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HENRY McMASTER
ATTORNEY GENERAL

October 27, 2006

Ray N. Stevens, Director
South Carolina Department of Revenue
Post Office Box 125
Columbia, South Carolina 29214

Dear Mr. Stevens:

We recently received a letter from you requesting an opinion as to the constitutionality of the 2006 amendments to section 12-37-670 of the South Carolina Code. You informed us that Lexington County inquired to the Department of Revenue for advice on applying several amendments contained in this provision. Along with three other issues being addressed by the Department of Revenue, you were asked: "whether the amendments to Section 12-37-670 create a procedure that, when acted upon by the County, violates the uniformity provision of the South Carolina Constitution as it exists today or as proposed for amendment by HB 4450 in the up coming November election." Because this question raises constitutional concerns, you seek an opinion of this Office addressing this issue.

Law/Analysis

Section 12-37-670 of the South Carolina Code pertains to when new improvements shall be listed with the county auditor and subject to property tax assessments. The previous version of this statute called for new structures to be listed with the appropriate county auditor "on or before the first day of March next after they shall become subject to taxation." S.C. Code Ann. § 12-37-670 (2000). In the 2006 session of the General Assembly, the Legislature passed amendments to this provision, which now reads as follows:

(A) Each owner of land on which any new structures have been erected which shall not have been appraised for taxation shall list them for taxation with the county auditor of the county in which they may be situate on or before the first day of March next after they shall become subject to taxation. No new structure shall be listed or assessed until it is completed and fit for the use for which it is intended.

Request Letter

(B)(1) Notwithstanding the provisions of subsection (A), a county governing body may by ordinance provide that an owner of land on which a new structure has been erected and that has not been appraised for taxation shall list the new structure for taxation with the county auditor of the county in which it is located by the first day of the next month after a certificate of occupancy is issued for the structure. A new structure must not be listed or assessed until it is completed and fit for the use for which it is intended, as evidenced by the issuance of the certificate of occupancy.

(2) Additional property tax attributable to improvements listed with the county auditor on or before June thirtieth is due for the period from July first to December thirty-first for that property year, and payable when taxes are due on the property for that property tax year. Additional property tax attributable to improvements listed with the county auditor after June thirtieth of the property tax year is due and payable when taxes are due on the property for the next property tax year.

(3) If a county governing body elects by ordinance to impose the provisions of this subsection, this election is also binding on all municipalities within the county imposing ad valorem property taxes.

2006 S.C. Acts No. 4449.

In your letter, you state:

The uniformity issue arises since the amendment to SC Code Section 12-37-670 allows each county, by ordinance to determine whether a new structure or improvement will be placed on the tax rolls in the current year. Thus, County A (having enacted an ordinance) will tax new construction in the current year while County B (not having passed such an ordinance) will not. Instead, County B will only be able to tax the new construction in the following year. Therefore, for identical houses occupied on the same day and having the same values but situated in the two different locations of County A and County B, the County A taxpayer will be taxed while the County B taxpayer will not.

Mr. Stevens
Page 3
October 27, 2006

In addition, you cite to three provisions of the South Carolina Constitution, which you find relevant to our analysis of your question. One is article X, section 1 of the South Carolina Constitution (Supp. 2005), which provides: "The General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property. The assessment of all property shall be equal and uniform in the following classifications:" You also cite to article X, section 3 of the South Carolina Constitution (Supp. 2005), which provides a list of property exempt from property taxation. This provision also states: "In addition to the exemptions listed in this section, the General Assembly may provide for exemptions from the property tax, by general laws applicable uniformly to property throughout the State and in all political subdivisions, but only with the approval of two-thirds of the members of each House." S.C. Const. Art. X, § 3. Finally, you note article X, section 6 of the South Carolina Constitution (Supp. 2005).

The General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State. Property tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes; provided, that on properties located in an area receiving special benefits from the taxes collected, special levies may be permitted by general law applicable to the same type of political subdivision throughout the State, and the General Assembly shall specify the precise condition under which such special levies shall be assessed.

...

S.C. Const. Art. X, § 6.

