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HENRY MCMASTER
ATTORNEY GENERAL

June 27, 2006

The Honorable Shirley R. Hinson
Member, House of Representatives
Post Office Box 2145
Goose Creek, South Carolina 29445

Dear Representative Hinson:

We understand from your letter you desire an opinion from this Office on behalf of Jim Royce, one of your constituents and a member of the Berkeley County Board of Education (the "Board"). You state: "I am requesting an opinion from your office as to the legality of procedures used by the Board in levying property taxes in 2005." In addition to your letter, you attached a letter written by Mr. Royce addressed to Attorney General Henry McMaster. In this letter, Mr. Royce outlines seven particular problems he observed in the Board's process of considering and approving Berkeley County School District's (the "District's") 2005 budget and levying taxes associated with the budget.

Law/Analysis

In this opinion, we will attempt to address each of Mr. Royce's concerns individually. However, we begin by a general examination statutory guidance surrounding the Board's preparation and adoption of annual operational budgets and its authority to levy taxes. By way of background, prior to 1982, the Legislature charged the Berkeley County Board of Education and the Berkeley County Legislative Delegation with the task of preparing the annual operating budget for all schools within Berkeley County (the "County"). 1971 S.C. Acts 1118. In 1982, the Legislature repealed the previous legislation regarding the budgetary process for the District and enacted new legislation placing authority to prepare the operational budget and levy taxes solely in the hands of the Board.

> Notwithstanding any other provision of law, the Berkeley County Board of Education is empowered to prepare an operational budget for the school district and to set the necessary tax millage for general school purposes of the district as reflected in the budget. For this purpose, the board shall furnish to the Auditor and Treasurer of Berkeley County before the second day of September of each year the school budget of the district for the ensuing year together with a certification as to the tax millage set by the board in order to finance

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> the general school purposes of the district for that year as reflected in the budget. This tax levy shall be assessed and collected in the same manner as other ad valorem property taxes are assessed and collected.

1982 S.C. Acts 3435. Furthermore, the Legislature enacted general law in 1995 dealing with the adoption of budgets by local governments, special purpose districts, and other political subdivisions. S.C. Code Ann. § 6-1-80 (2004). This section provides:

> (A) A county, municipality, special purpose or public service district, and a school district shall provide notice to the public by advertising the public hearing before the adoption of its budget for the next fiscal year in at least one South Carolina newspaper of general circulation in the area. This notice must be given not less than fifteen days in advance of the public hearing and must be a minimum of two columns wide with a bold headline.
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> (B) The notice must include the following:
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> (1) the governing entity's name;
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> (2) the time, date, and location of the public hearing on the budget;
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> (3) the total revenues and expenditures from the current operating fiscal year's budget of the governing entity;
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> (4) the proposed total projected revenue and operating expenditures for the next fiscal year as estimated in next year's budget for the governing entity;
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> (5) the proposed or estimated percentage change in estimated operating budgets between the current fiscal year and the proposed budget;
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> (6) the millage for the current fiscal year; and
>
> (7) the estimated millage in dollars as necessary for the next fiscal year's proposed budget.

(emphasis added).

Given, this background, we address Mr. Royce's seven concerns as follows:

> 1. During the budgeting process, it was never publicly announced, though the district knew, that a massive tax increase would result from the proposed budget. To my knowledge, never in the history of the state has a taxing body levied this amount of a property tax increase without first publicly informing the tax payers.

In our review of the statutory authority cited above, we did not discover a provision specifically pertaining to the Board or any general law applicable to school districts requiring a public announcement of a tax increase. However, section 6-1-80 cited in full above, requires a public hearing prior to the adoption of the District's budget, as well as, notice of such a hearing in "a South Carolina newspaper of general circulation in the area" at least fifteen days prior to the hearing. Additionally, the notice must contain information regarding current year revenues and millage rates verses budgeted revenues and millage rates. Mr. Royce attached a copy of the affidavit of publication to his letter, which indicates the District published the notice in The Post and Courier on June 13, 2005 advertising a public hearing to be held on June 28, 2005. The notice appears on its face to meet all of the requirements for notice set forth in section 6-1-80 of the South Carolina Code. Accordingly, although the District does not appear to be required to give notice of a potential change taxes, section 6-1-80 requires the District to hold a public hearing upon sufficient notice prior to the adoption of its operational budget, which we presume would have a direct impact of the taxes levied.

> 2. During the budgeting process, it was never announced to several members of the School Board that a tax increase would result from the proposed budget. To my knowledge, never in the history of the state has a taxing body not known the level of taxation they were assessing the property owners prior to passing a budget.

