ALAN WILSON
ATTORNEY GENERAL

June 10, 2014

Ronald E. Mitchum, Executive Director
Berkeley Charleston Dorchester Regional Council of Governments
1362 McMillian Ave. Suite 100
North Charleston, SC 29405

Dear Mr. Mitchum:

By your letter received on January, 13 2014 you ask questions regarding the validity of a proviso contained within the South Carolina General Assembly's General Appropriations Act for fiscal year 2013-14, specifically, proviso 84.14 of the Act. In your letter you explain, "Section 84.14 of the Act states that the South Carolina Department of Transportation is prohibited from using funds authorized by this Act for tree removal, or other similar activities, in the median of Interstate 26 from approximately mile marker 170 to approximately mile marker 199 between Summerville and Interstate 95 until approval is given by the Berkeley-Charleston-Dorchester Council of Governments." Continuing you add:

> As background information, prior to the passage of the proviso, the South Carolina Department of Transportation had identified the removal of the median trees and the installation of a cable barrier system as a priority safety project. The project and associated funding have been approved by the South Carolina Department of Transportation Commission. While the COG historically performs transportation planning functions and works cooperatively with the South Carolina Department of Transportation, it generally does not have state legislation veto authority over specific South Carolina Department of Transportation projects.

In light of this you ask two questions. First, whether proviso 84.14 is valid "in light of the relative responsibilities and power of the South Carolina Department of Transportation and the Berkeley-Charleston-Dorchester Council of Governments" and second, "what liability, if any, might arise for the COG and the individuals who serve on the Board if injuries or loss of life occur for any individuals as a result of an accident in that area of Interstate 26 if a decision regarding the proposed project were made by the COG, contrary to what the South Carolina Department of Transportation has recommended." Our response to these questions follow.

I. Law

A. Authority of the South Carolina Department of Transportation

The South Carolina Department of Transportation ("SCDOT") is a state agency "authorized to construct and maintain highways within the State of South Carolina." Op. S.C. Atty. Gen., 1981 WL 96582 (June 16, 1981); see also S.C. Code Ann. § 57-5-10 (explaining SCDOT is authorized maintain state highways); S.C. Code Ann. § 57-3-110(1) (2006) (stating SCDOT is given the duty to "lay out, build and maintain public highways and bridges"). This includes, "the police power and duty to plan, construct, maintain and operate the state highway system, consistent with the needs and desires of the public." Brashier v. South Carolina Dept. of Transp., 327 S.C. 179, 191, 490 S.E.2d 8, 14 (1997) overruled on other grounds I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). SCDOT's broad authority to construct and maintain highways has been previously interpreted to extend to the removal of trees. Op. S.C. Atty. Gen., 1981 WL 96582 (June 16, 1981). This is consistent with state law. See S.C. Code Ann. § 57-23-800(A) (2013 Supp.) (requiring SCDOT to "conduct vegetation management of the medians, roadsides and interchanges along the interstate highway system..."). In fact, in order for a county or municipality to participate in "vegetation management activities" of interstate medians, roadsides and interchanges, they must receive SCDOT's "written approval" to do so, and even then, can only conduct such activities "if the department declines to conduct vegetation management in those areas." S.C. Code Ann. § 57-23-800(E) (2013 Supp.). In short, South Carolina law explains that SCDOT has authority to remove trees from interstate medians and retains such powers unless it specifically gives written approval to another entity to do so.

B. Authority of the Berkeley-Charleston-Dorchester Regional Council of Governments

Pursuant to Section 6-7-190 of the South Carolina Code, regional councils of governments ("COG's") are public agencies.[1] S.C. Code Ann. § 6-7-190 (2004) ("Each council of government established under authority of this article exists for nonprofit and public purposes and is a public agency."). The authority of the Berkeley-Charleston-Dorchester ("BCD") Regional COG is, like other regional COG's, set forth in Section 6-7-110 et seq. of the South Carolina Code. Op. S.C. Atty. Gen., 2008 WL 2324808 (May 8, 2008). In particular, Section 6-7-140 of the Code details the powers and duties of regional COG's stating such groups have the power to:

[1] But see Op. S.C. Atty. Gen., 1986 WL 191965 (January 8, 1986) ("[I]t is the opinion of this Office that a regional council of government as established under South Carolina law would not come within the definition of 'unit of local government' as it is not a 'city, county, township, borough, parish, village, or other general purpose political subdivision' of this State.").

