



ALAN WILSON
ATTORNEY GENERAL

August 21, 2018

The Honorable Stephen Goldfinch, Member
South Carolina Senate
P.O. Box 142
Columbia, SC 29202

Dear Senator Goldfinch:

We received your letter dated July 20, 2018 for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issues (as quoted from your letter):

- 1) *whether a county can use capital sales tax funds to acquire property for economic development.*
- 2) *Is this allowable under the surplus funds provision?*
- 3) *In addition, if a project that was voted on was never funded or completed (due to impossibility, not negligence), are those remaining funds considered surplus under the law, and therefore subject to the allowable expenditures of surplus funds?*

Law/Analysis:

As you are aware, the South Carolina Department of Revenue has authority to administer and collect the Capital Project Sales Tax. S.C. Code § 4-10-350. Thus, this Office would defer our opinion to the Department of Revenue as the administrative agency charged with the administration of the tax. Op. S.C. Att'y Gen., 2013 WL 1803941 (S.C.A.G. April 23, 2013). Regarding the revenue produced from the capital sales tax funds, the law states that:

The revenues of the tax collected under this article must be remitted to the Department of Revenue and placed on deposit with the State Treasurer and credited to a fund separate and distinct from the general fund of the State. After deducting the amount of any refunds made and costs to the Department of Revenue of administering the tax, not to exceed one percent of the revenues, the State Treasurer shall distribute the revenues quarterly to the county treasurer in the county area in which the tax is imposed and the revenues must be used only for the purposes stated in the imposition ordinance. The State Treasurer may correct misallocations by adjusting subsequent distributions, but these adjustments must be made in the same fiscal year as the misallocations. However, allocations made as a result of city or county code errors must be corrected prospectively. Within thirty days of the receipt of any quarterly payment, the county treasurer or the county administrator shall certify to the Department of Revenue amounts of net proceeds applied to the costs of each project and the amount of project costs remaining to be paid and, if bonds have been issued that were approved in the referendum, a schedule of payments remaining due on the bonds that are payable from the net proceeds of the sales tax authorized in the referendum.

S.C. Code Ann. § 4-10-360 (1976 Code, as amended) (emphasis added). The tax must be “for a specific purpose or purposes and for a limited time,” as quoting from the statute:

Subject to the requirements of this article, the county governing body may impose a one percent sales and use tax by ordinance, subject to a referendum, within the county area for a specific purpose or purposes and for a limited amount of time. The revenues collected pursuant to this article may be used to defray debt service on bonds issued to pay for projects authorized in this article. However, at no time may any portion of the county area be subject to more than one percent sales tax levied pursuant to this article, pursuant to Chapter 37, Title 4, or pursuant to any local law enacted by the General Assembly.

S.C. Code Ann. § 4-10-310 (emphasis added).

1) Whether a county can use capital sales tax funds to acquire property for economic development

Regarding the purposes authorized under the Capital Project Sales Tax, the statute reads that:

(A) The sales and use tax authorized by this article is imposed by an enacting ordinance of the county governing body containing the ballot question formulated by the commission pursuant to Section 4-10-320(C), subject to referendum approval in the county. The ordinance must specify:

(1) the purpose 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 local governmental entities, including the county, municipalities, and special purpose districts located in the county area, and may include the following types of projects:

- (a) highways, roads, streets, bridges, and public parking garages and related facilities;
- (b) courthouses, administration buildings, civic centers, hospitals, emergency medical facilities, police stations, fire stations, jails, correctional facilities, detention facilities, libraries, coliseums, educational facilities under the direction of an area commission for technical education, or any combination of these projects;
- (c) cultural, recreational, or historic facilities, or any combination of these facilities;
- (d) water, sewer, or water and sewer projects;
- (e) flood control projects and storm water management facilities;
- (f) beach access and beach renourishment;
- (g) dredging, dewatering, and constructing spoil sites, disposing of spoil materials, and other matters directly related to the act of dredging;
- (h) jointly operated projects of the county, a municipality, special purpose district, and school district, or any combination of those entities, for the projects delineated in subitems (a) through (g) of this item;

- (i) any combination of the projects described in subitems (a) through (h) of this item;

...

