ALAN WILSON
ATTORNEY GENERAL

April 28, 2014

The Honorable Bill Woolsey
Mayor, Town of James Island
P. O. Box 12240
James Island, South Carolina 29422

Dear Mayor Woolsey:

Attorney General Alan Wilson has referred your letter dated February 3, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issues (as quoted from your letter):

1) Would the substitution of a Town of James Island operating property tax millage for the existing James Island Public Service District millage within the area of the Town of James Island count as a municipal property tax increase in excess of the millage cap as determined by S.C. Code § 6-1-320?
2) Can the James Island Public Service District legally receive funds paid by the Town of James Island in exchange for the provision of services for Town residents, even if the funds paid by the Town were funds from the local option sales tax legally received by the Town from the State Treasurer?
3) Can the James Island Public Service District, and other public bodies, legally receive funds directly from the County Treasurer, if those funds were paid to the County Treasurer by the Town of James Island from sources including partially or wholly, local option sales tax legally received by the Town?

Law/Analysis:

By way of background, it is this Office's understanding the James Island Public Service District was founded pursuant to Act No. 498 of the 1961 S.C. Acts. Examining the statute in your first question, South Carolina Code § 6-1-320 states:

> (A)(1) 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.

(2) There may be added to the operating millage increase allowed pursuant to item (1) of this subsection any such increase, allowed but not previously imposed, for the three property tax years preceding the year to which the current limit applies.

(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**:

(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.
(6) purchase by the local governing body of undeveloped real property or of the residential development rights in undeveloped real property near an operating United States military base which property has been identified as suitable for residential development but which residential development would constitute undesirable residential encroachment upon the United States military base as determined by the local governing body. The local governing body shall enact an ordinance authorizing such purchase and the ordinance must state the nature and extent of the potential residential encroachment, how the purchased property or development rights would be used and specifically how and why this use would be beneficial to the United States military base, and what the impact would be to the United States military base if such purchase were not made. Millage rate increases for the purpose of such purchase must be separately stated on each tax bill and must specify the property, or the development rights to be purchased, the amount to be collected for such purchase, and the length of time that the millage rate increase will be in effect. The millage rate increase must reasonably relate to the purchase price and must be rescinded five years after it was placed in effect or when the amount specified to be collected is collected, whichever occurs first. The millage rate increase for such purchase may not be reinstated unless approved by a majority of the qualified voters of the governmental entity voting in a referendum. The cost of holding the referendum must be paid from the taxes collected due to the increased millage rate; or
(7) to purchase capital equipment and make expenditures related to the installation, operation, and purchase of the capital equipment including, but not limited to, taxes, duty, transportation, delivery, and transit insurance, in a county having a population of less than one hundred thousand persons and having at least forty thousand acres of state forest land. For purposes of this section, "capital equipment" means an article of nonexpendable, tangible, personal property, to include communication software when purchased with a computer, having a useful life of more than one year and an acquisition cost of fifty thousand dollars or more for each unit.

> 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.
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> (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.
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> (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.
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> (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.
>
> (F) The restriction contained in this section does not affect millage imposed to pay bonded indebtedness or operating expenses of a special tax district established pursuant to Section 4-9-30(5), but the special tax district is subject to the millage rate limitations in Section 4-9-30(5).[1]

S.C. Code § 6-1-320 (1976 Code, as amended) (emphasis added). In title 6, Chapter 1, Article 3, local governing body means "the governing body of a county, municipality, or special purpose district." S.C. Code § 6-1-300(3) (emphasis added). Additionally, S.C. Code § 4-9-30 states:

> Under each of the alternate forms of government listed in § 4-9-20, except the board of commissioners form provided for in Article 11, each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof:
> ...
> (5)(a) to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution; sewage collection and treatment; courts and

[1] A 2007 opinion by this Office noted that "general operating expenses" listed in 6-1-320 (A) are not defined. Op. S.C. Atty. Gen., 2007 WL 1934802 (June 26, 2007). However, "operating expenses" were discussed and ruled on by the South Carolina Supreme Court in 2009. Berkeley Co. School District v. S.C. Dept. Rev., 383 S.C. 334, 679 S.E.2d 913 (2009).

> criminal justice administration; correctional institutions; public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; hospital and medical care; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above.

Therefore, let us address your questions.

1) Let us further examine South Carolina Code § 6-1-320. As a background regarding statutory interpretation, the cardinal rule of statutory construction 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). Like a court, 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). The dominant factor concerning statutory construction is the intent of the Legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)).

