ALAN WILSON
ATTORNEY GENERAL

February 19, 2013

The Honorable Curtis M. Loftis, Jr.
South Carolina State Treasurer
P. O. Box 11778
Columbia, South Carolina 29211

The Honorable Richard A. Eckstrom
South Carolina Comptroller General
305 Wade Hampton Office Building
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Columbia, South Carolina 29201

Dear Treasurer Loftis and Comptroller General Eckstrom:

You have requested our opinion regarding the interpretation of Act No. 292 of 1985. This Act authorizes the Richland-Lexington Airport Commission to issue general obligation bonds, not exceeding twenty million dollars, for construction and renovation purposes and for refinancing existing debt. As we understand it, the Airport Commission proposes to issue its remaining 10 million dollars in its general obligation bond authority, to refund revenue bonds which it issued in 2001. Your questions relate to whether Act No. 292 permits such issuance.

Concerns have been expressed regarding such proposed issuance, both by the Treasurer and by the Comptroller General, regarding such proposed issuance. The first concern "is whether the legislative intent of Act 292 was to allow the District to issue GO bonds almost twenty-eight years after the Act was approved and for the purpose of refinancing revenue debt that has no apparent relationship to the needs or debt identified by the General Assembly in Section 1 of Act 292." More specifically, Mr. Condon of the State Treasurer's Office writes as follows:

> In my view, the legislative intent was to authorize the issuance of up to 20 M of GO bonds for physical needs that existed at the time the Act was approved and/or to refinance revenue debt that was outstanding when the Act was approved. My view comes from the language of the Act. First, as seen in the quote above, the

> General Assembly said in Section 1 of the Act, "it has *now* been determined that the facilities are inadequate ... and *existing* revenue debt needs refinancing." Second, in Section 2, the General Assembly again references "refinancing *existing* debt." In addition, the District admits that the proposed GO bonds will be used to refinance Series 2001 A revenue bonds, which clearly were not "existing revenue debt" in 1985. Based on the language of the Act, the General Assembly appears to be authorizing the issuance of GO bonds for physical needs that existed in 1985 and/or revenue debt that was outstanding in 1985. If this was the legislative intent and because the District will use the proposed GO bonds to refinance revenue debt that was issued in 2001, the District would be *unable* to use the remaining 10 M of GO bond authorization from Act 292.
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> The second concern is whether the District may use the proceeds of the proposed 10 M GO bond offering to refinance outstanding bonds. Although refinancing is mentioned in Sections 1 and 2 of Act 292, Section 2(g) specifically lists the *permitted* uses of the bond proceeds. As seen by the above quote, none of the listed uses of the bond proceeds includes refinancing. Additionally, the General Assembly excluded all [other] uses by concluding the list of authorized uses with the phrase "and to no other purposes." Excluding refinancing as an eligible use could have been a scrivener's error, but the actual text of the Act does not include refinancing as an eligible use and specifically excludes all unlisted uses. Such specificity regarding eligible uses of the proceeds of the bonds seems to exclude the proceeds of bonds issued pursuant to Act 292 from being used to refinance the District's now outstanding revenue debt.

(emphasis in original).

The Comptroller General's Office shares each of the concerns expressed by the Treasurer's Office. In addition, Mr. Holly of the Comptroller General's Office points out that to permit the use of GO bonds to refinance revenue bonds (which do not pledge the credit of the District, while GO bonds do) would do indirectly what is not done directly.

Bond counsel, on the other hand, disagrees with these as being valid legal issues. Bond counsel argues that "[b]y refinancing, the District will reduce its operating cost for debt service by more than $3.5 million over the life of the bonds." Further, according to bond counsel,

> [w]e believe that through the enactment of Act No. 292 the General Assembly clearly authorized the issuance of the Commission of general obligation bonds to refinance revenue indebtedness, and that the refinanced debt is not required to have been outstanding at the time Act No. 292 was enacted. We have advised the

> Commission that we would be willing to deliver our unqualified approving opinion with respect to the issuance of bonds on this basis.

