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The State of South Carolina

Office of the Attorney General

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February 5, 1987

The Honorable Harvey S. Peeler, Jr.
Senator, District No. 14
Suite 512, Gressette Building
Columbia, South Carolina 29202

The Honorable Donna A. Moss
Member, House of Representatives
309B Blatt Building
Columbia, South Carolina 29211

The Honorable Olin R. Phillips
Member, House of Representatives
309C Blatt Building
Columbia, South Carolina 29211

Dear Members of the Cherokee County Legislative Delegation:

You have advised that two vacancies exist on the governing body of the Daniel Morgan Rural Community Water District (referred to as the District). With reference to Act No. 1226 of 1966, confirming the creation of the District, as well as the by-laws adopted by the governing body of the District, you have asked that this Office address the following questions:

1. How are vacancies on the governing body to be filled?

2. Can the governing body fill vacancies directly, without an annual meeting?

3. What authority exists for amendment of the by-laws?

4. In case of a conflict between the by-laws and Act No. 1226 of 1966 or other state law, which would prevail?

5. Were the last amendments to the by-laws properly adopted?

After a brief discussion of relevant portions of state law and the by-laws, each of your questions will be addressed.

Act No. 1226 of 1966

Section 6-13-10 et seq. of the Code of Laws of South Carolina (1976), as adopted in Act No. 1022 of 1964, authorizes the establishment of rural community water districts. By Act No. 1226 of 1966, the General Assembly confirmed that the actions necessary under Act No. 1022 of 1964 had been followed and confirmed the creation of the Daniel Morgan Rural Community Water District. Section 4 of Act No. 1226 parallels the basic requirements of Code Section 6-13-30 as to establishing a board of directors, appointments, filling vacancies, and so forth; Section 4 provides in relevant part that successors to the original appointees

> shall be appointed by the Governor, upon the recommendation of the majority of the county legislative delegation for a term of six years. Any vacancy shall be filled in like manner as the original appointment for the unexpired portion of the term. ... 1/

Another relevant portion of state law is Section 6-13-50(6), which gives the governing body of the District the authority to "make bylaws for the management and regulation of its affairs." Section 5 of Act No. 1226 tracks the precise language of the state law.

By-laws of the District

The by-laws furnished to this Office were adopted as of December 7, 1967, as amended by certain deletions on December 16, 1986. Because this Office cannot investigate

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1/ You mentioned that a question had arisen as to a two-year term of office. Section 6-13-30 of the Code provided a mechanism for a staggered scheme of appointments. Of the initial appointees, two were to be appointed for two-year terms, two for four-year terms, and one for a six-year term. Therefore, all were to be appointed for six-year terms. This is the only reference to two-year terms which we were able to locate.

matters of this nature, we must assume for purposes of this opinion that the by-laws exist in the form provided to this Office. One relevant and apparently unchanged provision is Article XI, pertaining to amendments:

> These by-laws may be modified, altered, amended, increased or diminished by affirmative vote of a majority of the members of the entire Board at any properly constituted meeting, whether annual, public or special, provided that in case of special meetings such action is specified in the notice given therefor.

Article VI, pertaining to Directors and Officers, provides in Section 3 that "[i]f the office of any director becomes vacant it shall be filled as provided by law." Section 1, following amendment on December 16, 1986, now provides that "[t]he Board of Directors of this District shall consist of five users, all of whom shall be resident electors and users of the District." 2/ Deleted from that section by the Amendment was the requirement that "[a]t each annual meeting thereafter, vacancies of board members and terms of office of directors which have expired will be filled as set forth in Article V, Section 2.C."

Article V, pertaining to annual meetings of the users of the District's services, formerly contained Section 2.C until deleted on December 12, 1986. Formerly, at the annual meeting of the users, one purpose of the meeting was to "[n]ominate directors where vacancies exist or terms of office of members which have expired for submission to the County Legislative Delegation for recommendation to the Governor for appointment."

With these provisions in mind, each of your questions will now be discussed.

2/ Section 6-13-30 of the Code provides that the governing body is to consist of "five resident electors of the area who shall be appointed by the Governor, upon the recommendation of a majority of the county legislative delegation." Neither Section 6-13-30 nor Act No. 1226 requires that a board member be a user of the District. Cf., Article I, Section 5 of the State Constitution.

I am not sure this is a correct interpretation of §1-9-60 - Patty Putney 3-18-93

Question 1

Vacancies on the governing body are to be filled following Section 4 of Act No. 1226, Section 6-13-30 of the Code, and Article VI, Section 3 of the District's by-laws, namely, in the same manner as the original appointment for the unexpired portion of the term. Thus, vacancies would be filled by appointment by the Governor, upon the recommendation of a majority of the Cherokee County Legislative Delegation.

