ALAN WILSON
ATTORNEY GENERAL

March 4, 2016

The Honorable Shane Martin
Senator, District 13
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Martin:

You have requested the opinion of this Office relating to the Cherokee Springs Fire District located in Spartanburg County (hereinafter "the District"). Specifically, it is the District's intent to issue a general obligation bond to begin building a new headquarters on land that it has purchased. As a result, the following questions have ensued:

1. If the district wishes to exceed its borrowing limit for the purpose of building its new headquarters, what is the correct procedure for doing so?

2. Would a referendum have to be held within the district or, alternatively, are the Board of Commissioners of the Fire Department able to exceed the constitutional general obligation debt limitation without the approval, by referendum, of the voters of the district?

3. Do the elected Board of Commissioners need to spend tens of thousands of dollars to hold a referendum since they are elected to make these decisions?

Our analysis follows.

Law / Analysis

As referenced in your letter, the District was created by Act 318 of 1965. Act No. 318, 1965 S.C. Acts 565. We have noted in prior opinions of this Office that a review of Act 318 reveals that the District is located wholly within Spartanburg County and would be considered "a special purpose district (i.e. a political subdivision)." Op. S.C. Att'y Gen., 1993 WL 720103 (April 26, 1993); Op. S.C. Att'y Gen., 1990 WL 599207 (May 30, 1990). Such classification is relevant in analysis of general obligation indebtedness.

Article X, Section 14 of the South Carolina Constitution defines and provides for the bonded indebtedness of political subdivisions in the State and, for purposes of the Section, defines "political subdivision" as "the counties of the State, the incorporated municipalities of the State, and special purpose districts, including special purpose districts which are located in

more than one county or which are comprised of one or more counties." S.C. Const. art. X, § 14(1). Thus, as we have concluded that the District would classify as a political subdivision, Article X, Section 14 would govern the bonded indebtedness of the District.

In relevant part, Article X, Section 14 provides as follows:

> (2) The political subdivisions of the State shall have the power to incur bonded indebtedness in such manner and upon such terms and conditions as the General Assembly shall prescribe by general law within the limitations set forth in this section and Section 12 of this article.
>
> Such political subdivisions shall have the power to incur indebtedness in the following categories and in no others:
>
> (a) General obligation debt; and . . . .
>
> (3) "General obligation debt" shall mean any indebtedness of the political subdivision which shall be secured in whole or in part by a pledge of its full faith, credit and taxing power.

S.C. Const. art. X, § 14(2)(a), (3).

In regards to the amount of general obligation debt a political subdivision may incur, Subsections (6) and (7), respectively provide as follows:

> (6) If general obligation debt be *authorized by a majority vote of the qualified electors of the political subdivision voting in a referendum authorized by law*, there shall be *no conditions or restrictions limiting the incurring of such indebtedness* except:
>
> (a) those restrictions and limitations imposed in the authorization to incur such indebtedness;
>
> (b) the provisions of subsection (4) hereof;[1] and
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> (c) such general obligation debt shall be issued within five years of the date of such referendum.

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[1] Subsection 4 provides as follows:

> General obligation debt may be incurred only for a purpose which is a public purpose and which is a corporate purpose of the applicable political subdivision. The power to incur general obligation debt shall include general obligation debt incurred by counties within the limitations prescribed by Section 12 of this article, and general obligation debt incurred by any political subdivision for purposes permitted by Section 13 of Article VIII of this Constitution. All general obligation debt shall mature within forty years from the time such indebtedness shall be incurred.

S.C. Const. art. X, § 14(4).

> (7) Subject to the provisions of subsection (4) of this section and on such terms and provisions as the General Assembly may, by general law, prescribe, general obligation debt may also be incurred by the governing body of each political subdivision:
>
> (a) For any of its corporate purposes *in an amount not exceeding eight percent of the assessed value of all taxable property of such political subdivision*; or
>
> (b) General obligation debt incurred pursuant to and within the limitations prescribed by Section 12 of this article.
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> . . . .

S.C. Const. art. X, § 14(6)-(7) (emphasis added).