Bond counsel cites, among other authorities, Section 2-7-30(A), which states that all words in any act or joint resolution "importing the present tense shall apply to the future also."

Law / Analysis

Sections 1 and 2 of Act No. 292 provide in pertinent part as follows:

> SECTION 1. It has now been determined that the [Airport] facilities are inadequate and that new construction and land acquisition are needed and the existing facilities require enlarging, improving and extending and *existing revenue debt needs refinancing* and that the sum of twenty million dollars is necessary therefor. The General Assembly also finds that the United States Customs Service has established a customs facility at the district's air transportation facilities to accommodate international traffic, and it also finds that to better serve the international needs of the district it is desirable that it have the authority to operate a foreign trade zone and an inland port.
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> The General Assembly, therefore, has determined to authorize the commission to raise the additional sum through the issuance and sale of not exceeding twenty million dollars of general obligation bonds of the district and to establish and operate a foreign trade zone and inland port.
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> SECTION 2. In order to provide funds for refinancing existing debt and the construction, enlargement, improvement, extension, renovation, or land acquisition for the construction of suitable airport facilities within the Richland-Lexington Airport District, the commission may issue not exceeding twenty million dollars of general obligation bonds of the district. All or any general obligation bonds issued pursuant to this act shall confirm to the following specifications and are subject to the following procedures:
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> (a) They must be issued from time to time as several separate issues. Not more than ten million dollars of the bonds must be issued prior to July 1, 1987 ....

It is our understanding that ten million dollars of the GO authority was used and that ten million dollars has not yet been used. The question is whether Act No. 292 permits such ten million dollars to be used now and for the purpose of refinancing outstanding revenue debt.

In construing a statute, such as Act 292, we have advised that the following rules of construction are applicable:

> [T]he cardinal rule in statutory interpretation is to ascertain the intent of the Legislature and to accomplish that intent. *Hawkins v. Bruno Yacht Sales, Inc.*. 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. *Greenville Baseball v. Bearden*. 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. *Id.* An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." *U.S. v. Rippetoe*, 178 F.2d 735, 737 (4th Cir. 1950). This Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. *Sloan v. SC Board of Physical Therapy Exam.*, 370 S.C. 452, 636 S.E.2d 598 (2006).

Op. S.C. Atty. Gen., 2013 WL 391718 (January 15, 2013). Moreover, in Opinion No. 89-3, 1989 WL 406093 (January 10, 1989), we further stated:

> In construing a statute, both the courts and this Office will attempt to ascertain and effectuate legislative intent if at all possible. *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980). Language used in a statute will be given its plain and ordinary meaning. *Worthington v. Belcher*, 274 S.C. 366, 264 S.E.2d 148 (1980). All words importing the present tense will also apply to the future, generally. *Schumacher v. Chapin*, 228 S.C. 77, 88 S.E.2d 874 (1955). An interpretation which avoids absurd results is favored. *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778 (1964) ....

And, as we noted in *Op. S.C. Atty. Gen.*, Op. No. 82-41, 1982 WL 155010 (June 9, 1982):

> Where a statute is expressed in broad and general terms and words of present or future tense are used, it will be applied, not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter, 82 C.J.S., *Statutes*, § 319.

> In addition, § 2–7–30 provides further guidance as to the construction of statutes. It states 'words 'importing the present tense shall apply to the future also'. Hence, the South Carolina Code of Laws specifically calls for such prospective or expansive treatment where applicable.
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> It is a settled rule, though, that tax laws are to be strictly construed against the State and in favor of the taxpayer, and where there is reasonable doubt as to the meaning of a revenue statute, the doubt is resolved in favor of those taxed. *Colonial Life & Accident, Inc. v. South Carolina Tax Commission*, 233 S.C. 129, 103 S.E. 2d 908 (1958).

