

The State of South Carolina



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September 18, 1986

The Honorable Liston D. Barfield
Member, House of Representatives
Post Office Box 1734
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Dear Representative Barfield:

With respect to the Horry County Higher Education Commission, you have asked that this Office address several questions:

1. Who has jurisdiction over the Higher Education Commission?
2. Who has the authority to set the millage for the Higher Education Commission's endeavors with the Coastal Carolina campus of the University of South Carolina?
3. If the County Council or the Legislative Delegation sets the millage, would it constitute dual taxation in that the college is a state supported school, or would it come under the umbrella of the statute that allows taxation for public and technical schools?

Each of your questions will be addressed separately, as follows.

Question 1

The Horry County Higher Education Commission was created by Act No. 114, 1959 Acts and Joint Resolutions, as amended. The Commission was empowered to enter into contracts with institutions of higher learning to operate a school or schools of higher learning in Horry County. Powers and duties are specified in section 3 of Act No. 131 of 1963 and include the powers to sue and be sued, to adopt and use a corporate seal, to adopt rules and regulations, to enter into contracts and leases, to acquire

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real and personal property, and so forth. An annual audit is required of the Commission, with a copy of the audit report to be given to each delegation member. Similarly, the Commission is to compile a written report of its activities annually and give a copy of that report to each delegation member.

By opinions of this Office dated May 26, 1959, the Commission was deemed to be "a separate juristic entity," "a separate political subdivision," and "not an integral part of the County of Horry." The entity as created by the General Assembly has not been substantially altered since those opinions were written; thus, today, we would still conclude that the Commission is a separate political subdivision and is not an agency of Horry County.

The jurisdiction of the Horry County Legislative Delegation, acting solely as the Delegation outside the General Assembly, is not clearly or specifically granted. When county legislative delegations have been given the authority to approve or disapprove any tax increase adopted by a school board, for example, the Supreme Court has found that such activities are violative of the separation of powers doctrine of the State Constitution. Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972); Aiken County Board of Education v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980). The court has stressed that legislators may exercise legislative powers only as members of the General Assembly. 1/

Though authority for the Delegation to act outside the General Assembly is at best questionable, the General Assembly clearly would have jurisdiction over the Commission, as a creation of the legislature. Thus, the Delegation, acting only by and through the General Assembly, would still have some jurisdiction. See Welling v. Clinton Newberry Gas Authority, 221 S.C. 417, 71 S.E.2d 7 (1952) (General Assembly may limit and define functions of an agency created by it).

Question 2

A review of the acts relative to the Higher Education Commission shows that while a minimum number of mills has been set by the General Assembly, no entity has been given authority

1/ We note that Commission members are to be "appointed by the Governor upon the recommendation of a majority of the county legislative delegation, including the Senator." This power to recommend for appointment does not violate the separation of powers doctrine. See Walpole v. Wall, 153 S.C. 106, 149 S.E. 760 (1929); Little v. Willimon, 103 S.C. 50, 87 S.E. 435 (1915).

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to set a millage different from that specified in the particular statute. For example, by section 1 of Act No. 493 of 1973,

for the payment of such bonds, ... there is required to be levied and collected by the Auditor and Treasurer of Horry County a tax ad valorem without limit as to rate, sufficient to provide for the payment of the principal and interest of the bonds. Without in any way limiting the generality of the foregoing pledge, the tax to be levied shall in no event be less than two mills, [Emphasis added.]

Previously the millage had been set at not less than three or four mills, depending upon the particular act examined. Prior to determining the necessary number of mills to be levied, it is essential to know how much money will be needed to pay the interest and principal due on bond issues. If a levy of two mills covers the payment of principal and interest and a surplus results, such surplus is to be deposited in the county's general fund. If two mills should be insufficient, the Auditor and Treasurer are required to levy and collect the necessary millage to pay the principal and interest.

Should a change in the terms of Act No. 493 of 1973 be desired, the most appropriate entity to make those changes would be the General Assembly. It would appear that, because such legislation would involve educational matters, Article III, Section 34 and Article VIII, Section 7 would not prohibit adoption of such a law. Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975). Article XI of the State Constitution places educational matters under the jurisdiction of the General Assembly; the reference in Article XI, Section 3 to support for "public institutions of learning" indicates that this provision covers higher education as well as elementary and secondary education. See, for example, Sections 59-103-5 and -10 et seq. of the Code of Laws of South Carolina (1976, as amended); 3 Sutherland Statutory Construction, § 51.02. 2/

2/ While this Office cannot predict how a court facing the issue of constitutionality of such an act would resolve the issue, we would note that an act of the General Assembly is presumed to be constitutional in all respects. 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). Furthermore, all doubts of constitutionality are generally resolved in favor of constitutionality.

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Question 3

You have asked whether dual taxation may be occurring since funds for Coastal Carolina are generated from taxes levied on property of Horry County taxpayers and from the annual appropriations act adopted each year by the General Assembly. We think not.

Double or dual taxation results when any kind or class of property is subjected to more than one tax by a particular statute or ordinance. Alderman v. Wells, 85 S.C. 507, 67 S.E. 781 (1910); Wingfield v. South Carolina Tax Commission, 147 S.C. 116, 144 S.E. 846 (1928). Stated another way,

[i]n order to constitute double taxation in the objectionable or prohibited sense the same property must be taxed twice when it should be taxed but once; both taxes must be imposed on the same property or subject matter, for the same purpose, by the same state, government, or taxing authority, within the same jurisdiction or taxing district, during the same taxing period, and they must be the same kind or character of tax. Also the taxes must not be uniform or there must be discrimination, one tax must have been imposed on part only, not all, of the property in the taxing district; and the tax burden must be one imposed by the state and not one voluntarily assumed by agreement.

84 C.J.S. Taxation § 39. Applying these principles to your question, double taxation is not present. An ad valorem property tax is being levied against property by Horry County while a graduated income tax and other taxes (though not ad valorem property taxes) imposed by the State of South Carolina would constitute a large portion of the revenue appropriated in annual appropriations acts to the Coastal Carolina campus of the University of South Carolina.

In conclusion, this Office advises:

1. The General Assembly is the entity which would have jurisdiction over the Horry County Higher Education Commission, which is a separate political subdivision and not a county agency.

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2. The General Assembly would be the most appropriate entity to set the millage to be levied for the Higher Education Commission's endeavors with the Coastal Carolina campus of the University of South Carolina.
3. Double or dual taxation does not result from a taxpayer paying ad valorem property taxes to Horry County and other taxes, including income taxes, to the State of South Carolina, the proceeds of which would both be used to fund the Coastal Carolina campus of the University of South Carolina.

Sincerely,

Patricia D. Petway

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

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