

The State of South Carolina



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October 9, 1986

T. E. Walsh, Esquire  
Spartanburg City Attorney  
Post Office Box 5156  
Spartanburg, South Carolina 29304

Dear Mr. Walsh:

You have asked for the opinion of this Office as to applicability of various sections of the South Carolina Code to the administration of the Fire Fighters Pension Fund Plan of the City of Spartanburg. The matters to be considered are quite novel and complicated and the ultimate conclusion is not completely free from doubt; due to the complexity of the issues and the rights of the individuals and entities involved, it is our recommendation that the issue be resolved by the courts of this State.

The City of Spartanburg originally established a firemen's pension fund under Section 61-361 of the 1962 Code, which was formerly Section 7658-1 of the 1942 Code. It became apparent that the plan was, according to your memorandum, too inflexible, not actuarially sound, and further did not give firemen a realistic pension upon retirement. On February 18, 1980, City Council adopted an alternate pension plan, to be effective July 1, 1979, acting pursuant to Section 61-367.5 of the 1962 Code (Act No. 194 of 1973). This plan set forth all of the details for a retirement plan and included all of the details involved in a standard pension plan. The Plan has been amended several times since its adoption in 1980.

As noted above, the plan in effect prior to the alternate plan adopted in 1980 was adopted pursuant to Section 7658-1 of the 1942 Code. The applicable provisions in the 1962 Code were located in Article 2, Chapter 7, Title 61 of that Code, which provisions were apparently mandatory for cities from 30,000 to 60,000 in population under the 1950 census under the commission

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form of government. It should be noted that Article 1 of that chapter and title authorized firemen's pension plans in cities of more than 14,000 but less than 20,000 in population under the 1930 census and further that Article 3 of that chapter and title applied to "any city of this State not included in the terms of articles 1 and 2 of this chapter ... ."

In 1973, the General Assembly adopted Act No. 194, which became codified as Section 61-367.5 of the 1962 Code, which placed the new section within article 2. The new section permitted the city council of any municipality having a pension plan under article 2 to adopt an alternate plan which produced benefits greater than or equal to benefits already provided under plans adopted pursuant to article 2. Another amendment to Section 61-367.5 was adopted in 1975 but is not relevant to the matters being discussed herein.

In 1976, a new Code of Laws was adopted by the General Assembly. The provisions of articles 1 and 2 were deleted from the 1976 Code as being local in nature but the provisions of article 3 were retained as Section 9-13-10 et seq. At that time, it was apparent that the General Assembly intended the provisions of the earlier laws to remain in effect, since Section 9-13-10 read in part as initially adopted in 1976:

In any city of this State not included in the terms of Articles 1 and 2 of Chapter 7 of Title 61 of the 1962 Code of Laws of South Carolina, having a fire department with one or more paid members, the city council may form a pension fund, ... .

However, by Act No. 79 of 1979, Section 9-13-10 was amended to read in part:

In any city of this State having a fire department with one or more paid members, the city council may form a pension fund, ... .

The title of the act read in pertinent part:

To Amend Chapter 13, Title 9, Code Of Laws Of South Carolina, 1976, Relating To Firemen's Pension Funds In Cities, In The Following Particulars: Amend Section 9-13-10 So As To Make Chapter Applicable To Cities of Fourteen Thousand To Twenty Thousand

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Population, 1930 Census, And To Cities Of  
Thirty To Sixty Thousand Population, 1950  
Census; . . . .

The act also explicitly repealed Act No. 193 of 1949, relating to Firemen's Pension Funds in the City of Columbia. Act No. 79 took effect June 5, 1979.

Considering the sequence of changes made in both the pension plan and the various statutes applicable to pension funds, you have asked whether the City's ordinance or the current statutes would prevail with respect to:

1. Which body administers the pension plan - the Committee set forth under the plan or the Board of Trustees set forth in Section 9-13-20 of the Code?
2. How the secretary of the board is selected?
3. The margin of votes required to take action with respect to the pension plan?

The answers to your specific questions hinge in large part on the interpretation of the 1979 act.

