9284/9834

ALAN WILSON
ATTORNEY GENERAL

September 23, 2014

The Honorable Raymond E. Cleary III
Senator, District No. 34
3577 Marion Lane
Murrells Inlet, SC 29576

Dear Senator Cleary:

Thank you for your letter dated September 10, 2014 concerning the authority of the Murrells Inlet-Garden City Fire District "to levy and collect taxes." By way of background, you state:

> The [Murrells Inlet-Garden City Fire] district has an appointed board (see Section 4-23-20) and is authorized to levy and collect taxes up to a certain millage (see Section 4-23-40 and Act 598 of 1992). The district approached me in January 2013, asking that I introduce legislation to increase the tax millage. I introduced S. 293, which passed the General Assembly and became R. 205. The Governor vetoed the legislation. While the veto was overridden in the Senate, it was sustained by the House. As I understand, part of the reason for the House sustaining the veto was the belief that the district had a statutory mechanism for increasing a millage levy under Section 6-11-271, which provides a procedure for conducting a referendum to propose a modification in tax millage for a special purpose district.
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> In an opinion from April 3, 1985 (see 1985 WL 259095), your office advised Senator Doar that an act amending the provisions establishing the Murrells Inlet Garden City Fire District would not violate the constitutional prohibition against special legislation. In an opinion from February 29, 2012 (see 2012 WL 889088), your office advised Senators David Thomas and Shane Martin that "[t]he 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."
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> ...
>
> We are very concerned that if any special district with an unelected board has unfettered discretion to increase its millage beyond statutorily imposed limits that could have dire consequences to the entire tax payer population of the state in that it would increase millage by leaps and bounds on a regular basis.

Following this background, you request this Office's opinion on the follow questions:

(1) Whether [the Murrells Inlet-Garden City Fire District] may utilize the provisions of [S.C. Code] Section 6-11-271 to increase its millage.

(2) If [the Murrells Inlet-Garden City Fire District] may utilize the provisions of Section 6-11-271, may this referendum take place as a special election as opposed to during the time of the general election? (The General Assembly has been insistent that any referendum needs to be held in November during an election cycle.)

(3) And, even if the district may use Section 6-11-271 to increase millage by referendum, would that increase be limited to an increase of no more than the amount of millage authorized to be levied by the district in Section 4-23-40 and Act 598 of 1992?" [1]

Law/Analysis

To briefly expand on the context you provide in your correspondence, the Murrells Inlet-Garden City Fire District ("the MI-GC Fire District") is a joint county fire district that was created by Act No. 876 during the 1966 Legislative Session. A joint county fire district classifies as a "special purpose district," which is defined by S.C. Code Ann. § 4-8-10 (1986) as "any district created by an act of the General Assembly or pursuant to general law and which provides any local governmental service or function including, but not limited to, fire protection, sewerage treatment, water distribution, and recreation." The MI-GC Fire District services homes in parts of Georgetown and Horry Counties, as specified by the boundary lines contained in S.C. Code Ann. § 4-23-10 (1986). In addition, taxes are levied yearly for operations and maintenance of the MI-GC Fire District up to a specified amount. See S.C. Code Ann. § 4-23-40 (1986); 1992 Act No. 598, 1992 S.C. Acts 3630. While S.C. Code Ann. § 4-23-40 (1986) initially capped the MI-GC Fire District's millage rate at 5 mills, this rate was subsequently increased by the General Assembly to 10 mills by Act No. 598 in 1992. 1992 Act No. 598, 1992 S.C. Acts 3630. The Fire District now desires to increase its millage rate from 10 to 14 mills for the purpose of operating what would be the District's fourth fire station.

In addition, pursuant to S.C. Code Ann. § 4-23-20, upon the creation of MI-GC Fire District, the members of the Board of Fire Control have been appointed by the Governor. However, S.C. Code Ann. § 4-23-20 was amended by Act No. 86, effective June 13, 2013, which states that:

> if at least twenty percent of the qualified electors residing in the District petition the commissioners of election by the first of September of any general election

[1] We note that an additional opinion pertaining to the legislation you reference herein and the Murrells Inlet-Garden City Fire District's authority to levy and collect taxes has been issued; we suggest these two opinions be read together for further clarity on the subject. See Op. S.C. Att'y Gen., ___ WL ___ (Sept. 19, 2014).

> year, the commissioners shall call an election to be held at the following general election for the purpose of electing a member to the board to succeed the member whose term expires during the year, for a four-year term. Thereafter, members must be elected in each succeeding general election for terms of four years.
> This act takes effect upon approval by the Governor and first applies to members from Georgetown County on the Board of Fire Control of the Murrell's Inlet—Garden City Fire District whose terms expire on or after that date.

