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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

September 9, 2002

Kenneth R. Young, Esquire
21 West Calhoun Street
Sumter, South Carolina 29150

Dear Mr. Young:

In your letter, you note that "[i]n 1965 an act was passed by the legislature creating the Dalzell Water District of Sumter County." Upon creation of the Water District, by-laws were enacted and approved on April 8, 1965. By way of background, you state the following:

> [o]ur problem arises on the question of who is eligible to vote in annual elections. The act which created the water district in Section 3 provides "the board shall consist of five resident electors of the area who shall be appointed by the governor upon the recommendation of the majority of the Sumter Legislative Delegation, including the senator. The delegation shall recommend only such persons as were nominated at the meeting of the residents of these areas and certified to the delegation by the chairman and secretary of the meeting." Section 4, paragraph 6 authorizes the district board to "make by-laws for the management and regulation of its affairs."
>
> The by-laws of the water district provides under Article 5, Section 1 "the annual meeting of the users of the area served shall be held in the office of the district". Article 6, Directors and Officers, said under Section 1, "the board of directors of this district shall consist of five users, all of whom shall be residents of the district."

You thus question the apparent "inconsistency in the act which created the water system which states that the delegation shall recommend only such persons as were nominated at a meeting of the residents of the service areas and the by-laws which have to be users." Your specific question is: "[d]oes the act supersede the by-laws or because the board was given authority to create its by-laws do the by-laws control?"

Law / Analysis

Our Supreme Court has held that special acts, such as Act No. 149 of 1965, creating the Dalzell Water District, "remain valid until repealed or superseded by general law." Berry v. Weeks,

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279 S.C. 543, 546, 309 S.E.2d 744, 746 (1983). We have also recognized that "[g]overnmental agencies or corporations, municipal corporations, counties and other political subdivisions can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly, inherently or impliedly." Op. Atty. Gen., January 8, 1999; Op. Atty. Gen., September 22, 1988. As our Supreme Court has counseled, "enabling legislation is not merely precatory, but prescribes the parameters of conferred authority." Bostic v. City of West Columbia, 268 S.C. 386, 390, 234 S.E.2d 224, 226 (1977).

Similarly, it has been long recognized that political subdivisions cannot enact an ordinance repugnant to the State Constitution or statutes. Central Realty Corp. v. City of Sptg., 218 S.C. 435, 63 S.E.2d 153 (1951); Law v. City of Sptg., 148 S.C. 229, 146 S.E. 12 (1928). Even though the Home Rule Act expressly authorizes local governments to adopt ordinances, regulations and resolutions," such must not be inconsistent with the Constitution and general laws of this State. See, § 4-9-30 (counties); § 5-7-30 (municipalities). Likewise, with respect to the by-laws of a water district, this Office has recognized that "[i]n the event of a conflict between state law and a provision of the District's by-laws, state law would prevail." Op. Atty. Gen., February 5, 1987. In that same opinion, quoting the Supreme Court in Law v. City of Sptg., supra, the following authority in support of the proposition that any conflict between a water authority's by-laws and a state statute would require the by-laws to yield:

> [a]n ordinance which is repugnant either to the Constitution or general laws is ipso facto void .... "All ordinances or by-laws adopted by" a municipality "contrary to the laws of the land are void." "An ordinance is the product of legislative power conferred upon the municipality. One essential to its validity is that it shall not conflict with the laws of the State." ... A statute will override a conflicting city ordinance, whether it precedes or follows the ordinance in point of time. ..." A State law is paramount to a conflicting city ordinance, where they both relate to a subject with reference to which the right to legislate is concurrent." ... City ordinances conflicting with State Constitution or statute are void. 148 S.C. at 234.

Applying this authority to the Daniel Morgan Rural Water District, even though the District Board possessed the express authority to "make bylaws for the management and regulation of its affairs," we advised in the 1987 opinion that state law controlled where a by-law conflicted therewith. See also, Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984) [DHEC regulations which makes death certificates and medical examiners' records nondisclosable to the public conflicts with FOIA is invalid]; City of North Chas. v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) [ordinance conflicted with state statutes]; Riverwoods v. Co. of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002) [ordinance which granted ad valorem property tax exemption solely to owner-occupied residences conflicted with enabling legislation].

