

December 17, 2007

The Honorable Dennis Carroll Moss
Member, South Carolina House of Representatives
306 Silver Circle
Gaffney, South Carolina 29340

Dear Representative Moss:

We understand from your letter that you desire an opinion of this Office concerning the Gaffney Board of Public Works. In your letter, you state as follows:

I have several questions regarding the authority and responsibilities of this entity. Does the Gaffney Board of Public Works have the authority to dispose of real property? Is the Gaffney Board of Public Works required to be audited in any manner? Do the commissioners have to be bonded? Can the Gaffney Board of Public Works form a separate Corporation to build a golf course and move rate payer funds to do so?

Law/Analysis

From our research, we surmise the Legislature originally established the Gaffney Board of Public Works (the "Board") via act 389 of 1907. 1907 S.C. acts 808. In 1908, the Legislature amended Act 389 via act 563. 1908 S.C. acts 1271. The 1908 legislation is similar to Act 389 and many of the provision closely resemble the previous law. Id. In 1915, the Legislature again amended the Board's enabling legislation. 1915 S.C. acts 400. However, via act 455 in 1922, the Legislature repealed these amendments and re-enacted the provisions of the 1907 and 1908 acts. 1922 S.C. acts 780. Only one of the provisions contained in the 1907 and 1908 legislation was codified into the 1922. However, the appendix to the 1922 contains a reference to the law re-enacting the 1907 and 1908 legislation. Nonetheless, the provisions contained in the 1907 and 1908 legislation, including the provision contained in the 1922 Code, do not appear in subsequent versions of the Code.

The Legislature, in adopting the 1962 Code via act 1 of 1963, stated "this code is hereby declared to be the only general statutory law of the state on January 9, 1962." 1963 S.C. acts 1. Neither a court nor this Office has addressed the impact of this act on local legislation adopted prior to the 1962 Code, but not codified as part of the 1962. Thus, we find the status of legislation passed in 1907 and 1908 and re-enacted in 1922 unclear and suggest that a court would need to determine the current

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applicability of the provisions contained in these acts that have not been amended or repealed through subsequent legislation.

We also note that in 1940, 1953, and 1967, the Legislature enacted additional legislation applying particularly to the Board. 1940 S.C. acts 1904; 1953 S.C. acts 252; 1967 S.C. acts 179; 1967 S.C. Acts 1015. The 1942 Code includes the 1940 enactment and the 1962 Code includes both the 1940 legislation and the 1953 legislation. Thus, we believe these pieces of legislation are currently in effect and the Board is bound by their provisions. Furthermore, the Legislature passed general law applicable to all commissioners of public works. This legislation is found in sections 5-31-210 et seq. of the South Carolina Code and is also applicable to the Board.

We will attempt to address your questions with regard to the Board's authority in light of both the Board's enabling legislation, taking into consideration the 1907 and 1908 acts, and the applicable general law cited above. First, you ask whether the Board may dispose of real property. According to section 5-31-250 of the South Carolina Code (2004), commissioners of public works are generally afforded the following powers:

The board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. It may supply and furnish water to citizens of the city or town and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light.

In addition, the 1908 legislation, specifies powers and duties provided to the Board:

[T]he said Board of Public works shall take charge of and have the entire control of the electric light and waterworks plants of the town of Gaffney; shall fix rate to be charged for both water and lights, so as to make the said plant self-supporting; shall employ a Superintendent and fix his bonds, and such other help as may be necessary to successfully operate said electric lights and waterworks or to the extend the same, as may be necessary. The Board of Public Works may, at their discretion, contract for power to operate said electric light plant and waterworks plant upon such terms as to them may seem best: Provided, No such contract shall exceed a term of five years. But nothing in this Act shall be construed to authorize the Board of Public Works herein provided to lease or sell the electric light plant or the waterworks plant of the town of Gaffney; such sale or lease can only be made upon recommendation of the Board of Public Works herein provided to lease or sell the electric light plant or the waterworks plant of the town of Gaffney; such sale or lease can only be made upon recommendation of the Board of Public Works, after due notice by the publication of such lease or sale and the

terms thereof in one or more newspapers in the town of Gaffney, for a period of time not less than thirty days, immediately preceding the election to ratify or confirm such proposed lease or such proposed sale, of said light plant or waterworks plant, or both.

