ALAN WILSON
ATTORNEY GENERAL

February 29, 2012

The Honorable David L. Thomas
Senator, District 8
P.O. Box 142
Columbia, South Carolina 29202

The Honorable Shane R. Martin
Senator, District 13
P.O. Box 142
Columbia, South Carolina 29202

Dear Senators Thomas and Martin:

You have requested an opinion of this Office concerning the authority of the Metropolitan Sewer Subdistrict created by Act 687 of 1969. Specifically, you have inquired (1) whether "the requirement that the Greenville County Council approve any tax levy before it is effective authorize[s] the appointed commission of the Metropolitan Sewer Subdistrict to levy ad valorem taxes" and (2) whether the Subdistrict has the authority to raise fees. We will consider these questions in turn.

Law/Analysis

Authority to levy ad valorem taxes

The opinion of our Court in *Campbell v. Hilton Head No. 1 Public Service District*, 354 S.C. 190, 192, 580 S.E.2d 137, 138 (2003), provides a useful description of the evolution of South Carolina law with respect to taxation by appointed commissions. In particular, this opinion explains:

> In *Weaver* [*v. Recreation District*, 328 S.C. 83, 492 S.E.2d 79 (1997)], we ruled that the statute which authorized [a] recreation district's appointed commission to levy a property tax violated the State Constitution's provision forbidding taxation by unelected officials. The general holding from *Weaver* is that any legislative delegation of taxing authority to an **appointed** body unconstitutionally permitted "taxation without representation." *Id.* The *Weaver* Court, however, ordered only prospective relief, stating the following:
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> > We are cognizant . . . of the disruptive effect today's holding could have on the financial operation of numerous special purpose districts, local commissions and boards throughout this state. Accordingly, in order to give the General Assembly

> an opportunity to address this problem, we hold this decision shall be applied prospectively beginning December 31, 1999.
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> *Id.* at 87-88, 492 S.E.2d at 82. In response, the Legislature passed legislation in 1998 that removed the taxing power from appointed bodies such as the [Public Service] District's commission. *See* S.C. Code Ann. § 6-11-271 (Supp. 2002).

Section 6-11-271 of the South Carolina Code (2004) provides, in relevant part:

> (A) For purposes of this section, "special purpose district" means any special purpose district or public service authority, however named, created prior to March 7, 1973, by or pursuant to an act of the General Assembly of this State.
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> . . . .
>
> (C) (1) This subsection applies only to those special purpose districts, the governing bodies of which are not elected but are presently authorized by law to levy for operations and maintenance in each year millage without limit as to amount.
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> (2) There must be levied annually in each special purpose district described in item (1) of this subsection, beginning with the levy for fiscal year 1999, ad valorem property tax millage in the amount equal to the millage levy imposed in that special purpose district for operations and maintenance for fiscal year 1998.

Thus, for special purpose districts created prior to March 7, 1973, that meet the requirements in section 6-11-271(C)(1), the levy for operations and maintenance will be fixed at the millage imposed for those purposes in fiscal year 1998.[1] Section 6-11-271 also includes two mechanisms by which the millage in such districts may be increased: by referendum or by approval of county council. *Id.* § 6-11-271(D)-(E). These mechanisms for increasing the millage also are discussed in sections 6-11-273 and -275 of the Code.

The effect of section 6-11-271 is to take discretion with regard to taxation away from appointed commissions, placing the final say in the taxation of a district in the General Assembly, in the people of the district acting by referendum, or in the governing body of the county. *See Weaver*, 328 S.C. at 86, 492 S.E.2d at 81 (characterizing *Crow v. McAlpine*, 277 S.C. 240, 285 S.E.2d 355 (1981) as standing for the proposition that "the legislative power to tax may not be conferred on a purely appointive body but must be under the supervisory control of elected bodies"); *Hagley Homeowners Ass'n v. Hagley Water, Sewer, and Fire Authority*, 326 S.C. 67, 485 S.E.2d 92 (1997) ("While the General Assembly can delegate its taxing authority to a subordinate agency, it can only delegate this power to a body which is either composed of persons assented to by the people or subject to the supervisory control of a body chosen by the people.").

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[1] In this opinion, we have not addressed the issue of taxes levied to meet bond obligations.