S.C. Code Ann. § 4-10-330 (emphasis added). This Office was asked a similar question in 2010 as to whether pursuant to South Carolina Code § 4-10-330 could Aiken County include improvements to a domestic abuse center on the ballot. See Op. S.C. Att’y Gen., 2010 WL 1808731 (S.C.A.G. April 22, 2010). This Office concluded that the County could because “[t]he General Assembly used language such as ‘may include the following’ and ‘any combination of these facilities ... projects ...[or] entities,’ indicating that a flexible interpretation of the statute is appropriate.” Id. The 2010 opinion also quoted a 1998 opinion regarding the flexibility of this same statute, where we stated that:

[F]ocus must be paid to the word “include.” Ordinarily, the word “include” is a word of enlargement and not of limitation. Baker v. Chavis, 306 S.C. 203, 410 S.E.2d 600 (Ct. App. 1991). The word “include” is not a word of all embracing definition but an illustrative application of general terms. Id. When the word “include” is used in connection with a number of specified objects it implies that there may be others which are not mentioned. St. Louis County v. State Highway Commission, 409 S.W.2d 149 (Mo. 1966). The word “include” conveys the conclusion that there are other items includable, though not specifically enumerated. Zorba Contractors, Inc. v. Housing Authority of the City of Newark, 660 A.2d 550 (N.J.Super.Ct.App.Div. 1995).

In keeping with the aforementioned rules of statutory construction, the statute's use of the words “may include” suggests that the legislature did not intend to limit the permissible projects to only those listed. Baker v. Chavis, supra. The use of the words “may include” indicates that the listed projects are to be viewed as illustrative of the types of permissible projects.

The language “may include the following” indicates that a flexible standard should be used when reading the statute.

Op. S.C. Att’y Gen., 2010 WL 1808731, at *2 (S.C.A.G. Apr. 22, 2010) (quoting 19[9]8 WL 746191 (S.C.A.G. August 17, 19[9]8)). Since we have concluded above that the words “may include” suggests more than what is listed, this Office believes a court would find that the statute implicitly authorizes the use of Capital Project Sales Tax funds to purchase the land for administrative buildings, public garages and other such projects authorized within the statute. Therefore, based on the analyses within our prior opinions regarding the Capital Project Sales Tax, we believe a court will determine that a flexible interpretation of the Capital Project Sales Tax would allow the acquisition of property for economic development.

2) May a county use capital sales tax funds to acquire property for economic development under the surplus funds provision?

Regarding your second question, the statute states that surplus funds from the Capital Project Sales Tax must be applied in the following way:

(C)(1) Amounts collected in excess of the required net proceeds must first be applied, if necessary, to complete a project for which the tax was imposed.

(2) If funds still remain after first using the funds as described in item (1) and the tax is reimposed, the remaining funds must be used to fund the projects approved by the voters in the referendum to reimpose the tax, in priority order as the projects appeared on the enacting ordinance.

(3) If funds still remain after first using the funds as described in item (1) and the tax is not reimposed, the remaining funds must be used for the purposes set forth in Section 4-10-330(A)(1). These remaining funds only may be expended for the purposes set forth in Section 4-10-330(A)(1) following an ordinance specifying the authorized purpose or purposes for which the funds will be used.

S.C. Code Ann. § 4-10-340 (emphasis added). Thus, the law requires that after the project(s) approved by the voters has/have been completed, as long as: (1) the tax is not “reimposed” and as long as (2) the county issues an ordinance authorizing a purpose or purposes outlined in South Carolina Code § 4-10-330(A)(1), the excess may be used for such a purpose as described in the county ordinance and as listed in § 4-10-330(A)(1). Id.; § 4-10-330. Based on our analysis to answer your first question, we believe a court will determine that the Capital Project Sales Tax allows a flexible interpretation so as to include the acquisition of property for economic development as long as the development is one of the purposes within § 4-10-330(A)(1) and as long as: (1) the tax is not “reimposed” and as long as (2) the county issues an ordinance authorizing a purpose or purposes outlined in South Carolina Code § 4-10-330(A)(1). S.C. Code Ann. §§ 4-10-330; 4-10-340.

3) If a project that was voted on was never funded or completed (due to impossibility, not negligence), are those remaining funds considered surplus under the law, and therefore subject to the allowable expenditures of surplus funds?

