ALAN WILSON
ATTORNEY GENERAL

November 12, 2015

G.P. Callison, Jr., Esquire
McCormick County Attorney
Callison Dorn Law Firm, P.A.
Post Office Box 3208
Greenwood, SC 29648

Dear Mr. Callison:

Attorney General Alan Wilson has referred your letter dated September 14, 2015 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 a follow-up opinion request with clarification to our August 24, 2015 opinion to you (See Op. S.C. Att'y Gen., 2015 WL 5254329 (August 24, 2015))):

1) May the Savannah Lakes Village ("SLV") Special Tax District contract with a nonprofit corporation for fire protection services?
2) If Savannah Lakes Village Special Tax District is authorized to contract with a nonprofit corporation for fire protection services, can Savannah Lakes Village Special Tax District use tax funds to support fires and services rendered by Sandy Branch Fire Department outside of the boundary lines of the District? More specifically,
    a. may funds received by the SLV Special Tax District from the Special Tax District tax be lawfully spent, pursuant to the Agreement of Services between the SLV Special Tax District Commission with the Board of Directors of Sandy Branch Volunteer Fire Department (a nonprofit corporation), for fire protection services provided by Sandy Branch Volunteer Fire Department to persons and property outside the SLV Special Tax District?;
    b. may the SLV Commission lawfully pay the Sandy Branch Volunteer Fire Department the contractual fee of $25.00 per person per Fire Run for all Fire and First Responder runs; including runs:
        i. (a) outside the SLV Special Tax District but within the Sandy Branch Volunteer Fire Department's area it contractually serves; and
        ii. mutual aid fire runs totally outside the Sandy Branch Volunteer Fire Department's area it contractually serves and outside the SLV Special Tax District?;
    c. may SLV Special Tax District tax funds be used to construct and maintain fire houses, and/or fire hydrants outside SLV but within the Sandy Branch Volunteer Fire Department's area it contractually serves?;
    d. may SLV Special Tax District tax funds be used to test and flush fire hydrants installed outside the SLV Special Tax District?;
    e. if the SLV Special Tax District employed part-time or full-time firefighters, would it

be lawful for those firefighters to participate in Fire Runs outside the SLV Special Tax District, including mutual aid fire runs outside the SLV Special Tax District?;

f. if the Sandy Branch Volunteer Fire Department employed paid part-time or full-time firefighters, could the SLV Commission lawfully reimburse Sandy Branch Volunteer Fire Department for either:
    i. their full salaries and administrative expenses; and/or
    ii. a portion of their salaries and administrative expenses proportional to the percentage of the paid firefighters runs within SLV Special Tax District to their total runs? If not, is there a formula or method by which the SLV Commission may reimburse all or part of these costs?

Law/Analysis:
By way of background, it is this Office's understanding the Sandy Branch Volunteer Fire Department is a nonprofit corporation registered with the South Carolina Secretary of State's Office. It is also now our understanding there is no Sandy Branch Fire District, but any such reference to it refers to the territory that the Sandy Branch Volunteer Fire Department serves contractually.

As you are likely aware, counties have specific statutory authority to contract for fire protection with nonprofit corporations. S.C. Code § 4-21-10. Counties, municipalities and political subdivisions are given authority to agree with the State or another political subdivision for the joint administration of any function or exercise of power. S.C. Const. art. VIII, § 13. Moreover, the South Carolina Constitution gives local government broad powers to be "liberally construed in their favor" and include those "fairly implied and not prohibited by this Constitution." S.C. Const. art. VIII, § 17. If the county were providing fire protection to the Savannah Lakes Village Special Tax District, the county could hire Sandy Branch Volunteer Fire Department to provide fire protection service. S.C. Code § 4-21-10; S.C. Const. art. VIII, § 13. Moreover, South Carolina provides for a separate filing with the Secretary of State for an organization that is a nonprofit corporation financed by certain federal or State funds. S.C. Code § 33-36-10, etc. Those nonprofit corporations financed by government funds are authorized by statute to contract for fire protection with individuals, corporations and other political subdivisions. S.C. Code § 33-36-270. However, the statute creating such nonprofit corporations was enacted after the Sandy Branch Volunteer Fire Department was organized as a nonprofit with the South Carolina Secretary of State. Id. It is unknown to us whether Sandy Branch would qualify to file as a nonprofit corporation financed by certain federal or State funds pursuant to Section 33-36-10. Thus, there remains the question of whether a nonprofit corporation not organized pursuant to S.C. Code § 33-36-10 could contract to provide fire protection service. Certainly by the creation of such a filing status and by granting specific statutory authorization for a nonprofit organized pursuant to S.C. Code § 33-36-10, the South Carolina Legislature has contemplated and even condoned a private nonprofit corporation contracting to serve for fire protection.

