ALAN WILSON
ATTORNEY GENERAL

January 20, 2017

Ms. Miriam Hair, Executive Director
Municipal Association of South Carolina
P.O. Box 12109
Columbia, SC 29211

Dear Director Hair:

Attorney General Alan Wilson has referred your letter dated September 19, 2016 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter)**:**
"Does a newly incorporated municipality or municipality that is otherwise without a property tax levy have the authority to levy [a] property tax under South Carolina law?

The Municipal Association of South Carolina has recently received inquiries from some cities in the state about their authority to levy a property tax. In particular, cities that currently do not levy a property tax are confused about their authority to do so in light of a previous opinion your office issued to the Town of Edgefield on July 9, 2014.
...
We believe all cities in South Carolina have authority through the state Constitution and the SC Code of Laws to levy a property tax.
...
Section 6-1-320 was intended to limit increases of, not remove, the levy authority
...
Plain language examination of this provision signals a key underlying presumption that the formula laid out would only be applied where there was a millage rate "imposed . . . for the preceding tax year." Every sentence proceeding from that initial sentence is clearly intended to build upon that baseline assumption, and fails where that baseline assumption is not satisfied.

The formula contained in the first sentence of (A)(l) fails to result in any millage levy where the previous year's millage rate was zero. The second and third sentences of (A)(1), which would formulaically allow large rate increases where CPI or population growth are significant, would simultaneously allow zero increase, and indeed no assessment at all where there was zero millage during the prior year.

This well-settled rule is made all the more applicable regarding the present question because of the South Carolina Constitution's liberal construction requirement in favor of municipalities.
Article VIII, Section 17 of the Constitution states the following:

> *"The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution. "*

Likewise, SC Code of Laws Section 5-7-10 states in part:

> *"The powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities. "*

...

Conclusion

We believe cities, including those without a millage, have the authority to levy a property tax since their authority outlined above is still in full force and has not been altered or repealed, either explicitly or implicitly, by any other law passed by the General Assembly, including SC Code of Laws Section 6-1-320."

Law/Analysis:

Before we address your question, let us state that as a general rule, this Office recognizes a long-standing tradition that it will not overrule a prior opinion by this Office unless it is clearly erroneous or a change occurred in the applicable law. See, e.g., Ops. S.C. Atty. Gen., 2013 WL 6516330 (November 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). Thus, in the absence of a change in the law concerning the referenced statute or clear error, we are reluctant to change our legal opinion. Nevertheless, we will review the conclusion in our July 9, 2014 opinion and the reasons therein on your behalf. See Op. S.C. Att'y Gen., 2014 WL 3640923 (S.C.A.G. July 9, 2014).

Let us begin answering your question by reviewing statutory interpretation. As a background regarding statutory interpretation, the cardinal rule of statutory construction is to ascertain the intent of the General Assembly and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the General Assembly controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). Moreover, before we examine the particular statute, a background in tax interpretation would be helpful. Usually when one thinks of tax interpretation, he thinks of the long-recognized rule of statutory interpretation that any ambiguity in the imposition of a tax must be interpreted in favor of the taxpayer. See Op. S.C. Atty. Gen., 1967 WL 12119 (April 28, 1967); Alltel Communications, Inc. v. S.C. Dept. of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012) (citing Cooper River Bridge, Inc. v. S.C. Tax Comm'n, 182 S.C. 72, 76, 188 S.E. 508, 509-510 (1936)).

Keeping all of the above in mind, let us address some of your concerns. Quoting from your letter, you state:

"In this July 2014 opinion, your office took a position regarding the Town of Edgefield's ability to levy a property tax. In 2006, the town eliminated its property tax on real property by adjusting the rate from 81 mills to 0. Your office took the position that the town was not allowed to reinstitute the previous 81 mill levy, but had to instead levy said tax in strict adherence to the formula provided in Section 6-1-320 of the SC Code of Laws.

If so applied, the rate increase cap provided for in 6-1-320 would forever restrict municipalities like Edgefield, newly created municipalities and municipalities that never previously levied a millage from ever doing so. This outcome, we contend, is inconsistent with the legislative intent behind 6-1-320, confounding to the legislative intent of Section 5-7-30 of the SC Code, and violates the constitutional mandate of liberal construction in favor of municipalities set out in Article V[I]II, Section 17.

