ALAN WILSON
ATTORNEY GENERAL

May 16, 2012

Brian L. Burgess, Manager
Saluda County Water and Sewer Authority
113 East Church Street
Saluda, South Carolina 29138

Dear Mr. Burgess,

We received your letter requesting an opinion concerning eligibility requirements for members of the Saluda County Water and Sewer Authority (the "Authority"). By way of background, you explain that the Authority was created by Act No. 1015 of 1970. It is your understanding that the Authority's "service area" is all of Saluda County (the "County") excluding the municipal corporate limits of the several municipalities located within the County, e.g., the Town of Saluda, Ridge Spring, Monetta, Ward, and Batesburg-Leesville. You also explain that the members of the Authority voted to diminish its service area around the towns of Ridge Spring, Ward, and Monetta. The towns were given a certain geographical area around their municipalities to plan, construct, and provide water and sewer services.

With this information in mind, you ask the following questions:

1) Is a resident of a municipality located within the County eligible to serve as a member of the Authority?

2) Does the Authority have the power to diminish its service area? If so, is someone that resides in the diminished service area eligible to serve as a member of the Authority?

3) Is an individual eligible to serve as a member of the Authority if he or she has been charged with a felony and entered into a pre-trial intervention program?

Law/Analysis

As you indicate, the Authority was created by Act No. 1015 of 1970. The Authority's service area includes all of the County, "excluding any area within an incorporated municipality." 1970 Act No. 1015, § 1. The Authority is "composed of five members, who shall be resident electors of the county and who shall be appointed by the Governor, upon the recommendation of a majority of the Saluda County Legislative Delegation." Id., § 2. Section 6 provides that the Authority shall not sell water "elsewhere than in the county, such county being hereby defined to be the service area of the authority."

Your first question asks whether an individual who is a resident of an incorporated municipality in the County, and thus resides outside the service area of the Authority, is eligible to serve as a member of the Authority. In a previous opinion, we addressed whether an individual who was a resident of the portion of James Island that is also within the incorporated limits of the City of Charleston was eligible for membership on the James Island Park and Playground Commission. Op. S.C. Att'y Gen., 1980 WL 120777 (July 21, 1980). The relevant portion of the enactment creating the James Island Park and Playground Commission provided that "[a]ll members of the commission shall be residents of James Island ...." In consideration of this language, we concluded as follows:

> If the individual is in fact a resident of James Island, the fact that he is a resident of a portion of James Island which is not within the service area of the James Island Public Service District is not significant inasmuch as the statute requires only residence on the island itself.

Id.

In another opinion, we addressed the validity of a Laurens County ordinance creating county planning commission which provided that appointees to the commission "may reside in the unincorporated areas of the county or in an incorporated area which does not have an existing Planning Commission in place." Op. S.C. Att'y Gen., 2004 WL 113640, at *1 (Jan. 20, 2004). Noting that the County Council was empowered to create the commission and provide for the appointment of its members,[1] we observed "[i]t is generally held that the determination of the qualifications or disqualifications for an office are a matter for the determination of the appointing authority." Id. (citations omitted). Furthermore, we referenced the case of County of Nassau v. New York State Public Employment Relations Board, 547 N.Y.S.2d 339 (1989), in which "it was determined that an individual was qualified for a position if he or she met the qualifications established by the State Constitution, the legislature or the appointing authority." Id. In consideration of the above authorities, we concluded that "the provision establishing a restriction for membership on the Planning Commission to individuals residing in unincorporated areas or incorporated areas without a Planning Commission would be upheld as a proper determination by the county council of qualifications for that position." Id.

Consistent with the above prior opinions, the fact that an individual is a resident of an incorporated municipality within the County, and thus resides outside the service area of the Authority, does not render such individual ineligible to serve as a member of the Authority. This is because Legislature has only required that each member of the Authority be "resident electors of the county ...." Act No. 1015, § 2. Furthermore, the determination of whether membership on the Authority should be restricted to residents of the unincorporated areas of the County is a matter within the discretion of the appointing authority, in this case, the Governor upon the recommendation of a majority of the Saluda County Legislative Delegation.

You also ask whether the Authority has the power to diminish its service area and, if so, whether an individual who is a resident of the diminished service area is eligible to serve as a member of the

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[1] See § 6-29-320 ("The county council of each county may create a county planning commission"); see also § 4-9-170 ("The council shall provide by ordinance for the appointment of all county boards, committees and commissions whose appointment is not provided for by the general law or the Constitution").

Authority. Nothing in the provisions of Act No. 1015 gives the Authority such power. Instead, the power to diminish the service area of the Authority is expressly granted to the County Council:

> *The county boards*[2] of the several counties of the State *are authorized to* enlarge, *diminish* or consolidate *any existing special purpose districts*[3] *located within such county* and authorize the issuance of general obligation bonds by such special purpose district by the procedure prescribed by this article.

§ 6-11-420 (emphasis added); see also Berry v. Weeks, 279 S.C. 543, 309 S.E.2d 744 (1983) (holding Dorchester County Council had authority pursuant to § 6-11-420 to decrease services areas of Dorchester County Water Authority).

