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HENRY McMASTER
ATTORNEY GENERAL

February 24, 2006

The Honorable Stephen T. Draffin
Code Commissioner and Director
South Carolina Legislative Council
P.O. Box 11489
Columbia, South Carolina 29211-2145

Dear Mr. Draffin:

We received your letter requesting an opinion of this Office on behalf of Representatives Merrill, Hinson, Umphlett, and Dantzler. By your letter, you inquire as to the constitutionality and enforceability of section 3 of Act 229 of 1983. After review of this provision and the relevant constitutional law, we find this provision constitutionally suspect and likely to be ruled unconstitutional by a court of this State due to a violation of the separation of powers clause of the South Carolina Constitution.

Law/Analysis

Courts are hesitant to declare an act of the General Assembly unconstitutional and find every presumption in favor of the act's validity. Johnson v. Collins Entm't Co., Inc., 349 S.C. 613, 626, 564 S.E.2d 653, 660 (2002). "[N]o statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. This general presumption of validity can be overcome only by a clear showing the act violates some provision of the constitution." Id. In addition, we note only a court can render a statute unconstitutional. See e.g. Op. S.C. Atty. Gen., June 23, 2004. Therefore, although we may comment on our opinion as to the constitutionality of a statute, the statute will remain valid until a court declares otherwise. Op. S.C. Atty. Gen., April 29, 2004.

On several occasions, South Carolina courts dealt with the validity of statutes requiring legislative delegation approval under particular circumstances. In Bramlette v. Stringer, 186 S.C. 134, 195 S.E. 257 (1938), the South Carolina Supreme Court addressed the validity of a statute allowing a county to issue bonds for the purpose of road construction. The provisions under the statute required a county legislative delegation to determine the amount and method of selling bonds. Id. at 141, 195 S.E. at 261. In addition, the statute afforded the legislative delegation authority to designate the road to be constructed or improved. Id. at 142, 195 S.E. at 261. The Court determined these provisions under the statute were clear violations of the constitutional provision mandating a separation of powers. Id. at 150, 195 S.E. at 264.

In Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972), the South Carolina Supreme Court considered the constitutionality of a statute, which required a county legislative delegation to approve or disapprove any tax increased adopted by the board of trustee's for the county school district. The Court acknowledged the Legislature has the power to impose taxes and it may delegate such power to the school district under Article X, section 5 of the South Carolina Constitution. Id. at 441, 192 S.E.2d at 474. However, by giving the county delegation the power to approve any tax increases, "constituted the County Legislative Delegation a committee of the Legislature to determine not only when a tax increase was proper but also to take such action with regard to the increase as that committee might deem proper." Id. at 441, 192 S.E.2d at 475. Therefore, the Court held:

The Act does not and can not authorize the members of the delegation to participate in this determination as legislators, for they may exercise legislative power only as members of the General Assembly.

To authorize them to participate as corporate authorities of the school district, as the Act attempts to do, clearly assigns to them a dual role in violation of the separation of powers clause of the Constitution.

Id. Similarly, in Aiken County Board of Education v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980), involved a constitutional challenge to a statute that required the approval of a county's legislative delegation for millage increases proposed by the county's school board. The Court, relying on Gunter, stated:

As a general rule, the Legislature may not, consistently with the constitutional requirement here involved, undertake to both pass laws and execute them by setting its own members to the task of discharging such functions by virtue of their office as legislators. The Legislature may properly engage in the discharge of such functions to the extent only that their performance is reasonably incidental to the full and effective exercise of its legislative powers. As the functions of the Legislative Delegation in this instance are not incidental to or comprehended within the scope of legislative duties, the separation of powers doctrine as provided by Article I, section 8 has clearly been violated.

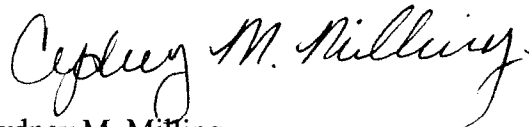
Id. at 149-50, 262 S.E.2d at 17. Article I, section 8 of the South Carolina Constitution (1976), the separation of powers clause, provides: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

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Act 229 of 1983 generally allows levy of taxes for school purposes in Berkeley County for the fiscal year 1983-1984 and allows for the levy of an additional tax for the purpose of retiring school bonds issued prior to the effective date of the act. Act. No. 229, 1983 S.C. Acts 1269. Section 3 of this act provides as follows: "Notwithstanding any other provisions of law, the Berkeley Legislative Delegation shall approve the future issuance of any additional school bonds." Id.

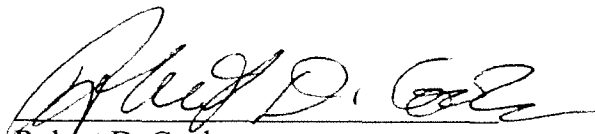
Article X, section 15 of the South Carolina Constitution (Supp. 2005) affords school districts the power to incur general obligation indebtedness, but provides they may do so "only in such manner and upon such terms and conditions as the General Assembly shall prescribe by law." Thus, although the South Carolina Constitution vests authority in the local school districts to issue school bonds, we recognize the General Assembly's authority to prescribe the terms and conditions under which a school board may issue such bonds. However, approval of the issuance of school bonds is neither incidental nor comprehended within the scope of the members of the Berkeley County Delegation's functions as members of the General Assembly. Thus, by giving such authority to the delegation constitutes an impermissible delegation of power to the members of the Berkeley County Legislative Delegation. Therefore, in accordance with Bramlette, Gunter, and Knotts, in our opinion, section 3 of Act 229 of 1983 assigns the members of the legislative delegation a dual role in violation of the separation of powers clause of the South Carolina Constitution. However, we again note only a court can definitively make the determination as to the constitutionality of this provision. Op. S.C. Atty. Gen., May 6, 2003.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General