This Office addressed a similar question whether in the absence of express statutory authorization the South Carolina Department of Corrections could contract with a private corporation in management of a State correctional facility. See Op. S.C. Att'y Gen., 1985 WL 166051 (August 8, 1985). Some portions of that opinion are very applicable to your situation, and we recommend reading that opinion for further analysis, in addition to seeking legislative clarification. In that opinion we stated:

> *It is well established that the State may properly maintain supervision and control through the use of a contract. As a general matter, any employment contract*

contemplates supervision and control by the employer over his employee. More specifically, a private corporation 'may be employed to carry a law into effect.' 16 C.J.S., Constitutional Law, § 137. As stated in Amer. Soc. P.C.A. v. City of N.Y., 199 N.Y.S. 728, 738 (1933),

> *While it is true that strictly governmental powers cannot be conferred upon a corporation or individual . . . still it has been held by a long line of decisions that such corporations may function in a purely administrative capacity or manner.*

While 'an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties . . ..' Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5th Cir. 1957); see also, 73 C.J.S., Public Adm. Law and Procedure, § 53; McQuillin, Municipal Corporations, § 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) (contract between a city and private company for the control, management and operation of waterworks plant is valid).

This law has been applied to analogous situations such as the administration of hospitals. In Robinson v. City of Phil., 400 Pa. 80, 161 A.2d 1 (1960), for example, the Supreme Court of Pennsylvania upheld a contractual agreement between a municipality and two private universities relating to the operation, management and control of the city's general hospital. Reviewing the contract in detail, the Court concluded:

> *It will suffice us to say that our study of the contract convinces us that neither the city of Philadelphia nor the Board of Trustees of Philadelphia General Hospital has unlawfully delegated their powers and responsibilities in and by the above mentioned contract.*

161 A.2d at 4. In Government and Civic Emp. Etc. v. Cook Co. School of Nursing, 350 Ill.App. 274, 112 N.E.2d 736 (1953), the Court upheld a contract between a county and a nonprofit corporation which required the corporation to 'furnish, direct and perform the nursing services required for the proper care and nursing of all patients in the County Hospital . . ..' 112 N.E.2d at 737. And in Bolt v. Cobb, 225 S.C. 408, 415, 82 S.E.2d 789 (1954), our own Supreme Court upheld a contract between a county and a private entity for the 'performance of a public, corporate function', i.e. medical services in the form of a hospital. Only recently, in S.C. Farm Bureau Marketing Assoc. v. S.C. State Ports Auth., 278 S.C. 198, 293 S.E.2d 854 (1982), our Court found a contract between a private association and the State for the management and operation of a grain elevator and storage facilities to be constitutionally valid. As mentioned earlier, our Court has upheld a contract between a city and a private corporation for the management of a water plant. Green v. City of Rock Hill, supra. See also, 16 C.J.S., Constitutional Law, § 137 (a State may validly use a private corporation as an agent for the treatment of inebriates). See also, Murrow Indian Orphans Home v. Children, 171 P.2d 600 (Okl. 1946). In these instances, the governmental entity maintained supervision and control over the corporation by virtue of a contractual agreement.

...

> *It is well recognized that there must exist statutory authority for an administrative officer or agency to subdelegate any portion of the authority which has been delegated to him by statute. 73 C.J.S., Public Administrative Law and Procedure, § 56. However, if it is reasonable to imply the authority to subdelegate, such an implication may legally be made. State v. Imperatore, 92 N.J. Super. 347, 223 A.2d 498 (1966); 73 C.J.S., Public Administrative Law and Procedure, supra.*
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> *Of course, as expressly noted in 1974 Op. Atty. Gen., No. 3855 the State, through its prison officials must maintain supervision and control over its prisons and the prisoners sentenced thereto. Consistent with this is the general constitutional principle that*
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> > *[t]he State's power to contract is subject to the further limitation that a state cannot by contract divest itself of the essential attributes of sovereignty and its governmental powers.*
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> *81 C.J.S., States, § 155. In essence, no governmental agency can by contract or otherwise suspend its governmental functions. Nairn v. Bean, 48 S.W.2d 584 (Tex. 1932).*

Op. S.C. Att'y Gen., 1985 WL 166051 (August 8, 1985). Furthermore, this Office affirmed the 1985 opinion in two opinions issued earlier this year. See Ops. S.C. Att'y Gen., 2015 WL 5896029 (September 28, 2015); 2015 WL 5896030 (September 28, 2015). Quoting from those opinions, we stated:

