5982
Library

STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

June 18, 1996

The Honorable David L. Thomas
Senator, District No. 8
410 Gressette Building
Columbia, South Carolina 29202

Dear Senator Thomas:

You have sought my opinion on the law regarding the people's right to have a referendum for highway projects. You have advised that two bills before the General Assembly address the area of financing highway projects: S.514 (which was recommitted to the Senate Transportation Committee) and H.3666 (which was passed by the General Assembly and became Act No. 52 of 1995). Your understanding is that if a project exceeds $150,000,000 and if it is a toll project, then a referendum is in order, pursuant to Chapter 37 of Title 4, by virtue of new S.C. Code Ann. §57-3-615. Thus, the issue arises of when a referendum must be held for such highway projects.

Act No. 52 of 1995, inter alia, adds Chapter 37 to Title 4, to authorize counties to establish optional methods for the financing of transportation facilities, including the acquisition, construction, equipment, and operation of highways, roads, streets, bridges, and other transportation-related projects, either alone or in partnership with the South Carolina Department of Transportation or jointly-operated projects of the county and other governmental entities. That act also amended §57-3-615 relating to tolls administered by the Department of Transportation, so that §57-3-615 now provides:

> If 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 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. [Emphasis added.]

(803) 734-3970 (803) 734-3646 Facsimile

Request Letter

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 project. The question becomes, then, the impact of §57-3-615 upon a project in which the cost would exceed $150,000,000 and a toll is proposed to be collected.[1]

In construing this statute, as any statute, the courts of this State and this Office are guided by certain rules of statutory construction. The primary function of both the courts and this Office in interpreting statutes is to ascertain and effectuate legislative intent if it is at all possible to do so. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). Words used in a statute are given their plain and ordinary meanings. Windham v. Pace, 192 S.C. 271, 6 S.E.2d 270 (1940). Where the language of a statute is clear and unambiguous, it must be applied literally. State v. Goolsby, 278 S.C. 52, 292 S.E.2d 180 (1982). The title of an act may be used to aid in construing a statute. University of South Carolina v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966).

As the House bill which became Act No. 52 moved through the legislature, the portion which eventually became amended §57-3-615 was not a part of the bill until just before third reading in the Senate. An amendment to the House bill was proposed by Senator Passailaigue on May 10, 1995, to amend §57-3-615; the amendment was adopted. The Senate then read the bill for the third time and returned the bill to the House, which body concurred in the amendment. The title of the bill/act was amended to reflect the amendment; that part of the title reads:

> AN ACT ... TO AMEND SECTION 57-3-615, RELATING TO TOLLS ADMINISTERED BY THE DEPARTMENT OF TRANSPORTATION SO AS TO PROVIDE THAT A TOLL PROJECT IN EXCESS OF ONE HUNDRED FIFTY MILLION DOLLARS MAY ONLY BE INITIATED AS PROVIDED IN CHAPTER 37 OF TITLE 4, ...

The act took effect on May 18, 1995, without the signature of the Governor.

---

[1]While your request does not specifically state a fact situation to which your question applied, it is our understanding that the highway project in question would not actually be undertaken by a county but would instead be undertaken by the South Carolina Department of Transportation in partnership with a consortium of companies, with the tolls to be collected by a nonprofit corporation known as a 63-20 corporation (for at least the first three years).

To 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.)[2] 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.[3]

As to any argument that new §57-3-615 would not be applicable to the project under consideration herein, as the project was at least on the drawing board before the effective date of §57-3-615, I am of the opinion that such argument would fail. Since the term "initiated" is not defined by Act No. 52 of 1995, and further since there is reference

---

[2]It might be argued that only certain direct costs, such as preliminary engineering, right-of-way acquisitions, design, construction, and construction management, should enter into the calculation of costs to determine whether the project is in excess of one hundred fifty million dollars. It is observed, however, that the legislature did not limit the categories of costs which would enter into the determination that a project would exceed the threshold amount. In other statutes, the legislature has distinguished between direct and indirect costs for various purposes; see §§ 2-65-50 (indirect cost recoveries); 2-65-70 (indirect cost); 2-65-80; 2-65-15 (definition of "indirect costs"); 12-53-30; 12-7-1245 (direct construction costs; direct lease costs); 44-6-5 ("costs of medical education" means direct and indirect teaching costs as defined under Medicare); 44-6-170 (total direct costs of medical education, total indirect costs of medical education); and 48-2-50 (consideration of direct and indirect costs). Had the legislature intended to limit the cost considerations in §57-3-615, the legislature could have done so easily. We suggest that a broad or expansive interpretation thus be applied in the determination that a toll project exceeds one hundred fifty million dollars. While a court could conclude otherwise, this Office is constrained by the text of the statute and must construe the law as it is written.

[3]The word "only" is defined in Black's Law Dictionary at page 982 (5th Ed. 1989) as "[s]olely; merely; for no other purpose; at no other time; in no otherwise; ... exclusive; nothing else or more."

to construction and maintenance in §57-3-615, the better reading of "initiated" would be with reference to construction and maintenance; construction has not yet begun on this project. In addition, the requirements of §57-3-615 would be viewed as procedural, rather than substantive. The law is clear that statutes which affect substantive rights are generally not given retroactive effect; on the other hand, where a law is viewed as remedial or procedural in nature, such statutes are generally held to operate retroactively. Jenkins v. Meares, 302 S.C. 142, 394 S.E.2d 317 (1990) (a statute of limitations was made more liberal; the statute was not construed to be retroactive since the General Assembly made it clear that it was to operate prospectively, for causes of action accruing after a certain date); Oehler v. Clinton, 282 S.C. 25, 317 S.E.2d 445 (1984) (the Uniform Child Custody Jurisdiction Act, procedural in nature, was applied retroactively); Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45, appeal after remand 279 S.C. 177, 304 S.E.2d 815 (1983); Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956) (where a remedy and not a right is affected, a statute will be applied retrospectively).

Of course, this Office may only read the statute as it is plainly written and possesses no authority in an opinion to make factual determinations. Courts, on the other hand, are not so constrained and may consider the application of a statute to a specific set of facts. Our courts have not yet examined §57-3-615. We consistently advise that novel questions of law should be reviewed by a court prior to a major financial or far-reaching undertaking.

Moreover, the applicability of Hilton Head Island v. Expressway Opponents, 415 S.E.2d 801 (S.C. 1992) must also be considered. There, 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 §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 §57-3-615 to this particular project so that the matter may be finally resolved.

CONCLUSION

Based on the foregoing, I am of the opinion that 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. This is because the General Assembly did not place within amended §57-3-615 any language limiting the factors to be considered in determining whether the 150 million dollar threshold has been met. In short, while a court may rule otherwise, we simply cannot deem a project consisting of a bond issuance of more than 180 million dollars as avoiding the statute's mandate. Thus, pursuant to Chapter 37 of Title 4, the Southern Connector project is, in my view, one which must be initiated by a county in strict accord with the plain language of §57-3-615. However, in light of Hilton Head Island v. Expressway Opponents, as well as the fact that §57-3-615 has never been applied by our courts, I also recommend that a declaratory judgment action be undertaken to resolve this matter with finality before the project is undertaken.

With kindest regards, I am

Sincerely,

Charles Molony Condon
Attorney General

cc: The Honorable Michael T. Rose