



ALAN WILSON
ATTORNEY GENERAL

June 08, 2017

The Honorable Michael W. Gambrell
Member
South Carolina Senate, District No. 4
P.O. Box 142
Columbia, SC 29202

Dear Senator Gambrell:

Attorney General Alan Wilson has referred your letter to the Opinions section for a response. Your letter raises the following question:

If a County Transportation Committee is a standalone Committee (like Anderson CTC is), and not attached to a county council, or a town, and the CTC has a contract with a private engineering firm to bid for the committee on projects with contractors and to manage the projects approved by the committee, and that the CTC may need from time to time an attorney, can C-Funds be used to pay for an attorney's services relating to contracts let by the CTC?

Law/Analysis

Whether a CTC can pay for attorney's services with "C" funds is determined by analyzing the powers delegated to such a committee expressly and "those which must be inferred or implied for it to effectively carry out the duties with which it is charged." City of Columbia v. Bd. of Health & Env'tl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987); 1975 S.C. Op. Att'y Gen. 196 (1975) ("Generally speaking, state officers boards, commissions, and departments have such powers as may have been delegated to them by express constitutional and statutory provisions, or as may properly be implied from the nature of the particular duties imposed on them."). Therefore, we will examine S.C. Code Ann. § 12-28-2740 which establishes county transportation committees, how the user fee on gasoline is distributed among counties, and the requirements for the expenditures of such funds. This Office's June 19, 2012 opinion described the general framework of the statute as follows:

The statute provides a means by which roads of the various counties may be constructed, improved, and maintained. The "C" funds are apportioned to the counties by the formula specified in subsection (A). The "C" funds must be deposited with the State Treasurer and expended for the purposes set forth in the statute. Id. The South Carolina Department of Revenue must submit the percentage of the total represented by each county to the South Carolina Department of Transportation (DOT) and annually to each county transportation committee. See § 12-28-2740(A)(3). Upon request of a county transportation committee, the DOT may continue to administer the funds allocated to the county. Id. Importantly, the "C" funds expended must be approved by and used in

furtherance of a countywide transportation plan adopted by a county transportation committee. See § 12-28-2740(B). Before the expenditure of “C” funds by a county transportation committee, the committee must adopt specifications for local road projects. See § 12-28-2740(F). The countywide and regional transportation plans must be reviewed and approved by the DOT. Id. In counties electing to expend their allocation directly pursuant to subsection (A), specifications of roads built with “C” funds are to be established by the countywide or regional transportation committee. In counties in which the county transportation committee elects to have “C” funds administered by the DOT, primary and secondary roads built using such funds must meet DOT specifications. Id. All unexpended “C” funds allocated to a county remain in the account allocated to the county for the succeeding fiscal year and must be expended as provided in the statute. See § 12-28-2740(E).

Op. S.C. Atty. Gen., 2012 WL 2484919, at *1 (June 19, 2012). As stated in the opinion above, we again emphasize that the expenditure of “C” funds “must be approved by and used in furtherance of a countywide transportation plan adopted by a county transportation committee.” S.C. Code Ann. § 12-28-2740(B). Subsection (B) also provides that a CTC may expend up to “two thousand dollars for reasonable administrative expenses directly related to the activities of the [CTC].” S.C. Code Ann. § 12-28-2740(B) (emphasis added). This subsection lists specific expenses which may be paid as administrative expenses and explicitly excludes others. It states, “Administrative expenses may include costs associated with copying, mailings, public notices, correspondence, and recordkeeping but do not include the payment of per diem or salaries for members of the committee.” Id.

Section 12-28-2740(C) establishes how “C” funds are apportioned between the Department of Transportation and county transportation committees (“CTC”) as follows:

At least twenty-five percent of a county's apportionment of “C” funds, based on a biennial averaging of expenditures, must be expended on the state highway system for construction, improvements, and maintenance. The Department of Transportation shall administer all funds expended on the state highway system unless the department has given explicit authority to a county or municipal government or other agent acting on behalf of the county transportation committee to design, engineer, construct, and inspect projects using their own personnel. The county transportation committee, at its discretion, may expend up to seventy-five percent of “C” construction funds for activities including other local paving or improving county roads, for street and traffic signs, and for other road and bridge projects.

S.C. Code Ann. § 12-28-2740(C).

