ALAN WILSON
ATTORNEY GENERAL

September 7, 2012

Duane N. Parrish, Director
South Carolina Department of Parks, Recreation & Tourism
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Mr. Parrish:

You have submitted to this Office several questions concerning the Tourism Infrastructure Admissions Tax Act ("the Act"), particularly the definition of an extraordinary retail establishment in section 12-21-6520(14) of the South Carolina Code (2000 & Supp. 2011). In a previous opinion, this Office expressed reservations regarding the constitutionality of those provisions of the Act that concern extraordinary retail establishments. *See* Letter to Chad Prosser, Op. S.C. Att'y Gen. (Feb. 20, 2009). However, as no court has yet ruled on the constitutional issue, you have continued to develop guidelines for implementation of the Act. *See generally* Letter to The Honorable Ronnie W. Cromer, Op. S.C. Att'y Gen. (Mar. 23, 2004) ("While we may comment upon what we deem an apparent constitutional defect, we may not declare an act void as unconstitutional.").

I. Background

The following information presented by the South Carolina Department of Revenue will provide useful context for your questions:

> The Tourism Infrastructure Admissions Tax Act in Article 27, Chapter 21 of Title 12 allows a portion of the admissions tax collected at a qualifying tourism and recreation facility ("facility") to be remitted to the county or municipality where the facility is located and to the Infrastructure Fund administered by the Coordinating Council for Economic Development ("Council") for making infrastructure improvements.
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> . . . The amount to be remitted to the county or municipality is 25% of the admissions tax collected at the establishment. An additional 25% of the admissions tax collected at any establishment must be remitted to the Infrastructure Fund. . . .
>
> . . . .
>
> A tourism or recreation facility can consist of a theme park; an amusement park; a historical, educational or trade museum . . . [etc.]. Additionally, a "tourism or recreational facility" can be an aquarium or natural history exhibit or museum located within, or contiguous to, an extraordinary retail establishment.

. . . .

> South Carolina Code § 12-21-6590 allows the Department of Parks, Recreation, and Tourism to designate up to 4 qualifying facilities as "extraordinary retail establishments." Instead of the admissions tax being subject to the Tourism Infrastructure Admissions Tax Act, a qualifying establishment's sales tax collected is subject to the Act. . . .
>
> Prior to completion of the "extraordinary retail establishment" the entity operating the establishment and the county in which the establishment is located may request the Department of Parks, Recreation and Tourism to conditionally certify the extraordinary retail establishment. . . . [H]owever, it cannot receive monetary benefits prior to satisfying the requirements of the conditional certification and the provisions contained in the definition of a "tourism and recreational facility."
>
> If the extraordinary retail establishment obtains conditional certification and complies with both the conditional certification and the requirements contained in the definition of a "tourism or recreational facility" then 50% of the sales tax collected by the establishment will be remitted to the county in which the establishment is located and no amounts will be remitted to the Infrastructure [F]und administered by the Council.

S.C.D.O.R., *Chapter 9: Infrastructure Incentive for Tourism and Recreation Facilities*, South Carolina Tax Incentives for Economic Development 256-58 (2011); *see* S.C. Code Ann. §§ 12-21-6520(14), -6530, -6540, -6590 (2000 & Supp. 2011).

The procedure by which a county or municipality qualifies to receive the funds provided for by the Tourism Infrastructure Admissions Tax Act is to submit a "certification application" for approval by the South Carolina Department of Revenue. S.C. Code Ann. §§ 12-21-6520(3), -6550. In 2006, the General Assembly adopted an additional, alternative procedure—known as "conditional certification"—by which a county or municipality may apply for the benefits of the Act. This conditional certification procedure, found in section 12-21-6590, is the subject of your first set of questions.

II. Analysis

We have organized our analysis of your questions by topic, rather than following the order in which the questions are presented in your opinion request. At the end of this letter, you will find a summary of our answers to your questions in the order you asked them. The first set of questions we will analyze concerns the conditional certification procedure.

A. Conditional Certification

1. Approval Authority

You have asked whether section 12-21-6590(B) should be read together with section 12-21-6520(3) and thereby construed to vest "final approval in the certification process" in the Department of Revenue.

Section 12-21-6520(3) provides:

> "Certification application" means an application submitted by a county or municipality to the [South Carolina Department of Revenue] requesting that the department approve a major tourism or recreation facility or a major tourism or recreation area for the benefits available under Sections 12-21-6530 and 12-21-6540.

