1983 S.C. Op. Atty. Gen. 95 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-61, 1983 WL 167255

Office of the Attorney General

State of South Carolina
Opinion No. 83-61
August 18, 1983

***1** The Calhoun County School District is free to spend any money received in 1983–84 or carried over from the previous school year.

Member, Senate
Member, House of Representatives

My advice has been requested with respect to the following questions:
1. Does Calhoun County School District possess the authority to spend funds allocated to it in 1983–84 from sources other than carry-over funds appropriated by the General Assembly for 1982–83?

2. What governmental body or bodies possess the authority to determine the method for setting the tax millage for Calhoun County School District for fiscal year 1983–84 in view of the current financial crisis?

The spending powers of the District were previously addressed by this office in a letter dated July 1, 1983. Since then, pending local legislation on this subject was not enacted by the General Assembly.

The simpler of your questions is directed to the spending authority of the District. The letter referred to above stated that the District appears to have the authority in 1983–84 to spend money on hand for school purposes without further legislation. Absent any special restrictions attached to particular funding, the authority cited in that letter should support the expenditure of money received from other sources in 1983–84, as well as carry-over money. [1] See, Act 1030, Acts and Joint Resolutions of South Carolina, 1974, as it amends Section 21–1558 of the Code of Laws of South Carolina, 1965. The School District must adopt a budget for the spending of its money and is free to choose its terms in accordance with Act 1030, Art. X, § 7B, Constitution of South Carolina (1865), as amended, and any other applicable requirements of law.

The more serious problem presented involves the issue of what governmental entity possesses the authority with respect to taxation. Local tax revenues are, of course, a critical source of funds for the school district's operation. For each of the past several years, the legislature has enacted legislation setting the annual tax millage for the operation of Calhoun County schools. See e.g., Act 519, Acts and Joint Resolutions of South Carolina, 1982; Act 226 of 1981; Act 1366 of 1974; Act 592 of 1973. This year no legislation was enacted for that purpose, and we have been able to find no other local statute setting tax millage for the school district. Therefore, at the outset, we emphasize that the legal question which we now address arises out of truly extraordinary circumstances, which we believe are unparalleled at least in recent memory. Accordingly, it should be noted that this question has not been handled as an ordinary opinion by this office, but has instead been one where we have attempted to exhaust every possible solution in order to assist in remedying the current financial crisis.

Article XI, Section 3 of the South Carolina Constitution mandates:
***2** The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State....

(emphasis added)

As the Supreme Court of South Carolina stated recently,
The plain language of this constitutional provision places the responsibility for free public education with the General Assembly and requires that such free public schools shall be given open to all children in the State. (emphasis added)

Washington, et al. v. Salisbury, et al., Op. No. 219–72 (August 10, 1983). For whatever reason, in this particular year and at least until January of next year when the General Assembly reconvenes, there does not exist an enactment by the General Assembly providing one of the critical means for funding the public schools of Calhoun County. In other words, this particular year the General Assembly did not choose to follow its usual means for complying with the Article XI, § 3 constitutional mandate, i.e. enactment of local legislation providing the authority to fund Calhoun County schools.

In South Carolina, it is well-established that
The General Assembly is a creature of the Constitution. Ours is not a grant of authority to the General Assembly; it is a limitation on the General Assembly. The legislature, under its plenary powers, may enact any law not specifically, or by implication prohibited. It must enact those laws mandated in the Constitution itself. (emphasis added)

Duncan v. County of York, 267 S.C. 327, 228 S.E.2d 92 (1976). The legislature by inaction cannot alter a constitutional mandate. Harris v. Shanahan (Kan.), 387 P.2d 771, 789 (1963). The legislature has a constitutional duty to perform constitutional mandates. North Dakota v. Garaas, 261 N.W.2d 914 (1978).

In this case, the subject of school taxes is generally addressed by the Home Rule Act in § 4–9–70 of the Code of Laws of South Carolina (1976). This law provides generally that county councils “shall determine by ordinance the method of establishing the school tax millage ...” except as otherwise provided in that law. (emphasis added) The use of the word “shall” in this phrase indicates that it should be given a mandatory construction. Sutherland, Statutory Construction, Vol. 1A, § 57.03 (4th ed.). An exception contained in § 4–9–70 reads as follows:
... in any county where the General Assembly retained the authority to establish or limit the millage levied by school districts or levy a tax for educational purposes on January 1, 1974, such authority shall continue in the General Assembly until such time as such authority may be transferred to the school district or the county governing body by Act of the General Assembly.