Thus, the issue to be addressed is whether the amendments to section 12-37-670, allowing counties to elect alternative dates for the listing of improvements by ordinance violates the uniformity requirements set forth in the above constitutional provisions. In determining the constitutionality of a statute, our courts adhere to the policy that "[s]tatutes are presumed to be constitutional and will not be found to violate the constitution unless their invalidity is proven beyond a reasonable doubt." Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 398, 596 S.E.2d 42, 47 (2004). Furthermore, this Office recognizes "only a court may deem a statute unconstitutional." Op. S.C. Atty. Gen., July, 19, 2006. Accordingly, while we may opine as to what we believe a court would determine with respect to the constitutionality of section 12-37-670, the ultimate decision must be left to a court. Moreover, unless and until such time as a court declares this provision unconstitutional, it remains valid and enforceable. Id.

Many jurisdictions have similar uniformity requirements in their state constitutions as those contained in the South Carolina Constitution. The Supreme Judicial Court of Massachusetts, in C

& S Wholesale Grocers, Inc. v. City of Westfield, 766 N.E.2d 63 (Mass. 2002) addressed a question similar to that presented in your request. In that case, the Court considered whether a statute providing for a local option to impose taxes on real property improvements made after the statutory date of January 1, were unconstitutional as in violation of the Massachusetts constitutional provisions requiring proportionality. Id. The relevant constitutional provisions, as cited by the Court, were as follows:

“full power and authority are hereby given and granted to the said general court . . . to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth, except that . . . the general court may classify real property according to its use in no more than four classes and to assess, rate and tax such property differently in the classes so established, but proportionately in the same class”

Id. at 66 (quoting Mass. Const. pt. II, c.1, § 1, art. 4). Relying on its previous interpretation finding these provisions “require that taxes be proportionate within each class and within each municipality,” the Court concluded the local opinion was not unconstitutional “because the taxes paid by property owners in a municipality accepting the option need not be proportionate with property owners in municipalities not accepting the option.” Id.

In our research, we found several other jurisdictions employing the same or similar rationale as the Massachusetts Court with regard to statutes allowing localities the option to implement different modes of taxation. For instance, the New Hampshire Supreme Court in Opinion of the Justices, 338 A.2d 553 (N.H. 1975), considered the constitutionality of a bill allowing local governments to expand real property tax exemptions to elderly homeowners. That Court upheld the bill as constitutional finding the property tax would remain uniform within the taxing district, thus satisfying the constitutional uniformity requirement. Id. at 555.

Although South Carolina courts have yet to consider the impact of our constitutional uniformity requirements with respect to the recently enacted amendments to section 12-37-670, they have considered the issue of uniformity. In City of North Charleston v. County of Charleston, 363 S.C. 527, 611 S.E.2d 920 (2005) our Supreme Court considered the constitutionality of section 12-37-223A of the South Carolina Code, a statute allowing counties to enact property tax caps. The Court cited to the provision contained in article X, section 3 of the South Carolina Constitution stating: “In addition to the exemptions listed in this section, the General Assembly may provide for exemptions from the property tax, by general laws applicable uniformly to property throughout the State and in all political subdivisions.” Id. at 530, 611 S.E.2d at 922. In citing this provision, the Court concluded:

Mr. Stevens
Page 5
October 27, 2006

Article X, § 3, mandates statewide uniformity in property tax exemptions enacted by the General Assembly. Where our Constitution requires statewide uniformity, a local option law is not valid. Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996). Section 12-37-223A is patently invalid since it enacts an exemption that is not uniform throughout the State. For this reason, we declare § 12-37-223A unconstitutional and hold County's ordinance is therefore invalid.

Id. at 530-31, 611 S.E.2d at 922.

Section 12-37-670, as amended, does not provide for an exemption from taxation as did section 12-37-223A in City of North Charleston. As you stated in your letter, section 12-37-670 could cause property in a county that enacted an ordinance provided for under this provision to tax property, which would not be subject to tax had the county not enacted the ordinance. Accordingly, the lack of uniformity, should one be found, is not the result of an exemption from tax but from the imposition of a tax. Therefore, we do not believe a court would find section 12-37-670 violates article X, section 3.

Nonetheless, the Court in City of North Charleston clarifies that generally local options are invalid when the Constitution requires statewide uniformity. Thus, we look to the other constitutional provisions requiring uniformity with regard to property taxes to determine whether section 12-37-670 runs afoul of this requirement. Article X, section 6, as cited above, states "Property tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes . . ." (emphasis added). "When construing the constitution, the Court applies rules similar to those relating to the construction of statutes." Fraternal Order of Police v. South Carolina Dept. of Revenue, 352 S.C. 420, 427, 574 S.E.2d 717, 721 (2002). Furthermore, courts are guided by the ordinary and popular meaning of the words used. Richardson v. Town of Mount Pleasant, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002).

