ALAN WILSON
ATTORNEY GENERAL

July 13, 2017

Bruce E. Davis, Esquire
8 Heather Way
Greenville, SC 29605

Dear Mr. Davis:

You seek an opinion, as attorney for the Dillon County Board of Education, regarding the Dillon County Council's use of proceeds from the local option sales tax. Your question specifically is "whether the Dillon County Council's termination of it's practice of twenty-one years of dividing Dillon County's portion of these funds equally between the County and the County School Board is lawfully appropriate." We conclude that a court is likely to find that such termination is not lawfully appropriate.

By way of background, you have provided a "Memorandum of Facts Regarding Passage and Purpose of Monies Generated by the Dillon County Local Option Sales Tax of 1995." This Memorandum states as follows:

1. By vote of September 1, 1995, The Dillon County Council presented, on November 7, 1995, a referendum to the electorate of Dillon County for the purpose of establishing a Local Option Sales Tax (LOST). A majority of the qualified electors of Dillon County, South Carolina, voted to impose an additional sales and use tax in Dillon County, South Carolina, pursuant to ACT NO. 317 of 1990. (See attachments 1 and 2).

2. The Dillon County Council is reporting a loss of the minutes of its meeting of September 1, 1995. Affixed hereto as Attachment 3 are notes made by Lisa Gray, the Clerk to Council, for her use in preparing the minutes of this meeting.

3. On November 2, 1995, there appeared in the Dillon Herald Newspaper a document furnished by the Dillon County Council titled "FACTS ABOUT THE LOCAL OPTION SALES TAX" reminding the citizens of Dillon County of the November 7, 1995 vote and encouraging their participation. (See attachment 4) FACT 9 states: "The county part of the distribution will be divided equally between the County and the County School Board with all proceeds being used for building replacement or repair only." FACT 10 States: "The County and Schools will use the funds for buildings only and not for administration or the growth of government!"

4. Affixed as Attachment 5 is page 13 of the Dillon County Audit for fiscal year ended June 30, 1997. The final paragraph of said page 13 asserts that "Upon enactment of the Local Option Sales Tax, Dillon County Council reached as agreement with the Dillon County Board of Education to divide the Revenue Fund Local Option Sales Tax Revenue evenly with the County Board of Education." Monies pursuant to this agreement have been going to the Dillon County School System since 1996. (See attachment 6)

5. Of overriding importance is the fact that it is not within the preview of County Council's authority to annul the wishes of the sovereign people.

Law/Analysis

You note that the referendum in question was authorized pursuant to Act No. 317 of 1990. Act 317 is codified at S.C. Code Ann. Section 4-10-10 et seq. Section 4-10-20 provides that "[a] county, upon referendum approval may levy a sales and use tax of one percent of the gross proceeds of sales within the county area. . . ." The "sales and use tax must not be imposed on the county area, unless a majority of the qualified voters voting in the referendum approve the question." § 4-10-30. In the referendum for a local option sales tax, the ballot question must be as follows:

> Must a one percent sales and use tax be levied in _____ County for the purpose of allowing a credit against a taxpayer's county and municipal ad valorem tax liability and for the funding county and municipal operations in the _____ County area.

Id.

We understand that on November 7, 1995, the voters of Dillon County approved the referendum required to authorize the additional one cent sales and use tax pursuant to § 4-10-10 et seq. You also noted that, pursuant to an agreement reached between County Council and the County Board of Education, voters understood that the county portion of the distribution would be "'divided equally between the County and the County School Board with all proceeds being used for building replacement or repair only'" and that such funds would not be used "'for the administration and growth of government.'" According to the facts presented, "[m]onies pursuant to this agreement have been going to the Dillon County School System since 1996."

According to one authority, it is well recognized that

> . . . a valid agreement as to the disposition of tax funds will be enforced. . . .
>
> A city violates its "contract" with voters only if it uses tax proceeds as approved by the voters in a way that voters did not approve. . . .

> Except by state legislative authorization, . . . if such authorization is permissible, ... taxes levied for a specific purpose cannot be used for other purposes,
>
> . . . .
> In general, tax money in a special fund is not available for current expenses; . . . .

16 McQuillin Mun. Corp. § 44: 238 (3d ed.).

Moreover, the following is stated in West's ALR Digest § 986:

> [w]hen tax is levied for specific purpose, legislative body making levy, after tax shall have been collected, does not thereafter have legislative authority over it for purpose of diverting it so long as purpose for which it was collected exists and administrative officials into whose custody tax is intrusted are without authority to divert it . . .
>
> Levying of tax for distinctly specified governmental purpose is an appropriation for protected use, and a tax levy so appropriated is beyond power of officials in their discretion to divert it. . . .
> (citing City of Newport v. McLane, 256 Ky. 803, 771 S.W.2d 27, 96 A.L.R. 655 (1934)).

Our opinions reach the same conclusion in various circumstances as these general governing principles. For example, as we opined in 1965, "[t]he South Carolina Supreme Court has held several times that funds derived from a tax levied for a particular purpose may not be diverted to another use before the original purpose has been accomplished." Op. S.C. Att'y Gen., 1965 WL 7974 (Op. No. 1811) (March 11, 1965) (citing Edwards v. Osborne, 193 S.C. 158, 173, 7 S.E.2d 526 (1940), citing Southern Railway v. Board of Commissioners, 148 N.C. 220, 61 S.E. 690 (1908)). Moreover, in Op. S.C. Att'y Gen., 2004 WL 1182081 (May 20, 2004), we quoted an earlier opinion (October 1, 2001) stating that "'(i)t is well recognized that public funds may be expended only for their designated purpose. '" And in Op. S.C. Att'y Gen., 1960 WL 11812 (September 26, 1960), former Attorney General McLeod stated the following:

> [b]y letter dated July 17, 1959, I advised authorities in Anderson County that a surplus in a fund derived from levies made for specific purposes cannot be applied to other purposes.
>
> In State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526, a North Carolina decision was cited with approval, in which case the precise point has been raised. In the latter case, it was held that the surplus could not be diverted to other purposes but must be held to meet interest accruing for coming years or for sinking fund to pay the principal. See Southern Railway v. Board of Commissioners of Mecklenburg County, 61 S.E. 690.

