1976 S.C. Op. Atty. Gen. 322 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4463, 1976 WL 23080

Office of the Attorney General

State of South Carolina
Opinion No. 4463
SEPTEMBER 23, 1976

***1** 1. Code of Laws of South Carolina & 33–172 (1962) requires that the State Highway Department receive the consent and approval of municipal authorities prior to the commencement of highway construction work within the municipality.

2. Code of Laws of South Carolina § 33–173 (1975 Cum. Supp.) gives to municipal authorities the right to review and approve plans of the State Highway Department prior to the commencement of work on a proposed permanent improvement, construction, reconstruction or alteration of a highway or highway facility.

TO: Clyde M. Dangerfield
Member
House of Representatives

QUESTION PRESENTED:

You have requested an opinion as to whether either Section 33–172, Code of Laws of South Carolina (1962) or Section 33–173, Code of Laws of South Carolina (1975 Cum. Supp.) or both of them authorize a municipality to withhold its approval of portions of highway projects which are within its municipal boundaries, thus effectively frustrating the construction of such projects.

AUTHORITIES CITED:

Constitution of South Carolina Art. 10 § 6

Code of Laws of South Carolina § 33–172 (1962)

Code of Laws of South Carolina § 33–173 (1962) as amended, Code of Laws of South Carolina § 33–173 (1975 Cum. Supp.)

56 Acts and Joint Resolutions 154 (1969)

47 Acts and Joint Resolutions 457 (1951)

40 Acts and Joint Resolutions 1930 (1938)

Dolan v. Camden, 233 S.C. 1, 103 S.E. 2d 328 (1958)

Moseley v. South Carolina Highway Department, 236 S.C. 499, 115 S.E. 2d 172 (1960)

Leonard v. Tolbert, 222 S.C. 79 S.E. 2d 603 (1952)

Purdy v. Strother, 184 S.C. 210, 192 S.E. 159 (1937)

Moore v. Waters, 148 S.C. 326, 146 S.E. 92 (1928)

Martin v. Saye, 147 S.C. 433, 145 S.E. 186 (1928)

Ex parte Withers, 3 Brev. (3 S.C. Rep.) 83 (1812)

40 C.J.S. (Highways) §§ 29, 117

82 C.J.S. (Statutes) § 380

DISCUSSION:

You have directed the attention of this office to the language of Code of Laws of South Carolina § 33–172 (1962) and § 33–173 (1974 Cum. Supp.) and have inquired as to the effect of a conflict, if any, in the language of these Code sections. These Code sections provide as follows:
§ 33–172. Consent of municipality to such construction.—All work to be performed by the Department on State highways within a municipality shall be with the consent and approval of the proper municipal authorities.

§ 33–173. Assent of municipality to plans.—In every case of a proposed permanent improvement, construction, reconstruction or alteration by the Department of any highway or highway facility within a municipality, the municipality may review and approve the plans thereof before the work is started.

It is a fundamental concept of statutory interpretation that conflicting provisions of an Act must be harmonized to give full effect to the intentions of the legislature. Purdy v. Strother, 184 S.C. 210, 192 S.E. 159 (1937). Here the question raised involves the distinction, if any, between the phrase 'work . . . shall be with the consent and approval' of § 33–172 and 'may review and approve the plans' of § 33–173. Although frequently the word 'may' is interpreted as permissive or directory, and the word 'shall' is interpreted as mandatory, see generally, 82 C.J.S. (Statutes) § 380, our Supreme Court has noted that such is not invariably the rule and in order that the intention of the Legislature be given effect, it is proper to inquire into the background and history of the legislation. Moore v. Waters, 148 S.C. 326 S.E. 92 (1928).

***2** It would appear that the origin of Code of Laws of South Carolina §§ 33–172 and 33–173, supra, is to be found in 40 Acts and Joint Resolutions 1930 (1938). That statute established the responsibility of the Department for highway construction in municipalities. Section 1 of the Act provided that for municipalities with a population in excess of 2,500, the Department was required to 'submit, to the municipal authorities concerned, an outline of its plans and purposes with regard to the highways or sections of highways in such municipality to be affected by the said plans and purposes, and the said Department shall take no action thereon until the said plans and purposes shall have been approved by the said municipal authorities. . . .' Compare Code of Laws of South Carolina § 33–172 (1962). Section 5 of the Act provided that work to be performed by the Department on highways passing into and through municipalities would be 'with the consent and approval of the proper municipal authorities and shall not result in the assumption by the said Department of any liability whatever on account of damage to property, injuries to persons or death growing out of or in any way connected with said work. . . .' Compare Code of Laws of South Carolina § 33–173 (1962).

In 1951, the general highway law was recodified. 47 Acts and Joint Resolutions 457 (1951). The delineation of state and municipal responsibilities and relationships is found in § 57(c) of that Act which begins:
It is hereby declared to be the purpose of this section to extend the benefits of state highway service to include sections of state highways extending into and through municipalities and to authorize the State Highway Department

to construct, reconstruct and maintain at its own cost all state highways and sections of state highways within the limits of municipalities subject to the provision of this section . . ..

Following this statement of purpose, the statute provided, 'All work to be performed by the Department on state highways within a municipality shall be with the consent and approval of the proper municipal authority and shall not result in the assumption by the said Department of any liability whatever on account of damages to property, injuries to persons or death growing out of or in any way connected with said work.' When the Act was codified in 1952, undoubtedly the provision of § 33–172 was drawn from the first phrase of this sentence. This provision retained the same section number in the 1962 Code and has not been amended to date.

In addition to the language which became § 33–172, § 57(c) of 47 Acts and Joint Resolutions 457 (1951) also provided: 'In every case of a proposed permanent improvement, construction, reconstruction or alteration by the State Highway Department of any highway, or highway facility, within a municipality, the municipality *shall have the right* to review and approve the plans thereof before the work is started. . . .' (emphasis added). When codified in the 1952 Code, this language, with certain editorial changes became § 33–173. One of the editorial changes was that the italicized words were deleted and replaced by the word 'may', which appears in the present amended version. *

***3** Viewed in light of the legislative history of Code of Laws of South Carolina §§ 33–172 and 33–173, any apparent distinction between the provisions evaporates. It is inescapable that the General Assembly intended that proper municipal authorities should have the opportunity to consent and approve of highway construction work within the municipality prior to its commencement, and to review and approve plans for such improvements prior to commencement of the work.

This opinion should not be construed as requiring municipalities in every case of proposed highway construction to review and approve of plans. Municipalities have the right to review and approve plans. The approval authority is a discretionary authority to be exercised as the interests of the municipality dictate and likewise the review authority would also appear to be discretionary. Thus, upon the positive manifestation by municipal authorities transmitted to the Department of an intent to waive the right to review and approve plans with regard to a project or class of projects, and until revocation of such waiver, the Department may advance such projects without the express approval of municipal authorities.

This office is not aware of any statute repealing the review and approval provisions of Code of Laws of South Carolina §§ 33–172 or 33–173.

Finally, we are unable to locate any case which holds such a statute to be unconstitutional. To the contrary, our Supreme Court has referred occasionally to the provisions of the review and approval statutes, see e.g., Moseley v. South Carolina Highway Department, 236 S.C. 499, 115 S.E. 2d 172 (1960) and Dolan v. Camden, 233 S.C. 1, 103 S.E. 3d 328 (1958), apparently with approval. It cannot be doubted that the authority to provide for the establishment, construction and maintenance of a highway system is within the police power of the legislature. See generally 40 C.J.S. (Highways) §§ 29, 177; cf., Const. of S.C. Art. 10 § 6. (as amended). Authority to establish, construct, and maintain highways may be delegated to public agencies and political subdivisions on such terms as the legislative branch may dictate. See Leonard v. Tolbert, 222 S.C. 79, 71 S.E. 2d 603 (1952); Martin v. Saye, 147 S.C. 433, 145 S.E. 186 (1928); Ex parte Withers, 3 Brev. (3 S.C. Rep.) 83 (1812). As originally enacted, the review and approval provision was obviously part of a legislative accommodation between the state interest in developing a State Highway System and the local communities' interests in self determination. Thus, it is not likely that Code of Laws of South Carolina §§ 33–172 and 33–173 would be held to be unconstitutional.

CONCLUSION:

1. Code of Laws of South Carolina § 33–172 (1962) requires that the State Highway Department receive the consent and approval of municipal authorities prior to the commencement of highway construction work within the municipality. 2. Code of Laws of South Carolina § 33–173 (1975 Cum. Supp.) gives to municipal authorities the right to review and approve plans of the State Highway Department prior to the commencement of work on a proposed permanent improvement, construction, reconstruction or alteration of a highway or highway facility.

***4** Marvin C. Jones
Assistant Attorney General

Footnotes

* The provision as it appeared in the 1952 and 1962 Codes was amended to strike the requirement that municipalities assume the tort liability of the Department arising from certain improvements, 56 Acts and Joint Resolutions 154 (1969). That amendment is of no importance to this opinion.

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