June 25, 2008

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Dear Mr. Martin:

We understand that you serve as the Anderson County Attorney and that you desire an opinion of this Office on behalf of Joey R. Preston, the Anderson County Administrator and the Anderson County Council. In your request, you provided us with the following background information:

> Anderson County has never operated a water system, and the voters of the County have never authorized the County to acquire or operate a water system via referendum as required by Article VIII, § 16 [of the South Carolina Constitution] . . .
>
> Water utilities in Anderson County are owned and operated by a patchwork of various municipalities, public service districts, and pre-home rule special purpose districts, as well as by other non-profit water companies. Members of the [Capital Projects Sales Tax ("CPST")] Commission appointed by Anderson County Council and the County municipalities have indicated that, even though the County cannot provide the water utility directly, they would like to consider granting CPST revenues to various water providers of the County, as grants, to accomplish that which the County cannot do directly.

Thus, you request an opinion of this Office on the following issues:

> I. If Anderson County Complies with the CPST Act and the requisite referendum is approved, could the County finance a water system or expansion of a water system with proceeds generated by the CPST Act directly, or through a County municipality, public service district, special purpose district,

or other non-profit water company, or some combination thereof, without a prior constitutional referendum, under Article VIII, § 16, authorizing the County to finance, expand or operate a water system; and,

II. If a successful referendum conducted pursuant to the CPST Act did not meet the constitutional requirements of Article VIII, § 16, what specific language, if any could be used in the CPST referendum question that would meet said constitutional requirements; and,

III. If the County may designate revenue from the CPST for a water system project, generally (apart from the question whether the County may own or operate such a system), and if the project identified by the ballot question as the beneficiary of revenues generated by the CPST Act is to be a part of a water system owned and operated by a public service district or other non-profit entity, as opposed to a water system owned and operated by a municipality or a special purpose district or other non-profit entity?

Law/Analysis

The Capital Projects Sales Tax Act (the "Act"), contained in sections 4-1-300 et seq. of the South Carolina Code (Supp. 2007), proscribes the means by which counties may impose a sales and use tax for purposes of funding various capital projects. Section 4-10-310, pursuant to this Act, states:

> Subject to the requirements of this article, the county governing body may impose a one percent sales and use tax by ordinance, subject to a referendum, within the county area for a specific purpose or purposes and for a limited amount of time to collect a limited amount of money. The revenues collected pursuant to this article may be used to defray debt service on bonds issued to pay for projects authorized in this article. However, at no time may any portion of the county area be subject to more than one percent sales tax levied pursuant to this article, pursuant to Chapter 37 of Title 4, or pursuant to any local law enacted by the General Assembly.

(emphasis added).

Article III, section 16 of the South Carolina Constitution provides, in pertinent part:

> Any county or consolidated political subdivision created under this Constitution may, upon a majority vote of the electors voting on the question in such county or consolidated political subdivision, acquire by initial construction or purchase and may operate water, sewer, transportation or other public utility systems and plants other than gas and electric; provided this provision shall not prohibit the continued operation of gas and electric, water, sewer or other such utility systems of a municipality which becomes a part of a consolidated political subdivision.

(emphasis added).

From your letter, we understand that Anderson County (the "County") wishes to impose a sales and use tax to finance a water system or the expansion of an existing water system either directly or through a municipality, public service district, special purpose district or other non-profit water company or a combination thereof. Thus, you question whether the County must conduct a referendum pursuant to article VIII, section 16 even if it conducts a referendum pursuant to the Act.

The referendum requirement pursuant to article VIII, section 16 is separate from the referendum requirement pursuant to the Act. Thus, the County must conduct a referendum pursuant to the Act if it wishes to impose a sales and use tax for the purposes of funding a capital project or projects. Likewise, the County must hold a referendum pursuant to article VIII, section 16 if it desires to construct, acquire, or operate a public utility system. Accordingly, if the County desires to both impose a sales and use tax pursuant to the Act and construct, acquire, or operate a public utility system, both referendums are required. However, if the County only wishes to impose the sales and use tax for a purpose that does not involve the construction, acquisition, or operation of a public utility system, then it must only conduct the referendum pursuant to the Act and vice versa.

In your letter, your question, in part, deals with whether the County must conduct both referendums if it acquires a water system and uses the proceeds generated under the Act to finance the acquisition. The answer to this question is yes. Under this scenario, the Act requires a referendum to impose the tax and because the County is constructing, purchasing, or operating a public utility, it must also hold a referendum pursuant to article VIII, section 16. However, the answer becomes less clear when, as you mention in your letter, the County does not provide the water service directly, but wishes to pass the proceeds of the tax onto other entities, including municipalities, public service districts, special purpose districts, and non-profit water companies.

