



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 19, 1997

The Honorable Harvey S. Peeler, Jr.
Member, South Carolina Senate
P. O. Box 142
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Peeler:

You have asked three questions concerning construction of toll roads by the South Carolina Department of Transportation in South Carolina. These questions are as follows:

1. Can the South Carolina Department of Transportation Commission proceed with the tolling of interstate highways without Legislative approval?
2. Who sets the amount? Is it the Commission, another "turnpike commission"-like entity, or must it be the Legislature?
3. As far as the statutory requirement for a referendum on "projects" over \$150 million, what constitutes a "project"? Must this "project" be one specifically, or can it be a list, grouped as one "project"?

LAW / ANALYSIS

With respect to Question 1, it would appear that DOT's authority in this area is bestowed by S.C. Code Ann. Section 57-5-1320 et seq. Section 57-5-1330 authorizes DOT to "designate, establish, plan, approve, construct, maintain, operate, and regulate turnpike facilities as part of the state highway system or any federal aid system whenever the department determines the traffic conditions, present or future, justify the facilities, except that the department may not designate as a turnpike facility any highway, road, bridge, or other transportation facility funded in whole or in part by a local option sales and use tax as provided in Chapter 37 of Title 4." The term "Turnpike facility" is defined by Section 57-5-1320 (2) to

... mean[] any express highway or limited access highway constructed under the provisions of this article by the Department, including any bridge, tunnel, overpass, underpass, interchange, entrance plaza, approach, toll house, service station and administration and storage and other buildings and facilities which the Department may deem necessary or desirable therefor. A turnpike facility may constitute a portion or extension of any existing or proposed highway in the state highway system;

It is my understanding that "the state highway system" includes the "interstate system." Therefore, in response to your first question, it would appear that the General Assembly has already delegated sufficiently broad authority to SCDOT in the area of approval of tolls or toll roads.¹

However, in response to your second and third questions, the General Assembly has qualified the authority granted to DOT at Section 57-3-615. This Section provides as follows:

[i]f a toll is administered on a project by the Department of Transportation, the toll must be used to pay for the construction, maintenance costs, and other expenses for only that

¹ It is my understanding that Congress may be considering or about to consider the issue of a widening of authority to toll the interstates. Your question here does not relate to federal authority, but to whether the Legislature has delegated authority to SCDOT to designate toll roads.

project. A toll project that is in excess of one hundred fifty million dollars may only be initiated as provided in Chapter 37 of Title 4.

Chapter 37 of Title 4 contains a mechanism whereby a referendum must be called if an authority established pursuant to that chapter would collect tolls within that jurisdiction, or where an additional sales tax would be collected to finance such a project²

This Office construed Section 57-3-615 in an Opinion, dated June 18, 1996. A copy of that Opinion is enclosed. In that Opinion, the statute was read literally in the absence of an construction thereof by our courts. We stated as follows:

² Section 12-27-1290 provides the authority to SCDOT to "review projects for the possibility of constructing toll roads to defray the costs of these projects pursuant to the authority granted the department in Section 57-5-1330." Such Section further states that

[n]o project may be funded by means of imposing a toll on the users of the project unless in conjunction with federal funds authorized for use on toll roads it is determined to be substantially feasible by the department. The funds derived from tolls must be:

- (1) credited to the State Highway Fund or retained and applied by the entity or entities developing the toll road pursuant to an agreement authorized under Section 57-3-200 for the purpose of funding the cost of construction, financing, operation and maintenance of the toll project; or
- (2) used to service bonded indebtedness for highway transportation purposes incurred pursuant to Paragraph 9, Section 13, Article X of the South Carolina Constitution.

Upon repayment the cost of construction and financing toll charges shall cease.

See also, Section 12-28-2920.

[t]o construe the application of § 57-3-615 to a project, it is necessary to resolve at least one threshold question: Will the toll project be in excess of one hundred fifty million dollars? (A corollary question may be how the threshold amount of one hundred fifty million dollars is calculated.) If the project cost will be in excess of one hundred fifty million dollars, the plain and unambiguous language of § 57-3-615 contemplates that such a project may be initiated only as provided in new Chapter 37 of Title 4. Such language appears to place a limitation on the ability of a county or indeed the State Department of Transportation (in which agency's enabling legislation this statute has been codified) to initiate a toll project the cost of which will exceed one hundred fifty million dollars. Indeed, from the title of the bill/act, it could be argued that the legislature intended to limit the ability of the Department of Transportation to undertake a project in excess of the specified cost by requiring that a project in excess of the specified cost be undertaken only pursuant to Chapter 37 of Title 4.