In our review of Act No. 292 of 1985, we believe the Treasurer and the Comptroller General have valid concerns. The Act is inartfully drafted and is indeed written in the present tense, as if the General Assembly intended to meet an immediate need existing in 1985. As both constitutional officers correctly point out, the Act speaks of refinancing "existing debt." As our Supreme Court stated in *Rhame v. Durant,* 93 S.C. 217, 76 S.E. 611 (1912), the ordinary meaning of the word "existing" refers to "things in the present time," although such term may be viewed as relating to future events, depending upon the circumstances. And, as stated in *Gorman Const. Co. v. Planning & Zoning Comm.*, 644 A.2d 964 (Conn. 1994), "the word 'existing' is existing at the present time, having actual being, presently ready to use." Quite clearly, a literal reading of the Act may well lead to the conclusion that the statute may not presently (years later) be used to issue general obligation bonds for the purposes specified.

Nevertheless, there are several specific reasons we believe a court would conclude otherwise. To interpret the statute as limited to the time frame of 1985 or thereabout, is inconsistent with the general rule that a court will not read a statute to expire by disuse. As our Supreme Court recognized in *Cain v. Daly*, 74 S.C. 480, 55 S.C. 110, 112 (1906), a statute is generally not repealed by nonuser:

> Courts should hesitate long to declare an act on our statute books obsolete from desuetude. *O'Hanlon v. Myers*, 10 Rich. Law 130. The better view is that a statute is in force until repealed by the proper authority, either expressly or by clear implication, as, for example, by the enactment of inconsistent legislation.

In *Op. S.C. Atty. Gen.*, 1970 WL 16827 (May 13, 1970), we applied this rule even though the original purpose of the statute had been fulfilled through termination of the federal law upon which the state statute was based. We stated the general rule that "a statute is no repealed by nonuser," thus concluding as follows:

> In the opinion of this office Act No. 1001 of the 1968 Acts clearly does not contain a repealer clause nor is there any indication of a legislative intent that this act was to automatically terminate upon the expiration of Public Law 89–749, 42 U.S.C.A., Section 246, et seq. The question you have propounded further does not present the question of repeal of Act No. 1001 by implication, as there has been no subsequent state statute enacted on this particular subject. In the opinion of this office, Act No. 1001, supra, will, after June 30, 1970, continue to constitute one of the general and permanent laws of the State of South Carolina until such time as this provision is specifically repealed by an act of the General Assembly, or unless Act No. 1001 is omitted from the subsequent adoption of the Code of Laws of South Carolina. See: Vol. 17, West's South Carolina Digest, Statutes, Key 167(2).

Secondly, it is a general rule of interpretation that "[p]rovisions of an act do not stand alone, but must be read in the context of an act or regulations as a whole." *Op. S.C. Atty. Gen.*, 2012 WL 2364243 (June 12, 2012) (referencing *Byerly v. Connor*, 307 S.C. 441, 415 S.E.2d 796 (1992)). In this instance, while Act No. 292 speaks of "existing" debt, the statute further provides in Section 2(a) that the twenty million dollars in general obligation bonds "must be issued from *time to time* as *several separate issues.*" (emphasis added). Further, Section 2(a) provides that "[n]ot more than ten million dollars of the bonds may be issued prior to July 1, 1987." Thus, while the words used in Sections 1 and 2 relate to "existing" debt, other parts of the statute clearly contemplate that the 20 million dollars in general obligation debt would be issued over the course of time. Thus, the Legislature, as indicated in the foregoing language contained in the statute, fully expected that the statute would continue in existence.