Id.; *see id.* § 12-21-6520(5) (defining "department" for the purposes of the Tourism Infrastructure Admissions Tax Act).

Section 12-21-6520(14) gives the Department of Parks, Recreation and Tourism ("PRT") the conclusive authority to determine whether a store meets the criteria to be an extraordinary retail establishment. *Id.* ("The Department of Parks, Recreation and Tourism shall determine and annually certify whether a retail establishment meets [the criteria for an extraordinary retail establishment] and its judgment is conclusive."). This authority extends to both the certification application process and the conditional certification process.

Using the certification application process, if the basis for a facility's qualification as a tourism or recreation facility is its association with an extraordinary retail establishment, PRT must first determine whether the store qualifies as an extraordinary retail establishment. *See id.* If PRT certifies the store as an extraordinary retail establishment, the associated tourism or recreation facility still must qualify either as a <u>major</u> tourism or recreation facility pursuant to section 12-21-6520(12) or as part of a major tourism or recreation area pursuant to section 12-21-6520(11) before the county or municipality may obtain the benefits provided by the Act. *See id.* § 12-21-6520(3). Thus, as further described in section 12-21-6550, PRT ensures the completeness of the county or municipality's certification application and then forwards the application to the Department of Revenue for approval.

As to the conditional certification process, section 12-21-6590(B) provides:

> Prior to the completion of an extraordinary retail establishment, an entity may request that the county or municipality in which the facility is located provide an application for conditional certification to the Department of Parks, Recreation and Tourism. The Department of Parks, Recreation and Tourism may grant conditional certification to the entity as an extraordinary retail establishment based on reasonable projections that the facility will meet the requirements of Section 12-21-6520(14) within three years of the certificate of occupancy. <u>If the Department of Parks, Recreation and Tourism grants the conditional certification to the entity as an extraordinary retail establishment, it shall forward the approval for conditional certification to the [South Carolina Department of Revenue]</u>. The [South Carolina Department of Revenue] shall notify the entity and either the county or the municipality, as applicable, of the approval.
>
> <u>An applicant obtaining conditional certification as an extraordinary retail establishment under this section and satisfying the requirements of conditional certification by the dates provided therein</u>, shall be deemed to satisfy all of the requirements of this article pertaining to qualification as an extraordinary retail establishment for the duration of the benefit period. The entity <u>shall be deemed to</u>

> constitute a major tourism or recreation facility under Section 12-21-6520(12) and shall be entitled to all of the benefits of this article for the duration of the benefit period without any further certification requirements. This subsection shall not be construed to allow an applicant to receive the benefits provided in this article prior to satisfying the requirements of the conditional certification and of Section 12-21-6520(14).
>
> The Department of Parks, Recreation and Tourism shall develop application forms and adopt guidelines governing the conditional certification process.

(Emphasis added). Thus, according to the plain language of section 12-21-6590(B), PRT is the agency charged with final approval of an application for conditional certification. A county or municipality applies to PRT for conditional certification of the extraordinary retail establishment, and PRT forwards its approval of the application to the Department of Revenue. *Id.* The Department of Revenue's only task in the conditional certification procedure is to "notify the entity and either the county or the municipality, as applicable, of the approval." *Id.* Once the applicant complies with the terms of the conditional certification, no "further certification" is required in order to obtain "all of the benefits" of the Act. *Id.* Therefore, an applicant that obtains conditional certification and satisfies all requirements thereof need not submit a subsequent certification application for approval by the Department of Revenue. Moreover, nothing in section 12-21-6590(B) suggests any authority besides PRT should be the judge of whether an applicant has complied with the terms of its conditional certification. Such conditions presumably will relate to ensuring that the applicant satisfies the requirements of section 12-21-6520(14),[1] and PRT is the unequivocal judge of those qualifications. For these reasons, we do not believe section 12-21-6590 can be construed to vest final approval authority in the Department of Revenue. Rather, when an applicant uses the conditional certification procedure, final approval must come from PRT.

2. Terms of Conditional Certification

Next, you have asked: (a) when the benefit period begins for entities that obtain conditional certification; (b) whether conditional certification can be withdrawn; and (c) whether annual certifications are necessary after conditional certification has been granted.