It should be noted that in this instance, the actual exercise of discretion in choosing persons for appointment rests with the Delegation. The Governor's role in the appointment procedure is ministerial and involves no exercise of discretion. Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936). In the exercise of its discretion, the Delegation may seek input from whomever the members deem appropriate, as long as the actual decisions as to recommendations to be made to the Governor are made by the Delegation. 67 C.J.S. Officers § 40; 63A Am.Jur.2d Public Officers and Employees § 95. The actual decision-making may not be delegated. Unless the Delegation abuses its discretion, courts will not attempt to control the appointment process. Id.

Question 2

As stated in response to Question 1, the Delegation is the appropriate entity to fill vacancies on the District's governing body. We have been unable to locate any authority which would permit the governing body to fill vacancies among the members, with or without an annual meeting. (Section 1-9-60 of the Code, relative to emergency interim successors, applies only after an attack upon the United States has occurred and thus is not applicable to your situation.)

Question 3

The relevant provisions of state law set forth above show that the governing body has the authority to adopt by-laws; using that authority, by-laws have been adopted and, on at least one occasion, amended. You have inquired as to authority to amend by-laws generally.

The South Carolina Supreme Court stated in State ex rel. Coleman v. Lewis, 181 S.C. 10, 186 S.E. 625 (1936), that "[t]he power to make rules is not one when once exercised is exhausted. It is a continuous power, always subject to be exercised by the [legislative body], and, within the limitations

suggested, absolute and beyond the challenge of any other body or tribunal." 181 S.C. at 22. It has also been stated that a

> rule of parliamentary law is a rule created and adopted by the legislative or deliberative body it is intended to govern. ... [It] is subject to revocation or modification at the pleasure of the body creating it ... .
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> ....
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> The rules of procedure passed by one legislative body are not binding on a subsequent legislative body ... .
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> ....
>
> Rules of procedure are always within the control of a majority of a deliberative body and may be changed at any time by majority vote. ...

67 C.J.S. Parliamentary Law §§ 2, 4, 8. See also 59 Am.Jur.2d Parliamentary Law, § 2; Commonwealth ex rel. Fox v. Chace, 403 Pa. 117, 168 A.2d 569 1961); State ex rel. Kiel v. Riechmann, 239 Mo. 81, 142 S.W. 304 (1911); Ops. Atty. Gen. dated May 18, 1981; June 13, 1985; and March 1, 1979.

Based on the foregoing, we advise that the power to adopt by-laws is a continuous power and that the power to adopt by-laws would necessarily encompass the power to amend the by-laws. See also Op. Atty. Gen. dated April 14, 1986, a copy of which is enclosed. Thus, the governing body of the District would be authorized to amend its by-laws.

Question 4

In the event of a conflict between state law and a provision of the District's by-laws, state law would prevail. Cf., Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928). In the latter case, applicable here by analogy, a municipal ordinance conflicted with the applicable state statutes;

therein, the South Carolina Supreme Court stated:

> An 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. The same reasoning would be applicable to a by-law which conflicted with a state law or constitutional provision.

Question 5

Your final question was whether the amendments to the by-laws adopted by the District's governing body on December 16, 1986, were properly adopted. We must advise that no state law governs as to amendment of such by-laws, and thus the procedure is left to the District. Because no legal question is involved, the question becomes one of fact, which this Office is not empowered to determine. Op. Atty. Gen. dated November 15, 1985.

By way of analogy, the enrolled bill rule relative to enactments of the General Assembly may be appropriate in this circumstance. In State ex rel. Richards v. Moorer, 152 S.C. 455, 150 S.E. 269 (1929), the Supreme Court stated:

> 'We announce that the true rule is, that when an Act has been duly signed by the presiding officers of the General Assembly, in open session in the Senate-House, approved by the Governor of the State, and

> duly deposited in the office of the Secretary of State, it is sufficient evidence, nothing to the contrary appearing upon its face, that it passed the General Assembly, and that it is not competent either by the journals of the two houses, or either of them, or by any other evidence, to impeach such an Act. And this being so, it follows that the Court is not at liberty to inquire into what the journals of the two houses may show as to the successive steps which may have been taken in the passage of the original bill.'

152 S.C. at 467. By analogy, a presumption most probably would attach that the by-law had been properly adopted, in keeping with the enrolled bill rule. The final determination of this question would necessarily be made by a court of competent jurisdiction rather than this Office, however.

We trust that the foregoing has satisfactorily responded to your inquiries. Please advise if clarification or additional information should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

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Executive Assistant for Opinions