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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 13, 1997

The Honorable G. Ralph Davenport, Jr.
Member, House of Representatives
323B Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Davenport:

Your opinion request has been forwarded to me for reply. Your request raises a number of questions regarding the Spartanburg County Transportation Committee and the county's expenditure of the gasoline tax found under Section 12-28-2740 of the Code.

By way of background, in Tucker v. South Carolina Department of Highways and Public Transportation, 309 S.C. 395, 424 S.E.2d 468 (1992) (Tucker I), the Supreme Court found the provisions of Section 12-27-400, which required that a county legislative delegation approve the expenditure of the gasoline tax earmarked as "C" construction funds and allowed the delegation to contract for improvements, to be unconstitutional. The court found these provisions unconstitutional because the legislative delegates are only permitted to exercise legislative power as members of the General Assembly enacting legislation. By constitutional mandate, the legislature may not undertake both to pass laws and to execute them by bestowing upon its own members functions that belong to other branches of government. In addition, action by a legislative delegation pursuant to a complete law cannot qualify as action to enact legislation and is therefore invalid.

The General Assembly subsequently amended Section 12-27-400 to require that the county legislative delegation appoint a county transportation committee to oversee the expenditure of "C" funds. The constitutionality of the amended version of Section 12-27-400 was upheld by the court in Tucker v. South Carolina Department of Highways and

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Public Transportation, 314 S.C. 131, 442 S.E.2d 171 (1994) (Tucker II). Thereafter, Section 12-27-400 was recodified as Section 12-27-2740 (Supp. 1996).

Question 1

1. The Spartanburg County Legislative Delegation is aware of the statutory authority to create the Spartanburg County Transportation Committee. The situation has arisen affecting the Spartanburg County Transportation Committee, in that,

- a. Can individual committee members be removed from serving?
- b. Can the entire Spartanburg County Transportation Committee membership be removed?
- c. Can the entire Spartanburg County Transportation Committee be removed by Act of the Spartanburg County Legislative Delegation?
- d. What are the legalities in the dissolution of the committee to the Delegation members?

It is a general rule that when the term or tenure of a public officer is not fixed by law, and the removal is not governed by constitutional or statutory provisions, the power of removal is incident to the power to appoint. In other words, the appointing power, where the term is not fixed by law, may remove the appointee at pleasure and without notice or opportunity to be heard. State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948). However, removal for such unconstitutional reasons as race or religion may be construed as a restriction on the removal power.

Section 12-28-2740 does not contain any provision setting forth a term of office for an individual appointed to the county transportation committee. Additionally, the statute contains no provision setting forth the power to remove an individual appointed to the county transportation committee. Therefore, in accordance with the general rule, the power of removal is incident to the power to appoint.

In this instance, since the power to remove is incident to the power to appoint, other than the restriction on removal for unconstitutional reasons, there does not appear to be any other restriction upon the Legislative Delegation's power to remove members of the transportation committee. Consequently, the Legislative Delegation may remove

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individual members or the entire membership of the transportation committee, if so desired. Further, based on the Wannamaker case, the removal is at the pleasure of the Legislative Delegation and may be done without notice or opportunity to be heard.

Question 2

2. If a new Spartanburg County Transportation Committee is created:
 - a. Can Spartanburg County Council serve as the committee or authorities be transferred to Spartanburg County Council?
 - b. Can a county employee such as county administrator, administrator secretary or assistant county administrator serve on the Spartanburg County Transportation Committee?

In interpreting any statute, the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). The court must apply the clear and unambiguous terms of the statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

According to the clear and unambiguous language of the Section 12-28-2740, "C" funds must be expended by either the county transportation committee or the Department of Transportation.¹ The statute does not provide for the expenditure of "C" funds by a body such as the Spartanburg County Council. Among the provisions of the statute which support this conclusion are the following: The Department of Revenue shall submit the percentage of the total represented by each county to the Department of Transportation and to each county transportation committee annually by March thirty-first. Section 12-28-2740(A)(3); the "C" funds must be approved by and used in furtherance of a countywide

¹ Upon request of a county transportation committee, the Department of Transportation shall continue to administer the funds allocated to each county. Section 12-28-2740(A)(3). Further, a county transportation committee may elect to have the Department of Transportation administer the "C" funds. Section 12-28-2740(F). It is my understanding that the Spartanburg County Transportation Committee has not elected to have the Department of Transportation administer the "C" funds.

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transportation plan adopted by a county transportation committee. Section 12-28-2740(B); County transportation committees may join in approving a regional transportation plan, and the funds must be used in furtherance of the regional transportation plan. Section 12-28-2740(B); The county transportation committee, at its discretion, may expend up to seventy-five percent of the "C" construction funds for activities including, but not limited to, local paving or improving county roads, for street and traffic signs, and for other paving projects. Section 12-28-2740(C); Before the expenditure of funds by a county transportation committee, the committee shall adopt specifications for local road projects. Section 12-28-2740(F); The applicable source for payment of principle and interest on bonds is the share of "C" fund revenues available for use by the county transportation committee. Section 12-28-2740(J).

