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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

January 12, 2006

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

Dear Mr. Draffin:

We received your letter requesting an opinion as to the constitutionality of the proposed legislation attached to your request. We understand your request is made on behalf of Representative Shirley Hinson, who wishes to introduce the legislation. As you described the proposed legislation, it would establish "a special tax review committee appointed by various local elected entities to approve any increases in ad valorem tax millage proposed by the Berkeley County Board of Education for the School District of Berkeley County."

After our review of the proposed legislation and the applicable statutory and case law, in our opinion, the proposed legislation is constitutionally suspect. Such legislation, in our view, authorizes taxation without representation in violation of Article X, Section 5 of the South Carolina Constitution.

Law/Analysis

We begin our analysis by noting, if enacted the legislation in question would be entitled to a strong presumption of validity. As we recently stated in an opinion of this Office dated May 2, 2005,

> any statute enacted by the General Assembly carries with it a heavy presumption of constitutionality. As we have often stated, any act of the General Assembly is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its

> unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939).
>
> Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

Article X, Section 5 of the South Carolina Constitution (Supp. 2005) provides, in pertinent part: "No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled." In Crow v. McAlpine, 277 S.C. 240, 244, 285 S.E.2d 355, 358 (1981), our Supreme Court interpreted this provision of the Constitution as

> an implied limitation upon the power of the General Assembly to delegate the taxing power. Where the power 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, this constitutional restriction is violated.

The plaintiffs in that case brought a declaratory judgment action challenging the constitutionality of a statute authorizing a county board of education appointed by the governor to levy and collect taxes to fund the school district's operating budget. The Supreme Court remarked if the taxing power is abused by those who are not "directly responsible to the people," this abuse of power may not be "directly corrected by those who must carry the burden of the tax." Id. at 244-45, 285 S.E.2d at 358. Thus, the Court in finding the statute unconstitutional, held "the General Assembly may not, consistent with Article X, Section 5, delegate the unrestricted power of taxation to an appointive body." Id. at 245, 285 S.E.2d at 358.

Bradley v. Cherokee School District No. One of Cherokee County, 322 S.C. 181, 184, 470 S.E.2d 570, 571 (1996), also dealt with a constitutional challenge of a statute under Article 10, Section 5 of the South Carolina Constitution. In that case, the plaintiffs argued the Cherokee County School District No. One School Bond-Property Tax Relief Act, authorizing the Cherokee County School Board to impose a sales tax throughout Cherokee County, constituted taxation without representation. Id. Citing Crow, the Supreme Court in Bradley stated: "Delegation of the taxing power should be kept with supervisory control always vested in elective bodies." However, because the electors of Cherokee County approved the imposition of the state tax by referendum, the Supreme Court disagreed with the plaintiffs' position. Id. The Court found the act did not give the School Board "unlimited power of taxation." Id. at 185, S.E.2d at 572. "The ultimate power to

impose sales tax rest with the electors of the entire county . . ." giving "the residents . . . a voice and a vote in the imposition of the tax . . . ." Id.

In Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997), the Supreme Court considered the constitutionality of a statute authorizing a recreation district's commission, consisting of appointed members, to levy a tax not exceeding five mills on all taxable property within the district. Relying on Crow and Bradley, the Supreme Court determined the statute "gives the Recreation Commission the complete discretion to determine its annual budget, and to levy anywhere from one to five mills taxes to meet its budget." Id. at 87, 492 S.E.2d at 81. Accordingly, the Supreme Court held the statute unconstitutional as it violated Article X, Section 5 of the South Carolina Constitution. Id. at 87, 492 S.E.2d at 82.

As we emphasized above, a statute is presumed constitutional and only a court could make a determination relating to its unconstitutionality. Op. S.C. Atty. Gen., May 2, 2005. However, in our opinion, we find the proposed legislation unconstitutional. Under the proposed legislation, the special tax review committee (the "committee") is an appointed body, not subject to the approval or supervisory control of the people. If the Berkeley County Board of Education (the "Board") is required to gain the approval of the committee, its role would be that of simply making a recommendation as to the millage rate with the ultimate authority to levy the tax vested in the committee. Thus, until such approval is obtained, the tax proposed by the Board would not be a valid tax. Because a tax cannot be levied by the Board without approval, the supervisory control of the taxing power vested in the Board would be delegated to an appointed body, and unlike in Bradley, the residents would not have a voice and vote in the imposition of the tax. Accordingly, in our opinion and under the case law cited above, if the proposed statute were subject to a constitutional challenge it likely would be found to violate Article X, Section 5 of the South Carolina Constitution.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General