In relevant part, subsection (D) further provides that “C” funds “allocated to the county also may be used to issue county bonds or state highway bonds as provided in subsection (J), pay directly for appropriate highway projects, including engineering, contracting, and project supervision, and match federal funds available for appropriate projects.” S.C. Code Ann. § 12-28-2740(D) (emphasis added). Section 12-28-2740(P) assigns DOT to conduct reviews to ensure county compliance with subsections (C), (D), (F)¹, and (I)². This subsection states the penalties for a county which fails to comply as follows:

¹ S.C. Code Ann. § 12-28-2740(F) requires DOT review and approval of countywide and regional transportation plans.

A county failing to comply with these subsections must have all subsequent “C” fund allocations withheld until the requirements of those subsections are met. If a county fails to comply with those subsections within twenty-four months, the county forfeits fifty percent of its allocations for the following year and the forfeited amount must be divided among the other counties as provided in subsection (A).

S.C. Code Ann. § 12-28-2740(P). Finally, Section 12-28-2740(Q) establishes procedures for notifying a county subject to a proposed withholding or forfeiture of “C” fund allocations and to request a review of DOT’s decision in such a case.

Section 12-28-2740 does not expressly address the issue of whether “C” funds may be used to pay for an attorney’s services related to a contract let by a CTC. As a result, we refer to the rules of statutory interpretation to determine whether such funds may be expended as described in your letter. Statutory interpretation of the South Carolina Code of Laws requires a determination of the General Assembly’s intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) (“The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible.”). Where the statutes’ language is plain and unambiguous, “the text of a statute is considered the best evidence of the legislative intent or will.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers.” State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh’g denied* (Aug. 5, 2015). However, the Supreme Court of South Carolina has stated that where the plain meaning of the words in a statute “would lead to a result so plainly absurd that it could not have been intended by the General Assembly... the Court will construe a statute to escape the absurdity and carry the [legislative] intention into effect.” Duke Energy Corp. v. S. Carolina Dep’t of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) (“[C]ourts are not confined to the literal meaning of a statute where the literal import of the words contradicts the real purpose and intent of the lawmakers.”). “Where there are different statutes in *pari materia*, though enacted at different times, and not referring to each other, they are to be taken and construed together as one system, and as explanatory of each other.” Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426, 427 (1934). We apply these principles to the text of Section 12-28-2740 to ascertain the General Assembly’s intent regarding the expenditure of “C” funds for an attorney’s services.

As described above, Section 12-28-2740(B) provides that a CTC may expend up to two thousand dollars for administrative expenses directly related to the activities of the CTC. The statute lists specific expenses which may be paid as administrative expenses and explicitly excludes others. Attorney’s fees are not included within the permissible list of expenses nor are they listed within the excluded expenses. Based on the structure of the statute expressing both permissible and excludible expense, it would be inappropriate to apply the canon of construction “*expressio unius est exclusio alterius*” which holds that “to express or include one thing implies the exclusion of another, or of the alternative.” Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). We read the list of permitted expenses to determine a “practical, reasonable and fair interpretation” of whether the Legislature intended to include attorney’s services as a permitted administrative expense. State v. Henkel, 413 S.C. at 14, 774 S.E.2d at 461. While attorneys draft correspondence and often engage in the activities of copying, mailing, and record keeping, these activities are not typically used to describe attorney’s services. The listed activities are more closely associated with data entry, clerical work, or supportive services generally. After examination of the listed

² S.C. Code Ann. § 12-28-2740(I) requires the use of a procurement system for all projects.

permissible expenses, it is this Office's opinion that a court would likely find that attorney's services are not administrative expenses as used in Section 12-28-2740(B).

Next, we examine whether attorney's services may be paid with "C" funds under Section 12-28-2740(D) which states that "C" funds "allocated to the county also may be used to... pay directly for appropriate highway projects, including engineering, contracting, and project supervision." Again, attorney's services are not expressly listed among the included activities. In contrast to Section 12-28-2740, the General Assembly has addressed whether attorney's fees are eligible to be paid with funds from the South Carolina Transportation Infrastructure Bank. Specifically, the South Carolina Transportation Infrastructure Bank Act defines "eligible cost" as follows:

"Eligible cost" means as applied to a qualified project to be financed from the federal accounts, the costs that are permitted under applicable federal laws, requirements, procedures, and guidelines in regard to establishing, operating, and providing assistance from the bank. As applied to a qualified project to be financed from the state highway account, these costs include the costs of preliminary engineering, traffic and revenue studies, environmental studies, right-of-way acquisition, legal and financial services associated with the development of the qualified project, construction, construction management, facilities, and other costs necessary for the qualified project. As applied to any qualified project to be financed from the state transit account, eligible project costs are limited to capital expenditures for transit equipment and facilities.