Even if the service areas of the Authority were properly diminished by the County Council, our previous conclusion that Act No. 1015 only requires that members of the Authority be residents of the County would equally apply to residents in the diminished services areas of the County. Thus, we believe residents of the County who reside in such diminished services areas would remain eligible to serve as members of the Authority. We reiterate that the determination of whether to appoint individuals as members of the Authority who reside in the diminished services areas of the County is a matter within the discretion of the appointing authority.

Finally, you ask whether an individual who has been charged with a felony and has entered into a pre-trial intervention program is eligible to serve as a member of the Authority. Article XVII, section 1 of the South Carolina Constitution provides that "[n]o person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector …." The qualifications of an elector are set forth in section 7-5-120(A) and include age, the absence of any disabilities named in the Constitution, and residency. Subsection (B) of that statute provides a person is disqualified from being an elector if, *inter alia*, he:

> (2) is serving a term of imprisonment resulting from a conviction of a crime; or
>
> (3) is convicted of a felony or offenses against the election laws, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.

§ 7-5-120(B). We have interpreted a prior version of section 7-5-120(B) as rendering ineligible for office any individual "who has been convicted of a felony or offense against the election laws where the latter offense is a felony or misdemeanor" unless the sentence has been served or the individual has been sooner pardoned. Op. S.C. Att'y Gen., 1981 WL 96540, at *1 (Feb. 20, 1981).

In addition, Article VI, section 8 provides:

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[2] See § 6-11-410(b) (defining "county board" as "the governing bodies of the several counties of the State as now or hereafter constituted").

[3] See § 6-11-410(a) (defining "special purpose district" as "any district created by act of the General Assembly prior to March 7, 1973, and to which has been committed prior to March 7, 1973, any local government function").

> Any officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial Branches, who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment if permitted by law may be suspended by the Governor until he shall have been acquitted. *In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law.*

(emphasis added); see also § 8-1-100 ("[A]ny state or county officer who is indicted in any court for any crime may, in the discretion of the Governor, be suspended .... In case of a conviction, the office shall be declared vacant by the Governor and the vacancy filled as provided by law.")

We have previously construed the last sentence of Article VI, section 8 as rendering an official in the Executive Branch ineligible to hold office only upon *conviction* for a crime involving moral turpitude, not upon suspension for an indictment for such a crime. Op. S.C. Att'y Gen., 1981 WL 96540, at *1. In the event an executive official was convicted of a crime of moral turpitude, we advised that such individual was ineligible for office "irrespective of the characterization of the basis for [the] conviction as a misdemeanor or a felony." Id.

Sections 17-22-10 et seq. provide for the establishment of pretrial intervention programs by each circuit solicitor the respective circuits of the State. In any case where an individual agrees to enter into a pretrial intervention program, an agreement must be made including, *inter alia*, "a section stating the period of time after which the prosecutor will either dismiss the charge or seek a conviction based upon that charge...." § 17-22-120. In addition, section 17-22-150 provides:

> (a) In the event an offender successfully completes a pretrial intervention program, the solicitor shall effect a *noncriminal disposition* of the charge or charges pending against the offender. Upon such disposition, the offender may apply to the court for an order to destroy all official records relating to his arrest and no evidence of the records pertaining to the charge may be retained by any municipal, county, or state entity or any individual, except as otherwise provided in Section 17-22-130. *The effect of the order is to restore the person*, in the contemplation of the law, *to the status he occupied before the arrest....*
>
> (b) In the event the offender violates the conditions of the program agreement: (1) the solicitor may terminate the offender's participation in the program, (2) the waiver executed pursuant to § 17-22-90 shall be void on the date the offender is removed from the program for the violation and (3) the prosecution of pending criminal charges against the offender shall be resumed by the solicitor.

(emphasis added).

In a previous opinion, we addressed whether an individual's successful completion of a pretrial intervention program constitutes a "conviction" for purposes of the above statutory and constitutional provisions:

> A prior opinion of this Office dated October 13, 1988 stated that where an offender successfully completes a pretrial intervention program, there is no

> conviction. Also, another opinion of this Office dated November 8, 1965 determined that
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> > ... one is "convicted" of a disqualifying offense within the meaning of the constitutional and statutory provisions when there is a verdict of guilty and sentence thereon....
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> > See also 71 A.L.R.2d 595 ("the term 'conviction' usually imports an adjudication reached in a trial in a court of law and does not include a civil or administrative proceeding").

Op. S.C. Att'y Gen., 1990 WL 482438, at *2 (Aug. 31, 1990). Thus, we concluded in that opinion there is no conviction when an individual successfully completes a pretrial intervention program. Id. Instead, we stated "there is 'noncriminal disposition,' or dismissal, of the criminal charge," and concluded no vacancy in the office would occur. Id.

Consistent with the above authorities, this Office is of the opinion an individual who has been charged with a felony and entered into a pretrial intervention program is eligible to serve as a member of the Authority. An individual is "convicted" for purposes of the statutory and constitutional provisions discussed herein when the individual receives a guilty verdict and a sentence is imposed. Pursuant to section 17-22-150(b), the dismissal or prosecution of charges pending against a participant in a pretrial intervention program depends on whether the participant successfully completes the program or violates its terms. Therefore, no "conviction" occurs during the individual's participation in the program. Although the Governor has the discretionary power to suspend a member of the Authority who is *indicted* for a crime involving moral turpitude pursuant to Article VI, section 8, a member of the Authority only becomes ineligible for office upon *conviction* for such a crime.

Very truly yours,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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