, be set forth as a single question relating to several of the projects..." Secondly under the statute, is mass transit a different project or purpose from a bridge, road, or greenbelt? Finally, can a ballot question be written so as to include as a single question the following example and be in conformity with Section 4-37-30?

"I approve a special sales and use tax in the amount of ___% to fund the following projects:

Project 1: Greenbelts and I-526 Yes ___ No ___

Project 2: Mass Transit (CARTA) and Expressway Yes ___ No ___

According to the information supplied to this Office, the question for the 2004 referendum will read as follows:

CHARLESTON COUNTY SPECIAL SALES AND USE TAX

QUESTION 1

I approve a special sales and use tax in the amount of one-half (½) of one percent to be imposed in Charleston County for not more than 25 years, or until a total of \$1,303,360,000 in resulting revenue has been collected, whichever occurs first. The sales tax proceeds will be used for the following projects:

Project (1) For financing the costs of highways, roads, streets, bridges and other transportation-related projects, facilities, and drainage facilities related thereto, and mass transit systems operated by Charleston County or jointly operated by the County and other governmental entities. \$1,081,788,800.

Project (2) For financing the costs of greenbelts. \$221,571,200.

YES

NO

Instructions to Voters: All qualified electors desiring to vote in favor of levying the special sales and use tax shall vote "YES;" and

All qualified electors opposed to levying the special sales and use tax shall vote "NO."

QUESTION 2

I approve the issuance of not exceeding \$113,000,000 of general obligations bonds of Charleston County, payable from the special sales and use tax described in Question 1 above, maturing over a period not to exceed 25 years, to fund completion of projects from among the categories described in Question 1 above.

YES

NO

Instructions to Voters: All qualified electors desiring to vote in favor of the issuance of bonds for the stated purposes shall vote "YES;" and

All qualified electors opposed to the issuance of bonds for the stated purposes shall vote "NO."

Law / Analysis

South Carolina Code Ann. Section 4-37-30 empowers counties either to impose a sales and use tax or to authorize an authority established by the county council to "use and impose tolls" in order to provide revenue for a transportation facility. Section 4-37-30(A) provides as follows:

(A) Subject to the requirements of this section, the governing body of a county may impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects and for a specific period of time to collect a limited amount of money.

(1) The governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance. The ordinance must specify:

(a) the project or projects and a description of the project or projects for which the proceeds of the tax are to be used, which may include projects located within or without, or both within and without, the boundaries of the county imposing the tax and which may include:

(i) highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects;

(ii) jointly-operated projects, of the type specified in sub-subitem(i), of the county and South Carolina Department of Transportation; or

(iii) projects, of the type specified in sub-subitem (i), operated by the county or jointly-operated projects of the county and other governmental entities;

(b) the maximum time, stated in calendar years or calendar quarters, or a combination of them, not to exceed twenty-five years or the length of payment for each project whichever is shorter in length, for which the tax may be imposed;

(c) the estimated capital cost of the project or projects to be funded in whole or in part from proceeds of the tax and the principal amount of bonds to be supported by the tax; and

(d) the anticipated year the tax will end.

Subsection (3) of § 4-37-30(A) further provides in pertinent part:

(3) A separate question must be included on the referendum ballot for each purpose which purpose may, as determined by the governing body of a county, be set forth as a single question relating to several of the projects, and the question must read substantially as follows:

"I approve a special sales and use tax in the amount of (fractional amount of one percent) (one percent) to be imposed in (county) for not more than (time) to fund the following project or projects:

Project (1) for _____ \$ _____

Yes ____

No ____

Project (2), etc.”

Several principles of statutory construction are pertinent to your inquiry. The primary objective in construing statutes is to determine and effectuate legislative intent if at all possible. Bankers Trust of S.C. v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words used must be given their plain and ordinary meaning without resort to subtle or forced construction either to limit or expand the statute’s operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). Every part of a statute must be given effect. State ex rel. McLeod v. Nessler, 273 S.C. 371, 256 S.E.2d 419 (1979). The statute must be harmonized to render the statute consistent with the general purpose of the act. Crescent Mfg. Co. v. Tax Commission, 129 S.C. 480, 124 S.E. 761 (1924).

We have advised with respect to § 4-37-30 in particular that “the purpose of the enacting ordinance, like the ballot question, is to educate the public about the substance of the pending referendum,” Op. S.C. Atty. Gen., November 7, 2001. Thus, we have observed that there should be

... as much disclosure to the public as practicable. Thus, although project categories may be sufficient, [we] ... would advise against identifying the projects only [by] reference to a pre-existing program list. The identification and description of the project categories should be adequately detailed in the enacting ordinance.