S.C. Code Ann. § 11-43-130(5) (emphasis added). "Qualified project" is further defined to mean "an eligible project which has been selected by the bank to receive a loan or other financial assistance from the bank to defray an eligible cost." S.C. Code Ann. § 11-43-130(16). Although these definitions are part of a separate act and codified in a separate title from the "C" fund statute, a court could find that the express inclusion of legal services as an eligible cost to be applicable by analogy to Section 12-28-2740. Just as "qualified projects" are selected by the South Carolina Transportation Infrastructure Bank, so are appropriate "C" fund financed highway projects selected by the CTC. Where legal services are associated with the development of state highway projects financed by the state highway account, so would the state highway system projects which are funded by a minimum of twenty-five percent of a county's apportioned "C" funds. See S.C. Code Ann. § 12-28-2740(C). Paying for such a project with a different source of funding would not change what expenses can reasonably be anticipated. Thus, a court could find that because legal services are an expense associated with state highway system projects, the expenditure of "C" funds to pay for legal services associated with the development of such a project would "pay directly" for the project as required by Section 12-28-2740(D). A court could further find that if legal services can be paid with "C" funds for state highway system projects selected by a CTC, legal services are also an anticipated expense associated with county road projects selected by the CTC which would "pay directly" for such projects.

Further, a court may find that a private engineering firm which has contracted with a CTC can administer "C" funds as its agent. DOT administers the expenditure of these funds on the state highway system unless the Department gives explicit authority to the county, municipal government, or other agent acting on behalf of the CTC. Id. Given the scenario described in your letter, a court would likely find the private engineering firm to be the CTC's agent. As an agent of the CTC, the private engineering firm can be authorized by DOT to administer "C" funds on such projects. Thus, a court may find that such a private engineering firm which acts as an agent of the CTC and has been delegated authority by DOT can

spend “C” funds for legal services associated with the development of projects in furtherance of a countywide transportation plan.

Yet, it can also be argued that the “eligible cost” definition in the South Carolina Transportation Infrastructure Bank Act should not be applied by analogy to the “C” fund statute. The eligible cost definition allows separate expenses depending on the funding source. S.C. Code Ann. § 11-43-130(5). For instance, projects financed from the state transit account are “limited to capital expenditures for transit equipment and facilities.” *Id.* Further, projects which are financed from federal accounts include expenses that are “permitted under applicable federal law” as eligible costs. *Id.* Legal services are not expressly included as an eligible cost under either of these funding sources. Even though the Transportation Infrastructure Bank and “C” funds can be used to finance a state highway project, they are separate sources of funding. Because the definition of “eligible cost” only expressly permits the payment of legal services from the state highway account, a court may find that this definition is inapplicable beyond the projects funded by the state highway account.

Section 12-28-2740 was recently amended by 2017 Act No. 40. The Act is titled in relevant part as “AN ACT... TO AMEND SECTION 12-28-2740, RELATING TO THE DISTRIBUTION OF THE MOTOR FUEL USER FEE TO COUNTIES, SO AS TO ALLOW FOR CERTAIN ADDITIONAL ALLOCATIONS, AND TO DISTRIBUTE ADDITIONAL REVENUES TO EACH COUNTY.”³ Section 13 of the Act amends Section 12-28-2740 by adding a subsection at the end of the statute which reads as follows:

Notwithstanding the provisions of subsection (A), on July 1, 2018, and each July first thereafter until after July 1, 2021, the amount of proceeds of the user fee on gasoline only as levied for in this chapter that must be deposited with the State Treasurer and expended for the purposes of this section must be increased by .3325 cents a gallon, until such time as the total amount equals three and ninety-nine one-hundredths cents a gallon. Any increase in proceeds resulting from the provisions of this subsection must be used exclusively for repairs, maintenance, and improvements to the state highway system.

