ALAN WILSON
ATTORNEY GENERAL

May 5, 2022

J. Alexander Sherard, Esq.
White & Story LLC
Post Office Box 7036
Columbia, South Carolina 29204

Dear Mr. Sherard:

We received your letter requesting an opinion of this Office on behalf of Greenwood School District 52 (the "District"). We understand your firm, White & Story LLC, serves as general counsel to the District and the District's Board of Trustees desires an opinion regarding the Greenwood County's allocation of fee in lieu of tax revenue from a joint county industrial and business park ("JCIBP") to the District. You present four specific questions as follows:

1. Is there a requirement that revenue from the fee in lieu of taxes from a JCIBP under S.C. Code Ann. 4-1-170 et seq. be distributed in the same proportion that it would be if the property were taxable?
2. Is a county required to specify how the revenue should be allocated? If so, what are the appropriate allocation methods (e.g., percentage-based, pro-rata, etc.)?
3. Under §4-1-170 et seq., are the fees generated in lieu of ad valorem taxes from all properties within a JCIBP required to be reallocated to all the tax entities within the County, or may some fees only be allocated to certain tax entities?
4. Does state statute provide any remedy for a local government entity within a county to redress inequitable allocation of fees collected in lieu of ad valorem taxes?

Law/Analysis

Section 13(D) of article VIII of the South Carolina Constitution (2009) permits the creation of joint industrial or business parks. This provision exempts property contained within the park from ad valorem taxes, but requires property owners pay a fee equivalent to the property taxes that would have been collected, commonly referred to as a "fee in lieu." S.C. Const. art. VIII, § 13(D). Pursuant to this provision, prior to the establishment of such joint industrial or business parks, the General Assembly must "first provide by law for the manner in which the value of the property in the park will be considered for purposes of bonded indebtedness of political subdivisions and school districts and for purposes of computing the index of taxpaying ability pursuant to any

schools based on the assessed valuation of taxable property in the district as compared to the assessed valuation of the taxable property in all school districts of this State." Id. In response, the General Assembly adopted section 4-1-170 of the South Carolina Code (2021), which you reference in your letter. This provision states as follows:

> (A) By written agreement, counties may develop jointly an industrial or business park with other counties within the geographical boundaries of one or more of the member counties as provided in Section 13 of Article VIII of the Constitution of this State. The written agreement entered into by the participating counties must include provisions which:
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> (1) address sharing expenses of the park;
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> (2) specify by percentage the revenue to be allocated to each county;
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> (3) specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties.
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> (B) For the purpose of bonded indebtedness limitation and for the purpose of computing the index of taxpaying ability pursuant to Section 59-20-20(3), allocation of the assessed value of property within the park to the participating counties and to each of the taxing entities within the participating counties must be identical to the allocation of revenue received and retained by each of the counties and by each of the taxing entities within the participating counties. Misallocations may be corrected by adjusting later distributions, but these adjustments must be made in the same fiscal year as the misallocations. Provided, however, that the computation of bonded indebtedness limitation is subject to the requirements of Section 4-29-68(E).
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> (C) If the industrial or business park encompasses all or a portion of a municipality, the counties must obtain the consent of the municipality prior to the creation of the multi-county industrial park.

S.C. Code Ann. § 4-1-170.

In 2001, the South Carolina Supreme Court considered whether section 4-1-170 gave a county complete discretion as to how to allocate the fee in lieu revenue received in relation to a multi-county business park ("MCBP"). Horry Cty. Sch. Dist. v. Horry Cty., 346 S.C. 621, 626, 552 S.E.2d 737, 739 (2001). In that case, the agreement between Horry County and several adjacent counties creating the MCBP allocated the fee in lieu revenue without regard to the millage imposed by the various taxing entities, allocating less to the Horry County School District than it would have received in property tax. Id. at 625, 552 S.E.2d at 739. The Horry County School District sued Horry County claiming Horry County should have allocated fee in lieu revenue in accordance

with the millage the various taxing entities would have received absent the MCBP. The Supreme Court considered section 4-1-170 and section 4-29-67 of the South Carolina Code (2021), pertaining to industrial development projects, which provides in pertinent part:

> (L)(1) For a project not located in an industrial development park as defined in Section 4-1-170, distribution of the fee in lieu of taxes on the project must be made in the same manner and proportion that the millage levied for school and other purposes would be distributed if the property were taxable but without regard to exemptions otherwise available to a project pursuant to Section 12-37-220 for that year.
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> (2) For a project located in an industrial development park as defined in Section 4-1-170, distribution of the fee in lieu of taxes on the project must be made in the manner provided for by the agreement establishing the industrial development park.

