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The State of South Carolina



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December 29, 1988

J. G. Rideoutte, Executive Director
Department of Highways & Public Transportation
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Dear Mr. Rideoutte:

You have inquired as to any potential constitutional problems with respect to S-724, a Bill which was pending before the General Assembly which would have allowed the South Carolina Department of Highways and Public Transportation (Department) to finance the cost of construction and maintenance of toll roads or bridges with the "State Highway Fund"; allowed the Department to request the issuance of "Turnpike Bonds" for the purposes of reimbursing the State Highway Fund for monies expended in construction of a toll project; allowed Turnpike Bonds to be supplemented with other funds which are to be repaid with turnpike facility revenues; allowed turnpike facility revenues to be used to reimburse State Highway Funds used on toll projects after outstanding Turnpike Bonds are retired; and allowed gasoline tax revenues to be used for the payment of costs and disbursements of the Department for the accomplishment of public transportation goals. Although the Bill was not adopted during the legislative session recently concluded, we understand that the question is still of interest to the Department.

In considering the constitutionality of an Act of the General Assembly, it is presumed that the Act is constitutional in all respects. Such an Act will not be considered void unless it is unconstitutional beyond any reasonable doubt. Thomas v. Macklen, 180 SC 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 SC 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. In this instance, however, we do identify some potential conflicts with provisions of the South Carolina Constitution.

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S-724 would have amended several sections of the Code of Laws of South Carolina concerning the financing of toll roads or bridges. Each provision will be analyzed separately so that potential conflicts can be identified.

Section 1 of S-724 would have amended Section 57-5-1330 which concerns the general powers of the department and turnpike projects. This amendment added Sub-Section (6) and allowed the Department to utilize the State Highway Fund to finance all or part of the cost of construction and maintenance. Revenues from tolls or other charges must be used to reimburse the State Highway Fund. Section 57-11-20 defines the State Highway Fund and allows all revenues and income expendable by the Department to be consolidated into one fund known as the State Highway Fund. There does not appear to be any constitutional infirmity in this section.

Section 1 of S-724 went on to add new Sub-Section (7) to 57-5-1330. This provision allowed the Department to request the issuance of turnpike bonds for purposes of reimbursing the State Highway Fund for monies expended in construction of a toll project. When that occurs, the turnpike facility revenues must be pledged for payment of the bonds. This provision is analyzed in light of Article X Section 13(9) which states:

The General Assembly may authorize the State or any of its agencies, authorities or institutions to incur indebtedness for any public purpose payable solely from a revenue-producing project or from a special source, which source does not involve revenues from any tax but may include fees paid for the use of any toll bridge, toll road or tunnel. Such indebtedness may be incurred upon such terms and conditions as the General Assembly may prescribe by law. All indebtedness incurred pursuant to the provisions of this sub-section shall contain a statement on the face thereof specifying the sources from which payment is to be made.

It appears that the procedure envisioned by the proposed amendment would be for State Highway Funds to construct the turnpike project after which, a Turnpike Bond Issue would be made to repay the State Highway Fund. After that, turnpike revenues would be used to repay the Turnpike Bonds. There does not appear to be any constitutional infirmity in this provision. State Highway Funds would be used to originally construct the project. Subsequent to that, Turnpike Bonds would be issued to repay the State Highway Fund after which, turnpike revenues would be used to repay the Turnpike Bonds. Accordingly, the Turnpike Bonds would be repaid solely from a revenue-producing project or special source which does not involve tax monies but does include fees paid for the use of the toll bridge or road.

Section 2 of S-724 amended Code Section 57-5-1450 by allowing the Budget and Control Board, after approving a proposed turnpike project and making provision for Turnpike Bonds to prescribe whether the bonds are to be "supplemented with other funds which are to be repaid with turnpike facility revenues." Clearly, these funds which are supplemented could be funds from the State Highway Fund which involves revenues from tax sources. Based upon Article X Section 13(9) which is quoted above, this provision would probably be found to violate the South Carolina Constitution in any case where the funds which are used as a supplement include tax funds since Article X Section 13(9) specifically disallows the use of revenues from any tax. A method prescribed by the Constitution for legislative action such as this is exclusive. Legislative power is unlimited except to the extent that it is circumscribed by the Constitution. State ex rel. Edwards v. Osborne, 11 S.E. 2d 260 (1940). Naturally, this constitutional problem could be solved if the Legislature made it clear that any tax revenues could not be used to supplement the funds.