The enabling legislation does not indicate an individual or an entity is required to inform the Board of any tax increase resulting from a budget adopted by the Board. Furthermore, the enabling legislation empowers the Board to prepare the operating budget for the District and "to set the necessary tax millage." 1982 S.C. Acts 3435. "In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996). Thus, according to a plain reading of the enabling legislation, the Legislature placed the responsibility of developing the budget and levying taxes to fund the budget on the Board. Therefore, we must presume the Board, in the exercise of its duties, knew the tax impact of the budget.

> 3. In discussion with Jim Rozier [, the Berkeley County Supervisor,] I discovered that a dialog had taken place between the school

> district's Chief Financial Officer, Brantley Thomas and the Assessor's office. The district, at least the CFO, was informed of the dollar amount increase the school district would receive as a result of the reassessment. That amount was to be a ten million dollar "windfall" over the prior year. When Mr. Thomas was informed of that number, his statement was, "We can use the money." This conversation and this figure was never discussed with the school board.
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> Mr. Rozier has since stated that the school district has received nearly $40 million more dollars than the prior year. The School District had prior knowledge of the tax impact and chose not to share the information with anyone. This has resulted in a "breach of trust" between the property owners and the School Board and this resulted from a "breach of trust" between the superintendent and some members of the School Board.

In addressing these concerns presented by Mr. Royce, as we stated in response to his second concern above, the adoption of the annual operating budget and the levying of the associated taxes is the responsibility of the Board. Additionally, although information from the District's CFO and the Assessor's Office may be helpful in the Board's decisions on the budget, we find no legal authority requiring either of these individuals to discuss their knowledge with the Board. The ultimate decision as to whether the budget should be adopted rests with the Board.

With regard to the alleged breach of trust by the Board and the Berkeley County Superintendent (the "Superintendent"), we initially find neither the Board nor the Superintendent subject to a duty to disclose the specific tax impact, although we presume such information would be addressed in the public hearing on the budget. In addition, for an individual to be charged with criminal breach of trust, the State must prove the existence of a trust relationship. State v. Parris, 363 S.C. 477, 482, 611 S.E.2d 501, 502 (2005). "A trust is an arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit." Id. Under the information provided, we are unsure what basis the State would have to bring charges against the Board or the Superintendent. Furthermore, because this Office does not have the authority of a court, the Attorney General cannot investigate or determine facts. Op. S.C. Atty. Gen., April 29, 2005. Thus, whether or not the Board's or the Superintendent's actions constitute breach of trust is for a court, not this Office, to decide.

> 4. My Fourth piece of evidence is that prior to the Board agreeing to the "alternative financing package" that exceeded the 8% cap imposed by the legislature for the new school construction and renovations; we met with the bonding company. They stated with

> graphs and charts and in no uncertain terms that the schools could be built and renovations made with no tax increase as long as Berkeley County showed a 5% increase in tax revenues. We were told that 5% growth would "more than cover" the payments for the 25 year bonds. Those were the terms to which we agreed.
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> The number of mills necessary to accomplish the payments in 2004 was 60 mills. With the 2005 property reassessment by the county, we had a 45% increase in the tax income. The millage should have been rolled back to accommodate the massive $10 million dollar "windfall" increase, but it was not. That means that 20 mills were kept by the school district without informing anybody. The value of a mill is around a half a million dollars.
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> I was told in a meeting with the superintendent that it was his decision, not the Board's to keep the building fund taxes at the 60 mill level. Later questioning in public, it was revealed that the money had been spent. This anomaly needs to be investigated by state law enforcement auditors.

Initially, we address the Board's decision to adopt a budget that included funding for the construction of new schools and the renovation of existing schools over the cost told to the Board by a bonding company. Our Supreme Court recently stated in Davis v. Greenwood School District 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005) (citations omitted):

> In general, courts will not disturb matters within the school board's discretion unless there is clear evidence of corruption, bad faith, or a clear abuse of power. Furthermore, an appellate court will not substitute its judgment for that of the school board's in view of the powers, functions, and discretion that must necessarily be vested in such boards if they are to execute the duties imposed upon them.

The enabling legislation cited above clearly indicates the adoption of an annual operational budget is within the Board's discretion. Thus, should a court review the Board's decision to adopt the 2005 budget or its decision to levy taxes such to support that budget, it would give great discretion to the Board's determinations. In addition, we are neither apprised as to what the Board was told prior to its decision to adopt the budget, nor is this Office in a position to investigate and determine such facts. Op. S.C. Atty. Gen., September 26, 2005 ("[A]n opinion of the Attorney General cannot investigate or determine facts."). Thus, we cannot ascertain what the Board considered in making such a determination.

