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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 18, 1996

The Honorable Robert W. Hayes, Jr.
Senator, District No. 15
P. O. Box 904
Rock Hill, South Carolina 29731

Re: Informal Opinion

Dear Senator Hayes:

By letter dated December 5, 1996, you seek an opinion concerning the legality of transferring the responsibility for the "C" fund program in York County from the County Transportation Committee to the County Council.

LAW/ANALYSIS

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 declared the provisions of S.C. Code Ann. § 12-27-400 which required that a county legislative delegation approve the expenditure of "C" funds and which allowed the delegation to contract for improvements were unconstitutional. The Court found these provisions unconstitutional because the legislative delegates may exercise legislative power only 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 constitutionally invalid.

The General Assembly subsequently amended § 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 § 12-27-400

Request Letter

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was upheld by the Court in Tucker v. South Carolina Department of Highways and Transportation, 314 S.C. 131, 442 S.E.2d 171 (1994) (Tucker II). Thereafter, § 12-27-400 was recodified as § 12-28-2740 (Supp. 1995).

The expenditure of the gasoline tax, commonly known as the "C" fund, among the various counties is governed by S.C. Code Ann. § 12-28-2740. According to § 12-28-2740(B)

> the funds expended must be approved by and used in furtherance of a countywide transportation plan adopted by a county transportation committee. The county transportation committee must be appointed by the county legislative delegation and must be made up of fair representation from municipalities and unincorporated areas of the county.

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 statute, the "C" funds must be approved by and used in furtherance of a countywide transportation plan adopted by a county transportation committee. Accordingly, the transfer of the authority to expend "C" funds from the county transportation committe to the county council would be improper under § 12-28-2740.

Since the county council is not permitted by statute 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 simultaneously on a County Transportation Committee, that individual would most probably violate the dual office prohibitions of the state Constitution.

Reference has been made to a January 23, 1995 opinion of this Office addressing the Horry County Council's ability to collect and disperse a road maintenance fee.[1] This opinion concluded that the separation of powers doctrine applicable at the State level does not apply to the political subdivisions of the State. Therefore, the constitutional difficulty present in Tucker (I), whereby a county legislative delegation would both enact laws and attempt to execute them, with respect to §12-27-400, would not be present in the situation in which the Horry County Council would adopt an ordinance requiring a road maintenance fee to be collected from vehicle owner and then direct (on an individual member basis) how the fees were to be expended.[2]

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[1] This opinion cites Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992). In this case, the Court found that the fifteen-dollar road maintenance fee charged on motor vehicles in Horry County was a valid uniform service charge authorized under S.C. Code Ann. § 4-9-30. The Court determined that since the fee was specifically allocated for road maintenance, it was a service charge rather than a tax.

[2] I have attached a copy of this opinion.

Reliance on the January 23, 1995 opinion to support a transfer of the authority to expend "C" funds from a county transportation committee to a county council is misplaced. This opinion does not validate a county council's authority to expend "C" funds. It merely acknowledges that in this Office's opinion, a county council may expend a county initiated road maintenance fee without running afoul with the separation of powers doctrine.

To summarize the foregoing, it is the opinion of this Office that a county council does not have the authority under § 12-28-2740 to expend "C" funds. Furthermore, 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, the opinion of this Office dated January 23, 1995 is not applicable to the facts presented by your opinion request.

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

Paul M. Koch
Assistant Attorney General