Further, we stated:

... a toll project in excess of 150 million dollars may be initiated only as provided in Chapter 37 of Title 4, thereby requiring a referendum. It makes no difference whether such project is one of a county or the South Carolina Department of Transportation. To determine whether the threshold amount of 150 million dollars has been reached, a broad and expansive interpretation should be given to the factors which make up that determination.

However, in the Opinion we also cautioned that the constitutionality of Section 57-3-615 was somewhat uncertain. We referenced the South Carolina Supreme Court case of Hilton Head Island v. Expressway Opponents, 415 S.E.2d 801 (S.C. 1992), and noted that

[t]here, the Supreme Court of South Carolina held that a municipal ordinance, which had sought by initiative and referendum to block a state toll project, violated Art. VIII, Sec. 14 (6) of the South Carolina Constitution. This Section

of the Constitution provides that a municipality or county may not set aside "the structure and the administration of any governmental service or function, the responsibility for which rests with State government or which requires statewide uniformity." The Court in Expressway Opponents found that the planning, construction and financing of state roads "requires statewide uniformity", and thus that the Hilton Head ordinance seeking to veto by referendum the state project was inconsistent with Art. VIII, Sec. 14 (6). This Office, of course, presumes the constitutionality of Section 57-3-615. However, in light of the Hilton Head case, a court should probably review the constitutionality question as well as the applicability of Section 57-3-615 to this particular project so that the matter may be finally resolved.

Since this Opinion was issued, there has been a trial court decision construing Section 57-3-615. In Brashier v. SCDOT et al, CA No. 96-CP-23-3189 (February 7, 1997), the Honorable Charles B. Simmons, Jr. issued an Order concluding that Section 57-3-615 was inapplicable to the Southern Connector project because the total project cost did not, in the Court's opinion, exceed 150 million dollars. The Court concluded that SCDOT's interpretation as to the project cost would be given great weight and would not be overturned by the Court. Moreover, Judge Simmons concluded that the Highway 153 portion was not part of the Southern Connector "project" because it had never been treated as such by the parties or by SCDOT and was not a toll road.

In addition, the Court found that Section 57-3-615 was unconstitutional with respect to projects of statewide concern, as had been suggested in our June 18, 1996 Opinion. The Court concluded as follows:

[o]n the facts presently before the Court, the constitutional infirmity is clear. Under S.C.Code Ann. Section 4-37-30 (B) (1) (b), because the statute used the word "may" county council would not even be required to call a public referendum, despite the serious shortcomings of trying to adapt the procedures and limitations of Section 4-7-30 to a project structured like the Southern Connector, the referendum might not succeed. The practical result is that SCDOT would no longer have control over such a project and it would be up to local county councils and voters to determine whether or not toll projects of statewide concern would be constructed.

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I am enclosing a copy of Judge Simmons' Order for your information. I presume that this case will ultimately land in the South Carolina Supreme Court for final resolution. Currently, however, this is, as far as I know, the only judicial ruling with respect to Section 57-3-615.

Thus, in summary, SCDOT appears to have authority with respect to toll projects pursuant to Section 57-5-1320 et seq. This statute, at Section 57-5-1450 (C), requires a finding by the Budget and Control Board "that the estimate of turnpike facility revenues made by the state board (Budget and Control Board) indicates that collection from turnpike revenues for applicable fiscal years is not less than that required for annual debt service requirements of the requested turnpike bonds." Thus, the statute plainly requires DOT, with the approval of the Budget and Control Board, to set a toll sufficient to meet the required annual debt service requirement. The toll must end, however, when the debt service is paid. As to your question regarding the definition of "project," our June 1996 opinion construed such term broadly, but Judge Simmons' order indicated that deference would be given the SCDOT's characterization. Judge Simmons stated that "the Court should give great weight to the construction of the statute by the agency charged with its administration."

Finally, the construction and constitutionality of Section 57-3-615 is currently being litigated in the courts. The ruling by Judge Simmons to my knowledge represents the only judicial ruling with respect to the statute, but will undoubtedly be appealed. Again, I am providing you a copy of Judge Simmons' Order for your information as well as a copy of our June 18, 1996 Opinion.

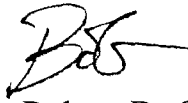
I am hurriedly providing this information to you because of your need for it on very short notice. Of course, I express no opinion regarding the wisdom or policy considerations of the proposed project, or any other, but simply provide you with these relevant legal authorities.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

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With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/ph
Enclosures