While Act No. 86 (2013) has set forth a procedure for the election of the MI-GC Fire District's Board of Fire Control, we are not aware that any member currently sitting on the Board has been elected. It is with the understanding in mind that we address your questions.

1. A Special Purpose District's Power to Levy Ad Valorem Taxes

As noted in a prior opinion of this office, local governing bodies, including special purpose districts, have limited authority to increase millage rates for operating expenses. Op. S.C. Att'y Gen., 2003 WL 21040134 (Feb. 2003). Campbell v. Hilton Head No. 1 Public Service District, 354 S.C. 190, 192, 580 S.E.2d 137, 138 (2003) provides a useful explanation of the reason behind the limitations placed on a special purpose district's ability to levy taxes. Specifically, in Campbell, the Court addressed Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997), noting that:

> [i]n *Weaver v. Recreation District*, 328 S.C. 83, 492 S.E.2d 79 (1997), we ruled that the statute which authorized [a] recreation district's appointed commission to levy a property tax violated the State Constitution's provision forbidding taxation by unelected officials. The general holding from *Weaver* is that any legislative delegation of taxing authority to an **appointed** body unconstitutionally permitted "taxation without representation." *Id.* The *Weaver* Court, however, ordered only prospective relief, stating the following:
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> > We are cognizant... of the disruptive effect today's holding could have on the financial operation of numerous special purpose districts, local commissions and boards throughout this state. Accordingly, in order to give the General Assembly an opportunity to address this problem, we hold this decision shall be applied prospectively beginning December 31, 1999.
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> *Id.* at 87-88, 492 S.E.2d at 82. In response, the Legislature passed legislation in 1998 that removed the taxing power from appointed bodies such as the District's commission. *See* S.C. Code Ann. § 6-11-271 (Supp. 2002).

Thus, pursuant to the Supreme Court's ruling in Weaver, assessment of property taxes by an appointed governing body of a special purpose would violate the South Carolina Constitution forbidding taxation by unelected officials. In response to Weaver, our General Assembly passed S.C. Code Ann. § 6-11-271 (2004), taking "all discretionary taxing power out of the hands of appointed bodies . . . ." Lawyer v. Hilton Head Public Service Dist. No. 1, 220 F.3d 298, 300 (4th Cir. 2000) (discussing Weaver v. Recreation District, 328 S.C. 83, 492 S.E. 2d 79 (1997) and the enactment of S.C. Code Ann. § 6-11-271).

S.C. Code Ann. § 6-11-271 (2004), titled "[m]illage levy for special purpose district" applies to a "special purpose district or public service authority, however named, created prior to March 7, 1973, by or pursuant to an act of the General Assembly this State." S.C. Code Ann. § 6-11-271(A) (2004). As noted above, the MI-GC Fire District was created in 1966 and constitutes as a "special purpose district" pursuant to the definition of such set forth in S.C. Code Ann. § 4-8-10 (1986). Therefore, it follows that the provisions of S.C. Code Ann. § 6-11-271 (2004) are applicable to the MI-GC Fire District.

Pursuant to the holding in Weaver, S.C. Code Ann. § 6-11-271(2004) defines the millage rates for certain special purpose districts and also provides a mechanism for increasing millage rates, one of which is by way of a referendum held within the district. Because S.C. Code Ann. § 4-23-20 (1986) provides for appointment of the MI-GC Fire District's Board of Fire Control by the Governor and S.C. Code Ann. § 4-23-40 (1986) caps the MI-GC Fire District's millage rate at a "given amount," the guidelines for the MI-GC Fire District's millage rate limitations fall within the parameters of S.C. Code Ann. §§ 6-11-271(B)(1)-(2). Specifically, S.C. Code Ann. §§ 6-11-271(B)(1)-(2) (2004) state that:

> "(B)(1) [t]his subsection applies only to those special purpose districts the governing bodies of which are *not elected* but are presently authorized by law to levy for operations and maintenance in each year millage up to or not exceeding a *given amount* and did impose this levy in fiscal year 1997-98.
>
> (2) [t]here must be levied annually in each special purpose district described in item (1) of this subsection, beginning with the levy for fiscal year 1999, ad valorem property tax millage in the amount *equal to the millage levy imposed in fiscal year 1998.*

S.C. Code Ann. §§ 6-11-271(B)(1)-(2) (2004) (emphasis added).