Id. See also, Op. S.C. Atty. Gen., August 30, 1996 [“A ballot description must give a true and impartial statement of the purpose of the measure in such language as not intentionally to be an argument or to be likely to create prejudice either for or against the measure.” 42 Am.Jur.2d, Initiative and Referendum, § 46 (1969).”]

The November 7, 2001 opinion also stressed that the governing body possesses broad discretion in terms of the expenditure of funds raised by virtue of the authorizing referendum. There, we noted the following:

[h]owever, although the statute requires that the governing body notify the public of the intended uses of the proceeds of the tax, the county may maintain some discretion in the expenditure of the funds for best interests of the public. For example, in Ramsey v. Cameron, 245 S.C. 189, 139 S.E.2d 765 (1965), the Supreme Court of South Carolina found that pursuant to the Municipal Bond Act, the effect the referendum question is to limit the use of funds for the purposes set forth in the referendum question. How those funds are spent and the precise improvements to which the proceeds are applied are decisions within the discretion of the municipal governing body. Id. In Sarrat v. Cash, 103 S.C. 531, 88 S.E. 256 (1916), the Supreme Court addressed the allegation by voters that they had approved a bond referendum based on representations made by school trustees that a school would be

built in a certain location; upon approval of the referendum, the school trustees decided to build the school elsewhere. The court denied the plaintiffs' request to enjoin the trustees from building the school at a different locality, upholding the trustees' right to exercise discretion in the matter:

[The trustees] could not, therefore, bind themselves by promises or representation, so as to divest themselves of the right to a free and untrammelled exercise of their judgment and discretion for the best interests of their district at the time they were required to act as a body.... It would be contrary to public policy to allow public officers who are charged with the duty of exercising their judgment and discretion ... to bind or fetter themselves by promise or presentation to individuals or to electors of ... the district so that they could not, at all times, act freely and impartially.... The power was conferred upon them for public purposes, and it could not be lawfully bartered away to influence ... votes in the election. The electors are presumed to have known this. Therefore they had no legal right to reply upon the alleged representations, or to be influenced by them in ... voting in the election.

Id. at 535-36, 88 S.E. at 258.

Thus, we found that "... the county must sufficiently identify and describe the projects for which the proceeds of the tax will be used in order for the public to make an informed decision in the referendum, but the county need not so narrowly tailor the enacting ordinance that it leaves no room for the exercise of discretion in the actual expenditure of funds." Accordingly, we specifically advised "against identifying the projects only by reference to a pre-existing program list," noting instead that the "identification and description of the project categories should be adequately detailed in the enacting ordinance." In our view, "[a]ny attempts to fund projects that could have been, but were not, included in the referendum and identified to the public could be seen as a violation of the spirit of Section 4-37-30."

Recently, in an opinion dated August 22, 2003, we reiterated at some length the general standards governing the validity of ballot referenda in South Carolina. We cited earlier opinions of May 8 and May 14, 2003 as well as a wealth of other authorities.

Our May 8 opinion discussed the general law governing any alleged material ambiguity or misrepresentation which a court would consider concerning any court action relating to the November 5 bond referendum. We noted therein that, generally speaking, the general purpose of a bond referendum – like any other referendum – "must be stated with sufficient certainty to inform and not mislead the voters as to the object in view" Fairfax County Taxpayers Alliance v. Bd. of County

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Supervisors of Fairfax, 202 Va. 462, 117 S.E.2d 753 (1961), cited with approval by the South Carolina Supreme Court in Sadler v. Lyle, 254 S.C. 535, 176 S.E.2d 290, 295 (1970). [quoting Fairfax] See also, Stackhouse v. Floyd, 248 S.C. 183, 149 S.E.2d 437 (1966), citing Ex Parte Tipton v. Smith, 229 S.C. 471, 93 S.E.2d 640 (1956); Dick v. Scarborough, 73 S.C. 150, 53 S.E. 86 (1905) ["voter should have reasonable notice of the (bond) election and the issue it involved."]; Winterfield v. Town of Palm Beach, 455 So.2d 359 (Fla. 1984) [ballot for bond referendum may not fail to adequately inform voters of the proposed project]; McNichols v. City and County of Denver, 120 Colo. 380, 209 P.2d 910 (1949) [question submitted to the electors must not be misleading, but must be specific]. ...

