1976 WL 30507 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 2, 1976

***1** John Henry williams, Esquire
Aiken County Attorney
214 Newberry Street S.W.
Aiken, South Carolina 29801

Dear Mr. Williams:
A question has arisen as to the validity of the introduction and first reading of an ordinance creating the Aiken County Public Service Authority (PSA) by the Aiken County Board of Commissioners prior to the holding of the referendum required by Article VIII, § 16 of the South Carolina Constitution. In my opinion, such introduction and first reading would not be valid.

As you are well aware, the South Carolina Supreme Court recently invalidated the election called by the PSA and conducted on November 5, 1974, and went on to say:
It follows that before Aiken County nay acquire the treatment facility properties, it must obtain a favorable vote, now required by the constitution, at the instigation of the county governing body after appropriate legal notice and publication. Murphree, et al. v. Mottel, et al., —— S.C. ——, —— S.E.2d —— (Opinion No. 20244 filed June 16, 1976). [Emphasis added.] I think that the intent of that language is clear; a favorable referendum vote is a condition precedent to Aiken County's acquisition and operation of the Horse Creek Basin Wastewater Treatment Facility. Of course, once that favorable vote is received, one initial step in the acquisition and operation would be the creation of a county agency, board or commission to manage the acquisition and operation of the facility and the granting of authority to do so by the Aiken County Board of Commissioners. Before that time, however, the Board would have no authority to begin the process of empowering its agent to do that which the Board itself was not yet, and might not ever be, authorized to do.

The law is well settled that:
[t]here can be no valid ordinance until it is properly passed by the legally constituted legislative body of a municipality [or county], and 'pass' as applied to the enactment of local laws comprehends all necessary steps to create the law. The passage of an ordinance requires that it be introduced, read and approved by the lawmaking body . . . in a legal, official and formal session, ... 5 McQUILLIN MUNICIPAL CORPORATIONS § 16.28 at 173 (3rd Ed. 1969). [Emphasis added.]

In order for an ordinance to be properly passed and, consequently, valid, all of the steps necessary to create it, including the introduction and reading thereof, must have been proper as well.

Inasmuch as the introduction and reading of an ordinance creating the PSA before the authority to do so is established is clearly unauthorized and improper [id., § 16.10 at 145 ('[s]ubstantial compliance with requisite procedure in enactment of an ordinance is prerequisite to its validity, and no ordinance is valid unless and until mandatory prerequisites to its enactment and promulgation are substantially observed'); cf., Mason v. Salem, 167 A.2d 433 (ordinance adopted by selectmen after, instead of before voters' approval, as required by statute, void)], the ordinance itself cannot be considered as having been validly enacted. See generally, 5 McQUILLIN MUNICIPAL CORPORATIONS § 15.16 at 74 (3rd Ed. 1969). Moreover, some doubt exists as to whether such invalidity could be cured subsequently [see, e.g., Cedar Rapids

Water Co. v. Cedar Rapids, 91 N.W. 1081 (ordinance authorizing execution of contract for waterworks, passed before constitutional amendment giving city power to create indebtedness takes effect, is void and contract being ultra vires at time it is made, cannot be ratified afterwards by subsequent ordinance)], especially in view of what appears, at least to me, to be the clear mandate of the State Constitution and, in the case of Aiken County, of the Supreme Court as well.
With kind regards,

***2** Karen LeCraft Henderson
Assistant Attorney General

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