While S.C. Code Ann. §§ 6-11-271(B)(1)-(2) (2004) in effect cap the MI-GC Fire District's millage rate to the specific amount "imposed in fiscal year 1998" (10 mills pursuant to Act No. 598 enacted in 1992) and prevents the MI-GC Fire District from independently levying taxes, S.C. Code Ann. § 6-11-271(D) (2004) sets forth a mechanism for it to propose an increase in its millage rate by referendum. S.C Code Ann. § 6-11-271(D) (2004) reads as follows:

> notwithstanding any other provision of law, any special purpose district within which taxes are authorized to be levied for maintenance and operation in accordance with the provisions of subsections (B) or (C) of this section, or otherwise, may request the commissioners of election of the county in which the special purpose district is located to conduct a referendum to propose a modification in the tax millage of the district. Upon receipt of such request, the commissioners of election shall schedule and conduct the requested referendum on a date specified by the governing body of the district. If approved by referendum, such modification in tax millage shall remain effective until changed in a manner provided by law.

Furthermore, S.C. Code Ann. § 6-11-273 (2004), which generally addresses special purpose district tax levy referendums, specifies that if pursuant to a referendum, "a majority of the qualified electors of the district voting in the referendum vote in favor of the proposed tax millage change" then "the governing body of the district shall by resolution adopt the new millage rate which shall thereupon have full force and effect of law." We note that S.C. Code Ann. §§ 6-11-271(E) and 6-11-275 (2004) permit a special purpose district authorized to levy taxes for maintenance and operation, "totally located within a county" and "in existence prior to March 7, 1973" to increase its millage rate upon approval of the governing body of the county in which they are located. Yet, because the MI-GC Fire District services both Georgetown and Horry Counties, this section appears inapplicable.

From analysis of the dynamics of the MI-GC Fire District, the Supreme Court's ruling in Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997), and examination of the language contained in S.C. Code Ann. § 6-11-273 (2004) passed by the General Assembly in response to Weaver, it is our opinion that a court would find that the provisions of S.C. Code Ann. 6-11-271 (2004) apply to the MI-GC Fire District. Reaching this conclusion, we will address the concern raised in your letter "that if any special district with an unelected board has unfettered discretion to increase its millage beyond statutory imposed limits that could have dire consequences to the entire taxpayer population of the state in that it would increase millage by leaps and bound on a regular basis." We understand your concerns and your efforts to limit tax increases and think a General Assembly sought to remedy these concerns by its choice of the referendum procedure contained in S.C. Code Ann. § 6-11-271(D) (2004). The Legislature's purpose in enacting S.C. Code Ann. § 6-11-271 (2004) was to prevent the very concern you raise by restricting appointed commissions from independently levying taxes. Pursuant to S.C. Code Ann. § 6-11-271 (2004), a special purpose district falling under the provisions of § 6-11-271is, in effect, at the mercy of the taxpayer, or those whom the taxpayer has elected, to increase its millage rate for maintenance and operational purposes.

As noted in a prior opinion of this Office, special purpose districts are provided with a means to propose an increase in millage rates in manners that comport with taxpayer representation. Op. S.C. Att'y Gen., 2012 WL 889088 (Feb. 29, 2012). Specifically, we stated that:

> [t]he 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. Att'y Gen., 2012 WL 889088 (Feb. 29, 2012). Being a joint county fire district, the MI-GC Fire District can only *propose* an increase in its millage rate, which must be approved by a majority vote of the qualified electors of the district voting by referendum. Through this procedure, the General Assembly ensures that the population that the millage rate increase would affect is represented in a decision to increase taxes.

2. Time at which the Referendum Must be Held

We will now turn to your second question of whether a referendum held pursuant to S.C. Code Ann. § 6-11-271 (2004) may "take place as a special election as opposed to during the time of the general election." As a question of statutory construction, we note that "all rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and the language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006) (citing Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 341, 47 S.E.2d 788, 789 (1948)). Furthermore, when a statute's terms are clear and unambiguous on their face, there is no room for statutory construction, and courts must apply the literal meaning of those terms. Sloan, 370 S.C. at 486-87, 636 S.E.2d at 616 (citing Carolina Power & Light Co. v. Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994)). Rejection of the plain meaning of statutory terms should be done only to escape absurdity that could not have possibility been the intent of the Legislature. Id. at 487, 636 S.E.2d at 616 (citing Kiriakides v. United Artists Commc'n, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

Applying the rules of construction to S.C. Code Ann. § 6-11-271(D) (2004), it is our opinion that the answer to your second question can be determined directly from the plain language of the statute as its terms are clear and unambiguous and consonant with the intent of the Legislature. The statute's purpose, which can be derived from its title as well as the history leading to its enactment, is to cap certain special purpose districts' millage rates and to provide those special purpose districts with a defined mechanism to increase their millage rates either through the vote of the district's population by way of a referendum or, for special purpose districts located wholly within a county, by approval of the governing body of the district and county in which the district is located. S.C. Code Ann. § 6-11-271(D)-(E) (2004). As previously noted, S.C. Code Ann. § 6-11-271(E) (2004) does not apply to the MI-GC Fire District which services both Georgetown and Horry Counties.

