ALAN WILSON
ATTORNEY GENERAL

February 14, 2017

The Honorable Bill Sandifer, Member
South Carolina House of Representatives
407 Blatt Building
Columbia, SC 29211

Dear Representative Sandifer:

You have requested an opinion regarding the constitutionality "of delegating the authority to establish business license tax rate classes to the Municipal Association of South Carolina (MASC)." In addition, you wish to know "is it constitutionally permissible for the General Assembly to delegate MASC to be the filing body and collector for business license taxes owed by businesses operating in South Carolina?" You recite H. 5109 of 2016 "as an illustration of legislation which would enable MASC to set business tax rates and collect that tax." Thus, you ask if "such delegation of taxing authority rise[s] to a level that it is no longer a purely ministerial act but rather a constitutionally suspect transfer of a sovereign function inherent to municipalities?"

Law / Analysis

There is no question that the power to impose a business license tax may be and has been delegated to municipalities in South Carolina by the General Assembly. As our Supreme Court stated in Thompson Newspapers, Inc. v. City of Florence, 287 S.C. 305, 307, 338 S.E.2d 324, 325 (1985):

> [m]unicipalities are empowered to levy a business license tax on gross income. S.C. Code Ann. Section 5-7-3 (1984); Article VIII, Section 1, South Carolina Constitution. The power to impose a license tax implies the power to classify businesses and establish rates of taxation. Southern Bell Telephone & Telegraph Company v. City of Aiken, 279 S.C. 269, 306 S.E.2d 220 (1983). However, the classification must be reasonable and not arbitrary, and must be assessed on persons of the same class. Wingfield, et al. v. S.C. Tax Commission, et al., 147 S.C. 116, 144 S.E.2d 846 (1928).

A business license fee is undoubtedly "a tax on the privilege of doing business within the Town." Town of Hilton Head Island v. Kigre, Inc., 408 S.C. 647, 649, 760 S.E.2d 103 (2014).

Moreover, we have repeatedly stated in our opinions that "the taxing authority is not one which may simply be delegated away to a private entity." Op. S.C. Att'y Gen., 1998 WL 993679 (December 21, 1998). In that opinion, we described as "most troublesome" the issue "of whether municipalities have unlawfully delegated their taxing and tax collection authority to a private organization, the Municipal Association." We referenced a statement by our Supreme Court in Watson v. City of Orangeburg, 229 S.C. 367, 93 S.E.2d 20, 24 (1956) as follows:

> [t]he power of taxation, being an attribute of sovereignty vested in the legislative subject to constitutional restrictions, taxes can be assessed and collected only under statutory authority. 51 Am. Jur. Taxation, Section 44, p. 74 Grier v. City Council of City of Spartanburg, 203 S.C. 203, 26 S.E.2d 690. It follows that in the absence of a statute so providing the power to collect taxes due to the municipality may not be delegated by it without express authority, . . . and a fortiori cannot be exercised by a private citizen.

(emphasis added).

Further, in Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999), the Court concluded that the General Assembly possessed no authority to delegate the power to legislate to the voters. There, the Court cited Gaud v. Walker, 214 S.C. 451, 462, 53 S.E.2d 316, 321 (1949) that

> [i]t is a well settled rule, supported with practical unanimity by the authorities, that the general doctrine prohibiting the delegation of legislative authority has no application to the vesting in political subdivision of powers to govern matters which are local in nature.

However, the Legislature could not, consistent with the Constitution, delegate such legislative powers to the people, noting that "[h]ere in contrast, the legislature has left to the people to determine what the general law will be." Id.

And, in Eastern Federal Corp. v. Wasson, 281 S.C. 450, 316 S.E.2d 373 (1984), the Court struck down as unconstitutional a statute which unlawfully delegated the legislative power to the Motion Picture Association of America, a private organization. The Court noted that the "statute in question imposes a tax of twenty percent (20%) on all admissions to view movies rated X or not rated by the Motion Picture Association of America (MPAA). According to the Court,

> [t]he MPAA is a private, voluntary organization of the major film producers in the United States, and employs a board to review films voluntarily submitted to it for ratings.
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> The statute imposes no guidelines for rating of films, but leaves the determination solely to the discretion of the MPAA. The MPAA determines which pictures shall be rated "x." It therefore, of necessity, determines which

> films will be taxed at twenty percent. This is clear delegation of legislative power. State v. Watkins, 259 S.C. 185, 191 S.E.2d 135.
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> In Watkins, the Court found an unconstitutional delegation of legislative power in the statutory exemption from prosecution granted to displayers of MPAA approved films. The Court there held:
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> > "Exclusion from prosecution cannot be made independent upon the whim or will of [the MPAA]. Just as exclusion from prosecution could not be made dependent in Watkins upon the sole discretion of the MPAA, so the determination in this case of which films will be subject to the application of the twenty percent tax cannot be constitutionally left to the sole determination of the MPAA.