Third, the general rule of interpretation is that a statute which uses the present tense intends to encompass future events. Thus, when Act 292 references the refinancing of "existing" debt, the law generally presumes that the statute is not limited to debt existing at the time of passage, but future refunding of other debt as well. An Opinion of this Office, Op. No. 89-3 (January 10, 1989), *supra*, well illustrates this principle. There, the question presented was whether Act No. 590 of 1988, which authorized municipalities and counties to adopt zoning ordinances providing for the landscaping, protection and regulation of trees, which exempted public utilities and power suppliers "would apply only to existing utility lines, or whether new lines yet to be erected would also be covered by the exemption." The pertinent statute referenced electric supplier "*maintaining* state clearance around utility lines ...." (emphasis added). We referenced the general rule of construction that "[a]ll words importing the present tense will also apply to the future, generally." We concluded as follows:

> Applying the foregoing rules of statutory construction to the above-cited provisions of Act No. 590 of 1988, it would appear that while the General

> Assembly considered the environmental agricultural, aesthetic, scenic and preservation value of trees, the General Assembly also recognized the public safety aspect of utility companies and electrical suppliers maintaining safety around utility lines; the unambiguous language clearly states these considerations. The use of the present tense, without reference within the exception to the future tense for any activity, mandates application of the exception in the future. *Schumacher v. Chapin, supra.* It would be absurd to interpret the statute as applying only to electrical or utility lines presently in existence, as the same safety considerations existing presently will also exist as to future utility or electrical lines. Otherwise, the General Assembly would be required, on a continuing basis, to update the provisions of Act No. 590 of 1988, periodically to cover electrical or utility lines erected since the last legislative act; this too would be an absurd result and would effectively mean that the General Assembly has acted in a futile manner in adopting the provisions of Act No. 590 of 1988.
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> Based on the foregoing, it is the opinion of this Office that the terms of Act No. 590 of 1988, as cited above, would apply equally to electrical or utility lines existing on the effective date of the act, as well as to those electrical or utility lines to be erected in the future.

Fourth, it is well recognized that "[t]he intent of the legislature is determined in light of 'the overall climate in which the legislation was amended.'" *Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 385, 556 S.E.2d 357, 361 (2001) (quoting *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994)). Also, an ambiguous statute, which Act No. 292 is, will be construed in light of what the words meant to those who used them and the history of the enactment. *Crescent Mfg. Co. v. Tax Comm.*, 129 S.C. 480, 124 S.E.2d 761 (1924). Here, it is noteworthy that the legislative findings of Act No. 292, as expressed in Section 1 of the Act states as follows:

> It has now been determined that the facilities are inadequate and that new construction and land acquisition are needed and the existing facilities require enlarging, improving and extending *and existing revenue debt needs refinancing* and that the sum of twenty million dollars is necessary therefor.

In accordance with Section 2(a)'s requirement that "not more than ten million dollars of the bonds may be issued prior to July 1, 1987" and that the bonds "be issued from time to time as several separate issues," the District used the first ten million dollars in bond authority for the construction and rebuilding authorization. However, it is our understanding that no bond proceeds were used for refinancing of debt. The fact that no authority was used for refinancing of debt at the time of enactment, or even thereafter – the second broad reason for any bond issuance by the District – indicates that District officials at the time did not believe the statute required the District to "use it or lose it" with respect to its bond authority. The "Court generally

gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

Fifth, we concur with bond counsel's analysis that "if the General Assembly intended to limit the refinancing to debt that was outstanding in 1985, it could have easily done so through the use of words or phrases such as 'refinancing debt outstanding on May 2, 1985' or words or phrases of similar effect." *See McCreight v. Zemp,* 49 S.C. 78, 26 S.E. 984 (1897) ("The framers of our present constitution recognized the full force of this distinction between debts already created and those to be created."). As bond counsel also recognizes, § 2-7-30 supports the argument that Act No. 292 must be interpreted to govern future events, including debt created after the Act's passage.

We also concur with bond counsel that § 11-15-440 provides additional support for the District's position. Such provision states:

> The governing body of any issuer may issue general obligation bonds of such issuer to such extent as such issuer shall be indebted by way of principal, interest, and redemption premium upon any outstanding general obligation *or revenue bonds*, maturing or called for redemption, less all sinking funds or other monies on hand applicable thereto.

(emphasis added).

Nor do we believe that the fact that Section 2(a) does not mention refinancing of revenue bonds is determinative. "The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose." *Laurens County Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992). Sections 1 and 2 do reference "existing debt" and the fact that such additional purpose is not mentioned in Section 2(a) is, in our judgment, not determinative.