In City of Beaufort v. Griffin, the South Carolina Supreme Court gave a useful summary of the above quoted sections from Article X, Section 14, providing that:

> [t]he general obligation debt aspect of bonded indebtedness, as illustrated by the emphasized language in Article X, Section 14, may thus be understood as indebtedness lawfully contracted for governmental purposes and ultimately secured by taxes on the property within the political entity. This definition is found also in prior case law treatment of the term . . . .
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> Article X, Section 14 provides generally that the political subdivision may incur general obligation debt if approved by the qualified electors within the subdivision. Subsection 7, however, gives the local political entity a limited method to incur general obligation debt without first submitting the issue for voter approval, as long as the debt thus assumed does not exceed the eight percent of the assessed value of the taxable property within the entity. Once the indebtedness accrued by means of this subsection reaches the eight percent exemption limit, any subsequently proposed general obligation debt must first be approved by the voters.

275 S.C. 603, 605-06, 274 S.E.2d 301, 303 (1981).

Thus, Article X, Section 14 authorizes political subdivisions to incur bonded indebtedness "in such manner and upon such terms and conditions as the General Assembly shall prescribe by general law within the limitations set forth in this section and Section 12 of this article." S.C. Const. art. X, § 14(2). The limitation on general obligation indebtedness to be incurred without a referendum is expressed in S.C. Const. art. X, § 14(7)(a) as "an amount not exceeding eight percent of the assessed value of all taxable property of such political subdivision." As S.C. Const. art. X, § 14(6) makes clear, if the District wishes to exceed the eight percent general obligation debt limitation imposed on political subdivisions, it must do so by referendum with a majority of the qualified electors of the political subdivision authorizing the excess debt. See also S.C. Code Ann. § 11-27-40(2)(2011) (addressing the referendum procedure if required by Article X).

As noted in a prior opinion of this Office on the similar question of whether a school district could exceed the constitutional limitation imposed on bonded indebtedness without holding a referendum,[2] we acknowledged that: "[t]he legislative power of the State is conferred upon the General Assembly; however, that power is subject to whatever restrictions or limitations may be imposed by the Constitution. Op. S.C. Att'y Gen., 1993 WL 720071 (Feb. 5, 1993) (citing Clark v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935); Massey v. Glenn, 106 S.C. 53, 90 S.E. 321 (1916); State v. Aiken, 42 S.C. 222, 20 S.E. 221 (1894); Mauldin v. City Council of Greenville, 42 S.C. 293, 20 S.E. 842 (1895)). Therefore, we concluded that "[b]ecause the Constitution contains an express limitation of eight percent when a referendum is not held respecting the incurring of bonded indebtedness, the General Assembly could not permit, by legislation alone, the incurring of bonded indebtedness by a school district in excess of the eight percent limitation without a referendum; a constitutional amendment would be required." Id. at *1. Although the Board of Fire Control of the District is made up of elected officials given the powers and duties enumerated in Act 318, the Board is unquestionably subject to the restrictions and limitations imposed by the Constitution, and, as addressed in the analysis in our February 5, 1995 opinion, a constitutional amendment would be required for the District to exceed this limitation. Therefore, if the District wishes to exceed the eight percent general obligation debt limitation imposed by Article X, Section 14, a referendum must be held to do so.

We do wish to distinguish that pursuant to local law, the Board of the District is authorized to borrow up to one million dollars by way of tax anticipation notes ("TANs"). See Act No. 226, 1993 S.C. Acts 3474 ("Act 226"). Specifically, Act 226 authorizes the Board of the District

> [t]o borrow not exceeding one million dollars on terms and for a period as to the fire control board may seem most beneficial for the fire district in anticipation of taxes. The indebtedness must be evidenced by a note issued by the members of the board and the county treasurer. The full faith, credit, and taxing power of the Cherokee Springs Fire District is pledged irrevocably for the payment of the indebtedness.

Id. We have previously explained that "TANs are general obligation debts of a school district [or other political subdivisions, see S.C. Code Ann. §§ 11-27-40, 11-27-50 (2011)] used for cash flow purposes until property tax revenue is collected. Op. S.C. Att'y Gen., 2014 WL 4165337 (Aug. 8, 2014) (citing Op. S.C. Att'y Gen., 1980 WL 120783 (July 23, 1980) (explaining TANs are "secured by a pledge of *[ad valorem]* taxes or license fees and a pledge of the full faith, credit and taxing power of the political subdivision."); Davenport v. City of Rock Hill, 315 S.C. 114, 115 n. 1, 432 S.E.2d 451, 452 n. 1 (1992) ("[TANs] are short term obligations issued during a fiscal year in anticipation of taxes already levied but not collected.")). Intended to be short term obligations, "[t]ax anticipation notes shall be expressed to mature not later than ninety days from the date on which such taxes or license fees may be paid without penalty." S.C. Code Ann. § 11-27-40(5) (2011).