281 S.C. at 452, 316 S.E.2d at 373.

There is also the issue of "taxation without representation." As our Supreme Court stated in Weaver v. Recreation Dist., 328 S.C. 83, 85, 492 S.E.2d 79, 80 (1997),

> Article X, § 5 provides, in pertinent part:
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> > No tax . . . shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. . . .
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> In Crow v. McAlpine, 277 S.C. 240, 285 S.E.2d 355 (1981), this Court was faced with a legislative delegation of authority to an appointed board, the Marlboro County Board of Education, to levy and collect all tax millage necessary to meet the school district's operating budget. We found such a delegation of authority violated Article X, § 5 as the legislative power to tax may not be conferred on a purely appointive body but must be under the supervisory control of elected bodies, stating:
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> > The unlimited power of taxation attempted to be conferred by the Act under consideration is itself a forcible reminder that the power to fix and levy a tax should only be conferred upon a body which stands as the direct representative of the people, to the end that an abuse of power may be directly corrected by those who must carry the burden of the tax.
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> 277 S.C. at 244-245, 285 S.E.2d at 358. Accordingly, we held the act unconstitutional stating, "the General Assembly may not, consistent with Article X, Section 5, delegate the unrestricted power of taxation to an appointive body." Id.
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> The same result was subsequently reached in Stone v. Traynham, 278 S.C. 407. 297 S.E.2d 420 (1982) in which we invalidated an amendment to S.C. Code Ann. § 4-9-70, which purported to permit the Orangeburg County Board of Education to establish school tax millages. There, we noted our holding in Crow that

> "participation by an appointed board . . . in the budgeting process . . . constituted taxation without representation." 278 S.C. at 408, 297 S.E.2d at 421 (emphasis supplied).
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> Most recently, in Bradley v. Cherokee School District No. One, 322 S.C. 181, 470 S.E.2d 570 (1996), we upheld an act authorizing the Cherokee County School Board to conduct two referenda: one for issuance of general obligation bonds, and the other to approve a 1% sales tax to pay off the debt service on the bonds. The act was challenged on grounds it permitted the Board to impose a lax throughout the county, when a portion of the residents did not vote for the members of the school board. This Court upheld the act, finding that "[t]he ultimate authority under the Act to impose the tax rests with the Cherokee County voters," as the entire county electorate had voted on issuance of the bonds and the sales tax. In Bradley we noted, however, that "where the taxing power is delegated to a body composed of persons not assented to by the people nor subject to the supervisory control of a body chosen by the people, the constitutional restriction against taxation without representation is violated." 322 S C. at 184, 470 S.E.2d at 571.
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> Here, Act No. 317 gives the Recreation Commission the complete discretion to determine its annual budget, and to levy anywhere from one to five mills taxes to meet its budget. We find such a delegation impermissible under our holdings in Crow, Traynham, and Bradley. Accordingly, insofar Act No. 317 permits such a delegation, it violates Article X, § 5 of the South Carolina Constitution and may not stand.

In addition, in Willis v. Town of Woodruff, 200 S.C. 266, 20 S.E.2d 701 (1942), our Supreme Court stated the following:

> [t]he rule as laid down in 43 C.J., page 245 is: "Since the police power of a municipal corporation cannot be exercised for private purposes or for the benefit of particular individuals or classes, it has been held that regulations or ordinances requiring the consent of property owners, or a specified percentage thereof, in the vicinity, for the creation, alteration, or use of particular kinds of building or for the maintenance of particular businesses are invalid on the grounds that such is delegation of the governmental power to private citizens, and that such regulations deprive the applicant of the equal protection of the law and of their property without due process of law. . . ."

An exception to the rule against delegation to private entities exists. The Court has noted "that delegation [to private entities] of administrative and ministerial duties is not unconstitutional." State ex rel. Medlock v. S.C. State Family Farm Development Authority, 279 S.C. 316, 322, 306 S.E.2d 606, 609-10 (1983), citing Clarke v. S.C. Pub. Serv. Auth., et al., 177 S.C. 427, 181 S.E. 481 (1935) and Green, et al. v. City of Rock Hill, et al., 149 S.C. 234, 147 S.E. 346 (1929). In Medlock, the Court held that "[s]ince the Legislature in this instance

delegated only ministerial duties, the Act is not violative of Article III, § 1 of the South Carolina Constitution." (emphasis added).

We turn now to the text of H. 5109. This Bill provides in pertinent part as follows:

> (C) Each municipality must accept a standard business license application as established and provided by the Municipal Association of South Carolina.
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> (D)(1) By December thirty-first of every odd year, a municipality must adopt, by ordinance, the latest Standardized Business License Class Schedule as provided by the Municipal Association of South Carolina. The Municipal Association of South Carolina shall determine and revise the Standardized Business License Class Schedule every even year using the business classification codes of the latest North American Industry Classification System.
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> (2) A municipality, upon a finding of a rational basis as explained in its ordinance and by a positive majority vote of council, may provide for additional reasonable subclassifications, described by NAICS sector, subsector, or industry, based upon particularized considerations as needed for economic stimulus or the enhanced or disproportionate demands by specific business subclassifications on municipal services or infrastructure.
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> (3) The Municipal Association of South Carolina must submit the revised Standardized Business License Class Schedule to the Revenue and Fiscal Affairs Office by December thirty-first of every even year.
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> (E) Each municipality must provide access to businesses for the reporting, calculation, and payment of business license taxes through the Municipal Association of South Carolina's Business License Tax Portal, subject to the availability and capability of the portal. Limitations in portal availability or capability do not relieve businesses from existing business license or business license tax obligations.
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> (F)(1) A municipality must establish its 2018 Business License Tax Rate Schedule using the gross income reported by businesses 16 for a twelve-month period in the 2017 business license year so that the aggregate municipal business license tax calculated for 2018 does not exceed the aggregate municipal business license tax collected in 2017 from the same businesses.
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> (2) If the rate for a NAICS sector, subsector, or industry is unchanged from 2017 to 2018, then the business license tax collections may be excluded from the calculation set forth in item (1)."