Because the General Assembly set the millage for the 1973–1974 school year (Act 592 of 1973) this proviso normally would be applicable to the District. Here, the question is how § 4–9–70 might govern the present extraordinary situation in light of the clear constitutional mandate in Art. XI, § 3 and in view of the General Assembly's inaction this year.

***3** In construing § 4–9–70 recently, the South Carolina Supreme Court expressly rejected a literal approach in favor of one that considered legislative intent. Stone v. Traynham, 278 S.C. 407, 297 S.E.2d 420 (1983). In Stone, the Court noted that, because another of the exceptions expressed in § 4–9–70 (concerning county boards of education) had been declared unconstitutional in Crow v. McAlpine, 277 S.C. 240, 285 S.E.2d 355 (1981), Orangeburg County was left “without a means to finance its school system.” 297 S.E.2d, supra at 422. The Court further observed that § 4–9–70's
clear intent is to vest the power to determine the school tax levy in county council in all cases where it is not vested elsewhere. It is inconceivable the legislature would not provide for the levy merely because it could not constitutionally vest control of that power in appointed boards of education.

Supra.

Here, as in Stone, it would appear “inconceivable” that the General Assembly would intend that taxes not be levied in Calhoun County and thus the constitutional mandate contained in Art. XI, § 3 would not be met. The General Assembly will always be presumed to have acted in a constitutional manner and the unconstitutionality of legislative action or inaction must be shown

beyond a reasonable doubt. Cf., Chesterfield Co. v. State Hwy. Dept., 191 S.C. 19, 3 S.E.2d 686 (1939). This year, the General Assembly did not enact local legislation as it usually does, pursuant to the proviso contained in § 4–9–70, so as to fully meet the mandate of Art. XI, § 3. Therefore, for this year, the exception proviso must be deemed inapplicable to the present situation, just as the exception proviso in Stone was deemed inapplicable because of its constitutional infirmity. Otherwise, the General Assembly would have violated Article XI, § 3. § 4–9–70 must thus be applied this year in view of the statute's general legislative intent "to vest the power to determine the school tax levy in county council in all cases where it is not vested elsewhere," Stone, supra and in light of Art. XI, § 3 and other legislative mandates. [2] It is evident to us then that, in light of Stone, a court would thus view the County Council as possessing the authority, pursuant to the intent of § 4–9–70, to "determine by ordinance the method of establishing the school tax millage...." This application of § 4–9–70 in favor of the County Council's authority to determine the method for settling millage is supported by the requirement in Art. VIII, § 17 of the South Carolina Constitution which provides in part that:

The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor.

This construction of § 4–9–70, which does not provide an express answer to the Calhoun County School District's financial situation, is not free from doubt absent judicial resolution. However, the above construction of this statute, in my opinion, appears to be the conclusion that a court would adopt if the matter were litigated.

***4** Therefore, I would advise the following:

1. In accordance with a proper budget and any restrictions on particular funds, the School District is free to spend any money received in 1983–1984 or carried over from the previous school year.

2. A Court most likely would conclude, in my opinion, that the county council may determine by ordinance the method for setting the tax millage in these extraordinary circumstances, although the General Assembly retains the authority to set the millage for ensuing years. We would further advise that if this option is implemented without the benefit of court order, the General Assembly as an additional precaution should consider ratifying by appropriate legislation at its next session the millage set by the Council or by the authority to which Council properly delegates the power. As one bound by the important duties of this office and the high standards of his profession, I also must advise you that absent judicial resolution, my opinion is not free from doubt. [3]

T. Travis Medlock
Attorney General

Footnotes

1 For additional authority as to the carry-over of 1982–83 money, see, Section 59–69–250 of the Code of Laws of South Carolina (1976).

2 One of the means by which the legislature has chosen to execute its Art. XI, § 3 mandate is the Education Finance Act (§ 59–20–10, et seq.) which provides for a minimum educational program for the children that are supported by a combination of state and local revenue. To construe § 4–9–70 so as to leave the Calhoun County School District without a means of levying the local taxes contemplated by the Educational Finance Act, would of course seriously frustrate the intent of that Act, as well as Art. XI, § 3.

3 This office also has researched the option of the School District issuing tax anticipation notes based upon the tax millage that the General Assembly would set at its next session. Authority for the issuance of tax anticipation notes by school districts is found in Article X, § 15(7), South Carolina Constitution; § 11–27–50(4), Code, supra, and Act No. 1030 [Section 21–1555(6)] of 1974. Due to the unusual circumstances in which the notes would be issued, this option should be reviewed by experienced tax and bond attorneys before implementation.

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