The State of South Carolina

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The Honorable Glenn F. McConnell
Senator, District No. 41
1370 Remount Road, Suite D
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Dear Senator McConnell:

You have asked that this Office address the following question:

> Can the General Assembly, by passage of a regulation, delegate to a State agency the authority to establish a fee schedule and grant by such regulation the authority to the governing board of the agency to set and approve the amount of the fees?

The question has arisen in the context of Regulation 61-51, Code of Laws of South Carolina (1976, as amended), under which the South Carolina Department of Health and Environmental Control (DHEC) is proposing a fee schedule for the inspection of public swimming pools. You are concerned that this may be an unlawful delegation of legislative authority to the executive branch of government, in violation of the separation of powers doctrine.

The General Assembly has authorized DHEC to "make, adopt, promulgate and enforce reasonable rules and regulations" for, among other things, the "safety, safe operation and sanitation of public swimming pools and other public bathing places ... ." Section 44-1-140(7) of the Code. As a result of this authorization DHEC has promulgated Regulation 61-51, which provides in part (B)(2) that the

> Board of the Department of Health and Environmental Control may establish a fee which

> shall accompany applications for permits. The Board must provide public notice and opportunity for public comment prior to implementation of a fee schedule.

Again, within part (c)(2), it is provided:

> The Board of the Department of Health and Environmental Control may establish an annual operating permit with fees to be set by the Board. Public notice and opportunity for public input will be provided prior to implementation of a fee schedule.

By this regulation, the General Assembly appears to have delegated to the governing board of DHEC the authority to set the fees for applications for permits and annual operating permits. This regulation was approved by a joint resolution of the General Assembly under the Administrative Procedures Act. See Act No. 182, 1983 Acts and Joint Resolutions; Section 1-23-120 of the Code. A presumption of validity thus attaches to the regulation, which would carry the force of law. Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976).

The separation of powers doctrine is expressed in Article I, Section 8 of the State Constitution:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Likewise, Article III, Section 1 of the Constitution places the power and authority to legislate with the General Assembly. While the General Assembly cannot delegate the power to make laws, it may authorize such an agency as DHEC to "'fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." Heyward v. South Carolina Tax Commission, 240 S.C. 347, 355, 126 S.E.2d 15 (1962).

Further, the General Assembly has

> the right to vest in the administrative officers and bodies of the State a large measure of discretionary authority, especially to make rules and regulations as to the enforcement of law; and such rules when promulgated are valid, if they are not in conflict with, or do not change in any way the statute conferring such authority.

Fisher v. J. H. Sheridan Co., Inc., 182 S.C. 376, 326, 189 S.E. 356 (1936).

The many decisions of our courts as to delegation of authority relative to regulation-making have been analyzed in Shipley, South Carolina Administrative Law (1983) as follows:

> The theory stated in several decisions is that regulation-making involves only the filling-in of details by agencies, but in reality, the delegations of authority to state agencies are so substantial that this view is no longer entirely correct. ... [T]here are limits on the range of powers the legislature may delegate, but often the legislative mandate is little more than a framework and the agency must do substantially more than add details. ...

Id., p. 4-2. Thus, how much delegation would be permissible should be considered.

As to how much authority may be delegated, the Supreme Court has stated that

> [t]he degree of authority that may lawfully be delegated to an administrative agency must in large measure depend upon circumstances of the particular case at hand, including legislative policy as declared in the statute, objective to be accomplished and nature of agency's field of operation.
>
> ....
>
> [W]hen a statute is complete on its face no unconstitutional delegation of legislative

> authority can be imputed to it by the fact that authority or discretion as to its execution is vested in an administrative officer, commission or board.

Terry v. Pratt, 258 S.C. 177, 183, 187 S.E.2d 884 (1972). The Court has further noted that

> [t]he degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. "There are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative officers to carry out the legislative will ... ."

S. C. State Highway Department v. Harbin, 226 S.C. 585, 594-95, 86 S.E.2d 466 (1955). Great leeway is especially essential where discretion "is necessary to protect the public ... health, safety and general welfare." Cole v. Manning, 240 S.C. 260, 265, 125 S.E.2d 621 (1962). Accordingly, the Court has fashioned the following guidelines: a statute "which in effect reposes an absolute, unregulated and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation." Bauer v. S. C. State Housing Authority, 271 S.C. 219, 233, 246 S.E.2d 869 (1978). Whether the delegation of Regulation 61-51 exceeds permissible bounds is, at best, unclear.

It may be argued that setting such fees and allowing such discretion is a regulation authorized by a regulation. A regulation is defined as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." Section 1-23-10(4) of the Code. Setting fee schedules would appear to be a prescription of policy by an agency, and arguably then the requirements of the Administrative Procedures Act, Section 1-23-10 et seq., should be followed. However, the General Assembly has, on other occasions, authorized various agencies by either statute or regulation to adopt fee schedules which are not then subject to approval by the General Assembly pursuant to Section 1-23-120 of the Code. See, for example, Regulation 11-10

(The Board of Architectural Examiners is authorized to determine certain fees, though limits are set by Section 40-3-90 of the Code); Regulation 57-23 (fees set therein are minimum and may be increased at any time by the State Board of Funeral Services); Section 40-45-110 and Regulation 101-7 (giving State Board of Physical Therapy Examiners discretion in setting its fees).

