July 11, 2007

The Honorable Raymond E. Cleary, III
Senator, District No. 34
3577 Marion Lane
Murrells Inlet, South Carolina 29576

Dear Senator Cleary:

We understand from your letter to Attorney General Henry McMaster you desire an opinion as to the impact of the amendments to section 6-1-320(B) of the South Carolina due to the passage of the Property Tax Reform Act in 2006 on section 59-21-1030 of the South Carolina Code. You state:

> During the 2007 Legislative Session and with the passage of Property Tax Reform Act 388 of 2006, varying interpretations still surround the deletion of the per pupil maintenance of effort requirement of Section 59-21-1030 from Section 6-1-320(B) effective January 1, 2007.
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> I understand that those representing local governing bodies responsible for the levying of local millage consider Section 59-21-1030 repealed by the deletion of the ability to increase millage to meet this requirement.
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> I also understand that some consider the millage limitations provided in Section 6-1-320 sufficient to meet the requirements of Section 59-21-1030 without the specific authority to raise additional mills to meet the requirements.

Thus, you ask "whether Section 59-21-1030 is repealed through the passage of the Property Tax Reform Act 388"?

Law/Analysis

Section 59-21-1030 of the South Carolina Code (2004) is contained among the provisions of the Education Improvement Act of 1984 (the "EIA"). The EIA is designed to provide

maintenance and support to local school districts through the levy of sales, use, excise, and accommodations taxes. Section 59-21-1030, however, requires local school districts to maintain a minimum level of per pupil financial support as a condition of receiving EIA funds. Section 59-21-1030 reads as follows:

> Except as provided in this section, school district boards of trustees or any other appropriate governing body of a school district shall maintain at least the level of per pupil financial effort established as provided in fiscal year 1983-84. Beginning in 1985-86, local financial effort for noncapital programs must be adjusted for an inflation factor estimated by the Division of Research and Statistical Services.
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> Thereafter, school district boards of trustees or other governing bodies of school districts shall maintain at least the level of financial effort per pupil for noncapital programs as in the prior year adjusted for an inflation factor estimated by the Division of Research and Statistical Services. The county auditor shall establish a millage rate so that the level of financial effort per pupil for noncapital programs adjusted for an inflation factor estimated by the Division of Research and Statistical Services is maintained as a minimum effort. No school district which has not complied with this section may receive funds from the South Carolina Education Improvement Act of 1984 Fund. School district boards of trustees may apply for a waiver to the State Board of Education from the requirements of this section if:
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> > (1) the district has experienced a loss in revenue because of reduction in assessed valuation of property or has had a significant increase in one hundred thirty-five average daily membership;
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> > (2) the district has experienced insignificant growth in revenue collections from the previous year;
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> > (3) the district has demonstrated for one year that it has achieved operating efficiencies and all education requirements are being met;
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> > (4) a midyear revenue shortfall results in a reduction of funds appropriated in accordance with Chapter 20 of Title 59 (The Education Finance Act). A decline in the measured academic achievement of the students must immediately cause the State

> Board of Education to void all waivers provided under this section and make the district ineligible to apply for any waivers under this section for two consecutive years. If the decline in student achievement occurs, the district shall revert to the minimum effort requirement, adjusted for the prior years inflation factor. Waiver (4) does not apply to funds needed to meet the Minimum Salary Schedule for teachers in South Carolina. A school district is eligible for an annual renewal of the waiver provided the district meets one of the above criteria and meets the minimum effort requirement of the previous year and at least the minimum required effort of the Education Finance Act.

As you mentioned in your letter, in 2006 the Legislature passed the Property Tax Reform Act, amending among other provisions, section 6-1-320(A) of the South Carolina Code. The Legislature again amended this provision during the 2007 legislative session. As amended, this provision now reads as follows:

> (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 indices for the most recent twelve-month period consisting of January through December of the preceding calendar year, plus, beginning in 2007, the percentage increase in the previous year in the population of the entity as determined by the Office of Research and Statistics of the State Budget and Control Board. If the average of the twelve monthly consumer price indices experiences a negative percentage, the average is deemed to be zero. If an entity experiences a reduction in population, the percentage change in population is deemed to be zero. 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.
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> (B) Notwithstanding the limitation upon millage rate increases contained in subsection (A), the millage rate limitation may be suspended and the millage rate may be increased upon a two-thirds vote of the membership of the local governing body for the following purposes:
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> (1) the deficiency of the preceding year;

(2) any catastrophic event outside the control of the governing body such as a natural disaster, severe weather event, act of God, or act of terrorism, fire, war, or riot;

(3) compliance with a court order or decree;

(4) taxpayer closure due to circumstances outside the control of the governing body that decreases by ten percent or more the amount of revenue payable to the taxing jurisdiction in the preceding year; or

(5) compliance with a regulation promulgated or statute enacted by the federal or state government after the ratification date of this section for which an appropriation or a method for obtaining an appropriation is not provided by the federal or state government.