Section 3 of S-724 amended Section 57-5-1380 by adding the provision that "turnpike facility revenues may be used to reimburse state highway funds used on toll projects after outstanding Turnpike Bonds, if any, are retired." The effect of this provision could be much like that discussed above concerning Section 57-5-1450. An example can be envisioned where a project could be financed from both the State Highway Fund and Turnpike Bonds and in which the effect would be to subsidize the Turnpike Bonds from the State Highway Fund, since the State Highway Fund cannot be repaid until the Turnpike Bonds are first repaid. The Legislature cannot accomplish indirectly what it cannot do directly. State ex rel. Edwards v. Osborne, 7 S.E. 2d 526 (1940). This result is certainly not clear and since only a court can declare a statute unconstitutional, a test case of some sort would be necessary in this instance. Again, the Legislature could add language which makes it clear that revenues from tax sources may not be used to finance Turnpike Bonds.

Section 4 of S-724 amended Section (1), Item 5 of Act 82 of 1977 which are the legislative findings concerning general public transportation policy and the financing of public transportation responsibilities of the Department. Item 5 is amended by adding that "gasoline tax revenues should be allowed to be used for payment of costs and disbursement of the Department of Highways and Public Transportation for accomplishment of public transportation goals of the department." This deletes the previous provision that public transportation responsibilities given to the Department would be financed from other sources. This amendment is analyzed with reference to Article X Section 5 of the of the South Carolina Constitution:

No tax, subsidiary or charge shall be established, fixed, laid or levied under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.

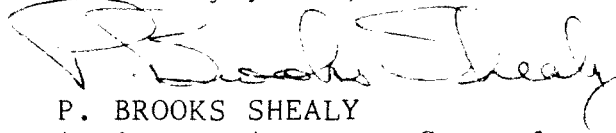
Two separate code sections impose taxes on gasoline in South Carolina. Section 12-27-230 imposes a tax of 6.67 cents per gallon on gasoline. Section 12-27-380 distributes that tax in the amount of 5.67 cents on each gallon to the State Highway Department "for the purpose of said Department." The other 1 cent per gallon is distributed to the counties of the state to be used for construction and maintenance of county roads. In addition, Section 12-27-240 imposes an additional 1.33 cent per gallon tax on gasoline. The distribution of this additional tax is governed by Section 12-27-400 which provides that this 1.33 cent per gallon tax is exclusively for the construction, improvement and maintenance of the State Highway Secondary System. When Sections 12-27-240 and 12-27-400 are read together, it is clear that the object of the 1.33 cent per gallon tax is the financing of the construction, improvements and maintenance on the State Highway Secondary System. Any use of these funds other than for the object prescribed would probably be a violation of Article X Section 5 of the South Carolina Constitution.

The effect on the 6.67 cent per gallon tax imposed under Section 12-27-230 and distributed under Section 12-27-380 is not as clear. Section 12-27-380 states that the tax allotted to it in the amount of 5.67 cents on each gallon "shall be turned over to the State Highway Department for the purpose of said department..." Section 57-3-10 establishes the Department of Highways and Public Transportation and allows it to coordinate all State and Federal programs relating to public transportation. Section 57-3-30 authorizes the Department to develop a general public transportation plan and policy. Since these sections establish public transportation and its development as a purpose of the Department, it does not appear that allowing the 5.67 cents on each gallon distributed under Section 12-27-380 to be used for accomplishment of public transportation goals would be in violation of the South Carolina Constitution. However, Section 12-27-380 also allots 1 cent per gallon to be distributed to the counties of the state to be used exclusively for the construction and maintenance of county roads. Use of these funds

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for public transportation goals would probably be in violation of the South Carolina Constitution and again, a test case before the Courts would be advisable.


Sincerely yours,



P. BROOKS SHEALY
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