As detailed previously, requiring new and yet-to-be-formed municipalities, municipalities that have never levied a property tax, or municipalities that have repealed a previously existing property tax to levy such tax in strict adherence to the provisions of 6-1-320 results in the effective denial of this authority to all such enumerated municipalities. Such strict adherence requirement amounts to an implied repeal of 5-7-30, which first granted the authority, and a repeal of 5-1-10, which guarantees this and other previously granted authority will be enjoyed equally by all municipalities. Such an outcome would violate established SC law and the state's constitution."

First and foremost, is this Office's opinion, as expressed in the July 9, 2014 opinion, that Section 6-1-320 can apply to the Town of Edgefield (with a zero millage). Op. S.C. Att'y Gen., 2014 WL 3640923 (S.C.A.G. July 9, 2014). It is also this Office's opinion that the July 9, 2014 opinion did not interpret Section 6-1-320 as preventing the Town of Edgefield from imposing a millage. Id. Moreover, we emphasized in the conclusion of the 2014 opinion that the Town of Edgefield may meet an exception in Section 6-1-320(B) for an additional millage increase. Id. South Carolina Code § 6-1-320 authorizes a local governing body to "increase the millage rate imposed for general operating purposes above the rate imposed for such purposes for the preceding tax year only to the extent of increase in the average of the twelve monthly consumer price indices for the most recent twelve-month period consisting of January through December of the preceding calendar year, plus, beginning in 2007, the percentage increase in the previous year in the population of the entity as determined by the Office of Research and Statistics of the Revenue and Fiscal Affairs Office." S.C. Code § 6-1-320 (1976 Code, as amended).[1] We agree, as you mention in your letter, South Carolina Code § 6-1-320 references an "increase" in the millage rate "above the rate imposed for such purposes for the preceding tax year." Id. However, we do not believe a court will determine the words "increase" and "above" preclude an entity with a rate of zero for the previous tax year from increasing the rate where the local governing body has previously issued a tax levy. Moreover, we believe the language in the statute is clear and unambiguous in limiting a tax increase regardless of the prior year's rate and that such an interpretation is consistent with a plain reading and sensible interpretation of the statute.

Contrastingly, this Office believes a court will determine that Section 6-1-310 ("a local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General

[1] Please see the statute for the full text.

Assembly') prohibits all new taxes imposed by any local governing body without specific authorization. S.C. Code § 6-1-310 (emphasis added). Our State's Supreme Court has previously defined a tax when it stated that "[l]egislation is said to levy a tax when it fixes the amount or rate to be imposed." Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993) (citing Wolper v. City of Charleston, 287 S.C. 209, 336 S.E.2d 871 (1985)). Black's Law Dictionary defines "new" as:

> **new** *adj.* (bef. 12c) **1.** (Of a person, animal or thing) recently come into being <the new car was shipped from the factory this morning>. **2.** (Of any thing) recently discovered <a new cure for cancer>. **3.** (Of a person or condition) changed from the former state <she has a new state of mind>. **4.** Unfamiliar; unaccustomed <she asked for directions because she was new to the area>. **5.** Beginning afresh <a new day in court>.

NEW, Black's Law Dictionary (10th ed. 2014). Therefore, we interpret a "new tax" as specified in S.C. Code § 6-1-310 to mean legislation where there has not previously been "an amount or rate [previously] imposed." Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993) (citing Wolper v. City of Charleston, 287 S.C. 209, 336 S.E.2d 871 (1985)). The General Assembly defines "specifically authorized by the General Assembly" as "an express grant of power" granted by "a prior act; []by this act; or [] in a future act." S.C. Code § 6-1-300(7) (1976 Code, as amended). Accordingly, we strongly disagree with your assumptions that compliance with § 6-1-320 implicitly repeals § 5-7-30 and explicitly repeals § 5-1-10. It appears the General Assembly wanted to limit tax increases by municipalities (and other local governments) not eradicate their taxing ability. Regarding newly formed local governments (including a new municipality), we believe Section 6-1-310 requires the local governing body to have specific statutory authority to impose a new tax levy. Section 5-7-30 grants every municipality in this State "the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them..." S.C. § Code 5-7-30 (1976 Code, as amended). Thus, we believe a court will interpret that Section 6-1-320 does not overrule Sections 5-7-30 and 5-1-10.[2]