Pursuant to Act 687 of 1969, the governing body of the Metropolitan Sewer Subdistrict is an appointed body with the power to "levy ad valorem taxes upon all taxable property within the area . . . for the purposes of carrying out the authority conferred upon such subdistrict by the terms of this act; *provided*, however, that any such levy shall be approved by the Greenville County Council before it shall become effective."[2] Thus, the Subdistrict appears to fall within the provisions of section 6-11-271(C), quoted above. Accordingly, the Subdistrict may not modify the levy fixed by section 6-11-271(C) unless it complies with one of the statutory methods for doing so. *Cf.* Letter to Marshall N. Katz, Op. S.C. Att'y Gen. (Oct. 14, 2009) ("[T]he District must levy the same property tax millage imposed for fiscal year 1998 every subsequent year unless subsection (D) or (E) [of section 6-11-271] apply.").

In sum, the Metropolitan Sewer Subdistrict must comply with section 6-11-271 in levying any tax for operations and/or maintenance, and any increase to this millage should be accomplished by one of the methods set forth in sections 6-11-271 through -275.[3] Notably, the website for the Subdistrict indicates that a portion of the Subdistrict's service area extends into Anderson County. Metropolitan Sewer Sub-District, www.metroconnects.org/about-metro.php (Accessed Feb. 24, 2012). Assuming this information is accurate, that fact might limit the ability of the Subdistrict to take advantage of sections 6-11-271(E) and 6-11-275, which allow millage increases by approval of county council but limit their application to those districts "wholly within a single county" or "totally located within a county."

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[2] The "authority conferred" by the 1969 Act included the power to "construct and maintain sewage collector lateral lines if the lines shall, within the discretion of the governing body of the subdistrict, become necessary and as funds . . . become available," to "conduct or contract for engineering studies and plans looking forward to an orderly development of sewage disposal facilities within such subdistrict," to recommend the establishment of new subdistricts, and to consent to annexation of any of its service area into the subdistrict of a municipality. Act. No. 687 § 2, 1969 S.C. Acts 1301.

[3] Previous opinions of this Office have addressed questions concerning the interaction between South Carolina Code section 6-1-320 (2004 & Supp. 2011) and sections 6-11-271 through -275. *E.g.*, Letter to The Honorable G. Ralph Davenport, Jr., Op. S.C. Att'y Gen. (Oct. 16, 2000) (opining that, because section 6-11-271(D) opens with the phrase "[n]otwithstanding any other provision of law," a special purpose district governed by a body of appointees may exceed the millage limitations in section 6-1-320 if approved by a referendum in compliance with section 6-11-271(D)). These opinions indicate that special purpose districts with a millage fixed by section 6-11-271(B) or (C) might not be permitted to take advantage of the annual millage increases addressed in section 6-1-320(A) unless such increases are approved using one of the methods set forth in sections 6-11-271 through -275. *See* Letter to Marshall N. Katz, *supra* (noting the district at issue had been levying a fixed millage of 10 mills since 1998 and stating that it must do so "every subsequent year unless subsection (D) or (E) [of section 6-11-271] apply," but opining nevertheless that mandatory language in section 6-1-320(A) regarding reassessments would require use of a rollback millage when applicable); *see also Campbell*, 354 S.C. at 192, 580 S.E.2d at 138 (describing section 6-11-271 as having "removed the taxing power from appointed bodies").

Authority to raise fees

Act 687 of 1969, which created the Metropolitan Sewer Subdistrict, was amended in 1972. The 1972 Act provided the Subdistrict with additional powers, including but not limited to the following:

> (7) To build, construct, maintain and operate sewage collector lateral lines and related facilities and equipment.
>
> . . . .
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> (10) To exercise the authorizations of Act No. 397 of 1965.
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> . . . .
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> (20) To impose sewer service charges and tap-in fees in an amount sufficient to generate revenues for application to the payment of any general obligation bonds hereafter issued by the Subdistrict and to apply the revenues so generated in the Commission's discretion to the payment of such bonds.
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> . . . .
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> (22) To do all other acts and things necessary or convenient to carry out any function or power committed or granted to the Subdistrict.
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> . . . .
>
> (24) To require the payment of tap-in fees when sewage lines are made available even though a property owner may not choose to tap to the sewer.