According to the plain and ordinary meaning of the language used in article X, section 6, such provision only requires uniformity within the jurisdiction of the body imposing the tax. Similar to Supreme Judicial Court of Massachusetts in C & S Wholesale Grocers, Inc., we read this provision as requiring uniformity within the county imposing the property tax. We also find regardless of the county's decision to enact the local option provided for under section 12-37-670, such a decision will not affect the uniformity as it will be consistent within the taxing jurisdiction.

Despite our finding that section 12-37-670 does not violate the uniformity provisions in article X, sections 3 and 6, a court could find this statute violates article X, section 1. Again,

employing the rules of constitutional construction, we look to the plain meaning of the language used in article X, section 1 to first determine whether it requires statewide uniformity. Johnson v. Collins Entm't Co., Inc., 333 S.C. 96, 104, 508 S.E.2d 575, 579 (1998) (“Court is constrained to give the words of our Constitution their plain and ordinary meaning.”). Article X, section 1 requires: “The assessment of all property shall be equal and uniform in the following classifications:” Unlike article X, section 6, this provision does not restrict uniformity to “within the jurisdiction imposing such taxes.” S.C. Const. Art. X, § 6. However, unlike article X, section 3, as discussed in City of North Charleston, article X, section 1 does not specify that such uniformity shall be “throughout the State and in all political subdivisions.” S.C. Const. Art. X, § 3. Nonetheless, we believe the intent of this provision was for the classifications to be equal and uniform statewide.

Thus, based on our interpretation that article X, section 1 requires statewide uniformity, we now view section 12-37-670 in light of such a requirement. Per section 12-37-670, if one county opted for the alternative date to list new structures for taxation, property of the same class may be subject to tax in one county and not in another. In accordance with this scenario, we believe a court could find section 12-37-670 is of questionable constitutionality due to the uniformity requirement contained in article X, section 1.

Justice Littlejohn in his concurring opinion in Thorne v. Seabrook, 264 S.C. 503, 216 S.E.2d 177 (1975), came to the conclusion that a piece of legislation similar to section 12-37-670 violates article X, section 1 of the South Carolina Constitution. In that case, the Supreme Court addressed the constitutionality of an act providing “that in Charleston County every new building, addition, renovation or other improvement to real property shall be returned for taxation, and shall be taxable, as of the first day of the calendar month after it is first occupied.” Id. at 507, 216 S.E.2d at 178. The appellants argued this provision violates numerous constitutional provisions. The majority of the Court struck down the legislation as violative of article 3, section 34(IX) of the South Carolina Constitution, prohibiting the enactment of special legislation. Id. at 508, 216 S.E.2d at 179. Finding the legislation unconstitutional due to article 3, section 34(IX), the Court refrained from addressing the appellants’ additional constitutional arguments. Id. However, Justice Littlejohn issued a separate concurring opinion not only finding this provision violates article VIII, section 7 of the South Carolina Constitution, also prohibiting special legislation, but also finding this legislation in contravention of article X, section 1. Id. at 514, 216 S.E. 2d at 182.

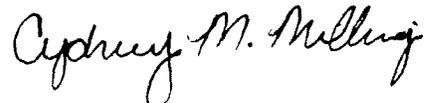
The rules of statutory construction mandate that section 12-37-670 is presumed constitutional and will only be declared unconstitutional when such a finding is clear and beyond reasonable doubt. However, based on our interpretation of article X, section 1 as requiring statewide uniformity with regard to assessment of property within the provided classifications, section 12-37-670, in its application, appears to be in contravention with this requirement. Accordingly, we believe in this case, a court could find section 12-37-670 in violation of article X, section 1's uniformity requirement.

Mr. Stevens
Page 7
October 27, 2006

Conclusion

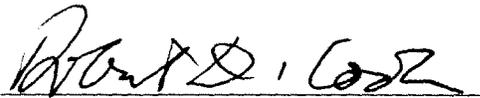
In our review of section 12-37-670 of the South Carolina Code, we do not find this provision violates article X, sections 3 and 6 of the South Carolina Constitution. Furthermore, like a court, we are reluctant to find a statute unconstitutional. Nonetheless, section 12-37-670 appears to run afoul of the uniformity requirement set forth in article X, section 1 of the South Carolina Constitution. However, as we previously noted, only a court may ultimately declare a statute unconstitutional. Thus, until and unless a court makes this determination, section 12-37-670 will continue to have the force and effect of law.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General