

## The State of South Carolina



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March 19, 1992

The Honorable John Drummond  
Senator, District No. 10  
213 Gressette Building  
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Dear Senator Drummond:

You have requested the opinion of this Office as to whether certain revenues derived from certain motor fuel taxes, commonly known as "SHIMS" funds, may be reallocated for purposes unrelated to those purposes for which the fund was created. As discussed more fully below, we are of the opinion that the "SHIMS" fund would be in the nature of a trust fund and revenues derived thereunder should not be diverted for other purposes.

The fund commonly known as "SHIMS" is an allocation of revenues from certain motor fuel taxes to the Strategic Highway Plan for Improving Mobility and Safety. Established in 1987 pursuant to S.C. Code Ann. § 12-27-1210 et seq. (1991 Cum. Supp.), the fund, by § 12-27-1260,

must be separate and distinct from the state general fund and highway fund. All unappropriated money in this fund must remain part of the separate fund. All earnings on investments from this fund must accrue to and be deposited in this separate fund. ...

The purposes for which "SHIMS" funds may be expended are detailed in § 12-27-1260:

Money from this fund may be spent only for the purpose of funding the Strategic Highway Plan for Improving Mobility and

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Safety Program administered by the department [of Highways and Public Transportation] and funding the Economic Development Account as provided for in § 12-27-1270. No funds may be expended from this account for any purpose other than for payment of engineering and planning, right-of-way acquisition, and construction of projects on the list submitted as provided in § 12-27-1280 or those designated for economic development by the Coordinating Council for Economic Development as provided in § 12-27-1270.

At the very least, the SHIMS fund is a special fund, as distinguished from a general fund. The general fund of a state consists of all public monies and revenues coming into the state treasury, not specifically authorized by the constitution or a statute to be placed in a separate fund, and not given or paid over in trust for a particular purpose. 81A C.J.S. States § 228; State ex rel. Brown v. Bates, 198 S.C. 430, 18 S.E.2d 346 (1942). A special fund, on the other hand, may be created by the legislature and funds allocated thereto, to be used as specified in the enabling legislation, are to be kept as a separate fund and not placed in the state's general fund. 81A C.J.S. States § 228. Because the "SHIMS" fund is a special fund and not part of the general fund, the monies therein are to be used to accomplish the purposes stated in § 12-27-1260. Cox v. Bates, 237 S.C. 198, 116 S.E.2d 828 (1960).

Diversion of funds from a special fund by a subsequent act of the legislature was discussed extensively in opinions of this Office dated January 30, 1984 and March 13, 1991. Therein, we noted that the "power of the Legislature over the matter of appropriations is plenary, except as restricted by the Constitution." Cox v. Bates, 116 S.E.2d at 834. These opinions have thoroughly analyzed the limitations deemed by courts to preclude the diversion of funds from a special fund by the legislature, including such factors as constitutional prohibitions, impairment of contractual obligations, and the like. Cited therein was Michigan Sheriffs' Assoc. v. Michigan Dept. of Treasury, 75 Mich. App. 516, 255 N.W.2d 666 (1977), which stated:

A fund becomes "special" and immune from diversion by a subsequent legislative transfer only when the diversion would

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conflict with a constitutional provision or impair a contractual relationship such as arises where the State holds trust or retirement funds, holds funds obtained to repay a specific indebtedness such as revenue bonds, or holds funds obtained for a specific and no other purpose. [Emphasis added.]

Id., 255 N.W.2d at 672.

These opinions further observed that some jurisdictions had adopted the position that such funds might be in the nature of a trust fund and thus not subject to diversion until the purposes for which the fund was established have been accomplished or, in the alternative, without the consent of the people by whom it was created. We are aware of no controlling authority in this jurisdiction, particularly as to the "SHIMS" fund; we had stated previously our belief that a court in this state might conclude that the legislature possessed the authority to transfer funds from certain special funds under circumstances specified in those opinions. This conclusion was by no means absolute, however.

Subsequent to the decision in Michigan Sheriffs' Assn., supra, other jurisdictions appear to be adopting the notion that such special funds may be considered in the nature of a trust, particularly where the legislature has stated affirmatively that the fund in question may be used for a specified purpose and no other. For example, the Attorney General of Iowa, citing the Michigan case in Opinion 91-3-2 issued March 27, 1991, concluded that restrictions specified in the language creating certain specified funds, that the funds be collected and used for the specified purpose and "for no other purpose," meant the funds could be used only for the specific purposes for which they were dedicated. See also McGraw v. Hansbarger, 301 S.E.2d 848 (W.Va. 1983) and cases cited therein.

Similarly, in Alliance of American Insurers v. Chu, 77 N.Y.2d 573, 571 N.E.2d 672 (1991) (decided April 2, 1991), the law being contested would have transferred funds to the state's general fund from the Property and Liability Insurance Security Fund. The Fund was established to be kept separate and apart from other state monies; subsequent legislation would have permitted income earned on contributions to be turned over to the state's general fund. The Fund was to be used for payment of claims on motor vehicle liability policies should an insurer become insolvent. The

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court refused to allow diversion to the general fund of funds and income already in the Fund (i.e., retroactively), citing impairment of legal rights and obligations and its unwillingness to disturb completed transactions.<sup>1/</sup> In the dissent of Hancock, J., 571 N.E.2d at 685, it is noted that the majority opinion is advancing a trust theory, though that specific term is not used.

In light of the developments following our more recent opinion, we believe that a court in South Carolina, in construing a statute in which specific language is used to evidence a legislative intent that funds be used for a certain purpose and no other, would apply the standard enunciated in Michigan Sheriffs' Assn., supra, particularly the third prong, to impose a trust on such funds. Thus, as such

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<sup>1/</sup> This is consistent with the court's views in Morton, Bliss & Co. v. Comptroller General, 4 S.C. 430, 456 (1873), cited in cases such as State ex rel. Brown v. Bates, supra, and State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526 (1940):

If it had been intended that the Legislature should have any discretion as to the objects to which such funds should be applied, this clause [now Art. X, § 5] would not have been inserted in the Constitution. Its insertion evidences the intent of the Constitution to deprive the Legislature of all power of misapplication, by an authoritative and imperative appropriation to the specific object set forth in the tax law as the ground of raising the specific tax. If the construction of the constitutional provision stopped short of this, it might entirely defeat the intent, for money might be raised by the Legislature under an Act strictly conformable to the Constitution as a mere pretext and, afterwards, applied to any purpose desired by the Legislature.

Art. X, § 5 provides that any tax to be levied must state distinctly the public purpose to which the proceeds will be applied.

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relates to the "SHIMS" funds and considering the statutory specification that the funds not be used for any purpose other than those specifically stated, we believe a court would apply the standard set forth in Michigan Sheriffs' Assoc., supra, and would conclude that the "SHIMS" funds are in the nature of a trust and that such may not be diverted until the accomplishment of the purpose for which the funds was established. 2/

With kindest regards, I am

Sincerely,



T. Travis Medlock  
Attorney General

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2/ In so concluding, and particularly in light of these more recent authorities, we must supersede the opinion of March 13, 1991, concluding that interest generated from allocations to the "SHIMS" fund might be diverted for educational or other purposes as the General Assembly might direct, to the extent inconsistent with today's opinion.