(emphasis added). The Supreme Court concluded:

> Reading these statutes together, there is clearly no requirement that revenue from the fee in lieu of taxes from an MCBP be distributed in the same proportion that it would be if the property were taxable. First, Article VIII, § 13(D) and § 4-1-170 exempt property in MCBPs from ad valorem taxation and permit the county to enter agreements specifying how MCBP revenue will be distributed. Second, § 4-1-170(2) specifically allocates that revenue to the county, not to any another taxing entity. Third, while § 4-1-170 clearly contemplates some allocation to the other taxing entities within the county, neither § 4-1-170 nor the fee in lieu statutes require the county to distribute to the district a proportion of MCBP funds identical to the district's millage, as required for other fee in lieu revenue. Fourth, § 4-1-170 contemplates that a school district might not receive the funding from MCBPs that it would from taxable property by specifying that the index of taxpaying ability will be calculated based on funds "received and retained" by the school district. If the legislature had intended to require counties to distribute MCBP revenue in the same proportion as if the property were taxable, it could have said so in plain terms exactly as it did concerning tax exempt non-MCBP property. Compare § 4–29–67(L)(1) with § 4–29–67(L)(2); See also Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended certain result in statute it would have said so).

Horry Cty. Sch. Dist., 346 S.C. at 630-31, 552 S.E.2d at 741-42 (footnotes omitted).

With this authority in mind, we address your specific questions. In response to your first question, given the Court's decision in Horry County School District, we do not believe a county is required to distribute the fee in lieu revenue in the same proportion as it would if the property were taxable.

As for your second question, the Supreme Court in Horry County School District instructed: "Section 4-1-170(3) requires the agreement creating the MCBP to 'specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties.'" Id. at 631, 552 S.E.2d at 742. But, the Supreme Court did not specify a methodology counties must use. Moreover, in our review of section 4-1-170, we did not find a requirement by the General Assembly that counties use a particular method in making such an allocation. Thus, based on the Court's holding and the absence of a specific requirement under section 4-1-170, we believe counties are not required to employ a specific methodology to allocate fee in lieu revenue.

Next, you question whether fee in lieu revenue must be reallocated to all of the taxing entities. The Supreme Court in Horry County School District cites to section 4-1-170(3) stating the agreement must "specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties," as "requiring some allocation to each of the taxing entities within the county." Id. at 631, 552 S.E.2d at 742 n.4. As such, we believe each taxing entities within the JCIBP must receive some allocation of the fee in lieu revenue.

Lastly, you ask whether local taxing authorities have a remedy to redress inequitable allocations of fee in lieu revenue. We did not find such a remedy in the statutes governing JCIBPs. Furthermore, in Horry County School District, the Supreme Court appears to recognize a remedy does not exist, describing it as a problem "inherent in the MCBP scheme." Id. at 635, 552 S.E.2d at 744.

> The MCBP scheme allows the county to determine unilaterally what percentage of revenue derived from the fee in lieu to allocate to schools. Certainly nothing in the ballot question authorizing the constitutional amendment alerted voters that this result was possible. On the contrary, voters were assured by public officials that school funding would not be affected. See Amendment Benefits Rural Counties, The State, Oct. 18, 1988, at Metro 1 ("'It's important that voters understand that they are not exempting taxes,' Ed Burgess of the State Development Board said. 'All of the taxing entities will get their share. A contract will guarantee payment.'").
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> . . .
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> The school district and many *amici curiae* have argued passionately against the policies effected by the statutes at issue here. We sympathize with the schools' plight; however, this Court does not sit as a super-legislature. Granting the relief the district requests would involve re-writing § 4-1-170, under the guise of statutory construction, to require revenue from MCBP fees to be allocated in

> the same proportions as if the property were subject to ad valorem taxes. Such action is the sole prerogative of the Legislature.

Id. at 635-36, 552 S.E.2d at 744. As such, we conclude that the law does not provide for remedy for school districts or other taxing entities who believe they received an inequitable allocation of fee in lieu revenue in the agreement creating a JCIBP.

Conclusion

Considering the Supreme Court's opinion in Horry County School District, we do not believe fee in lieu revenue collected from a JCIBP must be distributed to local taxing entities in the same proportion as the property tax revenue they would have received had the property been taxable. However, we believe all taxing entities must be allocated some fee in lieu revenue and the amount allocated must be specified in the agreement establishing the JCIBP, but no particular allocation method is required. As our Supreme Court recognized in Horry County School District, "[t]he MCBP scheme allows the county to determine unilaterally what percentage of revenue derived from the fee in lieu to allocate to schools." Finding no other remedy under the law, schools, like other taxing entities, appear to be left without a remedy to redress inequitable allocation of fee in lieu revenue.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General