Since Section 12-28-2740 does not grant a county council the authority to expend "C" funds, efforts may be made to appoint the county council as a whole or individual members of the county council to the county transportation committee. This Office has issued numerous opinions on the propriety of members of a county council serving on a county transportation committee. Article XVII, Section 1A of the state Constitution provides that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for officers in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public. For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

This Office has advised on numerous occasions that members of county councils would be considered office holders for purposes of dual office holding. See, as examples of the numerous opinions, Ops. Att'y Gen. dated May 16, 1995, December 7, 1994, December 20, 1993, and May 15, 1989.

Similarly, this Office has opined on several occasions concerning members of county transportation committees in the context of dual office holding. In an opinion dated May 16, 1995, it was concluded that

while it is not entirely free from doubt, it appears that one who would serve on a County Transportation Committee would hold an office for dual office holding purposes. Thus, if a mayor or city or county council member were to serve

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simultaneously on a County Transportation Committee, that individual would most probably violate the dual office prohibitions of the state Constitution.

The appointment of a county employee to the county transportation committee may be proper in certain instances. However, I caution that some county employees are considered public officers. If a county employee is considered a public officer, there would be a dual office holding problem if that individual is appointed to the county transportation committee. A determination of whether a county employee is a public officer for dual office holding purposes is most effectively accomplished by providing this Office with a job description of the employee.²

To summarize the foregoing, it is the opinion of this Office that a county council does not have the authority under Section 12-28-2740 to expend "C" funds. In addition, if a county council member were to serve simultaneously on the county transportation committee, that individual would most probably violate the dual office prohibitions of the state Constitution. Finally, if a county employee is a public officer, that individual would most probably violate the dual office prohibitions of the state Constitution if the individual were to simultaneously serve on the county transportation committee.

Question 3

Is there any emergency provisions that would allow the Spartanburg County Legislative Delegation to function as the Spartanburg County Transportation Committee?

Section 12-28-2740 does not contain an emergency provision which would permit the Legislative Delegation to act as the transportation committee. In fact, the supreme court's decisions in both Tucker cases makes it clear that the Legislative Delegation itself cannot expend the "C" funds. The court based its decision on the constitutional mandate that legislative delegates may not undertake to both pass laws and to execute them by bestowing upon its own members functions that belong to other branches of government. Therefore, based on the court's decisions in the Tucker cases and the lack of statutory

² I have been informed that Spartanburg County operates under a Council-Administrator form of government. This Office has previously stated that a County Administrator under this form of government is a public officer for dual office holding purposes. Op. Atty. Gen. dated May 30, 1979.

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authority, even in an emergency situation, the Legislative Delegation may not act as the transportation committee.

Question 4

If a Resolution is introduced by the Spartanburg County Legislative Delegation creating a new Spartanburg County Transportation Committee what affect would the present committee have?

The answer to this question is similar to the answer in Question 1. The Legislative Delegation, subject to certain constitutional limitations, may remove individual members of the transportation committee or the membership as a whole and replace those members at its pleasure.

Question 5

Can the Spartanburg County Delegation direct the present Transportation Committee to direct all funds to a County Council designee for disbursement?

The answer to this question is based on the analysis found in Question 2. According to the clear and unambiguous language of the Section 12-28-2740, "C" funds must be expended by either the county transportation committee or the Department of Transportation. Thus, the statute would not allow a county council to choose an individual who would then be responsible for the disbursement of "C" funds.

Question 6

In the opinion, is there a way to have the Tucker decision overturned?

The Tucker opinions do not include provisions which spell out a method to have the opinions overturned. I note that the decision in Tucker (I) is based on the court's interpretation of the state Constitution. Therefore, it would be difficult to overturn such a decision.

Question 7

What are the proper procedures for monies collected pursuant to Section 12-28-2740 to be administered by Spartanburg County?

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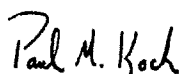
The procedures for the use of "C" funds are found in Section 12-28-2740. According to the statute, the proceeds from the gasoline tax must be deposited with the State Treasurer and expended for the purposes set forth in the section. Section 12-28-2740(A). The Department of Revenue shall submit the percentage of the total represented by each county to the Department of Transportation and to each county transportation committee annually by March thirty-first. Section 12-28-2740(A)(3). Upon request of a county transportation committee, the Department of Transportation shall continue to administer the funds allocated to the county. Id. The funds expended must be approved by and used in furtherance of a countywide transportation plan adopted by a county transportation committee. Section 12-28-2740(B). However, a county transportation committee may expend from the funds allocated under the section an amount not to exceed one thousand dollars for reasonable administrative expenses directly related to the activities of the committee. Id.

At least twenty-five percent of a county's apportionment of "C" funds must be expended on the state highway system for construction, improvements, and maintenance. Section 12-28-2740(C). The county transportation committee, at its discretion, may expend up to seventy-five percent of the "C" construction funds for activities including, but not limited to local paving or improving county roads, for street and traffic signs, and for other paving projects. Id. The funds allocated to the county also may be used to issue county bonds or state highway bonds as provided, pay directly for appropriate highway projects, including engineering, contracting, and project supervision, and match federal funds available for appropriate projects. Section 12-28-2740(D). All unexpended "C" funds allocated to a county remain in the account allocated to the county for the succeeding fiscal year and must be expended as provided in this section. Section 12-28-2740(E).

This letter is an informal opinion only. It has been written by a designated assistant 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.

With kindest regards, I remain

Very truly yours,



Paul M. Koch

Assistant Attorney General