Based on a plain reading of South Carolina Code § 6-1-320 (barring extraordinary circumstances as listed in the statute), a millage rate may only increase based on the consumer price index increase and the percentage of increase of the population. The intent behind S.C. Code § 6-1-320 seems clear by its title: "[m]illage rate increase limitation; exceptions." The stated intent is to limit the increase on taxes for special purpose districts (and other political subdivisions). The main limitation is in Section (A) of the statute and the exceptions and exemptions are in Section (B), (C), (D) and (E). Based on this Office's understanding of your question, the tax millage for the Town of James Island would increase from 0 mils to 51 mils, while the tax millage for the James Island Public Service District would decrease from 51 mils to 0 mils. While the situation you describe does not appear to fit as an exception listed in the statute, a court may find your situation does not violate the statutory intent of the statute in that your situation does not raise overall taxes.

This Office has previously addressed this section of the code in multiple opinions. In one such opinion we stated:

> Section 6-1-320(B) provides a very narrow listing of exceptions to the general rule prohibiting local governing bodies from increasing their millage rates. By providing such a narrow list, we presume the Legislature intended to prohibit governing bodies from increasing property taxes except for in limited circumstances. With that intent in mind, we look to the language used by the Legislature. In subsection (B), the Legislature provided that the limitation in subsection (A) may be "suspended" due to an enumerated list of circumstances, including a prior year deficiency. The term

> "suspend" is defined as "[t]o cause to stop for a period; interrupt[,] . . . [t]o hold in abeyance, defer [,] . . . [t]o render temporarily ineffective . . . ." The American Heritage College Dictionary 1368 (3rd ed. 1993). The Legislature's use of this term indicates the millage rate allowable under subsection (A) is only temporarily replaced by that rate necessary to remedy the reason for the exception.

Op. S.C. Atty. Gen., 2010 WL 4391632 (October 26, 2010). A 2011 opinion answered a similar question where a county failed to reassess property that caused fees to be increased to all property owners through service fees. In that opinion, this Office stated:

> South Carolina Code section 6-1-330 (2004 & Supp. 2010) expressly permits counties and municipalities to impose a "service or user fee" for public services. Section 6-1-330(C) contemplates that fees might be imposed for services that were previously funded using ad valorem property taxes: "If a governmental entity proposes to adopt a service or user fee to fund a service that was previously funded by property tax revenue, the notice required pursuant to Section 6-1-80 must include that fact in the text of the published notice."
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> A court evaluating the validity of a particular fee will consider whether such fee is paid in exchange for a "special benefit" to the payers and whether the fee is used to fund the service for which it is imposed. See, e.g., Brown v. County of Horry, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992) ("A service charge is imposed on the theory that the portion of the community which is required to pay [the charge] receives some special benefit as a result of the improvement made with the proceeds of the charge."). If the fee is a general revenue-raising measure, as opposed to a reasonable charge for services, a court will find that it is in the nature of tax. See id. at 184, 417 S.E.2d at 567 ("The question of whether a particular charge is a tax depends on its real nature and not its designation.").
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> If the fee is a tax, then it must comply with the millage cap in section 6-1-320(A) of the South Carolina Code or satisfy one of the statutory exemptions to that cap. E.g., Letter to Edwin C. Haskell, III, Esquire, Op. S.C. Att'y Gen. (June 26, 2007) (opining that "any increase in the millage rate levied by a county for the purpose of providing fire protection services . . . is limited by section 6-1-320(A), unless the increase is due to one of the exemptions provided under section 6-1-320(B)"). On the other hand, if the fee is a proper "service or user fee," it need not comply with the section 6-1-320 millage cap. See S.C. Code Ann. § 6-1-320(C) ("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." (emphasis added)).

2011 WL 3918181 (August 25, 2011). This Office emphasized the intent of this statute is to stabilize the revenue generated from property taxes in keeping the liability of taxpayers consistent in a 2011 opinion. Op. S.C. Atty. Gen., 2011 WL 2648717 (June 28, 2011). In 2007 this Office answered a question for Sumter County opining that the county did not meet an exception to S.C. Code § 6-1-320. Op. S.C. Atty. Gen., 2007 WL 1031448 (March 20, 2007). As that opinion stated:

> ... we do not believe the circumstances described in your letter contemplate a county's ability to increase its millage rates for purposes of acquiring residential development

> rights to property. Interestingly, prior to last year, **section 6-1-320 contained another exception to the general provision provided in subsection (A) allowing the governing bodies to override subsection (A) to allow for a millage rate increase so long as certain notice and public hearing requirements were met. However, in 2006 the Legislature amended section 6-1-320 removing this additional exception. 2006 S.C Acts 3133.** Thus, in finding the exceptions to the general limitation on millage rate increases not applicable for the purpose for which Sumter County wishes to increase its millage rate, we suggest Sumter County look to other means of funding the acquisition of such property rights.