> *In other words, our 1985 opinion concluded that the use of a private entity by a public body to assist it in carrying out its duties was not unauthorized so long as the public body or entity maintained sufficient supervision and control so as not to constitute an unlawful delegation to a private corporation. The validity of any such delegation ultimately depended upon all the facts and circumstances, which this Office cannot adjudge in a legal opinion.*
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> ...
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> *In Taylor [v. Richland Memorial Hospital, 329 S.C 47, 495 S.E.2d 431 (1997)], the Court rejected the argument that the arrangement constituted a violation of Art. X, § 11 of the State Constitution as a joint venture between a governmental entity and a private corporation. The Taylor Court said this:*
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> > *Article X, § 11 prohibits governmental entities from becoming either 1) a joint owner of or 2) a stockholder in a private company, association or corporation .... Not every joint endeavor between a public entity and private business is constitutionally prohibited. See Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976); Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923). We have approved arrangements where governmental entities leased assets to private entities without finding a violation of the joint ownership clause. Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982); Gilbert v. Bath, supra; Chapman, supra.*
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> ...

Id. In those opinions, this Office concluded that the State still needed to adequately supervise any such corporation it contracts with so as not to delegate its authority unlawfully. Id. This Office believes those

same principles expressed in the 1985 opinion and later affirmed in the 2015 opinions would apply to your question but ultimately your question would benefit from legislative clarification.

Regarding Question 2 and its subparts, the terms of the contract between the Savannah Lakes Village Special Tax District and the Sandy Branch Volunteer Fire Department, this Office believes a court is likely to uphold the terms of a contract, as we have previously opined that as long as a contract was lawfully entered into (i.e. no fraud or abuse of discretion) between two political subdivisions, a court will hold up such a contract in spite of what might appear to be an unwise deal. Op. S.C. Att'y Gen., 1990 WL 482417 (March 14, 1990). Even though the contract is between a nonprofit and a political subdivision, we believe a court is likely to uphold the contract as long as it was lawfully entered into. However, this Office understands you have concerns in regards to the use of funds collected for fire protection. As the South Carolina Supreme Court stated in Watson v. City of Orangeburg, 229 S.C. 367, 375, 93 S.E.2d 20, 24 (1956), "[t]he power of taxation being an attribute of sovereignty vested in the legislature subject to constitutional restrictions, taxes can be assessed and collected only under statutory authority." The South Carolina Constitution grants the General Assembly authority to "vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including special purpose districts, public service districts, and school districts ...." S.C. Const. art. X, § 6. Our State Constitution and laws require uniform assessment throughout the State. S.C. Const. art. X, § 6; S.C. Code § 12-43-210. See also S.C. Const. art. VIII, Section 14 and article X, Section 1 (regarding uniform assessment and taxation). This Office has also previously opined that taxation levied by a special purpose district must be uniform within the boundaries of the public service district. See, e.g., Op. S.C. Att'y Gen., 1977 WL 46015 (April 5, 1977). Moreover, our State Constitution requires the consent of the people for a tax, subsidy or charge to be established. S.C. Const. art. X, § 5. Additionally, in another such opinion, this Office concluded that "[t]axes collected for specific public purposes cannot be diverted to fund unbudgeted expenses unless the purpose for which the tax was levied is first satisfied." Op. S.C. Atty. Gen., 1991 WL 474751 (April 1, 1991). Furthermore, it is unlawful to use the proceeds of a tax specifically levied by a municipal corporation for any purpose other than what it is levied for. S.C. Code § 5-21-130. Moreover, our State Constitution requires "[a]n accurate statement of the receipts and expenditures of the public money shall be published annually in such manner as may be prescribed by law." S.C. Const. art. 10, § 9. Nevertheless, "[n]o governing body may spend public funds... beyond its corporate purpose." Op. S.C. Att'y Gen., 2014 WL 1398594 (March 12, 2014) (quoting Op. S.C. Att'y Gen., 2003 WL 21790882 (July 28, 2003)). While we believe a court will uphold the terms of the contract, there is a concern that funds are being used to provide services and equipment outside the jurisdiction of the District. While we defer to a court's interpretation, this Office believes just as two political subdivisions may agree to share services, as long as the contract was lawfully entered into, a court will likely uphold the terms of the contract.

Conclusion: This Office believes unless and until the Legislature clarifies its position on the matter, a court will likely determine that the special purpose tax district is authorized to contract for fire protection with a nonprofit corporation subject to the cautions and limitations expressed in our August 8, 1985 opinion. See Op. S.C. Att'y Gen., 1985 WL 166051 (August 8, 1985). Regarding the terms of the contract entered into for fire protection with a nonprofit corporation, this Office would caution that negotiations with a nonprofit corporation will inherently be scrutinized and that any such negotiation is subject to judicial review. Nevertheless, the specific terms of any such agreement should be entered into with the consent of the governing authority based on the legal advice of its counsel and subject to our State's limitations on the use of funds collected for fire protection, as noted above. Therefore, we will presume a court will leave any such terms intact except where they violate the law. 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. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. S.C. Code § 15-53-20. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General