The general rule in South Carolina is that the courts will employ every reasonable presumption in favor of sustaining a contested election. Irregularities or illegalities are held to be insufficient to set aside an election unless the errors actually appear to have affected the result of the election. Knight v. State Bd. of Canvassers, 297 S.C. 55, 374 S.E.2d 685 (1988); Sims v. Ham, 275 S.C. 369, 241 S.E.2d 316 (1980); Gregory v. South Carolina Democratic Executive Committee, 271 S.C. 364, 247 S.E.2d 439 (1978); Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 831 (1954); Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954). See also, Sykes v. Belk, *supra*. Quoting our Supreme Court in Connolly v. Beason, 100 S.C. 74, 84 S.E.297 (1915), in the typical situation, a variance in the bond referendum "does not affect the validity of the bonds It goes only to the application of the proceeds of the sale of the bonds."

Moreover, generally recognized is the following legal principle regarding the combination of separate propositions in a referendum ballot question:

[w]hile there may be no objection to voting on two separate propositions, at the same time, in most jurisdictions two or more separate or distinct propositions cannot be combined and submitted as a single question, so as to have only one expression of the voter to answer all propositions. The voters cannot be put into the position of being compelled to accept one purpose or proposition for which bonds are sought to be issued that they do not desire, merely because it is coupled with another purpose or proposition that they do desire, or to reject a purpose or proposition that is satisfactory, because it is coupled with another that is not. Thus a separate proposition ordinarily must be placed on the ballot for each distinct and independent object or purpose for which indebtedness is contemplated."

64 Am.Jur.2d, Public Securities and Obligations, § 145.

Our Supreme Court recently addressed the scope of § 4-37-30 in Douan v. Charleston Co. Council, 357 S.C. 601, 594 S.E.2d 261 (2003). In Douan, the Court granted certiorari review of a

decision from the State Election Commission denying protests regarding a referendum in which the voters of Charleston County had approved the imposition of a sales and use tax. The Court voided the referendum, based upon the ballot's wording.

Douan recognized that “[a] question should not be submitted in such form as to amount to an argument for its acceptance or rejection.” 357 S.C. at 610. In the Court's view, “... the characterization of the tax in the voter's instructions was so misleading as to warrant nullification of the election results.” Referencing § 7-13-400, which “provides for the form of the ballot when questions are submitted ...,” as well as other decisions [Bellamy v. Johnson, 234 S.C. 172, 107 S.E.2d 33 (1959), George v. Municipal Election Comm'n of City of Charleston, 335 S.C. 182, 516 S.E.2d 206 (1999) and O'Beirne v. City of Elgin, 1914 WL 2613 (Ill. App. 1914)], the Court held:

[i]n our opinion, the Ballot used here does not conform with the statutorily mandated format, and the non-conformance is so substantial that it affects the fundamental integrity of the election. *See George*. The purpose of section 7-13-400 is the same as that of the Illinois statute discussed in *O'Beirne*: to aid the voter in understanding the *meaning* of his vote, not the *reason* for it. *See O'Beirne*. Instead of explaining *how* the voter could vote for or against the sales tax, the instructions to the voters in this case attributed *reasons* to vote in favor of the measure: “traffic congestion relief, safe roads, and clean water.” In fact, these were the very same reasons that supporters of the tax espoused in favor of the tax in the weeks preceding election day. Additionally, just as in *O'Beirne* persons may be in favor of traffic congestion relief and clean water, “but for reasons satisfactory to themselves [do] not favor the [tax] in question.” *O'Beirne* at *2.

Like the ballot in *Bellamy*, the voter instructions here appear calculated to persuade and ultimately mislead the voters into voting in favor of the tax by obscuring the fact that a vote for clean water was a vote for increased sales tax.

Id. at 612.

While the Court in Douan voided the election because the “fundamental integrity” thereof was at stake, the Court refused to do so on the basis of two other technical violations of § 4-37-30(A)(3). In the Court's view, “the language actually placed on the ballot in this case differed from the required language in three ways.” 357 S.C. at 609. In addition to the fact that “the title and instructions to the voters appeared to advocate passage of the tax,” Id. – the ground upon which the Court struck down the referendum – Douan also noted that two other flaws were that

[f]irst, instead of listing a dollar amount for the cost of each project, the Ballot question adopted by County Council listed the *percentage* of the total amount to be collected that would be allotted to each project. The Ballot question included the total amount to be collected in the first paragraph of the ballot: 1,303,360,000.

Second, the two main projects were not numbered (1) and (2) as suggested in § 4-37-30(A)(3), and, instead, were separated into two different paragraphs. The second project's purpose (purchasing and improving parklands and otherwise preserving greenspace) was buried at the end of the paragraph, after all of the benefits of the project were listed. Third, and, most importantly, the title and instructions to the voters appeared to advocate passage of the tax.

The Court did not address the issue of combining projects into a single vote, although such issue was argued in the Appellant's Brief.

We turn now to the specific questions which you have raised.