Your concern regarding the above-quoted legislation is that there would be an unlawful delegation of legislative authority or sovereign functions to the MASC. According to the

legislation, a municipality is mandated every year to adopt, by ordinance, "the latest Standardized Business Schedule as provided by the Municipal Association of South Carolina." Moreover, every even year, the MASC "shall determine and revise the Standardized Business license Class Schedule . . . using the business classification codes of the latest North American Industry Classification System." Further, the municipality is authorized to "provide for additional reasonable subclassifications, described by NAICS sector, subsector or industry, based upon particularized considerations as needed for economic stimulus or the enhanced disproportionate demands by specific business subclassifications on municipal services or infrastructure."

We too are concerned that such provisions may be deemed by a court to unlawfully delegate sovereign functions to organizations or agencies outside South Carolina government. Our opinions have noted that a constitutional problem exists when legislation

> . . . attempts to provide for the same automatic adoption of future revisions of nationally recognized codes in the absence of any further considerations of the changes by the legislature or the agency enforcing them. Multiple jurisdictions have struck down such attempts as impermissible delegations of legislative power to private entities, as these private organizations would have the power to formulate rules that would ultimately acquire the status of law. Therefore, no language that attempts to adopt all prospective revisions or editions either by direct legislative mandate or by delegation to an agency, would be appropriate. The proposed legislation should contain some provision directing the agencies involved to consider future changes to the codes as they are enacted and then amend their regulations accordingly.
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> Our own Supreme Court addressed the possible unlawful delegation of legislative power in Santee Mills et al. v. Query, 122 S.C. 158, 115 S.E. 202 (1922). There, the question before the Court was whether the incorporation by reference in the South Carolina Tax Law of the federal income tax laws and regulations constituted an unconstitutional delegation of legislative power. In concluding that the statute was valid, the Court was careful to note that the statute was limited to the present Act of Congress and not to "future laws, rules, and regulations of the federal government." Id. at 205. The Court appears to be setting forth the applicable law in South Carolina in this area. . . .

Op. S.C. Att'y Gen., 2005 WL 1024603 (April 14, 2005).

Of course, if H. 5109 were enacted into law, it would, like any other enactment of the General Assembly, carry a strong presumption of constitutionality. As we have stated on numerous occasions,

> [w]hile this Office cannot predict how a court facing the issue of constitutionality of the statute would resolve the issue, we would note that, generally, 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 (1938); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). All doubts as to constitutionality are typically resolved in favor of constitutionality. Moreover, while this Office may comment upon constitutional problems, it is solely within the province of the courts of this State to declare a statute unconstitutional.

Op. S.C. Att'y Gen., 1987 WL 245426 (Op. No. 87-17) (February 12, 1987).

Conclusion

Based upon the 2005 Opinion's analysis set forth above, as well as our 1998 Opinion regarding a delegation of authority to the Municipal Association, we certainly see potential constitutional issues with the proposed legislation, H. 5109. See Wasson, supra; Watkins, supra. The requirements contained in Section 3 of the Bill include that the municipality "must adopt" the "latest" Standardized Business Class Schedule "as provided" by MASC. MASC, in turn, is mandated to "determine and revise" every even year the Standardized Business License Class Schedule "using the business classification Codes of the latest North American Industry Classification System." Certainly, these provisions appear to be "automatic" adoption requirements, which would be subject to serious constitutional challenge. While a court would give the strong presumption of constitutional validity to these provisions, if enacted, the legislation in question is likely to be challenged as an unlawful delegation of sovereign authority.

As we stated in our 1998 Opinion, it is "most troublesome . . . whether municipalities have unlawfully delegated their taxing and tax collection authority to a private organization, the Municipal Association." In addition, the legislation could also raise the issue of "taxation without representation," as discussed in cases such as Crow v. McAlpine, supra, and Weaver v. Recreation Dist., supra. Our Supreme Court has pointed out on numerous occasions that the taxing power may only be bestowed upon elected representatives.

Again, we emphasize that, if enacted, only a court may adjudge the validity of H. 5109. Such legislation will be presumed valid and is entitled to every reasonable doubt of constitutionality. However, our concern is the unlawful delegation of governmental power, as opposed to the bestowal of merely ministerial or administrative functions, to a private organization or entity outside South Carolina government. There is the additional question of taxation without representation.

Sincerely,

Robert D. Cook
Solicitor General