> (1) Prepare studies and make recommendations on such matters as it deems appropriate;
>
> (2) Coordinate and promote cooperative programs and action with and among its members and other governmental and nongovernmental entities, including those of other states;
>
> (3) Study and make recommendations on matters affecting the public health, safety, general welfare, education, recreation, pollution control, utilities, planning, development and such other matters as the common interest of the participating governments may dictate;
>
> (4) Provide continuing technical assistance, and information to the member local governments and other agencies and individuals;
>
> (5) In general, the regional council of government shall have the power to carry on such planning activities and the development of such studies and programs as it deems to be in the interest of the area;
>
> (6) Acquire and dispose of real and personal property necessary to the conduct of its business;
>
> (7) After coordination with the appropriate State, local and Federal agencies, the regional council of government may adopt such plans and programs as it may from time to time prepare. Such plans and programs as are adopted shall constitute the recommendations of the regional council of government.

S.C. Code Ann. § 6-7-140 (2004). In other words, as we have previously mentioned, a regional COG's authority is "limited to studying issues pertaining to local governments and to working with local governments on plans to resolve such issues by making recommendations." Op. S.C. Atty. Gen., 2008 WL 2324808 (May 8, 2008); Op. S.C. Atty. Gen., 2008 WL 2614985 (June 3, 2008). Indeed, this is consistent with your letter, which explains the BCD COG, as it relates to SCDOT, "historically performs transportation planning functions and works cooperatively with [SCDOT]."

II. Analysis

A. Interpreting and Analyzing Proviso 84.14 of the 2013-14 Appropriations Act

Understanding the respective authority of both SCDOT and the BCD COG, we will now address your first question, whether proviso 84.14 of the General Assembly's 2013-14

Appropriations Act is valid "in light of the relative responsibilities and power of [SCDOT] and [BCD COG]." Because we interpret proviso 84.14 as containing language outside of that which is typical of a provision of an appropriations act in that the proviso gives BCD COG veto power over a function which is outside of its authority and within that of SCDOT, specifically the management of vegetation and removal of trees from an interstate median, it is the opinion of this Office that proviso 84.14 is invalid. See Captain's Quarters Motor Inn v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.").

1. Interpreting Proviso 84.14 of the 2013-14 Appropriations Act

To analyze the validity of proviso 84.14, we must first interpret it. "The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When ascertaining legislative intent, South Carolina's appellate courts have stated, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will" and "courts are bound to give effect to the expressed intent of the legislature." Media General Communications, Inc. v. South Carolina Dept. of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). Indeed, "[t]here is no safer nor better rule of interpretation than when language is clear and unambiguous it must be held to mean what it plainly states." Jones v. South Carolina State Highway Dep't, 247 S.C. 132, 137, 146 S.E. 2d 166, 168 (1966).

Keeping these principles in mind, we now turn to the terms of the statute. Proviso 84.14 of the 2013-14 Appropriations Act states:

> *The Department of Transportation is prohibited from using funds authorized by this act for tree removal, or other similar activities*, in the median of Interstate 26 from approximately mile marker 170 to approximately mile marker 199 between Summerville and Interstate 95 *until approval is given by the BCD Council of Governments.*

2013-14 S.C. Acts, 120th Legis. Sess., Act. No. 101, Part 1B, Section 84.14 (emphasis added).

Our review of proviso 84.14 leads us to the conclusion that the proviso is clear and unambiguous and therefore, must "must be held to mean what it plainly states." Jones v. South Carolina State Highway Dep't, 247 S.C. at 137, 146 S.E.2d at 168. That is, SCDOT is "prohibited from using funds" authorized by the appropriations act for "tree removal and other similar activities" in the I-26 median from mile marker 170 to mile marker 199, "until approval is given by the BCD [COG]." In other words, proviso 84.14, aside from merely appropriating

funds to SCDOT for tree removal in the median of I-26, adds that such funds may only be expended upon approval by the BCD COG. We believe this proviso clearly and unambiguously operates so as to give the BCD COG a veto over SCDOT spending in this instance.