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[2] Compare S.C. Const. art X, § 15 with S.C. Const. art. X, § 14 (imposing the same limitation on bonded indebtedness provided for school districts other political subdivisions).

We have also explained that "[d]espite the fact these provisions clearly demonstrate that TANs are considered general obligation debts, and at least pursuant to the terms of Section 11-27-50's legislative title,[3] may be considered a type of bond, South Carolina law has consistently concluded that a TAN does not constitute bonded indebtedness for purposes of constitutional debt limitations." Op. S.C. Att'y Gen., 2014 WL 4165337 (Aug. 8, 2014) (citing Davenport v. City of Rockhill, 315 S.C. 114, 432 S.E.2d 451 (1993) ("TANs have been exempted historically from debt limits."); Caddell v. Lexington County Sch. Dist. No. 1, 296 S.C. 397, 373 S.E.2d 598 (1988) (explaining the eight percent debt limitation placed upon school districts does not include yearly expenses payable from current revenues because the governmental entity is not obligated to impose property taxes for their payments)).

Looking back to the District's ability to issue TANs as specified in Act 226, in a prior opinion of this Office, we addressed the "doubtful constitutionality" of Act 226 prior to its enactment on two grounds. Op. S.C. Att'y Gen., 1993 WL 720103 (April 26, 1993). First, we noted that "S.295, R-46 of 1993 is clearly an act for a specific county." Id. at *1 (explaining further that "Article VIII, Section 7 of the Constitution of the State of South Carolina provides that "[n]o laws for a specific county shall be enacted"). Furthermore, we concluded that the Act likely violated Article X, Section 14(8) of the South Carolina Constitution which requires TANs to mature ninety days from the date on which such taxes or license fees may be paid. Specifically, we provided that the Act "could be deemed violative of Article X, Section 14(8) on its face or as applied, or both, since the Board of Fire Control would be given the power to issue tax anticipation notes 'on terms and for a period as to the fire board may seem most beneficial. . . .' " Id. at *2. While we assume it was not the intent of the legislature to contravene our State's Constitution, we must also presume Act 226 is constitutional in all respects until a court rules otherwise. See Op. S.C. Att'y Gen., 2007 WL 4284626 (Nov. 27, 2007) (concluding that a legislative enactment is presumed constitutional and will remain in force unless and until a court rules otherwise). As such, we point out this alternative borrowing option of the District while continuing to caution against Act 226's constitutionality.

Conclusion

Based on the forgoing analysis, it is our opinion that the Cherokee Springs Fire District may only incur general obligation debt exceeding eight percent of the assessed value of the taxable property of the District after obtaining the approval of the qualified electors within the District by referendum. Although the Board of Fire Control of the District is made up of elected officials given the powers and duties enumerated in Act 318 of 1965, the Board is unquestionably subject to the restrictions and limitations imposed by the Constitution. Therefore, if the District wishes to exceed the eight percent general obligation debt limitation imposed by Article X, Section 14, a referendum must be held to do so.

By way of Act 226 of 1993, the legislature has also authorized the District to borrow a maximum of one million dollars, evidenced by a note, in anticipation of taxes for a period as the

[3] See S.C. Code Ann. § 11-27-40 (2011) (containing the same title as applied to school districts in S.C. Code Ann. § 11-27-50 to other political subdivisions, i.e. "Effect of New Article X on *bonds* of *political subdivisions*") (emphasis added).

Board may seem most beneficial for the fire district (tax anticipation note). While we addressed the "doubtful constitutionality" of the provisions of Act 226 prior to its enactment, we must presume all acts of the legislature constitutional until determined otherwise. As such, we point out this alternative borrowing method available to the District while continuing to caution against the potential constitutional shortcomings that could arise if utilized.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
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REVIEWED AND APPROVED BY:

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