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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 6, 2003

The Honorable Bill Herbkersman
Member, House of Representatives
434-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Herbkersman:

You have sought an opinion regarding the constitutionality of a proposed bill concerning real estate transfer fees. The bill would remove the prohibition on the imposition of a fee or tax on the transfer of real property thereby authorizing a municipality or county to impose the fee if it were being imposed prior to January 1, 1991. Specifically, the legislation would authorize a municipality to impose a real estate transfer fee, upon petition and approval of the county legislative delegation, if any municipality in the county required such fee prior to January 1, 1991. Likewise, a county could, upon petition and approval of the legislative delegation, impose and collect a real estate transfer fee if it had imposed the fee prior to January 1, 1991. The fee could not exceed .025 percent and must be used to purchase DHEC-recognized wetlands, green space and open areas for the public benefit.

Law / Analysis

The proposed legislation provides in pertinent part as follows:

SECTION 1. Section 6-1-70(B) of the 1976 Code, as last amended by Section 72A, Part II, Act 155 of 1997, is further amended to read:

"(B)(1) A municipality that originally enacted a real estate transfer fee ~~prior to~~ before January 1, 1991, may impose and collect a real estate transfer fee, by ordinance, regardless of whether imposition of the fee was discontinued for a period after January 1, 1991.

(2) A municipality that is located in a county in which is located a municipality that was imposing a fee or tax on the transfer of real property before January 1, 1991, may impose and collect a real estate transfer fee, by ordinance, regardless of whether imposition of the fee was discontinued for a period after

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January 1, 1991, upon petition and approval of the legislative delegation of that county.

(3) A county that is located in a municipality that was imposing and collecting a real estate transfer fee before January 1, 1991, may impose and collect a real estate transfer fee by ordinance, upon petition and approval of the legislative delegation of that county.

(4) A transfer fee imposed pursuant to the provisions of this section may not exceed .025 percent and must be used by the municipality or county to purchase the Department of Health and Environmental Control-recognized wetlands, green space, and open areas for the public benefit."

SECTION 2. This act takes effect upon approval by the Governor.

We begin with the legal proposition that "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits ...." Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). The General Assembly is "presumed to have acted within ... [its] constitutional power despite the fact that, in practice, ... [its] laws result in some inequality ...." State v. Solomon, 245 S.C. 550, 572, 141 S.E.2d 818 (1965).

Moreover, 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). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court and not this Office, may strike down an act of the General Assembly as unconstitutional. While this Office may comment upon what we deem an apparent unconstitutionality, we may not declare the Act void. Put another way, a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

In conjunction with the presumption of constitutionality which must be given every statute enacted by the General Assembly, it must also be noted that, if possible, a statute will be construed in a constitutional rather than an unconstitutional manner. Gardner v. S.C. Dept. of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003). As the Court instructed in Westvaco Corp. v. S.C. Dept. of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995), "[a] possible constitutional construction must prevail over an unconstitutional interpretation."

Section 6-1-70, at present, provides as follows:

(A) Except as provided in subsection (B), the governing body of each county, municipality, school district, or special purpose district may not impose any fee or tax of any nature or description on the transfer of real property unless the General Assembly has expressly authorized by general law the imposition of the fee or tax.

(B) A municipality that originally enacted a real estate transfer fee prior to January 1, 1991 may impose and collect a real estate transfer fee, by ordinance, regardless of whether impositions of the fee was discontinued for a period after January 1, 1991.

A predecessor statute to current § 6-1-70 was upheld by the State Supreme Court in Town of Hilton Head Island v. Morris, 324 S.C. 30, 484 S.E.2d 104 (1997). The statute, as it existed when the Court decided Morris, and which was enacted as 1994 Act No. 497, Part II, § 132A, provided as follows:

(A) ... [t]he governing body of each county and municipality which enacts and collects any fee which is charged on the transfer of real estate shall, not later than ten days after the close of a fiscal year quarter, remit to the State Treasurer an amount equal to the amount of real estate transfer fees collected in the previous fiscal year quarter. The county or municipality may voluntarily elect to have the State Treasurer or Comptroller General, as appropriate, deduct the amount required to be remitted from any distributions authorized to be made to the county or municipality under Aid to Subdivisions.