These issues are addressed in the second paragraph of section 12-21-6590(B), as quoted above. Pursuant to the first paragraph of section 12-21-6590(B), an applicant for conditional certification must demonstrate to PRT through "reasonable projections" that the store will meet the definition of an extraordinary retail establishment within three years of obtaining a certificate of occupancy. Pursuant to the second paragraph of section 12-21-6590(B), once the store is built it still must satisfy all of the elements of the definition of an extraordinary retail establishment before it may receive any benefits. In particular, section 12-21-6590(B) provides: "This subsection shall not be construed to allow an applicant to receive the benefits provided in this article prior to satisfying the requirements of the conditional certification and of Section 12-21-6520(14)." *Id.* (emphasis added). Accordingly, the benefit period should begin once the extraordinary retail establishment meets all requirements of section 12-21-6520(14), including the visitation, sales tax, and hotel requirements.

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[1] *See id.* § 12-21-6590(B) (providing PRT "may grant conditional certification to the entity as an extraordinary retail establishment based on reasonable projections that the facility will meet the requirements of Section 12-21-6520(14) within three years of the certificate of occupancy").

Further, section 12-21-6590(B) states that once all requirements are satisfied "[a]n applicant . . . shall be deemed to satisfy all of the requirements of this article pertaining to qualification as an extraordinary retail establishment for the duration of the benefit period" and "[t]he entity . . . shall be entitled to all of the benefits of this article for the duration of the benefit period without any further certification requirements." (Emphasis added). By these plain terms, once an entity using the conditional certification process satisfies all requirements of that process it may not have its certification withdrawn during the benefit period and there is no need for annual certification.[2]

B. Required Investment

Your next set of questions concerns the twenty-five million dollar investment requirement set forth in the definition of an extraordinary retail establishment. In particular, you have asked whether the following two items may be counted toward the required investment: (a) the cost of constructing a building that will be leased to the extraordinary retail establishment and (b) the cost of constructing a hotel built to service the extraordinary retail establishment.

The pertinent sentence of the definition of an extraordinary retail establishment reads as follows:

> The extraordinary retail establishment must have a capital investment of at least twenty-five million dollars including land, buildings and site preparation costs, and one or more hotels must be built to service the establishment within three years of occupancy.

S.C. Code Ann. § 12-21-6520(14).

The sentence above requires an extraordinary retail establishment to "have" a given amount of capital investment, but it does not specify by whom that investment must be made. By the plain language of this sentence, "land, buildings and site preparation costs" should be included in the calculation of the capital investment. No limitation is placed upon the persons or entities who may contribute to financing the enumerated items. Therefore, we find nothing in the plain language of the statute to suggest that it matters whether the store will lease the building or own it outright.

The hotel requirement is set forth in an independent clause; it is not part of the list of items to be included in calculating the capital investment. Nevertheless, you refer to section 12-21-6560, which provides in relevant part as follows:

> In determining whether or not a particular facility qualifies as a major tourism or recreation facility or a major tourism or recreation area, the following items may be included in determining if the twenty million dollar investment has been met:
>
> (1) secondary support facilities such as hotels, food, and retail services which are

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[2] We make no comment regarding whether annual certification might remain necessary for other purposes, such as the job tax credit provided by section 12-6-3360 of the South Carolina Code (2000 & Supp. 2011). However, by the plain language quoted above, annual certification would not be necessary in order to remain eligible for the benefits provided by the Tourism Infrastructure Admissions Tax Act.

> located within, or immediately adjacent to, the major tourism or recreation facility or the major tourism or recreation area and which directly support the major tourism or recreation facility or major tourism and recreation area . . . .

(Emphasis added). Section 12-21-6560 sets forth in plain language the specific purposes for which it may be used, and those enumerated purposes do not include the question of whether a store meets the criteria of an extraordinary retail establishment or whether the twenty-five million dollar investment required by section 12-21-6520(14) has been met. *See generally Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' . . . holds that 'to express . . . one thing implies the exclusion of another, or of the alternative.'"). Likewise, the definitions of major tourism or recreation facility and major tourism or recreation area refer to section 12-21-6560 as a method by which their investment criteria may be satisfied, but no such reference is included in the definition of extraordinary retail establishment. *Compare* S.C. Code Ann. § 12-21-6520(11) (requiring a twenty million dollar investment "in the designated development area . . . or as otherwise provided in Section 12-21-6560"), *and id.* § 12-21-6520(12) (requiring a twenty million dollar investment "at the facility, or as otherwise provided in Section 12-21-6560"), *with id.* § 12-21-6520(14) (requiring "a capital investment of at least twenty-five million dollars including land, buildings and site preparation costs"). We must assume this omission was intentional. *See generally U.S. v. Barial*, 31 F.3d 216, 218 (4th Cir. 1994) ("Where Congress has chosen different language in proximate subsections of the same statute, courts are obligated to give that choice effect."). For these reasons, we do not believe the cost of constructing a hotel to service an extraordinary retail establishment may be included in the calculation of the required investment in that establishment.

