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# The State of South Carolina

T. Travis Medlock
Attorney General

803-734-3970
Columbia 29211

## Attorney General

Opinion No 88-25
Rq. 1/1

April 18, 1988

J. Mac Holladay, Director
South Carolina State
Development Board
Post Office Box 927
Columbia, South Carolina 29202

Dear Mr. Holladay:

By your letter of April 4, 1988, you have advised that H.3706 is pending before the General Assembly. This bill, if enacted, would empower this State's counties to negotiate fees in lieu of property taxes with industrial prospects or existing industries that commit to an initial minimum of $85 million in new capital investment. Counties would be allowed to negotiate down to a fee equivalent to a six percent tax assessment ratio. You have inquired as to the constitutionality of this proposal.

The legislation is not a proposed constitutional amendment but is instead an addition to Chapter 29 of Title 4 of the Code of Laws of South Carolina. To negotiate its fees, a qualifying company would be required to finance its investment by means of a purchase-leaseback arrangement, whereby a public entity would hold the actual title to the facility. Capital for the facility would be raised with industrial revenue bonds tied to the credit worthiness of the company. Fees so negotiated would not be considered taxes.

You have assumed that property owned by counties and used for public purposes is not defined as taxable property. You have asked whether this assumption is constitutional and further whether the classification envisioned by H.3706 -- those companies committing to the $85 million investment requirement which would be permitted to negotiate fees in lieu of taxes -- would be constitutional.

If the bill should be adopted by the General Assembly, it must be remembered that in considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality 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. We must advise, however, that we do not identify constitutional difficulties with respect to H.3706.

Article X, Section 3(a) of the Constitution of the State of South Carolina exempts from ad valorem taxation "all property of the State, counties, municipalities, school districts and other political subdivisions, if the property is used exclusively for public purposes." In addition, Section 12-37-220(A)(1) of the Code exempts from ad valorem taxation

> all property of the State, counties, municipalities, school districts, Water and Sewer Authorities and other political subdivisions, if the property is used exclusively for public purposes, and it shall be the duty of the Tax Commission and county assessor to determine whether such property is used exclusively for public purposes[.]

H.3706 contemplates a county, as a political subdivision, holding title to property which would be used for industrial development, financing for which would be achieved by industrial revenue bonds. Industrial development was expressly held to constitute a valid public purpose for which public revenues may be expended in Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986). Thus, we advise that your assumption is correct and appears to comport with Article X, Section 3 and Section 12-37-220(1) of the Code; of course, each contemplated project would present a different factual situation which should be reviewed to make certain that the county property is being used exclusively for a public purpose. Charleston County Aviation Authority v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982). If any doubt exists as to a particular project, a determination may be sought from the Tax Commission.

If H.3706 were adopted, the General Assembly would create a classification by which existing industries or industrial prospects willing to invest $85 million as capital investment would be permitted to negotiate fees in lieu of taxes, if the facility were developed under a purchase-leaseback arrangement and financed by industrial revenue bonds. In so creating a classification scheme, the General Assembly will violate the Equal Protection clause of the Fourteenth Amendment to the United States Constitution only if the classification so created is arbitrary or lacking in some rational justification. Eslinger v. Thomas, 324 F.Supp. 1329 (D.S.C. 1971) In this instance, it cannot be said that this classification of industry being given special tax considerations, as described above, would be arbitrary or unreasonable.

Fees in lieu of taxes are already authorized to be charged in certain circumstances. See Section 4-29-60 of the Code; Powell v. Chapman, 260 S.C. 516, 197 S.E.2d 287 (1973). Fees must be the equivalent of taxes, the same amount the lessee would pay if it were, in fact, the owner of the property. Powell, 260 S.C. at 519. H.3706 would now permit industries willing to make a substantial capital investment to negotiate the fee to that amount equal to taxes collected at a minimum six percent assessment ratio on similarly valued property. There is justification for allowing negotiations to be conducted in those instances in which industries are investing exceptionally large amounts of capital in the various counties of this State.

One concern which must be addressed is the potential lack of uniformity of fees negotiated among the counties which elect to negotiate fees in lieu of taxes. It might be argued that negotiation of non-uniform fees among the counties would be violative of Article X, Section 1 of the State Constitution, which provision requires that taxes imposed by the counties be uniform. Because fees negotiated in lieu of taxes are not themselves taxes, Powell v. Chapman, supra, the potential lack of uniformity is not an actual concern. Notwithstanding that the fees are not taxes, the constitutional provision is satisfied and uniformity is obtained when taxation is equal within the county, or other taxing entity. Charleston County Aviation Authority v. Wasson, supra.

This Office has recognized the extent to which the State of South Carolina relies on industry as a large part of its tax base and as employers of substantial numbers of this State's citizens. In Op. Atty. Gen. dated October 29, 1985, we noted that "the economy of South Carolina is vitally dependent upon the textile, apparel and related industries for its sustenance

and well being. ... [T]he present plight of the textile industry in this State is well known. ..." The opinion then cited facts and figures substantiating the depressed state of industry in this State.

A potential industry or an existing industry willing to expend a minimum of $85 million would infuse a great amount of capital into a county which opted to negotiate fees in lieu of taxes under H.3706 if enacted. The potential job market would be enhanced, and the effect of such a capital expenditure on other segments of the economy cannot be overlooked; the construction industry would likely be a beneficiary of the capital expenditure, for example. At the conclusion of the fees-in-lieu-of-taxes arrangement and the purchase-leaseback arrangement, the industry would acquire the property, which would then become a part of the county's tax base. In addition, such a favorable arrangement would place the State of South Carolina and its counties in a competitive position among the southeastern states in attracting industries to this State, particularly with respect to tax advantages. The overall effect of such an exceptionally large industry locating or expanding in one of the counties of this State thus is sufficient justification for providing preferential treatment for such industries willing to spend the required capital and otherwise comply with the proposed statute.

CONCLUSION

Based on the foregoing, it is our opinion that H.3706, if adopted, could withstand a challenge to its constitutionality, on the basis of equal protection, in that a justification or rational basis may be established to allow counties to negotiate fees in lieu of taxes for exceptionally large industries willing to locate or expand their facilities in this State in accordance with the requirements of H.3706.

With kindest regards, I am

Sincerely,

T. Travis Medlock
Attorney General

TTM:sds