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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 11, 1997

George L. Schroeder, Director
Legislative Audit Council
400 Gervais Street
Columbia, South Carolina 29201

Dear Mr. Schroeder:

You have sought the opinion of this Office regarding the constitutionality of certain statutory provisions. You note that S.C. Code Ann. Sec. 12-27-390 deals with the water recreational resources fund and provides that

> ... All of the funds must be ... expended, subject to the approval of a majority of the county legislative delegation, including a majority of the resident senators, if any for the purpose of water recreational resources.

Section 50-9-910 provides that revenues from certain fines and forfeitures must be credited to the county game fund of the county where the revenue was collected and

> ... must be expended in the respective counties for the protection, promotion, propagation, and management of wildlife and fish in the enforcement of related laws.

You note that this statute "does not itself require approval of expenditures by the county delegation, but that Proviso 47.1 in the FY 96-97 Appropriations Act states that

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Request Letter

> [f]unds belonging to each of the counties of the State ... shall be expended on approval of a majority of the respective county delegation, including the resident senator or senators, if any. ... [T]he Department [DNR] shall make a proposal for expenditures of such funds in the succeeding fiscal year in each county to the members of the respective county legislative delegation ... and upon approval thereby shall proceed with the use of such funds in compliance with the finalized and approved plan as approved by each legislative delegation. If no plan is approved, the expenditure of such funds is to be administered as determined by the various legislative delegations.

You inquire as to the constitutionality of these requirements of approval by the county legislative delegation "especially in light of the Tucker cases, Tucker v. Dept. of Hwys. and Public Transp., 424 S.E.2d 468 (1992) and 442 S.E.2d 173 (1994)."

In addition, you reference Section 50-11-20(B) requiring the membership of the Migratory Waterfowl Committee to be composed of nine members. Among the nine (to serve ex officio) were the Ducks Unlimited Regional Director for South Carolina and the immediate past and present chairman of Ducks Unlimited. You further state that

> [t]his section was amended in 1995 and now requires that among the nine must be "... a designee who is not a paid employee, of Ducks Unlimited of South Carolina, a designee who not a paid employee, of the South Carolina Waterfowl Association ..." These two organizations are private organizations.
>
> Current appointments to the Migratory Waterfowl Commission for the two private organizations are the State Chairman of Ducks Unlimited and a Board member of the South Carolina Waterfowl Association. Of significance to this matter is that § 50-11-20 (C)(2) provides that a portion of funds from the sale of prints and related materials of the committee, as determined by the board, be disbursed to an appropriate nonprofit organization for the development of waterfowl propagation projects within Canada. According to staff and based on our review of records, Ducks Unlimited, Inc. has been the only recipient of these funds.

You note that "[w]e are concerned with this issue especially in light of the Supreme Court's decision in Toussaint v. State Bd. of Medical Examiners, 329 S.E.2d 433 (1985)."

LAW / ANALYSIS

Tucker cases

In Tucker v. S.C. Dept. of Highways and Pub. Transp., 309 S.C. 395, 424 S.E.2d 468 (1992) [Tucker], the Court addressed the constitutionality of a statute which provided as follows:

> [a] majority of the legislative delegation members ... must approve the roads upon which "C" construction funds are to be expended ... and they may contract for the improvements ... .
>
> The expenditure of funds known as "C" construction funds must have the approval of a majority of the legislative delegation members of the county in which the expenditures are to be made.

The argument made in Tucker I was that the power given to legislative delegations pursuant to the foregoing statute contravened the constitutional requirement of the maintenance of separation of powers contained in Article I, Section 8 of the State Constitution. The Court agreed, concluding as follows:

> [w]e have long held that 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. Aiken County Bd. of Ed. v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980); Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972). Action by a legislative delegation pursuant to a complete law cannot qualify as action to enact legislation and is therefore constitutionally invalid. Bramlette v. Stringer, 186 S.C.134, 195 S.E. 257 (1938); see also Dean v. Timmerman, 234 S.C. 35, 106 S.E.2d 665 (1959).

Thus, the Court declared the statute in questions unconstitutional.

In response to the Court's ruling in Tucker I, the General Assembly modified the "C" Fund statute. The new statute requires the legislative delegation to appoint a county transportation committee to oversee the expenditure of "C" Funds and allows the legislative delegation to make project recommendations to the county transportation committee. The Court held this statute to be constitutional because the power to appoint does not belong exclusively to any branch of government and because the Department of Transportation "retains the ultimate power to approve all transportation plans submitted by any transportation committee."

The Toussaint line of cases present a different constitutional problem. In Toussaint, the statute establishing the Medical board dictated "membership in the Medical Association, private organization as a prerequisite to membership on the Board. This statute was thought by the Court to "unconstitutionally delegate [ ] the power of appointment to a private organization ... ." 285 S.C. at 267. The Court distinguished the case from Hartzell v. State Bd. of Examiners in Psychology, 274 S.C. 502, 265 S.E.2d 265 (1980) because the statute in Hartzell "did not require a qualified candidate to be a member of the private body which compiles the list." The Court noted also that the Legislature had since amended the statute governing psychologist "to expand the source of nominations to include others besides the South Carolina Psychological Association." Id. See also, Gold v. South Carolina Bd. of Chiropractic Examiners, 271 S.E. 74, 245 S.E.2d 117 (1978).

In Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971), the Court also declared unconstitutional a provision for the appointment of a member of the Riverbank Park Commission by the Columbia Zoological Society as an unlawful delegation of the appointive power in violation of Article III, Section 1 of the State Constitution. Elaborating upon this issue, the Court concluded:

> [w]e are not in this case dealing with the power of the General Assembly to permit the zoological society to recommend, but rather with the delegation of the absolute power of appointment by the society of a member of the commission whose duty it is to administer the public funds. We agree with the lower court that the zoological society is closely akin to a civic or service organization such as was involved in Ashmore [v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88], and that the appointive power conferred upon the society

> constitutes an unlawful delegation of power in violation of Article III, Section 1 of the South Carolina Constitution.

Of course, in considering the constitutionality of an act of the General Assembly, such act is presumed to be constitutional in all respects. Moreover, such act will not be considered void unless its constitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Obviously, there are constitutional problems with the statutes governing the expenditure of the water recreational resources fund and the county game fund under Tucker I. The legislative delegation must approve the expenditure of such funds which is inconsistent with the Court's holding in Tucker I. Moreover, the fact that members of the Migratory Waterfowl Committee must be a designee (who is not a paid employee) of Ducks Unlimited of South Carolina and another member must be a designee (who is not a paid employee) of the South Carolina Waterfowl Association is inconsistent with the Court's holding in the Toussaint-Gould line of cases. A court faced with the question of the constitutionality of these statutory provisions could well declare them invalid.

Again, however, this Office is constrained to advise that these statutes must be presumed to be constitutional and thus must continue to be followed until a court declares otherwise. As we advised in an opinion even prior to the Court's ruling in Tucker I,

> [a] declaratory judgment or legislative clarification would be advisable to determine the constitutionality of this statute or to take corrective legislative measures. Until such legislative or judicial action is taken, however, it would appear that Section 12-27-400 of the Code should be followed. (emphasis added).

This same advice would be applicable here as well. Until the Legislature or the courts act to the contrary, I must advise that the statute continue to be followed.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph

REVIEWED AND APPROVED BY:

Zeb C. Williams, III
Deputy Attorney General