Moreover, we believe the intent and language expressed by the General Assembly in Section 6-1-300 et seq. is clear in restricting tax increases. For example, the bill that originally passed Section 6-1-320 was amended to "BY ADDING ARTICLE 3 SO AS TO PROVIDE WITH RESPECT TO THE AUTHORITY OF LOCAL GOVERNMENT TO ASSESS TAXES AND FEES, INCLUDING THE PROVISION, AMONG OTHERS, THAT A LOCAL GOVERNMENTAL BODY MAY NOT IMPOSE A NEW TAX AFTER DECEMBER 31, 1996, UNLESS SPECIFICALLY AUTHORIZED BY THE GENERAL ASSEMBLY." 1997 S.C. Act No. 138 (Bill 409). Thus, Article 3 was clearly passed regarding "the authority of local government to assess taxes and fees." Id. Therefore, we believe the intent of the General Assembly in enacting Article 3, where Section 6-1-320 is located, was to limit the

[2] However, as you expressed in your letter, this Office recognizes that there is a legal argument that the "specific statutory authorization" required in S.C. Code § 6-1-310 could be interpreted narrowly as to altogether preclude even newly-formed local governments from imposing a "new tax" without "specific statutory authorization" so as to result in an overruling of a newly created municipality's authorization to tax pursuant to S.C. Code § 5-7-30 et al. Nevertheless, we see the court determining that only new municipalities would be able to use S.C. Code § 5-7-30 for "specific statutory authority" to levy a tax pursuant to S.C. Code § 6-1-310. Any such new municipality that establishes a levy pursuant to S.C. Code § 5-7-30 would have any increases limited pursuant to S.C. Code § 6-1-320, whereas we believe the concern the General Assembly was addressing in S.C. Code §§ 6-1-310, 6-1-320, et seq. was, in great part, to limit tax increases by the numerous municipalities already established.

authority of local governments to tax and assess fees. Additionally, the lack of legislative and judicial action regarding the question presented in the 2014 opinion leads us to conclude that the General Assembly stands by its law and our interpretation thereof. As we have previously concluded, "[t]he absence of any legislative amendment following the issuance of an opinion of the Attorney General strongly suggests that the views [ex]pressed therein were consistent with the legislative intent." Op. S.C. Att'y Gen., 2005 WL 2250210 (S.C.A.G. September 8, 2005) (citing Scheff v. Township of Maple Shade, 149 N.J.Super. 448, 374 A.2d 43 (1977)). We presume you have already addressed your concerns to the General Assembly regarding the current language of § 6-1-320 and your assumptions regarding § 5-1-10 and § 5-7-30, and we will trust the General Assembly intended § 6-1-630 to limit increases in property taxes for all local governing bodies unless and until they legislate otherwise.

Additionally, while you cite Article VIII, Section 8 of the South Carolina Constitution (which states that "[t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. ..."), we believe a court will determine Section 6-1-320 specifically prohibits a local governing body (which includes a municipality within the definition of a local governing body pursuant to S.C. Code § 6-1-300(3)) from increasing taxes other than by the exceptions contained therein. As we expressed in the 2014 opinion to the Town of Edgefield, the General Assembly made its intent clear in that it wanted to limit increases in property taxes. Op. S.C. Att'y Gen., 2014 WL 3640923 (S.C.A.G. July 9, 2014). Section 6-1-320 (B) provides exceptions to allow larger increases in taxes by local governing bodies. 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. We stated in the 2014 opinion that the General Assembly's intent regarding § 6-1-320 was "clearly to limit a local governing body's ability to increase property taxes" to the effect of "protect[ing] the taxpayer from large increases in property taxes while still providing a consistent source of income for local governing bodies." Op. S.C. Att'y Gen., 2014 WL 3640923 (S.C.A.G. July 9, 2014). Moreover, quoting from a 2010 opinion, we reasoned in the 2014 opinion that the General Assembly passed a "narrow list" in § 6-1-320(B) to "prohibit governing bodies from increasing property taxes except for in limited circumstances." Id. (quoting Op. S.C. Att'y Gen., 2010 WL 4391632 (S.C.A.G. October 26, 2010)). Furthermore, we concluded in the 2014 opinion that:

> Reading section 6-1-320(B) as a whole and keeping in mind that if any doubt exist[s] with regard to this provision that it should be resolved in favor of the taxpayer, we believe the Legislature intended to limit a local governing body's ability to exceed the millage rate cap under section 6-1-320(A) to the year in which the exception applies. Therefore, if [] [a local governing body] wishes to exceed the millage rate allowed pursuant to section 6-l-320(A), it must establish the applicability of one of the exceptions in subsection (B) for that particular year.

Op. S.C. Att'y Gen., 2014 WL 3640923 (S.C.A.G. July 9, 2014). Thus, our position in the 2014 opinion was to resolve this issue in favor of the taxpayers and against the imposition of increased taxation.

As you point out in your letter, § 5-7-30 authorizes a municipality to "enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, ... including the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them...." S.C. Code § 5-7-30 (emphasis added). However, please note that we emphasize the language used in the statute "not inconsistent with

the Constitution and general law of this State." Id. The 2007 amendment to Section 6-1-320 clarified that a reduction in the population and a decrease in the consumer price index do not decrease the increase limits and that the millage increase limit does not "amend or repeal any more restrictive limits applicable in other law." See 2007 S.C. Act No. 57 (S.B. 367). The fact that in 2007 the General Assembly took the opportunity to clarify that Section 6-1-320 does not impede further restrictions on increases of taxes in other sections of the South Carolina Code of Laws further supports our position that the General Assembly did not intend for other sections to of the code to circumvent the tax increase limitations in Section 6-1-320.[3] Moreover, it is a well-recognized principle of law that an act which is forbidden to be done directly cannot be accomplished indirectly. Ops. S.C. Atty. Gen., 2000 WL 1803581 (November 13, 2000); 1990 WL 599265 (July 31, 1990) (citing State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526 (1940); Lurey v. City of Laurens, 265 S.C. 217, 217 S.E.2d 226 (1975); Westbrook v. Hayes, 253 S.C. 244, 169 S.E.2d 775 (1969)). As the State Supreme Court cautioned in Richardson v. Blalock, 118 S.C. 438, 110 S.E. 678 (1922), "[t]hat which cannot be done directly cannot be done indirectly." As this Office previously stated, "the purpose of this rule is to prevent circumvention of the law by ruse or artifice." Op. S.C. Atty. Gen., 2003 WL 21471505 (June 10, 2003).

Conclusion:

Yes, we believe a court will determine that Section 6-1-320 limits increases in taxation by all local governing bodies but that it does not prohibit a municipality with a zero millage to increase its millage pursuant to the limitations in Section 6-1-320 where it previously imposed a tax millage. While we appreciate your taking the time to request us to readdress our July 9, 2014 opinion, we affirm the July 9, 2014 opinion by this Office and believe that the General Assembly was clear in its intent to limit increases in property taxes by local governing bodies in Section 6-1-320. Moreover, the General Assembly offered a reprieve to the limitations on increases in millage rates in Section 6-1-320 by granting exceptions when there is a deficiency, catastrophic events, etc.[4] if the local governing body approves an increase by a two-thirds vote. Furthermore, regarding a new local government, this Office believes Section 6-1-310 prohibits a new tax levy imposed without specifically statutory authorization.[5] Thus, this Office believes a court will determine that if voters or elected officials choose to implement a new local government that all the applicable statutory powers including the power to tax are included with the implementation of the new local government. Most importantly, this Office wants to emphasize further that tax increases and new taxes are disfavored as evidenced by clear intent by our General Assembly. See, e.g., S.C. Code §§ 6-1-310, 6-1-320. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly 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. As we encouraged the Town of Edgefield to do in the 2014 opinion, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See 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.

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[3] See also S.C. Code § 6-1-310 which prohibits a local governing body from imposing a new tax that was not already imposed before December 31, 1996.

[4] Please see S.C. Code § 6-1-320 for a full description of the exceptions.

[5] Please see the statute for the full list of exceptions.

Sincerely,

Anita (Mardi) S. Fair

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General