Id. (emphasis added). This Office does not see a distinction between the situation in the 2007 opinion and your question when you provide no exception applicable pursuant to the statute.

Nevertheless, concerning tax rates our State Supreme Court has stated:

> The fixing of a tax rate is a legislative function that must be given the greatest respect by the courts *unless* that function is exercised in an illegal manner. *Simkins v. City of Spartanburg,* 269 S.C. 243, 237 S.E.2d 69 (1977).[FN5] It is basic hornbook law that when a government entity levies a tax, "the method outlined in the applicable law must be followed, at least in substance and especially concerning all mandatory provisions." 16 McQuillin Mun. Corp. § 44.97 (3d ed. 1998). We conclude Myrtle Beach's use of non-statutory variables violates § 12-37-251(E). Further, Myrtle Beach failed to hold a public meeting as provided under § 6-1-320(C) which would have allowed it to legally override the mandatory requirements of subsection (A).
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> FN5. Despite our recognition of this basis principle in *Simkins,* we excused an illegal tax rate in *County of Lee v. Stevens,* 277 S.C. 421, 289 S.E.2d 155 (1982). In that case, a county auditor challenged the county's authority to set the tax rate before current property values were known. We held the modest deficit caused by the county's error could be excused, but we prospectively ordered the tax rate to be based upon current property valuations. We found a prospective ruling necessary as a matter of "practicability and reasonableness" because of the various methods in use at the time by local governments statewide.
> We view *County of Lee v. Stevens* as a narrow exception and decline to follow it here. The critical factor in that case was that there was no standard procedure in place to accomplish the statutory requirement at the local level; to strictly enforce that requirement would have caused havoc for local governments statewide. Here, there is no such special circumstance. We cannot condone a taxing entity's illegal acts in fixing the tax rate simply because the resulting impact may be characterized as modest.

Angus v. City of Myrtle Beach, 363 S.C. 1, 4-5, 609 S.E.2d 808, 809-810 (2005). This Office also previously opined that:

> Initially, we note that section 6-1-320 makes no mention of county auditors with regard to the calculation of the millage rate cap. This section only refers to the local governing body, which in this case is County Council. Therefore, the language of the

> statute itself appears to indicate that the responsibility for insuring that the millage rate does not exceed that as provided for in this provision is placed solely on County Council. Thus, from section 6-1-320, we believe a court would find that County Council is also responsible for the calculation of the millage rate cap.
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> Moreover, we believe this interpretation comports with the general authority provided to county auditors by the Legislature. Section 12-39-180 of the South Carolina Code (Supp. 2008), discussing a county auditor's role with regard to the levy of property tax provides, provides in pertinent part:
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> > A county auditor, after receiving statements of the rates and sums to be levied for the current year from the department and from other officers and authorities legally empowered to determine the rate or amount of taxes to be levied for the various purposes authorized by law, shall immediately proceed to determine the sums to be levied upon each tract and lot of real property and upon the amount of personal property, monies, and credits listed in his county in the name of each person ....
>
> In accordance with this provision, the county auditor's authority is limited to the calculation of taxes on individual tracts of real property. The auditor is not given any authority with regard to the overall tax rate, which is to be determined by the body with the authority to levy the tax. As explained by our Supreme Court in Lee County v. Stevens, 277 S.C. 421, 424, 289 S.E.2d 155,156 (1982): "Section 12-39-180, Code of Laws of South Carolina (1976), requires the county auditor to calculate individual property taxes after receiving the rates and sums to be levied for the coming year." Furthermore, as we stated in a 1998 opinion of this Office: "The Auditor's role is limited to levying the millage upon all taxable property in the county. The Auditor does not possess any discretion in doing so, but act in a ministerial capacity only." Op. S.C. Atty. Gen., December 4, 1998 (citing Stevens, 277 S.C. at 421, 289 S.E.2d at 155).

Op. S.C. Atty. Gen., 2009 WL 3658269 (October 27, 2009). This Office has also made it clear than taxes must comply with the millage cap in S.C. Code § 6-1-320 unless there is an exception pursuant to the statute. While this Office acknowledges your situation does not seem to meet an exception, a court may find since the Town is complying with the legislative intent of overall not raising taxes that you may be able to proceed. Please note, though, that this Office believes a court would find even if no exception is found in (B) of S.C. Code § 6-1-320, the requirement that 2/3rds vote of council would still have to approve the action would apply. As this Office stated in a 2012 opinion:

> The effect of section 6-11-271 is to take discretion with regard to taxation away from appointed commissions, placing the final say in the taxation of a district in the General Assembly, in the people of the district acting by referendum, or in the governing body of the county. *See Weaver*, 328 S.C. at 86, 492 S.E.2d at 81 (characterizing *Crow v. McAlpine*, 277 S.C. 240, 285 S.E.2d 355 (1981) as standing for the proposition that "the legislative power to tax may not be conferred on a purely appointive body but must be under the supervisory control of elected bodies"); *Hagley Homeowners Ass'n v. Hagley Water, Sewer, and Fire Authority*, 326 S.C. 67, 485 S.E.2d 92 (1997) ("While the General Assembly can delegate its taxing authority to a subordinate

> agency, it can only delegate this power to a body which is either composed of persons assented to by the people or subject to the supervisory control of a body chosen by the people.").