(emphasis added). The plain language of the statute supports the interpretation that the General Assembly intended to limit the increase in proceeds allocated to “C” funds exclusively to pay for infrastructure by listing “repairs, maintenance, and improvements.” In fact, Senator Senn’s statement recorded in the Senate Journal with the adoption of the free conference report provides further support for this construction. In relevant part, Senator Senn’s statement reads as follows:

I have learned that all 12 cents of the gas tax will only go... to fix the roads and bridges.
...

There is an increase in C Funds and increase in Donor County Bonus funds as well as other fees all of which translates into more money locally for the counties which have the most heavily used roads. I do take credit for negotiating the increase in local money because I believe that local governments can best determine how certain monies should be spent.... There is no shortage of worthy projects that our counties can chose to spend

³ Section 11 of the Act amends Section 12-28-2740(H) regarding the definition of a “donor county” and eligibility to receive an allocation from DOT. This amendment does not impact our analysis of whether attorney’s services or legal services may be paid for with “C” funds.

the money on. In short, if this Bill passes, I will be proud to have been instrumental into bringing more money home locally because locals know how that money should best be spent.

S.C. Sen. J., 71d Leg. 55 (May 8, 2017).

Please note that the amendment merely specifies that the “increase in proceeds” is limited explicitly to the listed activities. Proceeds which would otherwise be collected prior to the increase do not appear to be subject to this limitation. Therefore, the amendment does not answer the question of whether “C” funds could be used to pay for attorney’s services with proceeds which would be collected as part of the current user fee on gasoline.

As discussed above, Section 12-28-2740(P) assigns DOT with ensuring compliance with subsections (C), (D), (F), and (I) having to do with the expenditure of “C” funds. After speaking with DOT, this Office understands that the Department considers the costs of the legal services or attorney’s services to be eligible costs of projects selected by a CTC to be paid with “C” funds. This Office, like our state courts, defers to an agency’s reasonable interpretation of the statutes which it is charged with administering. Laurens Co. School Districts 55 and 56 v. Cox, 308 S.C. 171, 174 n.3, 417 S.E.2d 560, 562 n.3 (1992) (“[T]he construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overturned absent compelling reason.”); Op. S.C. Atty. Gen., 2017 WL 1717129 (April 24, 2017) (“[I]t is not necessary that the administrative agency’s construction be the only reasonable one or even one the court would have reached if the question had initially arisen in a judicial proceeding.”). It is this Office’s opinion that a court is likely to find DOT’s interpretation to be a reasonable construction of Section 12-28-2740. Because the statute does not expressly state whether “C” funds can be expended to pay for attorney’s services associated with a project in furtherance of a countywide transportation plan, as we discussed above, this may not be the only reasonable interpretation of Section 12-28-2740. However, based on state court precedent and this Office’s policy, we defer to DOT’s interpretation. This Office suggests consulting with DOT if there is a question regarding whether a particular attorney’s service or legal service would be considered to be in compliance with Section 12-28-2740.

Conclusion

We hope that the guidance provided above will assist you and county transportation committees in determining the legality of paying for attorney’s services or legal services with “C” funds. This Office understands that DOT considers the costs of the legal services or attorney’s services to be eligible costs of projects selected by a CTC and paid for with “C” funds. Because DOT is assigned with ensuring compliance with the expenditure of “C” funds under Section 12-28-2740(P), we defer to its reasonable interpretation of the statute. It is this Office’s opinion that a court would likely find DOT’s interpretation to be a reasonable construction of Section 12-28-2740. Op. S.C. Atty. Gen., 2017 WL 1717129 (April 24, 2017) (“[I]t is not necessary that the administrative agency’s construction be the only reasonable one or even one the court would have reached if the question had initially arisen in a judicial proceeding.”). However, as discussed above, unlike in the South Carolina Transportation Infrastructure Bank Act, Section 12-28-2740 does not expressly address whether “C” funds may be expended to pay for attorney’s services or legal services. Further legislative clarification may therefore be warranted to expressly

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address whether it is appropriate to expend "C" funds to pay for legal services or attorney's services associated with a project selected by a CTC.

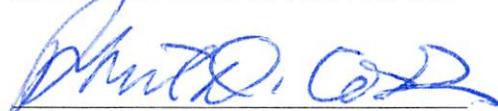
This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any further questions or issues, please let us know.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General