Further, though the conditional certification procedure allows an extraordinary retail establishment to be "deemed to constitute a major tourism or recreation facility" once it obtains conditional certification and satisfies all the requirements thereof, *see* S.C. Code Ann. § 12-21-6590(B), this fact cannot be used to lessen the burden of meeting the definition of an extraordinary retail establishment in the first instance. Rather, after a store has satisfied all criteria of an extraordinary retail establishment—including the twenty-five million dollar investment—it will be treated as a major tourism or recreation facility for the purpose of reaping the benefits of the Act. *See id.* § 12-21-6590(B) ("This subsection shall not be construed to allow an applicant to receive the benefits provided in this article prior to satisfying the requirements of the conditional certification and of Section 12-21-6520(14)." (emphasis added)).[3]

C. Required Revenue from Sales Tax

Your final two questions concern the following requirement in the definition of an extraordinary retail establishment: "[t]he extraordinary retail establishment annually must collect and remit at least two million dollars in sales taxes but is not required to collect or remit admission taxes." S.C. Code Ann. § 12-21-6520(14). You have asked (a) whether internet sales may be included in this figure and (b) which of the many types of sales tax should be counted when determining whether the two million dollar

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[3] Under section 12-21-6520(14), the store itself would not be a tourism or recreation facility. Rather, the associated aquarium or natural history exhibit or museum would be the tourism or recreation facility. *Id.* However, using the conditional certification procedure, an extraordinary retail establishment may be "deemed" to be a tourism or recreation facility and to meet the requirements of a major tourism or recreation facility set forth in section 12-21-6520(12).

minimum has been reached. We will consider these two issues in turn.

1. Internet sales

The apparent intent of the provisions of the Act concerning extraordinary retail establishments is to incentivize large-scale retailers that bring visitors from out-of-town. For example, the store must be "a destination retail establishment which attracts at least two million visitors a year with at least thirty-five percent of those visitors traveling at least fifty miles to the establishment" and "one or more hotels must be built to service the establishment within three years of occupancy." *Id.* Thus, one could argue that including internet sales when determining whether a retailer has reached the minimum sales figure would be inconsistent with the legislative intent. On the other hand, an argument could be made that, though other requirements ensure foot traffic, the plain language of the statute places no limitation on the sales that may be included when calculating sales tax revenue. Following this view, internet sales orders could be included in the calculation so long as those orders were filled by the extraordinary retail establishment, not by some other location of the store. The plain language of the statute is capable of more than one interpretation, and we have found nothing in the legislative history that demands one solution over the other. Accordingly, it is our opinion that the interpretation of the statute as it relates to internet sales has been left to PRT's discretion. *See* S.C. Code Ann. § 12-21-6520(14) (giving PRT conclusive authority to determine whether a store qualifies as an extraordinary retail establishment).

2. Types of Sales tax

As you have stated, there are myriad kinds of sales tax in this state. *E.g.*, S.C. Code Ann. § 12-36-910 (2000 & Supp. 2011) (five percent statewide sales tax); *id.* § 12-36-1110 (Supp. 2011) (additional one percent statewide sales tax); *id.* §§ 4-10-10 *et seq.* (Supp. 2011) (local option sales tax); *id.* §§ 4-10-310 *et seq.* (Supp. 2011) (capital project sales tax); *id.* §§ 4-10-410 *et seq.* (Supp. 2011) (education capital improvements sales and use tax); *id.* §§ 4-10-510 *et seq.* (Supp. 2011) (personal property tax exemption sales tax); *id.* §§ 4-10-720 *et seq.* (Supp. 2011) (local option sales and use tax for local property tax credits); *id.* §§ 4-37-10 *et seq.* (Supp. 2011) (optional methods for financing transportation facilities). By its plain language, section 12-21-6520(14) merely requires a given amount of "sales taxes;" it makes no distinction among these various kinds of tax.[4]

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[4] The plain language of the statute does not, however, extend to use taxes. The South Carolina Department of Revenue has explained:

> The sales tax applies to the retail sale, lease, or rental of tangible personal property. The use tax applies to the first storage, use, or consumption of tangible personal property in South Carolina purchased at retail in another state. A credit is given against the use tax due in South Carolina for any state and local sales or use tax due and paid in another state.