2. Whether Proviso 84.14 of the 2013-14 Appropriations Act, as Interpreted is Valid

Having interpreted proviso 84.14 of the 2013-14 Appropriations Act, we must now analyze its validity. In doing so, we initially note Article III, Section 17 of the South Carolina Constitution provides that, "[e]very Act or resolution being the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. Art. III, § 17 (1895). This constitutional provision has been interpreted to, "prevent the General Assembly from being misled into the passage of bills containing provisions not indicated in their titles, and to apprise the people of the subject of the proposed legislation, thereby giving them an opportunity to be heard." Ex parte Georgetown Water and Sewer Dist., 284 S.C. 466, 468, 327 S.E.2d 654, 656 (1985). "This section "should be liberally construed so as to uphold an act if practicable; however it should not be so liberally construed as to extend it to such a point as to foster the abuses which its provisions are designed to prevent." Id. Thus, in a situation where a portion of an appropriations bill contains language outside of the subject of its' purpose, which our Courts have said is to "make appropriations to meet the ordinary expenses of state government and to direct the manner in which funds are to be expended," such language is invalid under the terms of Article III, Section 17. Id. "The test to be applied to provisions of an appropriations act is whether the challenged legislation reasonably and inherently relates to the raising and spending of tax monies." Id.

Here, in light of our interpretation of proviso 84.14 of the Appropriations Act, specifically our conclusion that it bestows veto power on BCD COG over SCDOT expenditures for tree removal, we believe the proviso violates Article III, Section 17 of the South Carolina Constitution. In particular, the portion of the proviso giving veto power to the BCD COG for SCDOT tree removal, while arguably related to the appropriation of tax money, simultaneously enlarges the BCD COG's powers by granting the BCD COG final authority over functions which are clearly delegated to SCDOT[2] and are, according to the opinions of this Office, in excess of the statutory authority granted to regional COG's within Section 6-7-140 of the Code. Op. S.C. Atty. Gen., 2008 WL 2324808 (May 8, 2008) (summarizing a regional COG's powers under § 6-7-140 as being "limited to studying issues pertaining to local governments and to working with local governments on plans to resolve such issues by making recommendations."). Further, proviso 84.14 does so without making any mention of this in the legislative title as required by Article III, Section 17. See S.C. Const. Art. III, § 17 ("Every Act or resolution being the force of

[2] See Op. S.C. Atty. Gen., 1981 WL 96582 (June 16, 1981) (explaining SCDOT's broad authority to construct and maintain highways has previously been interpreted to extend to the removal of trees); S.C. Code Ann. § 57-23-800(A) (requiring SCDOT to "conduct vegetation management of the medians, roadsides and interchanges along the interstate highway system...").

law shall relate to but one subject, and that shall be expressed in the title."); Ex parte Georgetown Water and Sewer Dist., 284 S.C. at 468, 327 S.E.2d at 656 (explaining Article III, Section 17 has been interpreted to, "prevent the General Assembly from being misled into the passage of bills containing provisions not indicated in their titles, and to apprise the people of the subject of the proposed legislation, thereby giving them an opportunity to be heard.").

Moreover, to the extent one may argue proviso 84.14 does not operate so as to amend or expand either agency's permanent statutory powers and should instead be interpreted as merely permitting the BCD COG and SCDOT to collectively determine whether to expend funds to remove trees in the applicable areas of the I-26 median during the 2013-14 fiscal year, such an interpretation is still at odds with South Carolina law. Indeed such an interpretation, apart from violating the cannons of statutory construction mentioned above in section II(A)(1), neglects the fact that administrative agencies are creatures of statute and are limited to those powers granted to them by the Legislature. Op. S.C. Atty. Gen., 2004 WL 2451471 (October 22, 2004) (quoting Nucor Steel, Inc. v. S.C. Pub. Svc. Comm'n., 310 S.C. 539, 426 S.E.2d 319 (1992)) ("[T]he authority of a state agency or governmental entity created by statute 'is limited to that granted by the legislature.'"). To elaborate, if proviso 84.14 could be interpreted as merely allowing the BCD COG and SCDOT to collectively determine whether funds needed to be spent to remove trees from the I-26 median during the current fiscal year, doing so would ignore the fact that spending on, and performance of, tree removal is a statutory function reserved to SCDOT per the terms of Section 57-23-800(E) unless expressly delegated by SCDOT. See S.C. Code Ann. 57-23-800(E) (explaining SCDOT may only give *municipalities or counties* authority to conduct vegetation management in an interstate median and must do so by means of giving the municipality or county written approval). Furthermore, Section 57-23-800(E) as it relates to SCDOT's authority to delegate the function of interstate median vegetation management explains that only a municipality or county may receive such written approval from SCDOT. See S.C. Code Ann. 57-23-800(E) (explaining SCDOT may only give *municipalities or counties* authority to conduct vegetation management in an interstate median and must do so by means of giving the municipality or county written approval). In other words, the BCD COG, like all COG's, is an agency dedicated to studying issues, crafting plans and making recommendations, and, pursuant to the terms of Section 57-23-800(E), is unauthorized to make determinations regarding interstate median vegetation management. Thus, even assuming Section 57-23-800(E) could be construed as simply permitting the BCD COG and SCDOT to make collective decisions regarding expenditures on tree removal, making such decisions collaboratively is still at odds with each agency's statutory authority on this matter. See Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) (explaining public agencies only possess "such powers as have been conferred by law and must act within the authority granted for that purpose."). As a result, it is the opinion of this Office that even if proviso 84.14 is not interpreted as granting BCD COG a veto power and is instead looked at as merely permitting collective decision making regarding SCDOT expenditures, such an interpretation would still result in both agencies acting outside of their statutory authority and would thus be invalid.