(B) The provisions of Section 6-1-70 of the 1976 Code are suspended through January 1, 1997, in the case of any county or municipal real estate transfer tax or fee imposed on or before August 1, 1993.

(C) This section takes effect on July 1, 1994.

In Morris, the Court upheld the earlier 1994 predecessor statute against a variety of legal challenges. Plaintiff argued, for example, that § 6-1-70, as it earlier existed, violated Article VIII, § 17 of the Home Rule amendment. The contention was that since the Court had previously concluded that real estate transfer fees were within a local government's general statutory authority in Williams v. Town of Hilton Head, 311 S.C. 417, 429 S.E.2d 802 (1993), any limitation upon the imposition of the fee by the General Assembly, contravened Article VIII, § 17. The Court rejected this argument, noting that "[t]he authority of a local government is subject to the general laws passed by the General Assembly." Id., at 104. Likewise, the Court disagreed with the contention that § 6-1-70 was not a general law. Section 6-1-70 applies to all real estate transfer fees, concluded the Court, thereby rendering it a general and not a special law.

Further, in rejecting other arguments made, the Morris Court concluded that there was no violation of Equal Protection based upon the fact that real estate transfer fees apply only to those local governments which chose to impose such fees. The Court responded that "[s]ince § 6-1-70 applies to all local governments that are similarly situated, i.e. impose a transfer fee, there is no unconstitutional classification." Citing, Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). Moreover, the Court also disposed of the argument that there was arbitrary treatment imposed by § 6-1-70 in that those local governments which collected transfer fees before August 1, 1993, were exempt until January 1, 1997 from the application of the statute. The Court concluded that

> [t]his lapse in enforcement allows local governments which have relied on such fees in adopting budgets to phase them out as a source of revenue. Accordingly, this classification is not arbitrary but is reasonably related to a proper legislative purpose and therefore does not violate equal protection.

484 S.E.2d at 108. Thus, the predecessor statute to present § 6-1-70 has already been upheld by the Court against a number of constitutional attacks. Such statute was deemed by the Court to be well within the General Assembly's power to enact.

Turning now to the legislation which you are proposing, except for one part, discussed below, we are likewise of the opinion that the Bill would be constitutional. In light of the Morris decision, referenced above, the proposed bill would likely not be vulnerable to any attack that it violated Home Rule (Article VIII) or that it is special legislation. On its face, the Bill appears to apply statewide, as was the case in Morris, and we have no information that the legislation is aimed at or would impact only certain localities. Of course, an opinion of this Office cannot determine factual issues, See, Op. S.C. Atty. Gen., December 12, 1983. Thus, we must assume that the legislation applies to all areas equally as seems to be the case from the face of the Bill. See, Timmons v. S.C. Tricentennial Comm., 254 S.C. 378, 175 S.E.2d 805 (1970) [fact that legislation might apply only to certain cases is not determinative of constitutionality where neutral on its face]. With that assumption in mind, however, the Bill is general in scope.

Any Equal Protection argument, based upon the fact that not all localities would necessarily impose and collect the fee, would also likely not succeed as a result of the Morris decision. Moreover, the fact that the imposition and collection of a real estate transfer fee might be tied to certain facts, such as whether a municipality or a county had imposed the fee on the transfer of real property before January 1, 1991, does not undermine the General Assembly's constitutional power to enact this legislation. Joytime Distributors and Amusement Co., Inc v. State, 338 S.C. 634, 528 S.E.2d 647 (1999) [statutes which go into effect only on a certain contingency are constitutional].

There is one potential constitutional problem with the Bill in its present form, however. The legislation makes imposition and collection of the fee conditional "upon petition and approval of the legislative delegation of that county." In at least two cases, our Supreme Court has ruled that

requiring such approval by the delegation contravenes the constitutional principle of separation of powers under Article I, § 8 of the State Constitution.

In Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972), the Court considered the constitutionality of a statute which granted to the county legislative delegation the authority to approve or disapprove any tax increase by the board of trustees of Cherokee County School District No. 1. The Court reasoned that the Act unconstitutionally delegated executive powers to members of the General Assembly – in that instance the legislative delegation. In the majority's opinion, the Act thus violated Article I, § 8 of the Constitution requiring that the legislative, executive and judicial powers remain separate and distinct. Stated the Court,

> The power of the Legislature to provide for the imposition of taxes is unquestioned. Article 10, Section 3, South Carolina Constitution. Under Article 10, Section 5, of the Constitution, this power to tax may be delegated, as it was in this case. No contention is here made that the Legislature cannot impose limitations on the power delegated, when such limitations are imposed in the exercise of its legislative power. Thus, as stated in the order of the lower court, the Legislature may delegate the power to tax, but also impose by law a maximum millage ceiling. This, however, is not the effect of the provision here in question.
>
> Under Act No. 685, the Board of Trustees was granted the general power to levy taxes for school purposes in the district. After conferring this power on the Board, the Legislature passed Act No. 542 which attempted to amend the previous Act by granting to the Cherokee County Legislative Delegation the authority to approve or disapprove any tax increase adopted by the Board. This in effect, 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.
>
> That the determination of the amount of the tax levy in the school district may be a legislative function delegable to the corporate authorities of the School District under Article X, Section 5 of the Constitution is beside the point. 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.

The dissent in Gunter disagreed that the delegation was exercising an executive power, but thought instead it was a function legislative in nature. Justice Bussey, in dissent, reasoned that "[i]t is, of course, true that the local legislative delegation would no doubt want to take a look at the

proposed budget of the Board in deciding whether to approve or veto any proposed tax increase. This it may appropriately do, as one of the 'corporate authorities', in the exercise of a purely legislative function." 192 S.E.2d at 475. Given the fact that the statute must be given every benefit of he doubt in favor of constitutionality, Justice Bussey would have upheld the statute as valid. Again, however, the majority deemed the statute unconstitutional.

The same conclusion was reached by the Court in Aiken Co. Bd. of Ed. v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980). Relying upon Gunter, the Court invalidated a statute which qualified the right of a county board of education to authorize assessment of millage to meet its budget by giving approval authority of millage increases to the county legislative delegation. An attempt to distinguish the legislation from the statute considered in Gunter on the basis that veto authority by the delegation in Knotts was contingent rather than absolute was rejected by the Court. Defendants in Knotts argued that millage increases were still possible even if the delegation vetoed such increases because the school board could seek further recourse for such increases by referendum. Notwithstanding that argument, however the Court observed that the question was not whether the "... Delegation's participation amounts to an absolute or qualified veto" but whether "such participation is violative of the separation of powers provision of the constitution." 262 S.E.2d at 17. In the Court's opinion, "we are unable to discern any distinction between the instant case and Gunter that would justify different conclusions." Id.

While there are some factual distinctions between the legislation struck down in Gunter and Knotts and the proposed bill, in our opinion, these differences are not constitutionally controlling. The fact that any veto of the imposition and collection of the fee by the delegation might occur before the municipality or county is afforded an opportunity to consider whether or not such fee should be imposed, as opposed to afterwards (as was the case in Gunter and Knotts), is most probably a distinction without a difference. In either event, the Delegation would be involved integrally in the process of whether or not such fee is imposed. Gunter and Knotts conclude this involvement violates separation of powers principles pursuant to Article I, § 8 of the Constitution.

Accordingly, you may wish to consider whether or not the proposed legislation retains the Delegation's role in this process because of the constitutional problems which would be created thereby. Certainly, the Bill would be more constitutionally vulnerable to challenge if the portions of the Bill concerning the Delegation remain. Otherwise, in my opinion, the Bill would pass constitutional muster.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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