S.C.D.O.R., *Chapter 1: Overview of State Taxation*, South Carolina Tax Incentives for Economic Development 3 (2011). As this description makes clear, a sales tax taxes a sale, lease, or rental while a use tax taxes a storage, use, or consumption. Thus, a use tax differs from a sales tax in a fundamental way. If the General Assembly intended to include both sales and use tax, it certainly was capable of

As there might be more than one reasonable construction of the statutory language, this Office is unable to determine definitively which sales taxes PRT should consider. Rather, it appears the construction of the term "sales taxes" has been left to PRT's sole discretion. *See id.* (giving PRT conclusive authority to determine whether a store qualifies as an extraordinary retail establishment). We offer the following information to assist you in the exercise of your discretion.

a. Diversion of Funds

Section 12-21-6520(14) and what is now section 12-21-6590(A) were enacted simultaneously, and both provisions employ the term "sales taxes." Thus, a court likely would conclude the term "sales taxes" has an identical meaning in each provision. *See, e.g.*, *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."). As explained previously, pursuant to section 12-21-6590(A), "[i]nstead of the admissions tax being subject to the Tourism Infrastructure Admissions Tax Act, a qualifying [extraordinary retail] establishment's sales tax collected is subject to the Act." S.C.D.O.R., *supra*, at 257 (emphasis in original). The Act distributes funds for use in infrastructure improvements. Thus, if a court gave consistent meaning to the term "sales taxes" throughout the Act, a portion of any kind of sales tax that counts toward a store's eligibility as an extraordinary retail establishment would be diverted from the original purpose for which it was imposed and redistributed according to the purposes of the Tourism Infrastructure Admissions Tax Act.

Section 12-21-6530 specifies that this redistribution would take the form of payment "by the department to the county or municipality in which the establishment is located." For the purposes of the Act, the term "department" means the Department of Revenue. *Id.* § 12-21-6520(5). Thus, it would be reasonable to conclude that the Act applies only to sales taxes that are collected by the Department of Revenue.

In general, however, the redistributive effect of the Act does not afford a basis upon which to distinguish among the various kinds of sales tax listed above. Our Supreme Court has determined that the General Assembly has the authority to divert funds in this manner. It is well established that "[t]he power of the Legislature over the matter of appropriations is plenary, except as restricted by the Constitution." *Cox v. Bates*, 237 S.C. 198, 214, 116 S.E.2d 828, 834 (1960) (quoting *Briggs v. Greenville County*, 137 S.C. 288, 135 S.E. 153, 156 (1926)). In *Myers v. Patterson*, our Court stated:

> In our view, the effect of the 1977 amendment [to article X, section 5 of the South Carolina Constitution] was to remove the constitution's limitation of the Legislature's power to appropriate revenues as needed among legitimate government objectives. . . . Article X, section 5 . . . does not prohibit the Legislature from amending the public purpose to which tax proceeds may be applied.

315 S.C. 248, 252, 433 S.E.2d 841, 843 (1993).

The reasoning in *Myers* applies equally to statewide sales taxes and to taxes imposed locally by referendum. Specifically, the *Myers* Court determined that "article X, section 5 [did] not apply" to

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saying so.

legislation redistributing, rather than creating, a tax. *Id.* This reasoning affords no room for a distinction between redistribution of those taxes initially imposed by the General Assembly and redistribution of those taxes initially imposed by referendum.

Moreover, an act adopted by referendum generally has no greater weight than any other law, and it is subject to amendment and repeal without a referendum concerning such changes. Our Supreme Court has stated that "where there are no explicit constitutional or statutory restraints, a voter initiated ordinance may be repealed by the same procedure as non-initiated ordinances." *Townsend v. City of Dillon*, 326 S.C. 244, 247, 486 S.E.2d 95, 97 (1997). Similarly, we have opined:

> [I]n the absence of a constitutional provision to the contrary, statutes enacted [by] initiative and referendum do not have any more force and effect than other legislative acts and, like other statutes, are subject to repeal, amendment, or change by the legislature, within the same constitutional limitations as are other statutes.