Under these circumstances, the County itself is not constructing, purchasing, or operating a public utility. Furthermore, as you mentioned in a memorandum you submitted in addition to your request, we previously issued an opinion to you finding that a mere appropriation of money to a public or quasi-public body that provides water services does not require a referendum pursuant to article VIII, section 16. Op. S.C. Atty. Gen., August 8, 2003. In that opinion, you asked whether County Council could appropriate funds to public or quasi-public bodies for such things as installing

water lines without fulfilling the referendum requirement under article VIII, section 16. Id. We looked to prior opinions interpreting the language used in article VIII, section 16.

> [W]e have previously opined that a county could apply for and receive federal grant money and then transfer the money to various political subdivisions, including water authorities, for use in constructing water treatment facilities without first having a referendum pursuant to Article VIII, Section 16 as long as the county did not acquire or operate the utility. See Op. S.C. Atty. Gen., dated January 18, 1979. We stated, however, that "[s]hould the county assume the responsibility of providing water service within the county a referendum would be required." Id. See also Op. S.C. Atty Gen., dated June 26, 1978.

Id. Expanding on our previous findings, we concluded that "[t]his Office's conclusion that counties and municipalities can provide grant monies received by them to other political subdivisions for the provision of water services without a referendum would appear to be equally applicable to funds received by the county or municipality from other public revenue sources." Id. However, we added:

> If through appropriating money, a county council is attempting to exercise some degree of power and control over the operations of another public or quasi-public body regarding public utility services then a referendum should be held. Further, if a county council is to come into ownership of some portion of public utility facilities or plants through the appropriation of money, then a referendum should be held. However, the mere appropriation of money to a public or quasi-public body which provides water services does not appear to trigger the requirement.

Id.

In following the reasoning of our 2003 opinion, if the County wishes to pass the revenue raised by imposition of a sales and use tax pursuant to the Act onto other public or quasi-public entities for purposes of providing water service, we do not believe a referendum under section 16 of article VIII is required. However, in the event that the County itself becomes involved in the operation of a water system when it previously has not engaged in such activities, in addition to holding a referendum pursuant to the Act, the County must also hold a referendum as required under article VIII, section 16. Whether the County is sufficiently involved in the operation of the water system to require a referendum pursuant to article VIII section 16 mandates a factual determination of the exercise of control. As stated on numerous occasions, only a court may determine issues of fact. Op. S.C. Atty. Gen., January 17, 2008. Thus, only a court, not this Office, may determine whether the County must hold a referendum under these circumstances.

Next, if both a referendum under the Act and a referendum pursuant to article VIII, section 16 are required, you inquire as to what language should be used in a referendum conducted pursuant to the Act that would also meet the constitutional requirements of article VIII, section 16. More specifically, you inquire as to whether both the referendum requirements pursuant to the Act and those imposed by Article VIII, section 16 may be placed on the same ballot.

As you mentioned in your memorandum, we considered combining separate propositions into one referendum ballot question in an opinion issued by this Office in 2004. Op. S.C. Atty. Gen., September 13, 2004. In that opinion, quoting 64 Am.Jur.2d, Public Securities and Obligations, § 145, we stated:

> "[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."

Id.

In addition, in an opinion of this Office issued in 1987, we considered whether a single referendum may be used to submit both a question as to whether the size of a county council should be reduced and a question as to whether the method of election for a county council should be changed. Op. S.C. Atty. Gen., September 17, 1987. We determined: "more than one question may appear on the referendum ballot." Id. However, we were careful to explain as follows:

> A strong argument may be made that if more than one change is contemplated by a county council, each change should be presented separately on the referendum ballot to allow the voter to express his intent more completely. For example, a decrease in the number of council members may not be favorable to a voter who does wish to elect council members from single-member districts. If both questions were presented together, the will of that voter could not be adequately expressed; he would be forced to vote favorably for one proposal which he did not favor, or to vote negatively against the proposal he favored to be able to express his will as to the portion of the question he disfavored. Setting forth each question separately, allowing one alternative and a choice to maintain the status quo,

> would permit a more complete expression of the will of the electorate.

Id.

Thus, in accordance with our prior opinions, more than one question may be presented in a single referendum. Therefore, we believe the County may present both the question as to whether the County may provide water service as required under article VIII, section 16 of the South Carolina Constitution and the question of whether the County may impose a sales and use tax to fund the creation or expansion of a water facility as required by the Act in one referendum. However, the County must present these questions separately and in a manner that satisfies both the requirements of article VIII, section 16 and the Act.