Until the 1979 act became effective, it is apparent from the language of old Section 9-13-10 of the Code that articles 1 and 2 of Chapter 7, Title 61 of the 1962 Code were to continue in effect, notwithstanding that those articles were not codified in the 1976 Code. See Independence Ins. Co. v. Independent Life & Acc. Ins. Co., 218 S.C. 22, 61 S.E.2d 399 (1950). From both the title of Act No. 79 and the plain language therein, it may be argued that the General Assembly intended Section 9-13-10 et seq. to encompass all cities, including those formerly covered by article 1 (cities of fourteen to twenty thousand population, 1930 census) and article 2 (cities of thirty to sixty thousand population, 1950 census) of Chapter 7 of Title 61 of the 1962 Code. University of South Carolina v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966) (title as an aid to construction); State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983) (plain meaning of statutes). It must be noted that Act No. 79 became effective before the date of adoption of the revised pension plan, which had a retroactive effective date (but after the effective date of the act).

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Because Act No. 79 did not expressly repeal the provisions of articles 1 and 2 as stated above, to follow the provisions of Section 9-13-10 et seq. as to all firemen's pension funds, we must examine the question of whether the provisions of articles 1 and 2 were impliedly repealed. Implied repeal of a statute is disfavored and will be avoided unless no other reasonable interpretation of the statute may be made. State ex rel. McLeod v. Ellisor, 259 S.C. 364, 192 S.E.2d 188 (1972). The last act of the legislature is the law, however, and has the effect of repealing all prior inconsistent laws. Garey v. City of Myrtle Beach, 263 S.C. 247, 209 S.E.2d 893 (1974). The presence of an express repealer within Act No. 79, as to Act No. 193 of 1949, casts some doubt as to whether the legislature intended that more be repealed, but one authority on statutory construction has found that a single act may contain both express and implied repealers. 1A Sutherland Statutory Construction § 23.11 (4th Ed.). From the title and plain language of Act No. 79, it may be argued that articles 1 and 2 of Chapter 7, Title 61 of the 1962 Code were repealed by implication by Act No. 79 of 1979; however, this is by no means free from doubt, since the General Assembly could have easily expressly repealed the legislation for the City of Spartanburg as it did for the City of Columbia, and yet it did not.

It may also be argued that, because the amended pension plan was adopted after the effective date of Act No. 79, the terms of that act should prevail unless authority could be found elsewhere which would permit a municipality to adopt a firemen's pension plan without reference to a statute expressly permitting such an act. You have advised that the City did in fact rely upon express statutory authority to do so, but you have asked whether the grant of powers to municipalities under Section 5-7-30 of the Code would be broad enough to encompass adoption of a pension plan. Again, the answer is not free from doubt.

Section 5-7-30 of the Code sets forth the general powers of a municipality and includes those not expressly granted but necessarily implied therefrom. Lomax v. Greenville, 225 S.C. 289, 82 S.E.2d 191 (1954). However, as a general rule, a municipality is not authorized to adopt an ordinance which is repugnant to or inconsistent with the general laws of the State. Law v. Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928). When it is clear that the general law is intended to predominate in a particular matter, a political subdivision is not free to vary the terms of the general law by ordinance. Cf., Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985).

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In such a case, the general law must prevail over the ordinance. 5 McQuillin, Municipal Corporations, § 15.20. These general rules must now be applied to the situation at hand.

Act No. 79 of 1979, by its language bringing all cities formerly following articles 1 and 2 of Chapter 7, Title 61 of the 1962 Code into Section 9-13-10 et seq., arguably manifests an intent that all cities desiring to establish a pension fund for firemen follow Section 9-13-10 et seq. If a comprehensive scheme for all cities is intended by these statutes, a municipality could not vary the provisions by ordinance. Because Act No. 79 of 1979 did not expressly repeal articles 1 and 2 as discussed above, however, doubt exists as applied to this particular situation. A court should decide this issue.

#### CONCLUSION

It is our opinion that the City of Spartanburg is caught in a "gray area" of the law which is not expressly covered by acts of the General Assembly. Strong arguments can be made both ways on the implied repeal of the older statutes applicable to the City of Spartanburg. We cannot say that the older laws applicable to the City of Spartanburg have been repealed, particularly in light of the contemporaneous construction given them by Spartanburg City Council; a court should decide that issue, in the final analysis. However, it is clear that the General Assembly did intend that Act No. 79 be comprehensive and all-inclusive for those municipalities creating firemen's pension funds. Thus, the City of Spartanburg could choose to follow the comprehensive and uniform terms of Act No. 79 of 1979; or the City could continue to operate under the older laws, including ordinances adopted pursuant thereto, until a court declares otherwise.

With kind regards, I am

Sincerely,

*Patricia D. Petway*

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Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

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