Letter to Mr. Richard Sutton, Op. S.C. Att'y Gen. (Mar. 10, 1967) (internal citations omitted). Where our Supreme Court has given binding effect to the terms of a referendum, this result appears to have been dependent upon the constitutional basis for the referendum.[5] Therefore, absent a constitutional basis, the restrictions imposed by voters acting in a referendum likely would not impact the General Assembly's authority to redistribute the revenue of the various local sales taxes.

Two potential constitutional limits upon the General Assembly's discretion warrant discussion. First, where sales taxes have been pledged as security for bonds,[6] the constitution might limit the General Assembly's discretion to redistribute the revenue from those taxes. *See State ex rel. Roddey v. Byrnes*, 219 S.C. 485, 499, 66 S.E.2d 33, 38 (1951) ("The obligation of [contracts] will be protected from impairment by the federal and state constitutions."). It would require an investigation of fact to determine whether this limitation would impact any of the taxes currently imposed in a county that houses a potential extraordinary retail establishment. This Office does not engage in investigations of factual issues. Second, article X, section 3 of the South Carolina Constitution provides that the personal property tax exemption funded by the personal property tax exemption sales tax may be rescinded only by referendum. However, this does not necessarily mean that the General Assembly cannot redistribute the

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[5] *See Cornelius v. Oconee County*, 369 S.C. 531, 537, 633 S.E.2d 492, 495 (2006) ("The Constitution forbids a county from owning and operating a sewer system unless county electors have approved the county's assumption of this function by referendum. . . . [T]he voters of Oconee County approved the referendum, but only on the condition that specific, non-tax based financing be used . . . . To now permit the County to use the fact of a favorable vote as a license to ignore the express terms of that referendum . . . would subvert the popular will and deprive 'the people [of the right] to protect themselves against the rule of man . . . .'").

[6] *See, e.g.*, S.C. Code Ann. § 4-10-330 (authorizing the pledge of the capital project sales tax to the payment of bonds); *id.* § 4-37-30 (authorizing the optional sales tax for transportation facilities to be pledged to the payment of bonds).

revenue from the sales tax. Rather, a court likely would consider whether redistribution would work a *de facto* rescission of the exemption.[7]

In sum, the General Assembly has the authority to redistribute revenue from the various statewide and local sales taxes, absent a constitutional limitation on that authority. Therefore, it remains in your discretion—as the agency charged with interpreting section 12-21-6520(14)—to determine which of the various taxes the General Assembly intended to divert.

b. Latter Legislative Expression

One method of determining legislative intent in the event of a statutory conflict is to consider which of the statutes is the last expression of legislative will. *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991) ("Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails."). Sections 12-21-6520 and -6590 are the latter legislative expressions with respect to the distribution of both the five percent sales tax imposed by section 12-36-910 and the additional one percent sales tax imposed by section 12-36-1110. Section 12-36-2620 (2000 & Supp. 2011), providing that the five percent tax "must be credited as provided in" section 59-21-1010 parts (A) and (B), was last amended in 2001. Section 59-21-1010 (2004) has not been amended since it was enacted in 1990.[8] Section 12-36-1120 (Supp. 2011), providing the additional one percent sales tax "must be credited to the Homestead Exemption Fund established pursuant to Section 11-11-155," came into effect four days before the General Assembly overrode the veto of sections 12-21-6520 and -6590. When the General Assembly amended sections 12-21-6520 and -6590 the following year, it did not limit the application of those sections to prevent redistribution of the new one percent tax.[9]

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[7] According to the Department of Revenue's latest publication on the matter, the personal property tax exemption sales tax is not in effect in any county. S.C.D.O.R. Information Letter # 12-9 (effective October 1, 2012). If a county imposed the personal property tax exemption sales tax after a retail store within the county was designated as an extraordinary retail establishment, the county could take this fact into account when estimating the tax rate necessary for the exemption.