Fees are ordinarily imposed to cover costs and expenses of supervision or regulation. Valandra v. Viedt, 259 N.W.2d 510 (S.D. 1977). Another court has stated, as to license fees, that a

> license fee may be exacted as a part of or incidental to regulations established in the exercise of the police power. Such a fee commonly is commensurate with the reasonable expenses incident to the licensing and all that can rationally be thought to be connected therewith. ...

Robinson v. Secretary of Administration, 12 Mass. App. 441, 425 N.E.2d 772, 777 (1981) (emphasis added). This fee is apparently not being enacted to raise revenue but is designed more to recoup the costs and expenses of administering the law. Op. Atty. Gen. dated June 16, 1986. Further, costs may change and adjustments must be made therefor within a time frame which may not make it very feasible to require approval by the General Assembly every time an adjustment is needed. Thus, the General Assembly may have considered it appropriate to permit a fee schedule to be adopted incidental to Regulation 61-51. 1/ In any case, it could not be said with certainty that an unlawful delegation has occurred.

1/ Whenever possible, in construing statutes and regulations, the courts and this Office must try to ascertain and effectuate legislative intent. Cf., Anders v. South Carolina Parole and Community Corrections Board, 279 S.C. 206, 305 S.E.2d 229 (1983). However, there is no official legislative history compiled in this State and we have found nothing in the legislative journals to give guidance as to legislative intent in its approval of Regulation 61-51. Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 (1928). Thus, we can at best only speculate as to the legislature's intent in approving Regulation 61-51.

As noted earlier, the General Assembly approved this regulation by a joint resolution. In considering the constitutionality of such an enactment of the General Assembly, it is presumed that the enactment is constitutional in all respects. Moreover, such an enactment will not be voided by the courts 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. Only a court, and not this Office, can finally resolve constitutional questions.

Because the regulation in which the two questioned portions was quite lengthy and complicated, it might be argued that the General Assembly did not fully appreciate or understand its approval of Regulation 61-51, that the regulation was approved without thought or careful study. However, we cannot agree that Regulation 61-51 was adopted as these arguments would suggest.

The General Assembly is presumed to have fully understood the import of words used in a statute. Powers v. Fidelity and Deposit Company of Maryland, 180 S.C. 501, 186 S.E. 523 (1936). It is not for the courts or this Office to inquire into the motives of the legislature or what may have motivated the General Assembly. Scovill v. Johnson, 190 S.C. 457, 3 S.E.2d 543 (1939). The legislature is presumed to know the law and not to do a futile thing. Graham v. State, 109 S.C. 301, 96 S.E. 138 (1918). It must be presumed that the legislature knew its own intention and that when such intention is couched in unambiguous terms, the act expresses that intention. In enacting a statute or resolution, it must be presumed that the legislature acted with deliberation and with full knowledge of the effect of the act and with full information as to the subject matter and existing conditions and relevant facts. 82 C.J.S. Statutes Section 316; 73 Am.Jur.2d Statutes Section 28.

Moreover, the precise manner by which the General Assembly approved the regulation in question in this instances is significant. Such approval was accomplished by the enactment of a joint resolution. Our Supreme Court has stated that a joint resolution "is as potent to declare the legislative will" as an enactment. Smith v. Jennings, 67 S.C. 324, 330 (1903). See also, Rule 10.31(c), Rules of the House (1986 Legislative Manual). The Court further noted that "[w]henever a joint resolution does undertake to lay down a rule of conduct for any portion of the people of the state it becomes a law and will take effect as such...." 67 S.C. at 330-331. Furthermore,

this Office has recently concluded that where the General Assembly enacts a joint resolution as contemplated in the Administrative Procedures Act for the approval of proposed regulations, "the Joint Resolution must undergo the three readings required by Article III, Section 18." Op. Atty. Gen., March 19, 1986. And, in this instance, Act No. 182 of 1983 was signed by the Governor as any other statute. Thus, the method of approval of the regulation by Act No. 182, does not differ substantively from the enactment of any other statute. Accordingly, there has been an express articulation of public policy by the "supreme legislative power of the state." Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133 (1946).

To summarize the foregoing, this Office cannot say with any certainty that the General Assembly has unlawfully delegated its legislative authority to South Carolina Department of Health and Environmental control in its approval of Regulation 61-51. The presumption of constitutionality notwithstanding, the General Assembly appears to have adopted Act No. 182 and approved Regulation 61-51 just as it adopts any other statute; thus, the Regulation would be a law and would have the effect of law. Only a court could conclusively decide that Regulation 61-51 is unconstitutional, in keeping with the standards discussed above.

We trust that the foregoing will be responsive to your inquiry. If you need clarification or additional information, please advise.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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REVIEWED AND APPROVED BY:

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