

## The State of South Carolina



## Office of the Attorney General

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August 21, 1989

Mark R. Elam, Esquire  
Senior Counsel to the Governor  
Office of the Governor  
Post Office Box 11369  
Columbia, South Carolina 29211

Dear Mr. Elam:

By your letter of July 18, 1989, you have asked that this Office examine an act bearing ratification number 308 of 1989 and advise you as to its constitutionality. Upon a review of the act, we are of the opinion that there are no constitutional difficulties with respect to this act.

The act in question amends Section 58-25-40(1), Code of Laws of South Carolina, as last amended by Act No. 625 of 1988. The 1989 amendment changes Section 58-25-40(1), in the third paragraph, to provide that all member-governments of a regional transportation authority, regardless of size, must have at least one member on the governing body of a regional transportation authority. This Office can identify no portion of the state or federal constitutions which would be violated by the 1989 amendment.

Your actual concern, indicated during a telephone conversation about the act, may be about the role of the legislative delegation in appointing members of the governing body of a regional transportation authority. The relevant portion of Section 58-25-40(1), third paragraph, is as follows:

As many as three additional members of the governing body of a transportation authority may be appointed by the legislative delegations of the member counties if approved by the qualified electors within the proposed service area in accordance with the procedures set forth in Section 58-25-30. If the authority receives a grant of the state funds from the general fund or the

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highway fund, the delegation shall appoint three additional members. Unless the agreement approved by the qualified electors of a service area provides otherwise, the members of the governing board appointed by the delegation must be apportioned as determined by a majority of the delegation members including the resident Senator. ...

Certain of these provisions were amended in 1988 by Act No. 625, as noted above; the act was apparently signed by the Governor, as we find no indication of a veto or the fact that the act took effect without signature of the Governor.

Article I, Section 8 of the State Constitution provides:

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

In construing this constitutional provision, it has been noted that the appointment powers exercised by a legislative delegation are neither legislative nor executive in nature. Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971); Floyd v. Thornton, 220 S.C. 414, 68 S.E.2d 334 (1951). Exercising appointment powers is thus not an unlawful delegation of legislative powers. It is also well-settled that the makers of laws may not also execute those laws, Bramlette v. Stringer, 186 S.C. 134, 195 S.E. 257 (1938), but here the delegations are only exercising appointment powers and are not themselves serving on the governing board of a regional transportation authority (and thus executing the laws). Thus, apparently the provisions of Article I, Section 8 are not being violated.

Based on the foregoing, it is the opinion of this Office that S.522, R-308 of 1989 is not constitutionally infirm and would pass muster if its constitutionality were challenged.

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With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP/rhm

REVIEWED AND APPROVED BY:

*Robert D. Cook*

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Robert D. Cook  
Executive Assistant for Opinions