Finally, we agree with bond counsel that Act No. 270 of 2012 does not repeal by implication Act No. 292 of 1985. Bond counsel's analysis is as follows:

> No express language is found in the 2012 Act to amend or repeal Act No. 292 and we do not believe that the 2012 Act can be read as repealing Act No. 292 by implication. If one accepts the view that the 2012 Act repealed Act No. 292, then not only has the District lost the authority to issue $20 million of general obligation debt, but it has also lost the authority to provide for foreign-trade zones and inland port facilities.

> Act No. 292 and the 2012 act are two separate and distinct acts. The 2012 Act provides certain powers and authorizations for the Commission and District. Act No. 292 provides additional powers and authorizations. More specifically, the General Assembly states, in part, in Section 2(h) of Act No. 292 that "[t]he powers and authorizations conferred upon the commission are *in addition to all other powers and authorizations* previously vested in it." Emphasis added. Thus, the Commission has the authority to issue general obligations under Section 55-11-340(18), not to exceed $2,700,000 and the authority under Act No. 292 to issue general obligation bonds, not to exceed $20 million.
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> The 2012 Act re-enacted and amended the enabling legislation of the District (Act No. 681 of 1962, as amended to the date of enactment of the 2012 Act). The title of the 2012 Act, which states the general purposes for which it was enacted, makes no reference to the authorization of general obligation debt.... Act No. 681 of 1962 authorized the Commission to issue up to $2.7 million of general obligation bonds for specified purposes. By subsequent Acts ... the General Assembly authorized the issuance of incremental principal amounts of additional general obligation bonds, finding at the time of each incremental authorization that the bonds authorized by the prior Acts had been issued and the proceeds of such bonds had been applied as provided by law. This practice by the General Assembly of authorizing incremental principal amounts of bonds after previously authorized bonds had been issued, coupled with the legislative findings made at the time of enactment of each of the Acts, is inconsistent with the Memorandum's statement that the authorization in the 2012 Act "reaffirmed" the District's enabling $2.7 million general obligation bond limit. The provisions for the issuance of $2.7 million of bonds is separate and distinct from the authority of Act No. 292 to issue bonds.

Conclusion

Act No. 292 of 1985 is ambiguous and suffers from numerous draftsmanship problems. Due to the ambiguities of the Act, we share the concerns expressed by the Treasurer and the Comptroller General that there is at least a possibility that the statute may be interpreted as limited to the time of its enactment. Accordingly, there should be, at the very least, legislative clarification here.

However, having said that, we advise that our interpretation is that a court would more likely conclude that the District possesses the authority to refund its 2001 revenue bonds through its GO bond authority remaining from Act No. 292. While this is a close question, the Act must be interpreted with common sense and pursuant to the requirements of § 2-7-30(A), that the use

of the present tense in an Act shall be deemed to relate to the future also. Our 1989 Opinion, No. 89-3, applied this general rule in concluding that it would be incorrect to limit the statute in question there to circumstances existing at the time the statute was enacted. Moreover, Section 2(a) of Act No. 292 uses language which speaks of future events by providing that the GO bonds "must be issued from time to time as several separate issues" and that only ten million dollars of the GO bond authority may be used prior to July 1, 1987.

Finally, as we pointed out in our 1970 opinion, referenced above, courts are extremely hesitant to determine that a statute expires by disuse. Moreover, the District did not earlier use any bond authority under Act No. 292 to refund "existing debt." In our view, we must be cognizant of the administrative interpretation that Act No. 292 does not mandate such earlier use.

Again, while our conclusion is not free from doubt, we concur with bond counsel's analysis that a court would most probably conclude that the District may use its GO bond authority for the purposes specified – to refund its 2001 revenue bond debt. Of course, our opinion herein expresses no view as to the policy of the District's action.

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an

cc: William M. Musser, Esquire
J. Michael Ey, Esquire