Pursuant to S.C. Code Ann. § 6-11-271(D) (2004), a special purpose district authorized to levy taxes pursuant to S.C. Code Ann. § 6-11-271(B) or (C) (2004), or otherwise, "may request the commissioners of election of the county in which the special purpose district is located to conduct a referendum to propose a modification in the tax millage of the district." Upon receipt

of this request, it is our opinion that the language the legislature included within the statute indicates that a referendum must be held upon such a request at a time decided by the governing body of the district; the statutory language in support states "[u]pon receipt of such request, the commissioners of election shall schedule and conduct the requested referendum *on a date specified by the governing body of the district.*" Id. (emphasis added). Since this reading comports with the purpose of the statute, it is our opinion that there is no room for statutory construction, and the literal meaning of those terms must be applied. In other words, because the Legislature makes no mention that a referendum held pursuant to S.C. Code Ann. § 6-11-271(D) (2004) be conducted during a general election, it is our opinion that the rules of statutory construction would prevent a court from imposing such a requirement.

In comparison, we will briefly discuss a recent amendment to S.C. Code Ann. § 6-1-320 (2011) pertaining to fire districts. S.C. Code Ann. § 6-1-320 (2011), amended by Act No. 249, 2014 S.C. Acts ___, effective June 6, 2014. S.C. Code Ann. § 6-1-320 (2011) sets a "limitation" or cap on the amount a "local governing body" may increase its millage rate from year to year and provides specific exceptions for when a local governing body may deviate from the cap amount. A "local governing body," for purposes of S.C. Code Ann. § 6-1-320 (2011) and other provisions within Article 3, Chapter 1, Title 6, is defined as "the governing body of a county, municipality, or *special purpose district.*" S.C. Code Ann. § 6-1-300(3) (2004) (emphasis added). While it is our opinion that S.C. Code Ann. § 6-1-320 (2011) is applicable to special purpose districts[2] and therefore applicable to the MI-GC Fire District, we raise it here specifically in regards to an amendment passed by Act No. 249 on June 6, 2014. In part, Act No. 249 allows a county to increase the tax millage rate by referendum for the general operating purposes for fire districts in existence on January 1, 2014 and serving less than seven hundred homes. 2014 Act No. 249, 2014 S.C. Acts ___. The amendment, in pertinent part, reads as follows:

> ( ) (1) a fire district's governing body may adopt an ordinance or resolution requesting the governing body of the county to conduct a referendum to suspend the millage rate limitation for general operating purposes of the fire district. If the governing body of the county agrees to hold the referendum and subject to the results of the referendum, the millage rate limitation may be suspended and the millage rate may be increased for general operating purposes of the fire district. *The referendum must be held at the time of the general election,* and upon a majority of the qualified voters within the fire district voting favorably in the referendum, the millage rate may be increased in the next fiscal year. The referendum must include the amount of the millage increase. The actual millage levy may not exceed the millage increase specified in the referendum.
>
> (2) This subsection only applies to a fire district that existed on January 1, 2014, and *serves less than seven hundred homes.*

Id. (emphasis added). Albeit informal, research shows that the MI-GC Fire District services approximately 9,800 people. Therefore, while we assume the district serves well over 700

[2] See Op. S.C. A'tty Gen., 2009 WL 3658272 (Oct. 14, 2009).

homes and is outside of the scope of Act No. 249 (2014), we believe it was worthy of noting to provide a specific example of the language used by the Legislature when it intends a referendum be held during the general election. The clear and precise direction to hold a referendum conducted pursuant to Act No. 249 (2014) at the time of the general election is absent from S.C. Code Ann. §§ 6-11-271(D) (2004). Thus, it is our opinion that a Court would find that a referendum held pursuant to S.C. Code Ann. § 6-11-271(D) (2004) should be held "on a date specified by the governing body of the district," be it either during the general election or during a special election.