The Act, in section 4-10-330 of the South Carolina Code (Supp. 2007), specifies the contents of the referendum ballot for purposes of compliance with the Act. In addition, subsection (D) of this provision provides the language to be used on the ballot. However, we found no constitutional or statutory law giving guidance as to the language required for referendums held pursuant to article VIII, section 16. As we noted in an opinion of this Office issued in 1988, article VIII, section 16 "does not specify a particular format for a referendum question to be decided thereunder." Op. S.C. Atty. Gen., October 14, 1988. Nonetheless, in that opinion, we advised the requester to follow the language contained in this provision to ensure the validity of the referendum. Id. Accordingly, we cannot point you to specific language that must be included in a referendum in order to comply with article VIII, section 16. But, we advise that the question presented with regard to the County's ability to construct, purchase, or operate a water facility be clear in what it is authorizing the County to do. In addition, we also advise that this question should be clearly separate and distinct from the question of whether the County may impose a sales and use tax for the purpose of funding such facilities allowing voters to express their will as to each issue.

You also inquire as to whether ballot must also contain "(1) a choice of maintaining the status quo of a water system; or (2) some alternative to financing such water system project(s) with Act proceeds." We gather these questions stem from our findings in our 1987opinion cited above. In that opinion, we not only clarified that questions concerning a change in the size of county council and changes in the method of election must be separate, but we also advised that the ballot must provide a choice to maintain the status quo and therefore, not change either the size of city council or its method of election. In our review of this opinion, this advice is based upon the fact that section 4-9-10 of the South Carolina Code (1986), in requiring a referendum for such changes, states: "In any referendum, the question voted upon, whether it be to change the form of government, number of council members, or methods of election, shall give the qualified electors an alternative to retain the existing form of government, number of council members, or method of election or change to one other designated form, number, or method of election." We did not find a similar requirement under article VIII, section 16 or the Act. Thus, we do not believe the County must offer the choice of maintaining the status quo or an alternative to financing the water facilities with revenue from a sales and use tax imposed pursuant to the Act.

Lastly, assuming the County wishes designate revenue received from a sales and use tax imposed pursuant to the Act to another entity rather than using the revenue to own and operate its own water system, you question whether these funds may be designated to "a public service district or other non-profit entity, as opposed to a water system owned and operated by a municipality or special purpose district." As you mentioned in your memorandum, the South Carolina Constitution imposes a requirement that expenditures of public funds must be for a public purpose. Article X, section 5 of the South Carolina Constitution (Supp. 2007) mandates: "Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." In addition, Article X, section 11 of the South Carolina Constitution (Supp. 2006) provides, in pertinent part: "The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution." In State exrel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), the South Carolina Supreme Court interpreted this provision to prohibit the expenditure of public funds for the primary benefit of private parties.

In section 4-9-30 of the South Carolina Code (1986 & Supp. 2007), the Legislature afforded specific powers to counties. Among these powers, is the power to "make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution . . . ." Thus, we agree with your assessment that the County would serve a public purpose by appropriating funds for the purpose of constructing, acquiring, or operating a water system. However, you question whether or not the County may appropriate revenue raised from the sales and use tax imposed pursuant to the Act. Thus, we must look to the provisions of the Act to determine whether it limits the County's ability to appropriate funds for purposes of providing water to its residents.

As you mention in your letter, section 4-10-310 of the South Carolina Code (Supp. 2007) allows the imposition of a sales and use tax for "specific purpose or purposes and for a limited amount of time to collect a limited amount of money." Furthermore, section 4-10-330 of the South Carolina Code (Supp. 2007) states the purposes for which the proceeds of these taxes may be used as follows:

> (A) The sales and use tax authorized by this article is imposed by an enacting ordinance of the county governing body containing the ballot question formulated by the commission pursuant to subsection 4-10-320(C), subject to referendum approval in the county. The ordinance must specify:
>
> > (1) the purpose 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 local governmental entities, including the county, municipalities,

> and special purpose districts located in the county area, and may include the following types of projects:
>
> > (a) highways, roads, streets, bridges, and public parking garage and related facilities;
> >
> > (b) courthouses, administration buildings, civic centers, hospitals, emergency medical facilities, police stations, fire stations, jails, correctional facilities, detention facilities, libraries, coliseums, or any combination of these projects;
> >
> > (c) cultural, recreational, or historic facilities, or any combination of these facilities;
> >
> > (d) water, sewer, or water and sewer projects;
> >
> > (e) flood control projects and storm water management facilities;
> >
> > (f) beach access and beach renourishment;
> >
> > (g) jointly operated projects of the county, a municipality, special purpose district, and school district, or any combination of those entities, for the projects delineated in subitems (a) through (f) of this item;
> >
> > (h) any combination of the projects described in subitems (a) through (g) of this item;
> >
> > . . .

