ALAN WILSON
ATTORNEY GENERAL

April 29, 2016

Mr. Larry C. Smith, Esquire
Attorney for Richland County
Post Office Box 192
Columbia, South Carolina 29202

Dear Mr. Smith:

You have requested the opinion of this Office pertaining to the annual ad valorem tax levy collected for the Recreation Commission of Richland County ("Recreation Commission"). Specifically, you ask: (1) who is responsible pursuant to Act 397 of 1998 for levying the ad valorem property tax millage prescribed in S.C. Code Ann. § 6-11-271(B)(2); (2) if responsibility for levying ad valorem property tax millage lies with the Recreation Commission, an appointed rather than elected body, would such authority violate Article X, § 5 of the South Carolina Constitution by creating a situation of taxation without representation; and (3) if responsibility for levying ad valorem property tax millage lies with the governing body of Richland County, would that be an unfunded mandate and abrogate Home Rule?

Law / Analysis

We believe the answers to the above questions are set forth in Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997) and S.C. Code Ann. § 6-11-271 (2004), which was enacted by Act 397 of 1998 as a result of the South Carolina Supreme Court's ruling in Weaver. Furthermore, analysis of Weaver and Section 6-11-271 has been explained in detail in prior opinions of this Office.

By Act No. 317 of 1969 ("Act 317"), the Legislature authorized the Recreation Commission to:

> levy upon all the taxable property in the District a tax of not exceeding five mills per annum to meet the cost of operating and maintaining parks, playgrounds and recreational facilities under its jurisdiction. Such tax shall be levied by the county auditor and collected by the county treasurer who shall keep it in a separate fund applicable solely to the purpose for which it was levied.

Act No. 317, 1969 S.C. Acts 382. As the Recreation Commission is governed by an appointed rather than elected body,[1] taxpayer Don Weaver brought an action challenging the

[1] See § 51-395.3, Code of Laws of South Carolina, 1962 ("The District shall be governed by a commission . . . to be appointed by the Governor upon the recommendation of Richland County legislative delegation, including the Senator").

constitutionality of Act 317, permitting an appointed body to levy up to 5 mills per year, on the basis that it violated the prohibition of taxation without representation contained in Article X, § 5 of the South Carolina. Weaver v. Recreation District, 328 S.C. 83, 85, 492 S.E.2d 79, 80 (1997); see S.C. Const. art. X, § 5 ("No tax. . . shall be established, fixed, laid or levied, under the pretext whatsoever, without the consent of the people or their representatives lawfully assembled"). The Weaver Court ruled in favor of the taxpayer, reasoning as follows:

> Act No. 317 gives the Recreation Commission the complete discretion to determine its annual budget, and to levy anywhere from one to five mills taxes to meet its budget. We find such delegation impermissible under our holdings in *Crow*, *Traynham*, and *Bradley*. Accordingly, insofar as Act No. 317 permits such a delegation, it violates Article X, § 5 of the South Carolina Constitution and may not stand.

Weaver, 328 S.C. at 87, 492 S.E.2d at 81-82. As a result of this conclusion, the Court ordered prospective relief, stating that "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." Id. at 87-88, 492 S.E.2d at 82.

In response to Weaver, the General Assembly passed Act 397 of 1998, codified in the South Carolina Code at Section 6-11-271. Act No. 397, 1998 S.C. Acts 2389; S.C. Code Ann. § S.C. Code Ann. § 6-11-271 (2004). Section 6-11-271, in effect, took "all discretionary taxing power out of the hands of the 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). And, as we have explained in a prior opinion of this Office, "[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 the district in the General Assembly, in the people of the district acting by referendum, or by the governing body of the county." Op. S.C. Att'y Gen., 2012 WL 889088 (Feb. 29, 2012); see also, Op. S.C. Att'y Gen., 2014 WL 4953185 (Sept. 23, 2014) (discussing the effect of Section 6-11-271 on the taxing power of special purpose districts to which such Section pertains).

With this understanding in mind, we believe the answer to your first question – who is responsible pursuant to Act 397 of 1998 for levying the ad valorem property tax millage prescribed in S.C. Code Ann. § 6-11-271(B)(2) – is clearly set forth in Section 6-11-271. First, in regards to the applicability of Section 6-11-271, S.C. Code Ann. § 6-11-271(A) (2004) states that "[f]or purposes of this section 'special purpose district' means any 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 of this State." It is clear the Recreation Commission falls within this definition. In fact, as explained above, the Recreation Commission was the very subject of the Weaver decision that resulted in Section 6-11-271's enactment.

In regards to the annual tax levy of a special purpose district to which Section 6-11-271 pertains, S.C. Code Ann. § 6-11-271(B)(1)-(2) (2004) provides as follows:

> (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) There 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.*

Thus, because S.C. Code Ann. § 6-11-271(B)(2) (2004) expressly defines the millage rate that the Recreation Commission must impose – "*the amount equal to the millage levy imposed in fiscal year 1998*" – the discretionary authority to levy taxes was taken from the Recreation Commission and placed in the hands of the General Assembly. In other words, the General Assembly, by way of Section 6-11-271, has set the tax levy for the Recreation Commission and such power, as was previously given to the Recreation Commission by Act 317 of 1969, no longer stands. As to the actual levy of the tax set by the General Assembly, *i.e.* the amount equal to the millage levy imposed in fiscal year 1998, we believe such amount must be levied by the county auditor and collected by the county treasurer.

In light of the above conclusion, your second and third questions appear inapplicable. However, we will comment briefly on the potential roles of the tax payers of the special purpose district and the governing body of the county in which the special purpose district is located in raising the millage rate above that imposed by Section 6-11-271. We have explained that Section 6-11-271(D)(2004) provides a mechanism for the special purpose districts to which the Section applies to increase its millage rate by approval of the taxpayers within the district by way of referendum. See Op. S.C. Att'y Gen., 2014 WL 4953185 (Sept. 23, 2014) (discussing S.C. Code Ann. §§ 6-11-271(D) and 6-11-273 (2004)). We have also explained 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. See Op. S.C. Att'y Gen., 2014 WL 4953185 (Sept. 23, 2014). Therefore, "a special purpose district falling under the provisions of § 6-11-271 is, 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." Id. at *4. This too comports with the intent of Weaver to eliminate the problem of taxation without representation that existed when appointed commissions were given the discretionary authority to levy taxes on behalf of its district.

Conclusion

As a result of the Supreme Court's ruling in Weaver, it is clear that assessment of property taxes by an appointed governing body of a special purpose district would violate Article X, § 5 of the South Carolina Constitution forbidding taxation by unelected officials. In response to Weaver, S.C. Code Ann. § 6-11-271 was enacted 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, or, in the case of an increase in millage, in the people of the district acting by referendum or in the governing body of the county. Accordingly, because Section 6-11-271

undoubtedly applies to the Richland County Recreation Commission, the levy has been set by the General Assembly and any increase to the millage imposed by Section 6-11-271(B)(2) would require a referendum or approval of the governing body of the county, as set forth in S.C. Code Ann. §§ 6-11-271-275.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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