First and foremost, the Supreme Court of South Carolina addressed a similar issue in State v. County of Florence, 406 S.C. 169, 749 S.E.2d 516 (2013). This Office issued a 2013 opinion wherein we concluded that if the revenue from the Capital Project Tax Act and a subsequent reimposition referendum collected were not sufficient to fund all projects voted on, that the items voted on in the original referendum must be completed first. See Op. S.C. Att’y Gen., 2013 WL 1803941 (S.C.A.G. April 23, 2013). However, the substance of that opinion was adjudicated in State v. Cty. of Florence. Quoting from that case, the Supreme Court stated regarding the Capital Project Sales Tax that:

In our view, the Act permits a county to reimpose the tax at each opportunity without ever completing the projects set forth in the previous referendum. If and when a county does not complete a project for which the voters approved a tax, then the voters may decide whether they wish to continue the tax to fund another project. ...

Thus, we find the Act does not prevent Respondents from putting the referendum to the voters now, even though Florence County cannot raise the funds necessary to complete the new projects until the tax for the original projects expires.

State v. County of Florence, 406 S.C. 169, 179, 181, 749 S.E.2d 516, 521-522 (2013) (emphasis added). Thus, we certainly would defer our conclusions to that of the Court.

South Carolina Code Ann. § 4-10-340(C)(1) undoubtedly requires that excess amounts collected under the original tax (before it expires pursuant to S.C. Code § 4-10-340(A)-(B)) be used first to complete projects for which the tax was imposed, second, any projects voted on to reimpose the tax, and finally, the excess may be used for such a purpose as described in the county ordinance and as listed in § 4-10-330(A)(1). If a project was not completed due to impossibility, the law must still be complied with. Thus, a court would likely determine that any such funds for a project that was not completed due to impossibility must first be used to complete projects for which the tax was imposed, then any projects voted on to reimpose the tax, then the excess may be used for such a purpose as described in the county ordinance and as listed in § 4-10-330(A)(1). Please note that the statute also requires that “[w]hen the tax authorized by this article is imposed for more than one purpose, the enacting ordinance must set forth the priority in which the net proceeds are to be expended for the purposes stated. The enacting ordinance may set forth a formula or system by which multiple projects are funded simultaneously.” S.C. Code Ann. § 4-10-330(B). However, we again emphasize that the Court ruled in State v. County of Florence that “the Act does not prevent Respondents from putting the referendum to the voters now, even though Florence County cannot raise the funds necessary to complete the new projects until the tax for the original projects expires.” Lastly, we would be remiss if we did not caution against a county unilaterally declaring a project impossible. This Office suggests seeking such a declaration from the Department of Revenue or other entity with authority over the matter to prevent the appearance of impropriety.

Conclusion:

This Office believes a court will determine that:

- 1) a flexible interpretation of the Capital Project Sales Tax would allow the acquisition of property for economic development;
- 2) the Capital Project Sales Tax allows a flexible interpretation so as to include the acquisition of property for economic development as long as the development is one of the purposes within § 4-10-330(A)(1) and as long as: (1) the tax is not “reimposed” and as long as (2) the county issues an ordinance authorizing a purpose or purposes outlined in South Carolina Code § 4-10-330(A)(1). S.C. Code Ann. §§ 4-10-330; 4-10-340; and
- 3) subject to the ruling in State v. County of Florence, 406 S.C. 169, 749 S.E.2d 516 (2013), funds originally taxed (before the tax expires pursuant to S.C. Code § 4-10-340(A)-(B)) for a project that was not completed due to impossibility must first be used to complete projects for which the original tax was imposed, then any projects voted on to reimpose the tax, then the excess may be used for such a purpose as described in the county ordinance and as listed in § 4-10-330(A)(1).

Nevertheless, as we cautioned above, it would give the appearance of impropriety for the county to unilaterally declare a project impossible without a declaration from the Department of Revenue or other entity with authority over the matter. Moreover, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. 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. This opinion only addresses some of the sources in the subject area, but we can address other authority or additional questions in a follow-up opinion. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make

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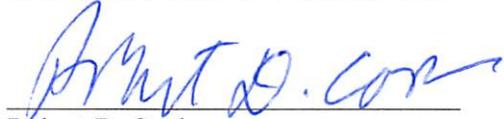
such determinations. See S.C. Code Ann. § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Anita (Mardi) S. Fair
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REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General