This provision does not appear to limit a county's ability to appropriate funds to other entities providing water service. In addition, as you pointed out in your memorandum, section 4-10-330(A)(1) indicates that the Legislature contemplated the use revenue raised under the Act to fund projects located within an area under the jurisdiction of a municipality or special purpose district. In addition, section 4-10-330(A)(1)(g) appears to contemplate projects that are not solely under the counties authority, but are operated jointly by "the county, a municipality, special purpose district, or school district, or <u>any combination of those entities</u> . . . ." (emphasis added). Thus, reading section 4-10-330 as a whole, we are of the impression that the Legislature considered the use of funds from the imposition of the tax by other entities. While this provision only speaks to municipalities, special purpose districts, and school districts, it does not appear to limit a county's

ability to transfer funds to other entities. Therefore, we find no reason that a county could not appropriate funds generated from the imposition of the tax to public service districts and non-profit entities, so long as the appropriation was in furtherance of a public purpose.

While we do not find evidence of the Legislature's intent to limit what entities may use funds generated from the tax, we must caution that the entities must use the funds generated in accordance with the provisions contained in 3 of chapter 10 of title 4 and only for the purposes provided under these provisions. In an opinion of this Office issued in 1985, we considered a county's ability to appropriate funds for a proposed performing arts center. Op. S.C. Atty. Gen., January 21, 1985. Under the circumstances presented to us, the county did not retain any ownership or control over the facility and took no part in its management. Id. In that opinion, we concluded a court would likely find that the performing arts center served a public purpose and a corporate purpose of the county and therefore, the county could contribute funding to the project even if it lacked ownership or control of the project. Id. However, we noted that if the county maintained some control over the facility or its management, "it would further insure the validity of such proposal . . . ." Id. In addition, we commented:

> It would also appear that the county could attach whatever conditions were necessary to its expenditure of funds to insure that the public and corporate purpose were being maintained. As the Court stated in Smith v. Robertson, supra, another governmental entity, such as the State or a political subdivision, 'has a clearly implied obligation' to operate the venture in which the county has invested 'as planned and to continue so to do or else make just compensation to the county.' 210 S.C. at 118. See, also, Op. Atty. Gen., November 17, 1983.

Id.

In consideration of this opinion, we believe the County may want to place conditions upon those entities receiving sales and use tax revues requiring them to comply with the provisions of the Act. Nonetheless, we also caution that if the County has not held a referendum as required by article VIII, section 16 it must be careful to exercise control over the entity providing the water service to a degree that it violates the South Carolina Constitution.

Conclusion

As explained above, if the County seeks to use the revenue from the imposition of a sales and use tax enacted pursuant to the Act to fund the County's construction, purchase, or operation of a water system, it must first hold a referendum pursuant to article VIII, section 16 of the South Carolina Constitution. However, if the County itself does not construct, purchase, or operate the water system, but is simply appropriating funds to other entities providing such services to the County's residents, we do not believe a referendum is required.

If a referendum is required by article VIII, section 16 in addition to a referendum required under the Act, we believe the County may use a joint referendum. However, it is our opinion that the referendum must separately state the question of whether the electors wish to have a sales and use tax pursuant to the Act and whether the electors wish to allow the County to be able to operate a water system. Furthermore, in presenting these questions, the County must comply with both the provisions of the Act and the requirements of article VIII, section 16. However, based upon our reading of the requirements under each of these bodies of law, we do not believe the ballot must provide for a choice of maintaining the status quo or providing some alternative to financing the water system project if proceeds under the Act are not available.

Lastly, in our opinion providing water service fulfills a public purpose as it is certainly within the County's authority. Thus, we believe the County generally may appropriate County funds to other entities to facilitate providing water service to its residents. In addition, while the Act, by the language included in section 4-10-330 indicates that the Legislature contemplated the County providing revenues generated under the Act to local governmental entities including municipalities, special purpose districts and school districts, we do not believe a county is limited to these types of entities. Thus, presuming the appropriation of funds raised pursuant to the Act to other entities, such as public service districts and non-profit entities, serves a public purpose of the County, we believe a court would allow the appropriation of such funds. However, we suggest the County take whatever measures are necessary to insure such funds are appropriately used under the Act.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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