Act No. 1842 § 3, 1972 S.C. Acts 3662; *see id.* § 9(n) (explaining the powers "hereby conferred upon the Commission shall be in addition to all other powers and authorizations previously vested . . . and may be availed of pursuant to action taken at any regular or special meeting of the Commission by a resolution to become effective immediately upon its adoption"). The 1972 Act further provided that the appointed commission would not "be required to obtain the approval of any other public agency or body to any action taken pursuant to the authorizations of this act." *Id.* § 9(o).

Act 397 of 1965—referenced in the 1972 Act as quoted above—granted certain special purpose districts the authority to, among other things, "place into effect and revise whenever it so wishes or may be required a schedule of sewer service and sewer connection charges for the use of and connection to any sewage disposal system which it may operate." Act No. 397 § 3, 1965 S.C. Acts 718. This Act, as amended, is codified as article 7, chapter 11, title 6 of the South Carolina Code (2004 & Supp. 2011).

The Subdistrict's power to impose fees and service charges is confirmed further by general law. For

example, section 6-15-60 of the South Carolina Code (2004) provides:

> The General Assembly confirms the right of any governmental entity to impose upon all those to whom sewer service is rendered, (a) a sewer service charge therefor, which may, in the discretion of its governing body, be sufficient to provide for all or any part of the cost of operating and maintaining the sewer facilities and to provide debt service on bonds or other obligations of the governmental entity issued to provide any type of sewer collection, disposal, or treatment service, and (b) a sewer connection charge, or connection fee or tapping fee designed to adequately reimburse the governing body for effecting the connection to provide sewer service.

(Emphasis added). Section 6-15-10 defines the term "governmental entity" to include "any incorporated municipality, county, or special purpose district within the State of South Carolina," and it defines "special purpose district" to mean "any special purpose or public service district now existing or hereafter created pursuant to general or special law and to which is committed any of the functions of collecting, disposing of and treating sewage." (Emphasis added). The Metropolitan Sewer Subdistrict appears to fall within this broad definition. *See, e.g., J.K. Constr., Inc. v. Western Carolina Reg'l Sewer Authority*, 336 S.C. 162, 165, 519 S.E.2d 561, 563 (1999) ("Authority is a special purpose district created by the Legislature in 1925. . . . Authority owns and operates trunk sewer lines, sewage pumping stations, and sewage treatment facilities. It disposes of sewage initially collected by other entities. JKC receives service from the Metropolitan Sewer District, a special purpose district that is a sub-district of Authority.").[4]

Based on these provisions, it appears the Subdistrict has the authority to impose sewer charges and tap fees without first obtaining the approval of Greenville County Council. "[T]he imposition of a charge in exchange for a service does not constitute taxation for constitutional purposes. Accordingly, legislative delegation of authority to impose charges and assessments to an appointed body does not run afoul of the prohibition against taxation without representation." *Hagley Homeowners Ass'n*, 326 S.C. at 75-76, 485 S.E.2d at 96; *see also Ford v. Georgetown County Water and Sewer District*, 341 S.C. 10, 532 S.E.2d 873 (2000) (reaffirming the *Hagley* decision in this regard).

For these reasons, it is the opinion of this Office that the appointed governing body of the Metropolitan Sewer Subdistrict has the authority to impose or modify fees and service charges, provided such fees and charges comply with other law.

Conclusion

In sum, it is the opinion of this Office that the Subdistrict must comply with section 6-11-271 in levying

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[4] Additional authorities might also be applicable to the Subdistrict's power to impose charges and fees. *See, e.g.*, S.C. Code Ann. § 6-1-330(A) (2004 & Supp. 2011) ("A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee."); *id.* § 6-1-300(3) (defining the term "local governing body" to include a special purpose district).

any tax for operations and/or maintenance, and any change in millage should comply with one of the methods set forth in sections 6-11-271 through -275 of the South Carolina Code. On the other hand, it appears the Subdistrict may impose or modify fees and charges without seeking the approval of county council.

Very truly yours,

Dana E. Hofferber

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REVIEWED AND APPROVED BY:

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