> It is the opinion of this Office that the excess revenues over and above the amount necessary to meet annual payments due for principal and interest may not be diverted to other purposes unless the entire purpose for which bonds were originally issued has been accomplished.

Judicial decisions in South Carolina are in accord. As was stated in Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13, 15 (1939),

> [p]erhaps the most frequent ground of application for relief by injunction against municipal corporations is, for the prevention of an illegal or an unauthorized diversion of public funds. The foundation of the relief which is invoked in cases of this nature rests in the doctrine of trusts, and while courts of equity are averse to any interference with the proceedings of municipal officers while acting within the scope of their authority, and while they will not by injunction control the judgment or reverse the action of municipal bodies in matters resting within their own well defined jurisdiction or discretion, they will yet relieve in behalf of citizens and taxpayers against official acts on the part of such bodies, when they move without authority or warrant of law, and in excess of their corporate powers.

The Court in Kirk went on to say with respect to diversion of public funds dedicated to the payment of bonds that "[a]dministrative officials into whose custody and control the law intrusts the same with the authority to invest, preserve, or pay out, are without authority to make any diversion thereof, contrary to law." Id. at 15-16.

In Cornelius v. Oconee County, 369 S.C. 531, 537, 633 S.E.2d 492, 495 (2006), the Supreme Court of South Carolina commented that the will of the voters in a referendum may not be ignored. There, the Court stated:

> . . . here Oconee County chose to include such a restriction [concerning the source of funding the county may use for a sewer system] in the referendum presented to the voters. Accordingly, the voters of Oconee County approved the referendum, but only on the condition that specific, non-tax-based financing be used to construct, operate, and maintain the sewer system. To now permit the County to use the fact of a favorable vote as a license to ignore the express terms of that referendum and deploy its general taxing power to finance expansion of the system would subvert the popular will and deprive "the people [of the right] to protect themselves against the rule of man. . . ."

While the division of funds between the County of Dillon and the Board of Education was not expressly mentioned or noted in the Referendum ballot question (as noted above, § 4-10-30 requires a specified question), the agreement between the two parties was clear that the county's portion of the funds would be equally divided with the School Board. The notes of the Clerk to Council reflect such an agreement. Moreover, the Dillon Herald edition of November 2, 1995 informs the voters, in information provided by County Council, that "[t]he county part of the distribution will be divided equally between the County and the County School Board with

all proceeds being used for building replacement or repair only." Further, it was specified that "The County and Schools will use the funds for building only and not for administration or the growth of government." Perhaps most importantly, this Agreement for equal division of funds has been recognized and honored by the County each year since 1996. Yet now, the County seeks to divert the School District's portion to other uses. This, we believe, it cannot do.

We are of the opinion that a court would likely conclude that these facts lend to the conclusion that voters understood the Agreement and approved the Referendum based upon it. The circumstances leading up to the Referendum in 1995, as well as more than twenty years of history afterwards, leave no room for doubt, in our mind, that the Agreement reached between the County and School Board is legally binding. While only a court may so conclude, we believe that a court is likely to do so.

The decision in City of Fairfield v. Haynes, 235 Ala. 194, 178 So. 212 (1938) is instructive. There, the State of Alabama and City sued for taxes owed. Haynes intervened, based upon an agreement with the City to audit the tax records and to be paid one half of all monies collected by the City "on account of any assessment made from such audit." 178 So. At 213. The Alabama Supreme Court held that Haynes was legally entitled to his one-half of the proceeds:

> [d]ealing with this fund as the fruits of an executed agreement, for which Haynes was to have as compensation an amount equal to one-half of same, the court was warranted in finding that Haynes was entitled to share in the fund itself, and was not limited to a claim against the city, as for an indebtedness merely, to be presented, audited, and paid from general funds if and when available.

Id. at 214. This case, as well as the authorities cited above, instruct that the County may not divert the monies from the local option sales tax designated for the school district to other purposes.

Conclusion

It is our opinion that a court would likely conclude that the agreement reached between the Dillon County Council and the Dillon County Board of Education to share evenly the County's portion of the local option sales tax proceeds is legally binding and enforceable. Education is a county purpose. See Op. S.C. Att'y Gen., 1976 WL 30437 (April 26, 1976). Such Agreement between the County and Board of Education was widely known and understood prior to the Referendum held in November, 1995 approving the local option sales tax. We believe voters approved the tax with that understanding. Indeed, the 1997 Dillon County Audit for fiscal year, June, 1997 states that "[u]pon enactment of the Local Option Sales Tax, Dillon County Council reached a agreement with the Dillon County Board of Education to divide the Revenue Fund Local Option Sales Tax Revenue evenly with the County Board of Education." This has been done for more than twenty years.

Based upon these facts, we believe County Council has no authority to divert the School Board's portion of the funds to other purposes. Such diversion is unauthorized by law, in our opinion. As Justice Littlejohn wrote in Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 356, 287 S.E.2d 476, 482 (1982) (Littlejohn, J. dissenting) "[t]he power of government to demand money from its people by way of taxation, or otherwise, is equivalent to the power to destroy." The will of the people is paramount and serves to "'protect themselves against the rule of man.'" Cornelius, supra.

Sincerely,

Robert D. Cook
Solicitor General