

February 16, 2007

R. Allen Young, Esquire
Town Attorney, Town of Mount Pleasant
Post Office Box 745
Mount Pleasant, South Carolina 29465

Dear Mr. Young:

We received your letter requesting an opinion of this Office on behalf of the Town of Mount Pleasant (the "Town"). In your letter, you provided the following information:

It is our understanding that Charleston County Council is contemplating a provision relative to prohibiting or, as a minimum, discouraging a municipality from exercising its eminent domain authority with the purchase of recreation property pursuant to ½ cents sales tax monies. Note that either Charleston County intends to prohibit the use of eminent domain as a condition of receiving ½ cent sales tax monies, or they will issue guidelines discouraging the use of eminent domain.

Based on this information, you ask "while Charleston County is certainly the holder of the ½ cents sales tax monies, can they promulgate rules and procedures which were not specifically authorized in the referendum ballot question and/or which contradict existing law (Eminent Domain, Title 28 of the South Carolina Code of Laws)."

Law/Analysis

Chapter 37 of title 4 of the South Carolina Code provides optional methods for financing transportation facilities. S.C. Code Ann. §§ 4-37-10 et seq. (Supp. 2005). Section 4-37-30 affords counties the ability to impose a sales and use tax or tolls to finance the cost of highways, roads, streets, bridges, and other transportation-related projects. This provision provides as follows:

To accomplish the purposes of this chapter, counties are empowered to impose one but not both of the following sources of revenue: a

sales and use tax as provided in item (A) or to authorize an authority established by the county governing body as provided in Section 4-37-10 to use and impose tolls in accordance with the provisions of item (B):

(A) Subject to the requirements of this section, the governing body of a county may impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects and for a specific period of time to collect a limited amount of money.

(1) The governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance. The ordinance must specify:

(a) the project or projects and a description of the project or projects for which the proceeds of the tax are to be used, which may include projects located within or without, or both within and without, the boundaries of the county imposing the tax and which may include:

(i) highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects;

(ii) jointly-operated projects, of the type specified in sub-subitem (i), of the county and South Carolina Department of Transportation; or

(iii) projects, of the type specified in sub-subitem (i), operated by the

county or jointly-operated projects of the county and other governmental entities;

(b) the maximum time, stated in calendar years or calendar quarters, or a combination of them, not to exceed twenty-five years or the length of payment for each project whichever is shorter in length, for which the tax may be imposed;

(c) the estimated capital cost of the project or projects to be funded in whole or in part from proceeds of the tax and the principal amount of bonds to be supported by the tax; and

(d) the anticipated year the tax will end.

Once the county's governing body adopts the ordinance, the election commission is charged with the responsibility of conducting a referendum to approve the imposition of the tax. S.C. Code Ann. § 4-37-30(A)(2). Section 4-37-30(A)(3) requires the referendum contain a separate question for each purpose, allowing electors an opportunity to vote on each project to be funded by the tax. If the voters approve the referendum, the Department of Revenue administers and collects the tax in the same manner as other sales and use taxes. S.C. Code Ann. §§ 4-37-30(A)(8). The Department of Revenue then remits the tax to the State Treasurer, who after deducting the refunds made and costs to the Department of Revenue, "shall distribute the revenues and all interest earned on the revenues while on deposit with him quarterly to the county in which the tax is imposed, and these revenues and interest earnings must be used only for the purpose stated in the imposition ordinance." S.C. Code Ann. § 4-37-30(A)(15).

In a prior opinion of this Office, we discussed the referendum requirements under section 4-37-30. Op. S.C. Atty. Gen., November 1, 2001. We found:

[T]he county must sufficiently identify and describe the projects for which the proceeds of the tax will be used in order for the public to make an informed decision in the referendum, but the county need not so narrowly tailor the enacting ordinance that it leaves no room for the exercise of discretion in the actual expenditure of the funds.

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Id. This opinion emphasizes our recognition that Charleston County (the “County”) has broad discretion with regard to how it expends these funds. Accordingly, it is our opinion that the County has authority to appropriate the revenue generated from the sales and use tax as it sees fit, so long as those expenditures are in line with the projects approved by the electorate. Additionally, we note none of the provisions in chapter 37 of title 4 address disbursements from a county to other entities or political subdivisions. Consequently, we do not find any indication that counties imposing a sales and use tax under these provisions are obligated to make appropriations to other entities. Therefore, we believe a county’s decision to appropriate funds to a municipality for purposes of accomplishing a project set forth in the referendum is within the county’s discretion.

Furthermore, in 1987, we issued an opinion generally addressing a county’s authority to attach conditions to appropriations. Op. S.C. Atty. Gen., February, 23, 1987. Looking to the county’s authority as a legislative body, we determined it has the ability to place conditions on its appropriations as “an integral element of the legislative prerogative to define social objectives through its exclusive appropriation power.” Id. Thus, we concluded “it is the opinion of this Office that a county or municipality may appropriate or allocate funds, with stipulations” Id.

You explained in a conversation with our Office that in order to receive an appropriation from the County’s sales and use tax funds, municipalities must submit an application to the County identifying the project for which they wish to receive funding. As part of the County’s decision making process, you informed us that the County considers whether the municipality must exercise its eminent domain authority in order to acquire the land upon which the project is to be placed. You are of the opinion that the County may not implement such criteria because it was not authorized in the referendum. However, finding no provision in chapter 37 of title 4 requiring the County to make such a disclosure in the referendum and based on our view that the County has broad discretion in expending funds generated by the tax, we do not believe the criteria used by the County in making subsequent disbursements of sales and use tax revenue must be contained in the referendum. It is our opinion that so long as the County expends these funds in accordance with the purposes stated in the referendum, to whom and how those funds are expended is within the County’s discretion.

In our conversation with you, you also indicated your concern that County’s policy with regard to the use of eminent domain conflicts with the eminent domain powers afforded to municipalities via title 28 of the South Carolina Code. Section 5-7-50 of the South Carolina Code (2004) specifically grants municipalities the authority to condemn property. Certainly, a county does not have the ability to usurp this authority. However, we recognize the County has the ability, in making appropriations, to place conditions those entities receiving appropriations.

In speaking with you, we gather the County is not trying to take away the Town’s ability to use its eminent domain powers. Rather, the County is evaluating whether it will appropriate funds

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from its sales and use tax revenues to support projects when the exercise of a municipality's eminent domain power is necessary. Because the County has broad authority as to how it expends funds generated from the sales and use tax and may place such conditions as it sees fit on the expenditure of those funds in order to serve its social objectives, we believe the County has the prerogative not to fund projects based on whether eminent domain power will be used. Moreover, we note the fact that the County may decide not to appropriate funds to support a project, does not affect the Town's ability to exercise its eminent domain powers. Certainly, the Town could proceed with the project, but must gain funding from another source.

Conclusion

Based on our analysis above, we believe the County has broad discretion as to how to appropriate revenue generated by a sales and use tax imposed under chapter 37 of article 4. Furthermore, we do not find a provision contained among these statutes requiring a county to include the criteria it intends to use in appropriating these funds in the referendum submitted to the electorate. Additionally, we opine that by considering whether the Town must employ its eminent domain powers to accomplish a project for which it seeks an appropriation by the County of sales and use tax revenues, the County does not usurp the Town's statutory authority to use its eminent domain power.

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