Op. S.C. Atty. Gen., 2012 WL 889088 (February 29, 2012). As our code states:

> A local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General Assembly.

S.C. Code § 6-1-310 (1976 Code, as amended).

Given the information provided to this Office and based on a plain reading of S.C. Code § 6-1-320, this Office believes a court will find pursuant to the literal language of the statue the millage for the municipality would increase by more than the amount allowed in S.C. Code § 6-1-320 if the municipality were to go from 0 mils to 51 mils. However, as you state in your letter, if a court were to interpret S.C. Code § 6-1-320 based on its plain language the Town's current millage is zero and therefore would not be able to be substantially increased beyond that. Thus, we would caution and recommend seeking a declaratory judgment from the court on this matter before proceeding, as only a court of law can interpret statutes and make such determinations. S.C. Code § 15-53-20, etc.

2), 3) Our state legislature has chosen the Department of Revenue to administer and collect the local sales tax. S.C. Code § 4-10-90. As this Office has previously opined, "[i]t is this Office's longstanding policy ... to defer to [the interpretation of] the administrative agency charged with the regulation [of] ... the subject matter." Ops. S.C. Atty. Gen., 2013 WL 4497164 (August 9, 2013); 2013 WL 4873939 (September 5, 2013). As this Office stated in a previous opinion:

> [A]s a general matter, it is well recognized that administrative agencies possess discretion in the area of effectuating the policy established by the Legislature in the agency's governing law. As our Supreme Court has recognized, 'construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons.' Op. S.C. Atty. Gen., [1997 WL 783366] October 20, 1997 quoting Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986). The Courts have stated that it is not necessary that the administrative agency's construction be the only reasonable one or even one the court would have reached if the question had initially arisen in a judicial proceeding. Ill. Commerce Comm. v. Interstate Commerce Comm., 749 F.2d 825 (D.C.Cir. 1984). Typically, so long as an administrative agency's interpretation of a statutory provision is reasonable, we defer to that agency's construction.

Op. S.C. Atty. Gen., 2006 WL 269609 (January 20, 2006). **Therefore, in regards to use of funds from a local option sales tax, this Office would defer to the Department of Revenue as the administrative agency chosen by statute for reasonable implementation in regards to your questions. However, if you find their interpretation is not reasonable or believe there is a further specific legal question you would like for this Office to answer, we will be glad to opine.** However, it should be noted that South Carolina's Constitution directly addresses appropriations by county treasuries when it states:

> **Money shall be drawn from** the treasure of the State or the **treasury of any of its political subdivisions only in pursuance of appropriations made by law**.

S.C. Const. Article X, § 8 (emphasis added). First and foremost, it is well established that counties in South Carolina are political subdivisions of the State. Wheeler v. County of Newberry, 18 S.C. 132, 1882 WL 5648 (1882); St. v. Maryland, 189 S.C. 405, 1 S.E.2d 516 (1939); Op. S.C. Atty. Gen., 1990 WL 599363 (December 11, 1990) (citing Parker v. Bates, 216 S.C. 52, 56 S.E. 2d 723 (1950)); et al. In addition to counties, municipalities are also political subdivisions of the State. Op. S.C. Atty. Gen., 2009 WL 3208465 (September 10, 2009) (citing Op. S.C. Atty. Gen., 1990 WL 482456) (citing Williams v. Wylie, 217 S.C. 247, 60 S.E.2d 586 (1950)). Therefore, that section of the State Constitution would limit draws from a municipal treasury for appropriated funds only. This Office has previously opined:

> **Thus, if a public official were to expend funds that were not appropriated, such action would be in violation of the South Carolina Constitution.**

Op. S.C. Atty. Gen., 2007 WL 419432 (January 8, 2007) (emphasis added).

Conclusion: While this Office is uncertain how a court would rule in regards to your questions and would recommend seeking a declaratory judgment from a court, we feel S.C. Code § 6-1-320 is clear in limiting any millage increase unless an exception is warranted pursuant to the statute and that S.C. Code § 4-10-90 is clear in that the South Carolina Department of Revenue is the agency in charge of administering and collecting the Local Options Sales Tax. However, this Office is only issuing a legal opinion based on the current law at this time. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General