As a creature of statute, the Board has no inherent power and derives its power from the Legislature. S. Ry. Co. v. South Carolina State Highway Dep't, 237 S.C. 75, 80, 115 S.E.2d 685, 688 (1960). Accordingly, the Board “possesses only those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to the powers expressly granted.” Brooks v. South Carolina State Bd. of Funeral Serv., 271 S.C. 457, 461, 247 S.E.2d 820, 822 (1978). From the 1908 act, it appears the Board has authority to sell its electric light plant or waterworks plants, but only with voter approval. However, neither this legislation granting the Board particular powers nor section 5-31-250, address whether the Board may dispose of other real property. Thus, we must determine whether such authority is incidental to the powers granted to the Board and necessary for its operation.

Although the sale or disposal of property is not a primary function of the Board, we can imagine circumstances under which the disposal of property could be necessary for the Board’s operation. For example, if the proceeds from the sale of the Board’s property are necessary to fund the purchase of additional property used to expand its facilities, we believe a court may find this type transaction within the scope of the Board’s authority as it would be incidental and necessary to the Board’s authority to provide electric and water service to the citizens of Gaffney. However, without knowledge of the purpose for which the Board is selling the property, we cannot fully analyze whether the disposal of such property is incidental to the Board’s general authority to operate waterworks or an electrical light plant. Nonetheless, we are of the belief that the disposal must serve some core function of the Board explicitly authorized by law.

Next, you inquire as to whether the Board must be audited. According to the 1908 legislation:

It shall be the duty of the Town Council of Gaffney to employ each year a non-resident expert, or any auditing company, to examine the books and vouchers and all transactions of the said Board of Public Works of the Town of Gaffney, and at the conclusion of such examination a copy of the said report shall be filed with the Mayor of the town of Gaffney, and such report shall be open to public inspection: Provided, That the statement showing the financial condition of the electric light plant, the waterworks plant and the sewerage system of the said town of Gaffney, each of them separately shall be published in one or more of the newspapers published in the town of Gaffney.

1908 S.C. acts 1271. In 1940, the Legislature enacted act 1001, amending the 1908 legislation and providing for a semi-annual audit of the Board. 1940 S.C. acts 1904. This legislation provides, in pertinent part, as follows:

Section 1. Audit semi-annually affairs of board of public works, town of Gaffney. —Be it enacted by the General Assembly of the State of South Carolina: There shall be made semi-annually an audit of the records of the affairs of the Board of Public Works of the Town of Gaffney, in Cherokee County.

Id. In addition, unlike the 1908 legislation, the 1940 legislation calls for the appointment of the auditor or auditors, which must be certified public accountants, by the legislative delegation for Cherokee County, but allows the Gaffney City Council to appoint such auditors if the legislative delegation fails to do so within a period of six months. Id. Thus, according to its enabling legislation, the Board must have a semi-annual audit.

You also inquire as to whether the Board's commissioners must be bonded. The 1908 act contains the following provision with regard to commissioner bonds:

The said Board of Public Works, before entering upon the discharge of their duties, shall file with the Mayor of the town of Gaffney a good and sufficient bond, to be approved by the said Town Council, in the sum of ten thousand dollars (\$10,000) each, conditioned for the faithful performance of all the duties imposed upon said Board of Public Works
.....

1908 S.C. acts 1271. This provision appeared in section 53 of the 1922 Code of Laws, however, it has not appeared in subsequent versions of the Code. Nonetheless, we find nothing repealing this provision. Therefore, presuming the 1908 provision cited above remains in effect, we believe the Board's commissioners must be bonded.

Lastly, you ask whether the Board has authority to form a separate corporation for the purpose of building a golf course and use rate payer funds to do so. First, we find no authority in the Board's enabling legislation or in the provisions contained in chapter 31 of title 5 allowing the Board to create another corporation. Second, the Board's purpose, as indicated in its enabling legislation, is to provide electricity and waterworks to the Town of Gaffney. Accordingly, although we lack the jurisdiction of a court to make factual determinations, we do not believe the construction of a golf course is necessary for the Board's operation and therefore, do not believe the Board is authorized to construct a golf course. See Op. S.C. Atty. Gen., June 20, 2007 (“[O]nly a court may consider and make factual determinations.”).

Conclusion

Based on our analysis above, we are of the opinion that a court could find the Board has the implied authority to dispose of real property, presuming such a disposal is necessary for the operation of the Board. In addition, according to the Board's enabling legislation, it is subject to a semi-annual audit. Furthermore, should a court determine act 563 of 1908, pertaining to the Board, remains in effect, we also find that its commissioners must file a bond to ensure faithful performance of their duties.

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However, we do not believe the Board has the authority to form a separate corporation for the purpose of constructing a golf course.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General