Of course, any conflict between a statute and an ordinance, regulation or by-law must be harmonized or reconciled, if possible. Lindsay v. Tacoma-Pierce Co. Health Dept., 8 F.Supp.2d

1213 (W.D. Wash. 1997); State v. Anderson, 749 P.2d 1342 (Alaska 1988); Kansas Comm. on Civil Rights v. City of Topeka Street Dept., 212 Kan. 398, 511 P.2d 253 (1973). In the latter case, however, the Court cautioned that an agency "may not exercise its sublegislative powers to modify, alter or enlarge the provisions of the legislative act which is being administered." 511 P.2d at 253.

Our Supreme Court has recognized that a conflict occurs between a statute and an ordinance (or by-law) where both contain either express or implied conditions which are inconsistent or irreconcilable with each other; mere differences in detail do not render them conflicting and if either is silent where the other speaks, there is no conflict. Town of Hilton Head v. Fine Liquors, 302 S.C. 550, 397 S.E.2d 662 (1990).

Here, as you suggest, there appears to be a facial conflict between the statute creating the Dalzell Water District and the by-laws thereof in terms of the eligibility to vote in the annual elections. Act. No. 149 of 1965 clearly states that the Delegation "shall recommend only such persons [for appointment to the Board] as were nominated at the meeting of the residents of these areas ...." (emphasis added). The by-laws, by contrast, make reference to the "annual meeting of the users of the area." Qualifications to sit on the Board, pursuant to the by-laws, require a person to be a "user" and be a "resident of the district." As far as I am able to ascertain, no mention is made in the statute of "users" in terms of either the annual election or the qualifications to serve on the board.

Article IV, Section 1 of the Bylaws defines the term "user" as follows:

> [a]ny bona fide occupant of a farmstead or any rural resident or other domestic or commercial users who are residents of Dalzell Water District as defined, having reasonable accessibility to the source of and who is need of having water supplied for domestic, commercial livestock and garden purposes form the water system operated by the corporation and who receives the approval of the Board of Directors may obtain water from the system by signing such agreements for the purchase of water as may be provided and required by the District; provided that no person otherwise eligible shall be permitted to subscribe for water from the District if the capacity of the District's water system is exhausted by the needs of its existing users. The connection fee for each initial tap shall be established by the Board of Directors of this District and published or announced at the annual meeting of the users of the area served.

Section 1 of Article V provides that the "annual meeting of the users of the area served shall be held in the office of the District, Sumter County, South Carolina, at 7 o'clock P.M. on the first Tuesday in January of each year, if not a legal holiday or if a legal holiday on the next business day following." Article V also speaks of "resident users" and Section 5 states that "Directors of this District shall be nominated at the annual meeting of the resident users.

It is clear that, while there is considerable overlap between the "residents of Dalzell Water District" and the "users"of the area, they are not the same. It is presumed that the Legislature intended to use the term "resident" in its common and ordinary meaning which means a place where one "abides or dwells or lives." Easler v. Blackwell, 195 S.C. 15, 10 S.E.2d 160 (1940). Although the by-laws define the qualifications of a "user" as including the necessity of being a "resident," all "residents" of Dalzell Water District certainly would not be "users" of the area. As written, the by-laws require that the annual meeting is of "users" of the District which is a different criteria than the statute's command that the meeting must be one of the "residents" of the District. There is no indication that the General Assembly in enacting Act No. 149 of 1965 intended to use the terms "resident" and "user" interchangeably. As mentioned, I do not even find the term "user" employed in the Act.

It is apparent that the Legislature envisioned that even those who are currently not "users" would have a voice in the election. For example, at some point in time, non-user "residents" might wish to become users. Other examples of non-user residents having a stake in the election are easily imaginable.

Accordingly, notwithstanding that the statute grants the Directors the authority to promulgate by-laws, the enabling statute must control over those by-laws where the two conflict.[1] In my judgment, the provisions of the statute that the annual meeting shall consist of the "residents" of the District are thus controlling.[2] Therefore, residents would have the right to vote at the annual meeting.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

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[1] Indeed, Article VI, Section 1 of the By-laws states that "[a]t each annual meeting thereafter, the residents shall nominate for a term of six years the number of Directors whose term of office ... expires." By following this portion of the By-laws, such By-laws are reconcilable with the enabling statute. (Emphasis added)

[2] You advise that at the last few elections, voting age residents, rather than "users," have been allowed to vote. This appears to be in accord with the statute.