If a tax is levied to pay for items (1) through (5) above, then the amount of tax for each taxpayer must be listed on the tax statement as a separate surcharge, for each aforementioned applicable item, and not be included with a general millage increase. Each separate surcharge must have an explanation of the reason for the surcharge. The surcharge must be continued only for the years necessary to pay for the deficiency, for the catastrophic event, or for compliance with the court order or decree.

(C) The millage increase permitted by subsection (B) is in addition to the increases from the previous year permitted pursuant to subsection (A) and shall be an additional millage levy above that permitted by subsection (A). The millage limitation provisions of this section do not apply to revenues, fees, or grants not derived from ad valorem property tax millage or to the receipt or expenditures of state funds.

(D) 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.

(E) Notwithstanding any provision contained in this article, this article does not and may not be construed to amend or to repeal the

> rights of a legislative delegation to set or restrict school district millage, and this article does not and may not be construed to amend or to repeal any caps on school millage provided by current law or statute or limitation on the fiscal autonomy of a school district that are more restrictive than the limit provided pursuant to subsection (A) of this section.

S.C. Code Ann. § 6-1-320.

As part of the amendments to this provision under the Property Tax Reform Act, the Legislature rewrote subsection (B) containing the reasons for which a local governing body may suspend the millage rate cap established under subsection (A). 2006 S.C. Acts 3133. In making these amendments, the Legislature removed the provisions allowing a local governing body to exceed the millage rate limitation to "to meet . . . the per pupil maintenance of effort requirement of section 59-21-1030." S.C. Code Ann. § 6-1-320 (Supp. 2004).

In an opinion recently issued to Charles Boykin, we considered the impact of Property Tax Reform Act (the "Act") on section 59-21-1030. Op. S.C. Atty. Gen., June 13, 2007. We enclosed a copy of that opinion for your convenience. As stated in that opinion, we first concluded the passage of the Act did not repeal section 59-21-1030. We determined "the Act does not make it impossible to comply with section 59-21-1030" and "[b]ecause the Act and section 59-21-1030 may be read to reconcile with one another, we believe both are operative and the Act did not implicitly repeal section 59-21-1030." Id. We also addressed the impact of the revised section 6-1-320 on section 59-21-1030. Noting the fact that the Legislature specifically removed the exception to the millage rate limitation to satisfy the maintenance of effort requirement in section 59-21-1030, we found "the Legislature clearly indicates its intention to prevent school districts from exceeding the millage rate limitations set forth in subsection (A) based on a need to satisfy the local maintenance of effort requirement imposed by section 59-23-1030." Id. We added: "Moreover, we find none of the five exceptions currently in place allow a school district to exceed the millage rate limitation in order to raise additional funds to satisfy this requirement. Therefore, we do not believe a school district's need to satisfy the local maintenance of effort requirement under section 59-21-1030 provides an exception to the millage rate limitation contained in section 6-1-320." Id.

We believe our analysis in this prior opinion is correct. In reviewing the Act, we do not find any amendment under the Act that supports the contention that the Legislature intended to repeal section 59-21-1030, including the amendments to section 6-1-320. The amendments to section 6-1-320, by deleting the provision allowing school districts to exceed the millage rate limitation set forth under section 6-1-320(A) in order to maintain the per pupil maintenance of effort requirement under section 59-21-1030, simply indicate the Legislature's intention to eliminate this exception to justify exceeding the millage rate limitation. We do not believe these amendments indicate the Legislatures intention to repeal section 59-21-1030. The Legislature had the opportunity to repeal section 59-21-1030 in its passage of the Act, but it chose not to do so. Further and in accordance with our prior

opinion, we do not find these amendments cause section 59-21-1030 to conflict with section 6-1-320. As explained in our opinion to Mr. Boykin, a school district may continue to comply with section 59-21-1030 despite the passage of the Act. The fact that the school district may no longer use its compliance with section 59-21-1030 as a reason to exceed the millage rate limitation provided for under 6-1-320 does not render section 59-21-1030 inoperable. Therefore, we do not find the amendments to section 6-1-320 under the Act repeal section 59-21-1030.

Conclusion

Relying on our recent June 13, 2007 opinion, we continue to believe the Act does not repeal the per pupil maintenance of effort requirement set forth in section 59-21-1030. Specifically, we do not believe the amendments to section 6-1-320 pursuant to the Act repeal section 59–21-1030. To the contrary, we find the amendments to section 6-1-320(B) demonstrate the Legislature's intent to prevent local school districts from exceeding the millage rate limitations set forth in section 6-1-320(A) in order to meet the per pupil maintenance of effort requirement under section 59-21-1030.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General