B. Determining Liability if the COG made a Recommendation Contrary to SCDOT

Having addressed your first question, we will now move to your second question, whether the BCD COG could be held liable "if injuries or loss of life occur . . . as a result of an accident in that area of Interstate 26 if a decision regarding the proposed project were made by the COG, contrary to what [SCDOT] has recommended." Because this Office, as a matter of policy, does not answer hypothetical questions or opine on potential lawsuits, we decline to specifically address this matter.

In a recent opinion of this Office, we explained that certain questions are simply beyond the scope of an Attorney General's opinion. Op. S.C. Atty. Gen., 2013 WL 3362068, n. 5-10 (June 25, 2013) (declining to address questions related to facts, hypothetical matters, potential lawsuits, contractual questions, applications of federal law, interpretations of federal regulations or policies and review of state administrative policies). In particular, we will not, as a matter of policy, address hypothetical questions. Op. S.C. Atty. Gen., 2013 WL 3362068, n.6 (June 25, 2013) (quoting Op. S.C. Atty. Gen., 1998 WL 196485 (March 23, 1998) ("pursuant to Office policy, we will not answer hypothetical questions in a legal opinion")). Likewise, "we do not . . . decide or offer an opinion on the merits of [a] hypothetical lawsuit." Op. S.C. Atty. Gen., 2013 WL 3362068, n.6 (June 25, 2013) (quoting Op. S.C. Atty. Gen., 1991 WL 632996 (July 8, 1991)).

That said, we would note that a regional COG such as the BCD COG could be subject to suit under the Tort Claims Act since, pursuant to the terms of Section 6-7-190, regional COG's are a "public agency" and "an agency" can be sued pursuant to Section 15-78-40 of the Code. See S.C. Code Ann. § 6-7-190 ("Each council of government established under authority of this article exists for nonprofit and public purposes and is a public agency."); S.C. Code Ann. § 15-78-40 (2005) ("The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein."). Moreover, the Court of Appeals has previously held that the Department of Highways and Public Transportation, the forerunner to SCDOT, owed a duty of care to a motorist that was injured by a falling tree when the department was performing roadside tree removal. Varn v. South Carolina Dep't. of Highways and Pub. Transp., 311 S.C. 349, 353, 428 S.E.2d 895, 898 (Ct. App. 1993). Nevertheless, questions related to whether a duty of care may arise in a certain situation, along with questions as to the breach of a potential duty and whether a plaintiff may be comparatively at fault are fact-driven and, as a result, simply cannot be accurately determined by this Office in the context of a legal opinion. See Op. S.C. Atty. Gen., 2013 WL 3479877 (June 26, 2013) ("[T]his Office does not have the authority of a court or other fact-finding body, and therefore, it is unable to adjudicate or investigate factual questions."); Op. S.C. Atty. Gen., 2013 WL 3479876 (June 26, 2013) (explaining this Office

does not investigate facts, but instead only issues legal opinions). Accordingly, we simply cannot provide you with an answer to your second question.

Conclusion

In conclusion, it is the opinion of this Office that proviso 84.14 of the 2013-14 Appropriations Act clearly and unambiguously bestows veto power on BCD COG over SCDOT expenditures for tree removal, and does so without any reference to its legislative title as required by Article III, Section 17 of the South Carolina Constitution and is therefore invalid. Moreover, we believe that even if proviso 84.14 could be interpreted as merely permitting collective decision making between BCD COG and SCDOT regarding SCDOT expenditures on interstate median tree removal, such an interpretation would still be invalid as it would result in both agencies acting outside of their respective statutory authority in violation of South Carolina law. Finally, because this Office, as a matter of policy, does not answer hypothetical questions, opine on potential lawsuits, or review factual questions, we cannot answer your second question regarding the BCD's potential liability "if injuries or loss of life occur . . . as a result of an accident in that area of Interstate 26 if a decision regarding the proposed project were made by the COG, contrary to what [SCDOT] has recommended."

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

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