The State of South Carolina

Opinion No 88-2
P20

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The Honorable Robert N. McLellan
Chairman, Ways and Means Committee
House of Representatives
Post Office Box 11867
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Dear Representative McLellan:

By your letter of November 16, 1987, you have asked for the opinion of this Office on whether the General Assembly may reduce the General Fund Reserve, prior to 1990, to three (3%) percent by a two-thirds vote of both houses. Article III, Section 36 of the State Constitution provides for the creation of the General Fund Reserve; interpretation of that constitutional provision is necessary to respond to your inquiry.

In relevant part, Article III, Section 36 provides:

> Upon implementation of the provisions of this section, the percentage rate of general fund revenue may be reduced to three or increased to five percent by the special vote provided in this section.
>
> During the regular session of the General Assembly in 1990 and during every fifth annual regular session thereafter, the General Assembly shall conduct and complete a review of the law implementing this section. Unless during such session that review results in an amendment to or repeal of the law implementing this section, which must be accomplished by the special vote provided in this section, the existing percentage rate shall remain unchanged.
>
> The special vote referred to in this section means an affirmative vote in each branch of the General Assembly by two-thirds

> of the members present and voting, but not less than three-fifths of the total membership in each branch.
>
> * * *

The law implementing this constitutional provision is codified as Section 11-11-310, Code of Laws of South Carolina (1976 & 1986 Cum. Supp.), which implements collection of the General Fund Reserve and Capital Expenditure Fund. Interpretation of Section 11-11-310 of the Code does not appear to be necessary to resolve your inquiry.

At the outset, it must be noted that the provisions of the State Constitution are a limitation on legislative power, rather than a grant of legislative power. Gaud v. Walker, 214 S.C. 451, 53 S.E.2d 316 (1949). Further, the "General Assembly represents the sovereign power of the State in legislative matters, and its powers are unlimited, except where expressly prohibited by the Constitution." Taylor v. Marsh, 211 S.C. 36, 39, 43 S.E.2d 606 (1947). The General Assembly has been deemed "practically omnipotent" in legislative matters except as restrained by the Constitution. Floyd v. Parker Water and Sewer Sub-District, 203 S.C. 276, 284, 17 S.E.2d 223 (1941). Moreover, "the Constitution must be examined, not to ascertain whether a power has been conferred, but whether it has been taken away." Nolletti v. Nolletti, 243 S.C. 20, 24, 132 S.E.2d 11 (1963). The South Carolina Supreme Court in Floyd v. Parker Water and Sewer Sub-District, supra, has stated that

> the application of arbitrary rules of constitutional construction should be resorted to with caution, especially when it would bring about results contrary to the declared public policy of the State and would hamper the health, morals, safety and well-being of the people. Only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned in view of the known policy of the State, should be considered as prohibiting the powers of the legislature.

Id., 203 S.C. at 284.

Considering these tenets of constitutional interpretation, we first point out that Article III, Section 36 does not expressly prohibit the General Assembly from reducing the General Fund

Reserve to three (3%) percent prior to 1990 by the specified vote. To interpret Article III, Section 36 as limiting action by the General Assembly to a regular legislative session in 1990 and every fifth annual session thereafter would, at best, be an implied limitation rather than an express limitation; we would prefer to read Article III, Section 36 consistent with the legislature's supreme authority, however.

A review of the fourth paragraph of Article III, Section 36 (second paragraph quoted supra), reveals that a mandatory periodic review of the General Fund Reserve has been established. In determining whether the Reserve should be expanded or reduced, or the status quo maintained, a systematic and orderly procedure was established. The last sentence of that paragraph makes it clear that an increase or reduction need not result from the mandatory review process.

For changes in years in which the General Assembly does not conduct its required review, the third paragraph (first paragraph quoted supra) would be controlling. Whether the change results from the required review or from legislative action in one of the four intervening years, such change must be accomplished by a specified special vote.

A comparison of Article III, Section 36 as ratified by Act No. 34, 1979 Acts and Joint Resolutions to the amendment adopted in the November 1984 general election and ratified by Act No. 10 of 1985, shows that the basic changes were in the percentage required to be placed in the General Fund Reserve; a slight change in the calculation of the two-thirds vote of both Houses; and the initiation of the mandatory review procedure separate from any other change made to the Reserve by the legislature. Indeed, the greatest change was in the addition of the mandatory review process. The summary of the constitutional amendment provided to the electorate in the November 1984 election reviews the changes and makes it clear that an increase or reduction of the percentage to be placed in the General Fund Reserve was separate from the reviews to be conducted in 1990 and every fifth year thereafter; no limitation appears to have been placed on the General Assembly to prevent a reduction or increase in years other than 1990 and every fifth year thereafter:

> This change would require that the General Assembly set aside each year sufficient money to keep in reserve a fund equal to four (4) percent of the general funds received by the State in the last fiscal year,

(a period of 12 months which is not necessarily January 1 - December 31). These reserve funds may be used only to pay operating debts of the State Government, which happens when the State spends more money than it takes in for operating purposes. The change would make the General Assembly provide by law for a way to put back into the reserve fund any amounts taken out to pay operating debts. The General Assembly may reduce the yearly amount of the reserve fund to three (3) percent or raise it to five (5) percent, but only by vote of not less than three-fifths (3/5) of the total membership of both the House and Senate and not less than two-thirds (2/3) of the members of both House and Senate present and voting. In the year 1990 and every five (5) years thereafter the General Assembly shall review the reserve fund law and may not change or do away with the law except by the same special vote.

The Constitution now requires that the State set aside each year enough money to keep a reserve fund equal to five (5) percent of the general funds received by the State in the last fiscal year. It also provides for the way the fund is set up and directs the General Assembly to provide for a way to check on the collection and spending of money and to make reductions to prevent overspending. When more money is spent in any year than the amount of money taken in, any money from the reserve used to make up the difference must be returned to the reserve fund within three (3) years. A way to do this is provided for. The Constitution now allows money in the reserve fund to be used for any purpose by a vote of two-thirds (2/3) of the total membership of the House and Senate. [Emphasis added.]

CONCLUSION

It is our understanding that the revenues which would be released if the General Fund Reserve were reduced from four (4) to three (3) percent would be appropriated, at least in part, for educational purposes. Education has properly been a recent

subject of considerable public policy-making, see, Op. Atty. Gen. dated June 30, 1986 and the Education Improvement Act of 1984. It is clear that appropriation of additional revenues for education is consistent with expressed public policy because "education is perhaps the most important function of state and local governments," Brown v. Bd. of Ed., 347 U.S. 483, 493 (1984). Undoubtedly,

> ... expenditures for education ... demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities.... It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education....

Id.

This being the case, an interpretation of Article III, Section 36 which would remove from the General Assembly the necessary freedom to enhance appropriations for education, could be viewed as hampering the "well-being of the people," Floyd, supra and is to be avoided if possible. The General Assembly maintains full authority to make whatever appropriations "as it deems wise in the absence of any specific constitutional prohibition against such appropriation...." Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 437, 181 S.E. 181 (1935). Based upon the foregoing authorities, we do not deem Article III, Section 36 as expressly barring a reduction in the General Fund Reserve from four (4%) percent to three (3%) percent prior to 1990, provided the necessary vote required by Article III, Section 36 is obtained.

Sincerely,

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Attorney General

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