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February 19, 1986

The Honorable Charles L. Powell
Senator, District No. 4
Post Office Box 1127
Abbeville, South Carolina 29620

Dear Senator Powell:

You have asked whether the appropriate body to enter into a lease-purchase agreement for fire trucks for Abbeville County would be Abbeville County Council or the "Abbeville County Fire Protection Commission." The status of the "Commission" and its authority must first be examined prior to determination of the question you have raised.

"Abbeville County Fire Protection Commission"

The exact nature of the entity known as the "Abbeville County Fire Protection Commission" must first be determined. Based on the reasoning in Opinion No. 84-132 (enclosed), we believe the Commission would be a special purpose district. The Commission was established for a single purpose, fire protection. By Section 3 of Act No. 1326, 1974 Acts and Joint Resolutions, the entity is declared to be a body politic and corporate and has been given corporate powers and duties. The Commission members are to be appointed by the Governor upon recommendation of a majority of the "county board of commissioners," now Abbeville County Council. 1/ By Section 3 (4) of the Act, the Commission is empowered to borrow money or issue bonds to pay for equipment and headquarters expenses against future taxes. The Commission may recommend a tax levy but only after a

1/ Because this entity would be a special purpose district, Abbeville County Council could not assume responsibility for ultimate appointment of Commission members, due to Section 4-9-170, Code of Laws of South Carolina (1976).

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successful referendum, pursuant to Section 9 of the enabling act. The entity was not created by the county as a special tax district but by the General Assembly as stated above. Enough of the criteria described in the enclosed opinion have been met to call the entity a special purpose district. 2/

We have been advised that no appointments have apparently been made by the Governor and that Abbeville County Council has apparently never made any recommendations to the Governor for appointment. We have checked with the Governor's Office, the Secretary of State, and the Department of Archives and History; no record of any appointment exists in any of those offices. Thus, no de jure appointments to the Commission appear to have been made. 3/

We have been further advised that a "commission" presently exists, being comprised of one individual from each of the ten rural fire departments. No one has been able to provide this Office with an ordinance or other information as to how this practice was begun. It does not appear that this ten-member body is the governing board contemplated by Act No. 1326 of 1974. At best, these "commission" members would be de facto officials, as described in footnote 3; this "commission" will be discussed in more detail later within this opinion.

2/ The constitutionality of this act may be questionable, as it was enacted after the effective date of Article VIII, Section 7, which precludes legislative enactments for a specific county. See Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976); Cooper River Park and Playground Commission v. City of North Charleston, 273 S.C. 639, 259 S.E.2d 107 (1979); Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974). While only the courts of this State can declare an act unconstitutional, we can merely advise that a potential constitutional problem exists. Of course, constitutionality is presumed.

3/ A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am.Jur.2d Public Officers and Employees § 495. A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952); also 67 C.J.S. Officers §§ 264-272.

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It would appear that this entity is in large part similar to the Court of Appeals, which had been established but could not operate without the requisite number of properly-elected judges. In Maner v. Maner, 278 S.C. 377, 296 S.E.2d 534 (1982), the Supreme Court stated that "an office created by statute comes into existence immediately upon the statute taking effect." 278 S.C. at 383. A newly-created office is vacant upon the instant of its creation and remains vacant until it has been duly filled. 67 C.J.S. Officers § 75. "A mere claim to be a public officer and the exercise of the office" will not be sufficient to make one an officer. Id., § 268. While a court could determine that those claiming to be Commissioners are actually de facto officers if they have "held office" and exercised the powers thereof with public acquiescence for a considerable period of time, it would appear that the offices are actually vacant as they have never been filled; because determination of questions of fact would be involved, we merely point out the arguments.

It appears that the Commission still exists though, like the court of Appeals in Maner, it has not been activated by appointment of commissioners, holding of a referendum to set millage, and so forth. To implement Act No. 1326 of 1974 and bring this special purpose district into being, commissioners should be appointed and the referendum held; until then, as with the Court of Appeals, the Commission would have no power or authority to act unless a court determined otherwise. Further, if Act No. 1326 is to be followed, the entire act should be followed, including holding the referendum.

County Council and Fire Protection

Several statutes deal with the power of a county council relative to fire protection services: Sections 4-9-30 (5), 4-19-10 et seq, and 4-21-10. The type of fire protection services contemplated by Abbeville County Council would be county-wide, excluding incorporated municipalities. There would be no given area of the county which would receive more or less service than any other area. Council has assessed a small millage with county-wide uniformity for these services for three or four years and also created an advisory board (which has apparently deemed itself the above-discussed Commission) to advise on the best way to spend monies generated by the millage. It appears that a county council is so empowered to provide fire protection services for its citizens and levy a millage, unless

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another body is authorized by law to levy the millage. 4/

By Section 4-9-30 (5), a county council is empowered to
assess property and levy ad valorem property
taxes and uniform service charges ... and
make appropriations for functions and
operations of the county, including ... fire
protection

Generally, if various portions of a county are to receive a different level of services and thus are to be taxed differently, Section 4-9-30 (5) specifies certain freeholder action to be taken to create the special tax district. As to fire protection specifically, Section 4-19-10 et seq. was reenacted in 1984 following the Supreme Court's holding the predecessor statute unconstitutional in City of Myrtle Beach v. Richardson, 280 S.C. 167, 311 S.E.2d 922 (1984). From the facts of the case, the Court's comparison of the stricken statutes to Section 4-9-30 (5) as to freeholder involvement when special tax districts are to be created, and the continual references to service areas in the newly-enacted Section 4-19-10 et seq., it appears that Section 4-19-10 et seq. would become applicable only when uniformity throughout the county is not desired. Thus, it may be concluded that a county council has the general power to levy taxes for fire protection under Section 4-9-30 (5); Section 4-19-10 et seq. would be applicable only when and if service areas are to be established. This is particularly important where, as here, the referendum required before the Commission may levy taxes has not been held.

Conclusion

Because Abbeville County Council has assumed responsibility, including the levying of taxes, for providing fire protection services, and since the Commission has apparently not yet been activated, it would appear to be appropriate that Council enter into contracts for lease or purchase of fire trucks, at least

4/ At the point when the Commission becomes properly activated, it would be authorized to set the millage; at that point, Abbeville County Council would no longer set the millage. Thus, the necessary referendum is critical.

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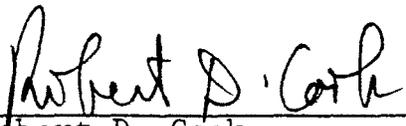
until the actual Commission becomes activated through proper appointment of its members and holding the required referendum. The body of ten citizens would, as to such a contract, have advisory authority only.

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosure

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

cc: Thurmond Bishop, Esquire
Abbeville County Attorney

Ms. Frances Williams, Member
Abbeville County Council