

The State of South Carolina



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March 13, 1991

The Honorable George H. Bailey
Member, House of Representatives
308-C Blatt Building
Columbia, South Carolina 29211

Dear Representative Bailey:

You have advised that, within the Department of Education's section of the appropriations bill, an amendment is pending which would remove funds from the "SHIMS" fund and permit those funds to then be used for education purposes. You have asked whether the "SHIMS" funds may be reallocated in this fashion for education or for any other purpose.

The fund commonly called "SHIMS" is an allocation of revenues derived from certain motor fuel taxes to the Strategic Highway Plan for Improving Mobility and Safety. Set up pursuant to S.C. Code Ann. § 12-27-1260 (1990 Cum Supp.), the fund, by statute,

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 or investments from this fund must accrue to and be deposited in this separate fund.

The funds about which you inquire would be interest generated by revenues allocated to the fund, which interest has accrued and is, as yet, unspent.

The purposes for which the "SHIMS" fund 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 Safety Program administered by the department and funding the Economic Development Account as provided for in § 12-27-1270. No funds may be expended from

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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.

It would appear that the "SHIMS" fund is a special fund, as distinguished from a general fund. 1/ A special fund may be created by the legislature and the monies allocated thereto, to be used as specified in the enabling legislation, are to be kept as a separate fund and cannot properly be placed in the State's general fund. 81A C.J.S. States § 228. Because the "SHIMS" fund is a special fund, and not a part of the general fund, the monies therein (both the allocated revenues and any interest or investment income) are to be used to accomplish the purposes stated in § 12-27-1260, supra. 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 an opinion of our Office dated January 30, 1984, a copy of which is enclosed. 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, supra, 116 S.E.2d at 834. We further noted:

Where a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose, or transferred from such authorized fund to any other fund.

1/ All public monies and revenues coming into the state treasury, not specifically authorized by the constitution or by statute to be placed in a separate fund, and not given or paid over in trust for the particular purpose, constitute a part of the general fund of the state. 81A C.J.S. States § 228; State ex rel. Brown v. Bates, 198 S.C. 430, 18 S.E.2d 346 (1942).

The legislature has power, however, to transfer to another fund or appropriate to another purpose any surplus which may remain in a special fund after the accomplishment of the purpose for which it was established, and, in general, whether or not the purpose for which a special fund was created has been accomplished, such fund may be diverted by statute to another and different purpose as long as it remains subject to legislative control. [emphasis added].

81A C.J.S. States §228 at 799-801. This also appears to be the law in South Carolina. Cox v Bates, supra; Parker v. Bates, 216 S.C. 52, 56 S.E. 2d 723, 726 (1949). See also, 63 Am.Jur.2d, Public Funds, §56 at 445.

However, the general authorities also recognize certain limitations upon even the Legislature's authority by statute to divert funds from a special fund. It is established that

...the legislature cannot authorize the diversion of a special fund where such diversion would conflict with a provision of the constitution controlling such fund, or would impair the obligation of a contract or constitute a breach of trust, although a surplus in a trust fund may be diverted therefrom. (Footnotes omitted).

81A C.J.S., supra. The Court of Appeals of Michigan has also recognized this limitation

upon legislative authority, by stating:

A fund becomes "special" and immune from diversion by a subsequent legislative transfer only when the diversion would conflict with a constitutional provision or impair a contractual relationship such as 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.

Michigan Sheriffs' Association v. Michigan Department of Treasury, 75 Mich. App. 516, 255 N.W. 2d 666, 672 (1977).

As noted in the opinion of January 30, 1984, some jurisdictions have 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 further noted that

it is not at all evident that South Carolina courts have adopted the trust fund limitation, or any other restriction except specific constitutional prohibitions. See, Cox v. Bates, supra. We have found only one South Carolina case where there is a suggestion that the imposition of a trust upon a fund might pose a limitation upon any legislative transfer. See, Foster v. Taylor, 210 S.C. 324, 331-332, 42 S.E.2d 531 (1947).

We concluded that "we believe a court would probably conclude that the General Assembly possesses the power to transfer or appropriate to another purpose any surplus [in the State Health Insurance Reserve Fund] which may remain after the accomplishment of the purpose for which the Fund was established."

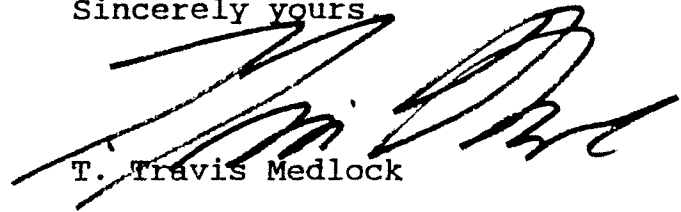
Based on the reasoning of the opinion of January 30, 1984, we are of the opinion that the "SHIMS" fund would be considered a spe-

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cial fund and further that if the General Assembly should so desire, the interest generated from allocations to the "SHIMS" fund could be used for educational or other purposes as the General Assembly may direct, since the General Assembly retains plenary power over appropriations matters.

With kindest regards, I am

Sincerely yours

A handwritten signature in black ink, appearing to read 'T. Travis Medlock', written over the typed name.

T. Travis Medlock

TTM:aln
Enclosure