Next, we understand Mr. Royce takes the position that the prior year millage for capital projects should have been decreased due to the increase in property values per the reassessment. Section 6-1-320 of the South Carolina Code provides general limitations with regard to the millage rates a local governing body may impose. In addition, this provision states specific requirements with regard to millage rates in years of reassessment. S.C. Code Ann. § 6-1-320.

> (A) Notwithstanding Section 12-37-251(E), a local governing body may increase the millage rate imposed for general operating purposes above the rate imposed for such purposes for the preceding tax year only to the extent of the increase in the average of the twelve monthly consumer price indexes for the most recent twelve-month period consisting of January through December of the preceding calendar year. However, in the year in which a reassessment program is implemented, the rollback millage, as calculated pursuant to Section 12- 37-251(E), must be used in lieu of the previous year's millage rate.

Section 12-37-251(E) of the South Carolina Code (2000) provides:

> Rollback millage is calculated by dividing the prior year property tax revenues by the adjusted total assessed value applicable in the year the values derived from a countywide equalization and reassessment program are implemented. This amount of assessed value must be adjusted by deducting assessments added for property or improvements not previously taxed, for new construction, and for renovation of existing structures.

However, section 6-1-320(D) states:

> The restriction contained in this section does not affect millage that is levied to pay bonded indebtedness or payments for real property purchased using a lease-purchase agreement or used to maintain a reserve account. Nothing in this section prohibits the use of energy-saving performance contracts as provided in Section 48-52-670.

From Mr. Royce's letter, we gather the Board decided to maintain the millage rate used for payments associated with the District's building fund at 60 mills despite the increase in the tax revenue that would result from the reassessment. He argues the millage should have been rolled back to equalize revenues prior to the reassessment. However, in accordance with section 6-1-320(D), if these funds are used for the payment of bonded indebtedness, used to make payments on

lease-purchase agreement, or used to fund a reserve account, the millage limitations set forth in 6-1-320(A) do not apply and the Board may set the millage as it deems appropriate. Mr. Royce's letter indicates these taxes are to be used to pay bond indebtedness, and therefore, the 60 mills levied for the building fund would be exempt from the limitations set forth in section 6-1-320(A). Moreover, section 6-1-320(C) of the South Carolina Code (2004) allows the Board to override the millage rate limitations by a positive majority vote. The only requirement, other than the vote requirement, is a meeting open for public comment after sufficient notice of such meeting. Thus, regardless of what the taxes are to be used for, the Board may impose a millage rate higher than that allowed under section 6-1-320(A) if it satisfies these requirements.

Finally, with regard to Mr. Royce's assertion that the Superintendent told the Board that he is entitled to retain the building fund taxes at 60 mills, we again reiterate that pursuant to the Board's enabling legislation, it has authority to levy taxes. Thus, Mr. Royce is correct in his assertion that the Superintendent does not have authority to determine the building fund millage. However, because we cannot sit as a court, investigating and determining the facts, we cannot address whether Superintendent or the Board acted in levying the tax. But, if the Superintendent set the millage rate without approval from the Board, he or she would be acting without authority and a court would likely find such actions invalid.

> 5. Next, according to the Berkeley County Assessor's Office, a revenue neutral number for the reassessment year would have been a 24 mill rollback to begin the budget process. That number was never on the table. The maximum rollback discussed was 10 mills and ultimately 4 mills.
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> Again, the tax impact of this budget was never discussed with the Board or the public. I have included a copy of the public announcement that was placed in a local newspaper prior to the budget meeting. As you will see, there are no indications of a tax increase. Also included with this request are spreadsheets documenting school tax receipts from the Assessor's office and school expenditures the Treasure's office.
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> The more serious problem with the public announcement is that it does not represent the actual numbers that were given to the School Board or used in the final draft of the budget. Conflicting figures were rampant throughout the entire budgeting process.
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> The ad states that the projected General Fund Budget is listed at $151, 575,361, an increase over last year of $9,605,839 or 6.77%. The millage rate is listed at 124, down 10 mills from 134 or -7.46%.

> During the Budget Meeting, the superintendent presented the board with a budget totaling roughly 158.5 million. He stated that reassessment and increased funding the state will allow the millage rate to be reduced by 5 mills from 134 to 129.
>
> During the Special Budget meeting the amount presented was 154.5 million and the millage is decreased from 134 to 130.