3. Amount of Millage Rate Increase that may be Imposed Pursuant to S.C. Code Ann. § 6-11-271(D) (2004)

Last, we turn to your third question which states that "even if the district may use [S.C. Code] Section 6-11-271 to increase millage by referendum, would that increase be limited to an increase of no more than the amount of millage authorized to be levied by the district in [S.C. Code] Section 4-23-40 and Act 598 of 1992." As we addressed previously, S.C. Code Ann. § 4-23-40 (1976) first capped the MI-GC Fire District's millage rate of "not more than five mills." Subsequently, in 1992, the General Assembly increased the MI-GC Fire District's millage rate from five mills to ten mills by Act No. 598. 1992 Act No. 598, 1992 S.C. Acts. 3630-31. In relevant part, Act No. 598, Section 1, Subsection (B) (1992) states: "[o]wing to the increase in operational and maintenance costs incurred by the district since 1966, the General Assembly finds that it is in order to authorize the levy and collection of additional millage for the district." Furthermore, Section 2 of Act No. 598 states in part that: "[t]he auditors and treasurers of Georgetown and Horry Counties are directed to levy and collect a tax of not more than ten mills . . . ." 1992 Act No. 598, 1992 S.C. Acts. 3631.

While we do agree that the effect of Act No. 598 (1992) caps the millage rate of the MI-GC Fire District at 10 mills, and S.C. Code Ann. § 6-11-271(B) (2004) sets this cap as the yearly millage to be levied as it was the millage imposed in fiscal year 1998, it is our opinion that S.C. Code Ann. § 6-11-271(D) (2004), as analyzed above, provides a means, by referendum, for the MI-GC Fire District to *"propose"* a "modification" in its millage rate. Concluding otherwise would, we believe, render the Legislature's enactment of S.C. Code Ann. § 6-11-271(D) (2004) useless. However, as discussed above, a special purpose district's ability to increase its millage rate is limited and for those special purpose districts to which S.C. Code Ann. § 6-11-271 (2004) apply, this can only be done in accordance with proper representation of a district's taxpayers, being direct enactment by the General Assembly, by way of referendum from the population of the district, or upon approval of the district and county council, should the special district purpose be located entirely in one county.

In reference to your concern that increases in a special purpose district's millage rate pursuant to a referendum held under S.C. Code Ann. § 6-11-271(D) (2004) would "increase millage rates by leaps and bounds" it is our opinion that the referendum's requirement of "propos[ing] a modification in the tax millage of the district" would prevent drastic millage rate increases. In our opinion, in order to indicate the "proposal" of the "modification in the tax millage of the district" the referendum ballot would necessarily have to disclose to the electorate

the current millage rate imposed and the proposed modification.[3] Thus, as the increase in the millage rate would presumably have to be specified to the electorate and passed by a majority vote of the qualified electors in the district voting in the referendum, an increase in millage "by leaps and bounds on a regular basis," as you state in your correspondence, is unlikely.

Conclusion

In summary, based on the plain language of S.C. Code Ann. § 6-11-271(D) (2004) and the Supreme Court's ruling in Weaver that led to the enactment of § 6-11-271, it is our opinion that a court would find the MI-GC Fire District may utilize the provisions of S.C. Code Ann. § 6-11-271 (2004); a referendum conducted pursuant to this section should be held "on a date specified by the governing body of the district;" and should a referendum be held pursuant to § 6-11-271(D) (2004), the proposed millage rate can exceed the statutory imposed millage rate cap so long as the actual millage rate imposed does not exceed the proposed increase approved by the electorate by referendum. In short, we stress that it is the voters who determine whether or not to increase a district's millage, not the district itself.

If we can answer any further questions pertaining to this opinion, please do not hesitate to contact our office.

Sincerely yours,

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[3] Although presumably not applicable to the MI-GC Fire District as it likely serves over 700 homes, the recently enacted amendment to S.C. Code Ann. § 6-1-320 that permits a fire district's governing body to adopt an ordinance or resolution requesting the governing body of the county to conduct a referendum to suspend the millage rate limitation for general operating purposes of the fire district, if it meets certain qualifying factors, is of guidance here. See 2014 Act No. 249, 2014 S.C. Acts ___. Specifically, we draw attention to the Act's requirement that a referendum held pursuant to it "must include the amount of the millage increase" and that "[t]he actual millage levy may not exceed the millage increase specified in the referendum." In line with the purpose of a referendum held under S.C. Code Ann. § 6-11-271(D) (2004) – to propose a modification in the tax millage of the district – it is our opinion that like a referendum held in accordance with Act No. 249, the millage rate increase should be listed on the referendum ballot, and that the amount imposed, must not exceed that amount; see also Op. S.C. Att'y Gen., 2008 WL 4870545 (Oct. 8, 2008).