

3664 Highway

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

June 13, 1989

Joe G. Rideoutte
Executive Director
South Carolina Department of
Highways and Public Transportation
Post Office Box 191
Columbia, South Carolina 29202

Dear Mr. Rideoutte:

Referencing Section 58-25-10 et seq. of the Code of Laws of South Carolina (1988 Cum. Supp.), relative to the formation of a regional transportation authority, you have asked for the opinion of this Office as to the following questions:

1. Whether Section 58-25-30 may be amended to delete the requirement that the question of creating a regional transportation authority [RTA] be submitted for ratification to the electors at a general or special election, thus allowing an RTA to be created upon execution of the agreement as described in Section 58-25-30(2).

2. Whether the provision for approval by the electors prior to creation of the RTA can be replaced by a provision that, prior to the imposition of any taxes by the RTA, the question of the amount to be imposed must be submitted for ratification to the qualified electors within the proposed service area at a general election or at a special election called for that purpose.

Following a discussion of the relevant statutory and constitutional principles, each of your questions will be addressed.

Mr. Rideoutte
Page 2
June 13, 1989

Formation of an RTA

As you have outlined in your letter, Section 58-25-30 of the Code provides that, in order to activate an RTA, a plan of service must be prepared; a majority of the governing bodies of the general purpose local governments within the service area must adopt the plan of service; an agreement to create the RTA must be executed; and the question of creating an RTA under the terms of the agreement must be submitted for ratification to the qualified electors within the proposed service area at a general election or at a special election called for that purpose as set forth in the agreement. The RTA becomes operational upon approval of the majority of the voters within the service area voting on the question.

Section 58-25-30(4) specifically provides as to the election for ratification:

The question to be placed before the electorate must state the service area of the proposed authority (cities and counties involved) and the proposed method of financing, including the level of tax to be initially imposed, and membership on the board.

By way of history, it may be noted that this method of forming an RTA was set forth by the General Assembly by Act No. 169 of 1985, effective July 1, 1985. That act substantially revised Section 58-25-10 et seq. of the Code with respect to formation of an RTA on or after July 1, 1985. Under the former statutory scheme, no election was required; however, no level of taxation appears to have been contemplated in the former statutory scheme.

RTAs created under the former statutes are authorized by section 4 of Act No. 169 of 1985 to continue to follow the former statutes, except that as terms of the appointees to the governing body expire, new appointments would be made pursuant to new Section 58-25-40. Such an RTA may also choose to operate under the new statutes; if the RTA chooses not to exercise the taxing power, however, it need not comply with the procedures in new Sections 58-25-30, -60, -70, and -100. If such an RTA wishes to follow the full terms and conditions of the new statutes, that RTA is to comply with all procedures set forth in the new statutes. Clearly, whether a grandfathered RTA chooses to exercise taxing power is a critical consideration in determining which new statutes and procedures must be followed.

Constitutional Considerations

The reason for the requirement of an election in the creation of an RTA 1/ does not appear on the face of the statute. However, at least two constitutional considerations may be identified, both with respect to Article X, Section 5 of the State Constitution, which states in relevant part:

No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. ...

It must be noted that the governing body of an RTA created under the new statutory scheme is appointive. Section 58-25-40(1) of the Code provides that the members of the authority are to be appointed by the governing bodies of the cities and counties in the service area. In addition, certain members may be appointed by legislative delegations of the member counties in the service area if such has been approved by the electorate. Possibly the appointees of the cities' and counties' governing bodies would be members of those governing bodies, thus serving in an ex officio capacity. In any event, the governing body of the RTA would be appointed in its entirety. The power to tax could not be exercised by such an appointed body.

The power of an appointed body to tax was held to be violative of Article X, Section 5 in Crow v. McAlpine, 277 S.C. 240, 285 S.E.2d 355 (1981). In reaching that conclusion, the court stated:

... Article X, Section 5 recognizes that the power to levy taxes rests with the people. As such, we believe it constitutes an implied limitation upon the power of the General Assembly to delegate the taxing power. Where the power is delegated to a body composed of persons not assented to by the people nor subject to the supervisory control of a body chosen by the people, this constitutional restriction is violated.

1/ The reasons for requiring a grandfathered RTA wishing to exercise the taxing power to comply with all requirements of the new statutes, including the election in Section 58-25-30, likewise are not specified.

The taxing power is one of the highest prerogatives of the General Assembly. Members of this body are chosen by the people to exercise the power in a conscientious and deliberate manner. If this power is abused, the people could, at least, prevent a recurrence of the wrong at the polls. However, where the power is reposed in a body not directly responsible to the people, the remedy is uncertain, indirect and likely to be long delayed. The unlimited power of taxation attempted to be conferred by the Act under considerations is itself a forcible reminder that the power to fix and levy a tax should only be conferred upon a body which stands as the direct representative of the people, to the end that an abuse of power may be directly corrected by those who must carry the burden of the tax.

Id., 277 S.C. at 244-45.

Because the power to tax cannot be delegated to a body not selected by the electorate nor under the supervisory control of a body selected by the electorate (the "representatives lawfully assembled" as required by Article X, Section 5), a tax anticipated by the RTA would thus have to be imposed by "the consent of the people." As stated in Dial v. Watts, 138 S.C. 468, 471, 136 S.E. 891 (1927) and in Cothran v. West Dunklin Public School District, 189 S.C. 85, 88, 200 S.E. 95 (1938), "the consent of the people means the vote of all the people using the ballot with registration certificates and tax receipts." Thus, if a tax is to be imposed, it must be accomplished pursuant to an election if not by duly elected representatives of the people.

Conclusions

Whether to amend the statutes relative to creation of regional transportation authorities is, of course, a matter for the General Assembly to decide. Merely amending Section 58-25-30 of the Code to eliminate the need for an election, without eliminating the permissibility of imposing taxes, would appear to run afoul of Article X, Section 5 of the State Constitution. To avoid this constitutional difficulty, the statutes could be amended as suggested in your second question, so that no taxes could be imposed by a regional transportation authority created as suggested by your second question, until a favorable vote had been obtained. Or, another option would be to amend the statutes further to have the governing body of a regional transportation authority elected by the people if that body is to impose taxes.

Mr. Rideoutte
Page 5
June 13, 1989

To specifically respond to your questions, it is the opinion of this Office that:

1. If Section 58-25-30 of the Code were to be amended to delete the requirement that the question of creating a regional transportation authority be submitted for ratification to the electors at a general or special election, thus allowing an authority to be created upon execution of the agreement as described in Section 58-25-30(2), such a procedure would most likely run afoul of Article X, Section 5 of the State Constitution as taxation without representation.

2. If the provision for approval by the electors prior to creation of the authority were to be replaced by a provision that, prior to the imposition of any taxes by the authority, the question of the amount to be imposed must be submitted for ratification to the qualified electors within the proposed service area at a general election or at a special election called for that purpose, such a measure would appear to avoid the constitutional difficulty described above. Creation of an authority without the power to impose taxes could thus be accomplished without an election, by the execution of the prescribed agreement, if the statute were to be amended to that effect.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions