

1972 S.C. Op. Atty. Gen. 93 (S.C.A.G.), 1972 S.C. Op. Atty. Gen. No. 3288, 1972 WL 20432

Office of the Attorney General

State of South Carolina

Opinion No. 3288

March 24, 1972

***1 The General Assembly probably can constitutionally delegate to municipalities the authority to create special service districts, within the municipality, to prescribe the boundaries thereof and the assessment levied for payment of the improvements. However, because of the decision in the case of [Mauldin v. City Council of Greenville](#), 53 S. C. 285, 31 S. E. 252, the matter would require judicial review.**

Member

House of Representatives

Greenville County

Greer, South Carolina

Reference is made to your request for the opinion of this office concerning the proposed legislation that would delegate to cities having a population of 10,000 or more the authority to set out within the geographical limits of the municipality a subdivision or part thereof designated as an 'improvement district'. The proposed legislation would further give such cities the right to levy a 'special assessment' upon real property situate within the improvement district to pay in whole or in part the costs of the improvement. Improvements would be in the nature of malls, parkways, parks and playgrounds, parking facilities, parking garages, and underground parking facilities, and all things incidental thereto including the relocation, construction, widening and paving of streets, and the acquisition of land therefor.

The Constitution in Article 10, Section 17, authorizes all cities and towns to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks immediately abutting such property. The opinion, therefore, does not relate to this self-executing constitutional grant but treats the power of the General Assembly to confer upon the municipality such authority.

The special assessment would not be a tax within the meaning of the term contained in the constitutional provisions that require uniformity and equality in taxation. [Sanders v. Greater Greenville Sewer District](#), 211 S. C. 141, 44 S. E. 2d 185. [Ashmore, et al. v. Greater Greenville Sewer District](#), 211 S. C. 77, 44 S. E. 2d 88. The Court in the latter case quotes from 49 Am. Jur. 256 as follows:

'The legislature may, except so far as it is restricted by the constitution, establish such a system for the convenient administration of public affairs throughout its territorial limits as seems to it best. * * *. The creation of municipal corporations is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restriction the power of the legislature over them is practically unlimited. The legislature may, if it sees fit, abolish all municipalities in the State and revert to direct control of local affairs, *or it may make a new subdivision of the State*. * * *.' (Emphasis added.)

The law in this State is further settled that the General Assembly may constitutionally create special districts of designated territory. [Ashmore v. Greater Greenville Sewer District](#), supra; [Newton v. Hanlon](#), 248 S. C. 251, 149 S. E. 2d 606; [Hedeman v. Postell](#), 250 S. C. 515, 159 S. E. 2d 230.

***2 The controlling question involved in the proposed legislation is whether the General Assembly can delegate to a municipality a right to create the improvement district. Our Court, in the case of [Mauldin, et al. v. City Council of Greenville](#), 53 S. C. 285, 31 S. E. 252, held that the General Assembly was without constitutional authority to establish special tax districts**

within the State and that because of such the cities were likewise without authority to create special or improvement districts. The Court went on to say that whenever there is a public or corporate purpose, the whole property of the city, town, or village must be taxed to subserve such public or corporate purpose. This is the latest decision from our Supreme Court on the subject of municipalities creating the districts, therefore in the event that the proposed legislation is enacted, it would be necessary to determine the constitutionality thereof by a judicial review. It would, however, appear that the later cases of our Court have overruled the 1898 decision, and more importantly, the proposed legislation authorizes a special assessment rather than a tax.

It is stated in 48 *Am. Jur.*, Section 115, *Special or Local Assessments*, at page 664 that

‘The legislature may refer the matter of fixing and prescribing an improvement area or district to local boards or bodies. It may refer to a municipal corporation the power to create assessment districts, fix their boundaries, and charge upon property within their limits the cost of local improvements. Such delegation to a municipal corporation is subject to strict construction.’

It is further stated in the same Article in Section 12 at page 573 that

‘The legislature may delegate the power of special assessment for public improvements to improvement districts, existing public corporations, political or administrative subdivisions of the state, or other proper agent. No other body or agency possesses any power of special assessment in the absence of such delegation to it by the legislature. While the residuary power of taxation in a legislative body of a state includes the power of special assessment, a power to tax delegated to a local authority does not in itself confer the power to levy special assessments for local improvements. Constitutional limitations upon the power of the legislature to levy taxes generally do not restrict its power to authorize municipalities to impose special assessments for local improvements.’

It was held by the United States Circuit Court of Appeals, Second Circuit, in the case of *Moore v. Yonkers*, 235 Fed. 485, 9 A. L. R. 590 that

‘The legislature has power to create an assessment district, and fix its boundaries, and charge the cost of a local improvement in whole or in part on the property within the defined area either according to valuation or frontage or superficial area. Instead of exercising the power directly, it may delegate the right to a municipal corporation, and when the power is so delegated the municipal corporation exercises its discretion in determining what property should be included in the assessment district and the extent to which the property therein is benefited.’

*3 It is therefore the opinion of this office that the proposed legislation is, in all probability, constitutional; however that because of the decision in the case of *Mauldin v. City Council of Greenville*, supra, it would be necessary that the constitutionality of the proposed legislation, if adopted, be tested in our Courts.

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