[8] Section 59-21-1010(C) purports to limit the circumstances in which the allocation of the five percent tax may be amended. Specifically, section 59-21-1010(C) purports to require "an affirmative two-thirds vote of the total membership of the Senate and an affirmative two-thirds vote of the total membership of the House of Representatives" for any amendment or repeal of the current allocation. Assuming, *arguendo*, that this restriction on the discretion of future General Assemblies is valid, it appears that sections 12-21-6520(14) and 12-21-6590(A) did receive an affirmative two-thirds vote of the total membership of each house. These provisions were amendments to House bill 4874 of 2005-2006 and Senate bill 1245 of 2005-2006. Both bills were vetoed by the Governor. The veto of House bill 4874 was overridden by a vote of one hundred (100) to sixteen (16) in the House and forty-three (43) to two (2) in the Senate. *See* Act No. 384, 2006 S.C. Acts 2948. On the same day, the veto of Senate bill 1245 was overridden by a vote of one hundred two (102) to one (1) in the House and thirty-one (31) to six (6) in the Senate. Act No. 386, 2006 S.C. Acts 3018.

[9] Of note, the amendment to sections 12-21-6520 and -6590 became law—again via veto override—after the most recent amendment to section 11-11-155. However, section 11-11-156, which provides for reimbursements to school districts from the Homestead Exemption Fund, was amended most

On the other hand, sections 12-21-6520 and -6590 are not the most recent expressions of legislative will as to the distribution of the education capital improvements sales and use tax or as to certain aspects of the use and distribution of the capital project sales tax. Rather, the Tourism Infrastructure Admissions Tax Act was last amended in 2007, whereas the Education Capital Improvements Sales and Use Tax Act was enacted in 2008 and certain provisions regarding the use and distribution of the capital project sales tax have been amended as recently as 2012. *See* S.C. Code Ann. §§ 4-10-310, -340, -420, -440.

c. Policy Considerations

Turning again to the various local sales taxes, it is worthy of note that these taxes represent the expressed will of the voters that funds be devoted to the purposes set forth in the referendum question. Therefore, PRT must determine whether the General Assembly intended to divert funds devoted to property tax relief and specified capital projects approved by the voters from their original purposes and to allow counties and municipalities to use those funds for other infrastructure projects according to their own discretion.

As a final consideration, including the local sales taxes in the calculation required by section 12-21-6520(14) would give stores in counties with higher taxes an advantage over stores in counties with lower taxes with respect to competing for the benefits provided by the Tourism Infrastructure Admissions Tax Act. Again, it remains to your discretion to determine whether such an advantage is consistent with the legislative intent.

III. Conclusion

Our answers to the questions presented in your request are as follows:

1. By the plain language of section 12-21-6520(14), "land, buildings and site preparation costs" should be included in the calculation of the twenty-five million dollar capital investment required for an extraordinary retail establishment. We find nothing in the plain language of the statute to suggest that it matters whether the store will lease the building or own it outright.

2. By the plain language of section 12-21-6590(B), once an entity using the conditional certification process satisfies all requirements of that process and of section 12-21-6520(14) its certification may not be withdrawn during the benefit period and there is no need for annual certifications. The benefit period begins once the extraordinary retail establishment meets all requirements of section 12-21-6520(14), including the visitation, sales tax, and hotel requirements.

3. Our answer to your second question disposes of the need to respond to your third question.

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recently by the same 2007 act that amended sections 12-21-6520 and -6590. Section 11-11-156 concerns the distribution of the Fund, not the distribution of the one percent tax. Section 11-11-156 merely recites that the portion of the Fund used for "tier three reimbursement is derived from the revenue of the tax imposed pursuant to Article 11, Chapter 36, Title 12." If there should be a shortfall in the Homestead Exemption Fund, the difference would be paid from the general fund of the State. *See id.* § 11-11-156(A)(6).

4. When an applicant uses the certification application process, final approval for benefits comes from the South Carolina Department of Revenue. When an applicant uses the conditional certification process, final approval for benefits rests with PRT, which must determine whether the requirements of section 12-21-6520(14) have been satisfied.

5. Based on the plain language of sections 12-21-6520(14) and 12-21-6560, we do not believe the cost of constructing a hotel to service an extraordinary retail establishment may be included in the calculation of the twenty-five million dollar capital investment required for that establishment.

6. Our answer to your fifth question disposes of the need to respond to your sixth question.

7. The construction of the term "sales taxes" as applied to internet sales by a potential extraordinary retail establishment is a matter committed to the discretion of PRT.

8. There are numerous types of statewide and local sales taxes in this State. The construction of the term "sales taxes" as applied to these various types of taxes has been committed to the discretion of PRT.

Very truly yours,

Dana E. Hofferber
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General