First, we found no requirement in section 6-1-80 mandating the disclosure in the notice for public hearing of the amount of a tax increase resulting from the proposed budget considered by a governing body. However, section 6-1-80 requires the inclusion of current and projected revenues and expenditures and the percentage change between the two periods. Thus, we presume such information may apprise an individual reading the notice of the potential tax impact.

Second, Mr. Royce voiced his concern that the numbers contained in the notice do not represent the numbers given to the school board in the final draft of the budget. The notice requirement, as presented in section 6-1-80(B)(4), only requires a statement of the "proposed total projected revenue and operating expenditures for the next fiscal year as estimated in next year's budget . . ." (emphasis added). "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." Brown v. Bi-Lo, Inc., 354 S.C. 436, 439, 581 S.E.2d 836, 838 (2003). "The intent of the legislature should be ascertained primarily from the plain language of the statute." Gordon v. Busbee, 367 S.C. 116, 119, 623 S.E.2d 857, 858 (Ct. App. 2005). Thus, the plain language of the statute indicates such numbers are not definitive of what may appear in the final budget. Furthermore, we do not believe the Legislature intended such to be the case. By requiring the District to hold a public hearing prior to the Board's adoption of a budget, the Legislature indicates its intent for the public to have an opportunity to influence the budget process, which may result in changes to the figures initially posted in the notice. Accordingly, we do not believe differences between the figures posted in the notice for public hearing and those presented in the final budget would render the budget process invalid.

> 6. The meeting laws specified for public input on budgets dictating tax increases were not strictly followed. A separate hearing to discuss a tax increase was not held by the school district. No prior notification was made to the public or the school board specifying a "dollar amount" of the tax increase that was dictated by the budget. A meeting was held, adjourned, and reopened for a vote without a word being said about the tax increase on our residents. This was underhanded and should be closely examined for legal inaccuracies.

We are unaware of a meeting law requiring a separate hearing to discuss a tax increase. We are only aware of the public hearing required by section 6-1-80 of the South Carolina Code prior to

the Board's adoption of the budget. The information provided in Mr. Royce's letter indicates the District held a public hearing prior to the adoption of the budget by the Board. Therefore, we presume the District satisfied the public hearing requirements under this section. Additionally, we not aware of any legal requirement mandating the Board to discuss the potential tax increase on residents should it adopt a particular budget. However, we again note that the tax impact is certainly a potential topic for discussion for the required public hearing.

> 7. When the tax implications of the budget were realized, Mr. Jim Rozier sent a letter to the superintendent stating his concerns. I have included a copy of the superintendent's reply.
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> The letter has several inconsistencies. In the first paragraph, what was "omitted" was informing the public that their taxes would be doubled. The other issues addressing the district's debt and meeting anomalies are discussed above.

We are unsure as to the legal issue posed by this section of Mr. Royce's letter. However, we find no legal provision requiring the Superintendent to inform the Berkeley County Supervisor of a potential tax increase.

Conclusion

We are cognizant of Mr. Royce's feeling that he, as a member of the Board, was misinformed by various parties concerning the tax impact of the 2005 budget adopted by the Board. However, we have very limited information from which to determine whether his claims are valid. Additionally, for the most part, this Office is without jurisdiction to consider such claims, as they are deeply rooted in fact, which we do not have the ability to examine. August 19, 2005 ("[A]n opinion of the Attorney General cannot determine facts or resolve factual issues."). Accordingly, such determinations are best left to the courts. In addition, for these same reasons, we are unable to give you a definitive answer to your question as to the legality of the procedures used by the Board in levying taxes in 2005.

Nevertheless, we inform you that the Legislature gave the Board specific authority to adopt an annual operational budget and implement such a budget by the levy of taxes. 1982 S.C. Acts 3435. In addition, our courts have recognized that a decision by a school board must be given great deference and will only be subject to challenge upon a finding of corruption, bad faith, or a clear abuse of power. Although, we find neither the Board nor the Superintendent have a specific duty to inform the public of the specific tax consequences of the adoption of the District's 2005 budget, the Board must, pursuant to section 6-1-80 of the South Carolina Code, hold a public hearing after proper notice prior to its adoption of the budget. Based on our review of information provided by Mr. Royce, the Board satisfied these requirements. Furthermore, although the Legislature set

limitations on school district millage rates, it also exempted millage levied to pay bonded indebtedness and payments under a lease-purchase agreement for real property from these limitations and gave the Board statutory authority to set millage rates above the statutory limitations if it chose to by a positive majority vote. We regret we cannot provide you with clear answers to your questions, but hope that the information provided to you in this opinion proves helpful to you and Mr. Royce.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General