

The State of South Carolina



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January 23, 1995

The Honorable William D. Witherspoon
Member, House of Representatives
327-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Witherspoon:

By your letter of January 3, 1995, you referenced the fact that in 1993 the authority to determine how "C" funds would be expended was legislatively removed from county legislative delegation members as a result of a South Carolina Supreme Court decision and placed with newly-created county transportation committees. You then advised that for several years Horry County has imposed a fifteen-dollar road-use fee which is collected throughout the year with the payment of vehicle taxes; the revenue thus raised goes into a road fund account which is divided among Horry County Council members to be spent within their respective council districts as they see fit. You asked how can county council members impose a tax and subsequently determine how the derived revenues are to be spent when the General Assembly cannot do likewise.

In Tucker v. South Carolina Dep't of Highways and Public Transportation, ___ S.C. ___, 424 S.E.2d 468 (1992), the constitutionality of S.C. Code Ann. §12-27-400 (1991 Cum. Supp.), commonly referred to as the "C" fund statute, was challenged as violative of art. I, §8 of the South Carolina Constitution, the separation of powers provision. The challenged portion of the statute provided that a majority of the county legislative delegation members must approve the roads upon which the "C" funds would be spent, as well as the expenditures. In agreeing that the action required of the delegations by §12-27-400 was violative of the separation of powers doctrine, the Supreme Court stated:

We have long held that legislative delegates [sic] may exercise legislative power only as members of the General Assembly enacting legislation. By constitutional mandate, the legislature may not undertake both to pass laws and to execute them by bestowing upon its own members functions that belong to other branches of government. [Cites omitted.]

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Action by a legislative delegation pursuant to a complete law cannot qualify as action to enact legislation and is therefore constitutionally invalid. [Cites omitted.]

Tucker, 424 S.E.2d at 469.

To remedy the constitutional difficulties as stated in Tucker, the General Assembly amended §12-27-400 in 1993 so that county transportation committees would subsequently have the authority to approve the expenditure of "C" funds. See §12-27-400(C); 1993 Act No. 164, Part II, §23, effective July 1, 1993.

The road maintenance fee referred to in your letter was the subject of the judicial decision in Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992). The South Carolina Supreme Court affirmed that the fifteen-dollar road maintenance fee charged on motor vehicles in Horry County was a valid uniform service charge authorized under §4-9-30. The court considered whether the fifteen-dollar fee would be a service charge or a tax and held that because the money collected thereunder was specifically allocated for road maintenance (rather than for general governmental purposes), the charge was a fee rather than a tax. Thus, there is some distinction between "C" funds, which are gasoline tax revenues (§12-27-400; Tucker), and the revenues being raised in Horry County by the referenced service charges.

The road maintenance fee was established pursuant to an ordinance of Horry County Council, acting legislatively pursuant to §4-9-30(5). Decisions as to expenditure of the fees would then be made by the individual county council members in their respective districts, according to your letter. Such decision-making would be executive in nature. Cf., Tucker. Whether the same difficulty present in Tucker would also be present in Horry County depends on the characterization of Horry County Council and on whether the doctrine of separation of powers also applies to Horry County Council.

A major distinction between the General Assembly and a county council must also be made. At the state level, powers exercised by the government are divided into executive, legislative, and judicial. Each power is to be separate and distinct, with no person or branch exercising the powers or duties of the other branches. See art. I, §8 of the State constitution. The legislative power is vested in the two houses of the General Assembly, by art. III, §1 of the State constitution. When the legislature attempts to exercise powers of another branch (i. e., trying to enact and execute laws), a separation of powers challenge might emerge, as was the case in Tucker. See, as other examples, Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972), and Aiken County Bd. of Ed. v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980).

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The constitutional requirement of separation of powers does not apply to local political subdivisions, however. See City of Greenville v. Pridmore, 86 S.C. 442, 68 S.E. 636 (1910); City of Spartanburg v. Parris, 85 S.C. 227, 67 S.E. 246 (1910). There is no similar separation of powers at the county level. Article VIII, §7 of the State constitution directed the General Assembly to provide by general law for the structure, organization, powers, duties, etc., of the counties. As a result, the Home Rule Act, Act No. 283 of 1975, was adopted. Nothing contained therein suggests that there is a separation of powers within county government. An analysis of the powers, duties, and responsibilities contained throughout Title 4 of the South Carolina Code (pertaining to county governments) and elsewhere in the Code shows that the county council exercises powers of all three types. Even before the enactment of the Home Rule Act, it was well accepted that a municipality's governing body (analogous to county council) exercised legislative, executive, and judicial powers. Mason v. Williams, 194 S.C. 290, 9 S.E.2d 537 (1940). Thus, the constitutional difficulties present in Tucker would not be present in the Horry County situation.

To summarize the foregoing, it is the opinion of this Office that the constitutional difficulty present in Tucker, whereby a county legislative delegation would both enact laws and attempt to execute them, with respect to §12-27-400, would not be present in the situation in which Horry County Council would adopt an ordinance requiring a road maintenance fee to be collected from vehicle owner and then direct (on an individual member basis) how the fees were to be expended. The separation of powers doctrine applicable at the State level does not apply to the political subdivisions of the state.

I trust that the foregoing has satisfactorily responded to your inquiry. If you have questions or if I may provide additional assistance, please do not hesitate to contact me.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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REVIEWED AND APPROVED BY:

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