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The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

May 18, 1990

The Honorable Dill Blackwell
Member, House of Representatives
335-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Blackwell:

By your letter of April 25, 1990, you have asked that this Office respond to several questions concerning the North Greenville Fire District.

Your first two questions involve the setting of elections for the county's special purpose districts, in particular the North Greenville Fire District, in light of conflicting acts of the General Assembly and the effect of the acts and gubernatorial actions on the term of a commissioner appointed to fill an unexpired term. It is our understanding that Robert C. Childs, III, Greenville County Attorney, has already given his opinion that the position be included in those to be elected in the general election this November. In addition, we are advised that Greenville County Council has adopted an ordinance pursuant to Section 6-11-70 of the South Carolina Code of Laws (1976), a copy of which is enclosed; such an ordinance would explain why the special purpose districts' governing boards' elections are held in odd-numbered years in spite of acts of the General Assembly calling for elections in even-numbered years (i.e., with the general election).

Your first question was what course of action should be taken, by whom, for the best interests of all concerned. Because the Greenville County Attorney and the Greenville County Election Commission have worked out a solution to the difficulty, it would now be inappropriate for this Office to second-guess the actions of those individuals. Unless a court should declare otherwise, we would suggest following the procedure which has already been set in motion.

In your second question, you outlined the sequence of events in the appointment and service of Mr. William Morro, one of the commissioners. He was appointed to fill an unexpired term, the appointment commencing in January 1989, but an oversight was made and the appointment was made until November 1990. A new six-year term would have begun after the election in November 1989. You have asked, when Mr. Morro's successor is elected in November 1990, whether that individual would hold a five-year term or a six-year term.

Again, this question has been resolved by the Greenville County Attorney and county election officials, who have determined that the term should end in December 1995. Again, it would be inappropriate for this Office to comment on a decision already made and in progress. We might add, however, that a term of office is distinguished from the tenure of the office holder. The law has been stated in Heyward v. Long, 178 S.C. 351, 183 S.E. 145 (1935) that

> when successors to the incumbent Commissioners are duly clothed with the full muniments of office as herein stated, they can hold only for the unexpired remainder of the term to which they may be appointed. "Since the term of an office is distinct from the tenure of an officer, 'the term of office' is not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed; and a holding over does not change the length of the term, but merely shortens the term of his successor." 46 C.J., 971.

Id., 178 S.C. at 376. See also Op.Atty.Gen. dated March 5, 1987 and authorities cited therein ("Thus, the predecessor's holding over for one year, until March 15, 1976, shortened the tenure which the individual in question would subsequently serve, though the term of office would remain twelve years.")(copy enclosed). Mr. Morro could be viewed as having held over one year past the expiration of his term, thus shortening the tenure which his successor would enjoy, though the term of office would remain six years. To resolve all questions that this would be the most appropriate course to follow, a declaratory judgment action could be instituted.

Your third question dealt with how the North Greenville Fire District might raise its tax millage. You asked whether Act No. 622 of 1976 would give Greenville County Council the authority to raise taxes, or whether Section 6 of Act No. 199 of 1971 would be controlling. Act No. 622 of 1976 provides one way for tax millage levels to be increased. Section 6 of Act No. 199 of 1971 set a cap of not more than fifteen mills for the District.

Enclosed are copies of Sections 6-11-273 and 6-11-275 of the Code of Laws, either of which could be followed to increase the District's tax millage. Section 6-11-273 would permit a referendum to be held in the District to authorize a new millage level; this is a permanent means of changing the millage until another change should be sought. Section 6-11-275 would permit a millage increase on a yearly basis only (i.e., not "permanent" as in Section 6-11-273), by action of county council. Too, Section 6-11-276 (enclosed) permits borrowing in anticipation of an annual tax levy. The latter two provisions of the Code were adopted in Act No. 622 of 1976. Thus, an increase in millage for the District could be accomplished by following either Section 6-11-273 or Section 6-11-275 of the Code; the District in such case would not be bound by Section 6 of Act 199 of 1971.

Your fourth question concerns annexation of new territory by the District. You ask whether Act No. 199 of 1971 should be amended, or whether Greenville County Council may annex by ordinance. Section 6-11-410 et seq. of the Code provides a mechanism by which a county council may enlarge, diminish, or consolidate the service areas of special purpose districts created by the General Assembly before March 7, 1973. Because the North Greenville Fire District was created by the General Assembly in 1971, Section 6-11-410 et seq. would be applicable. Thus, Greenville County Council could annex territory on behalf of the District by following these statues.

Action by the county council to annex territory would, from a legal standpoint, be preferable to action by the General Assembly to accomplish the same. Article VIII, Section 7 of the State Constitution prohibits the adoption, by the General Assembly, of an act for a particular county; because the District is located wholly within Greenville County, an act specifically for the District would be potentially unconstitutional, though only a court could so decide with certainty. Cooper River Parks and Playground Comm'n v. City of N. Charleston, 273 S.C. 639, 259 S.E.2d 107 (1979); Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976); Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974). Too, such an act would most likely be a special law, where a general law is already applicable. See Article III, Section 34 (IX) of the State Constitution. Thus, to avoid constitutional difficulties, action by a county council in such a situation would be preferable to an act of the General Assembly.

You have asked about a commissioner of a fire district serving as a paid or unpaid fireman for the district. As you point out, the recent constitutional amendments about dual office holding would remove such a situation from dual office holding prohibitions. As to a conflict of interest under the existing ethics laws, we must respectfully refer you to the State Ethics Commission to receive comments on how the State Ethics Act might apply in such situations.

We hope the foregoing will be helpful. If you have additional questions, please advise. With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

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Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

cc: Robert C. Childs, III, Esquire
Greenville County Attorney