1. Does Section 4-37-30 require a separate question for each project on the ballot?

No. While § 4-37-30(A)(3) is somewhat ambiguous, it is evident that the General Assembly intended that several projects may be enumerated within a single question.

Originally, § 4-37-30(A)(3) simply provided that "[a] separate question must be included on the referendum ballot for each purpose" This wording may have led to the question of whether a separate question was necessary for each "project" as enumerated in § 4-37-30(A)(1)(i) through (iii). In any event, an amendment to § 4-37-30(3) was enacted in 2000 as part of Act No. 368 to include the present language "... which purpose may, as determined by the governing body of a county, be set forth as a single question relating to several of the projects" The title of Act 368 of 2000 provides that the General Assembly's purpose in the amendment to § 4-37-30(A)(3) was "To Provide That A Single Question Relating to The Funding of Several Projects May Be Placed on A Referendum Ballot By A County Governing Body To Determine Whether Voters Approve A Special Sales And Use Tax" When read in conjunction with § 4-37-30(A)(1)(a), which refers only to the various categories therein as "projects" and not "purposes," we are of the opinion that county council has the discretion to combine several "projects" into a single ballot question.

However, the fact that the law now allows several projects to be placed within a single broad question, does not mean that the ballot may be so construed to authorize a single vote on different projects. This limitation contained in § 4-37-30 (3) is more fully explained below.

2. Is mass transit a different project or purpose from a bridge, road or greenbelt?

Yes. Section 4-37-30(A)(1)(i) through (iii) makes it clear that each category listed therein (highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities" are separate "projects." Subsection (3)'s ballot form buttresses this reading by providing by example for a separate enumeration of "projects." ["Project (1) ... Project 2, etc."].

3. Can a ballot question be written so as to include as a single question the following example and be in conformity with Section 4-37-30?

“I approve a special sales and use tax in the amount of (fractional amount of one percent) (one percent) to be imposed in (county) for not more than (time) to fund the following project or projects:

Project (1) for _____ \$ _____

Yes ___

No ___

Project (2), etc.”

No. While the statute permits the inclusion of various “projects” in a single question (see No. 1 above), it does not allow separate projects to be listed together as a single project – with a single vote thereupon. Subsection (3)’s question form clearly indicates that the General Assembly intended each project to be listed separately and that projects not be “lumped” together. Moreover, such combining of projects could result in a form of “bobtailing” in which voters interested in voting for or against one project would be required to vote the same way on another project which is combined with it. In our opinion, both the language, as well as the spirit of § 4-37-30, does not authorize such combinations.

It should be noted here that § 4-37-30 (6) provides that

[w]hen the optional sales and use tax is imposed, the governing body of the jurisdiction authorizing the referendum for the tax shall include by definition more than one item as defined in (a)(i) and (a)(ii) to describe the single project or multiple projects for which the proceeds of the tax are to be used.

Thus, this Subsection anticipates that certain projects must be described by “more than one item” in (a)(i) and (a)(ii). The obvious purpose of this provision is to provide full information to the voters regarding such multi-faceted projects.

There is no indication in the information which you have provided that § 4-37-30(6) is applicable here. We are thus unaware of any requirement, pursuant to this subsection, to describe the proposed projects by way of “more than one item.”

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Conclusion

Accordingly, in our opinion, § 4-37-30 requires that the various "items" in (a)(i), (a)(ii) and (a)(iii) be separately presented to the voters as "different projects." While it may be argued that county council possesses the requisite discretion to combine projects together for a single vote, and arguably Douan implicitly approved such a grouping, we respectfully disagree that the statute permits such combination. This combination would, in our view constitute a form of "bobtailing" which is inconsistent with § 4-37-30(3). A voter would necessarily have to vote "all or nothing" on combined projects. Although the Amendment in 2000 clearly permitted several projects to be combined in the same question, it did not authorize several unrelated projects to be rolled into a single vote. The form of the ballot set forth in § 4-37-30(3) remained unchanged after the amendment, and clearly anticipates a separate "yes-no" vote on each "project." Authorities are of the view that "[g]enerally, several separate distinct and unrelated projects may not be combined in one ballot." State v. City of Augustine, 235 So.2d 1, 2 (Fla. 1970).

Thus, while the issue was before the Court in Douan, the Supreme Court did not directly comment upon this particular question. To our knowledge, our courts have not squarely decided the issue. Therefore, in our view, both the language and the spirit of § 4-37-30 require that each project be voted on in "yes-no" fashion separately. County Council should thus proceed cautiously in combining discrete projects into a single vote (as opposed to a single question allowing separate votes on each project). Accordingly, in our opinion, it would be prudent to seek judicial resolution before the November election, rather than to subject taxpayers to the possibility of a second court challenge after the vote has been held.

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General

RDC/an