ALAN WILSON
ATTORNEY GENERAL

October 8, 2019

Amy Cofield, Esquire
Executive Director
South Carolina State Accident Fund
Post Office Box 102100
Columbia, SC 29221

Dear Ms. Cofield:

You seek an opinion of this Office "relating to benefits potentially due members of the South Carolina National [Guard] who were permanently injured during a period of state-ordered military duty in October 2015." You note that "[t]his issue was addressed by our General Assembly in this year's State Appropriation[s] Act." You relate that "[t]he applicable Proviso, Section 75.2 in Part IB of the Act, directs that the State Accident Fund ("The Fund") establish a military disability benefits program."

Your letter presents three questions: (1) [w]hether this Proviso effects a valid appropriation under state law; (2) [a]ssuming there is a valid appropriation, whether the circumstances under which The Fund operates will negate its ability to legally fund the military disability pension with the premiums collected from its policy holders, including state agencies and non-state governmental entities; and (3) [w]hether there are any other legal impediments to The Fund paying settlements in the form of either a one-time lump sum settlement or periodic payments to be made during the lifetime of the claimants?" In summary, our answers to these questions are: "yes," "no" and "no" respectively. We will discuss each of these issues more fully below.

Background

By way of background, you state the following in your request letter:

> Background
>
> Two members of the South Carolina National Guard were permanently injured on October 4, 2015 while on state-ordered duty, or "State Active Duty", in response to a severe flood-related emergency. I refer to these valued members of our National Guard as Soldier 1 and Soldier 2 in order to protect their privacy. Both were ordered to duty pursuant to Governor Haley's Executive Order No. 2015-28, which cited her authority under Article IV, Section 13 of the State Constitution and South Carolina Code §§ 25-1- 1820(9) and 25-1-1840(d). The two were injured in the same accident, which occurred when the military vehicle/equipment driven by Soldier 1 was overcome by rising water crossing a roadway/bridge, swept off the

roadway/bridge, and came to rest in a flooding creek. Soldier 2 was a passenger and crewmember in that vehicle/equipment.

Following the incident, the Adjutant General's Office assisted each Soldier in filing workers' compensation claims through the State Accident Fund, which handles the Adjutant General's State Active Duty-related workers' compensation cases as mandated by Title 42 of the State Code. Each received temporary total worker's comp benefits for a lengthy period of time, as well as payment of related medical expenses. One has already been paid a settlement which includes workers' compensation related permanent disability benefits and the other is now negotiating a final settlement which will include permanent disability benefits.

Both Soldiers faced federally-mandated medical review board procedures. The federal review boards rendered decisions that their federal military service must be terminated. When this occurs, military administrative processes are implemented and their state military service is also terminated. Soldier 1 has reached 20 years of federal military service and will be eligible for federal military retiree benefits, including health benefits, although he may have to wait until he reaches 60 years of age. Soldier 2 will likely not be entitled to any continuing or future military retirement, healthcare, or other benefits.

In August 2017, members of the Adjutant General's medical staff contacted his legal staff because the State had been required, under federal guidance, to initiate medical review board processing. The Adjutant General's staff began internal discussions about the potential benefits afforded Soldiers who are permanently injured while on State Active Duty orders, including both workers comp benefits and the benefits described in South Carolina Code § 25-1-100. Shortly thereafter, the Adjutant General's Office began receiving inquiries from elected federal and state elected officials regarding this matter.

Research indicates that the state statutory authority establishing military disability retirement benefits originated with an act passed by the General Assembly in the early 1920s, which first appeared in the state code of 1922. This military disability statutory provision has remained a part of the state militia code, even though work-injury related state benefits were provided under the state's workers compensation code as early as 1947. See SC Code §§25-1-100 & 42-7-67 (as well as historical references to State Militia Code found in § 25-1-100). Although this state military disability statute provides for the Governor's involvement before a disability pension is granted, our research has not revealed any record of a related claim being made. Furthermore, research efforts did not identify any line item in the State's annual appropriations acts which has ever been used to fund benefits under South Carolina Code §25-1-100. Accordingly, the Adjutant General was unable to identify any agency which had authority to adjudicate the Section 25-1-100 claims and to pay any resulting disability awards.

2019 Appropriations Act - Proviso § 75.2

The General Assembly addressed the issues in the 2019 legislative session. In Part IB of this year's Appropriations Act, the General Assembly enacted Proviso Section 75.2. This section provides as follows:

(A) From the funds credited to the State Accident Fund in the current fiscal year, there is established within the State Accident Fund a military disability program that provides a settlement for any such member of the National Guard that became permanently disabled while serving during the catastrophic weather event in October 2015. The settlement must be based upon that which persons under similar circumstances in the military service of the United States receive from the United States. The director may seek assistance in establishing the program from the Adjutant General or any other agency or entity with such expertise.

(B) A National Guard member may only participate in this program if the member permanently waives any right to claim benefits pursuant to Section 25-1-100 and releases the State from any potential liability pursuant to Section 25-1-100, and further agrees that any amounts due under this proviso are subject to appropriate offsets to avoid compensation in excess of what the member would have received from the federal government if permanently disabled while performing federally paid duty. Offsets include benefits received, or to be received, under Title 42 of the 1976 Code as a result of these injuries (State Workers Compensation), benefits received, or to be received, pursuant to Chapter 10 of Title 9 of the 1976 Code (SC National Guard Retirement System), as well as any benefits received, or to be received, from the federal government such as severance pay, military retirement pay, or VA benefits relating to the same disabilities at issue in the State military disability claim.

(C) From the funds credited and authorized to the State Accident Fund in the current fiscal year, the director of the State Accident Fund is authorized to offer a onetime lump sum settlement to members of the military disability program, subject to eligibility and the other requirements set forth in the proviso.

Proviso 75.2 Responsibilities and the State Accident Fund

The Fund is a workers' compensation insurance provider for state agencies and other governmental entities. It is "other funded" in that it receives no money from the state's general fund, but rather operates and pay claims through premiums paid by its policy holders. Premiums from both state agencies and non-state entities are combined into one trust fund.

There were no state funds added to the Fund's appropriations in Part IA of this year's Appropriations Act following insertion of the §75.2 Proviso and the Fund received no direct State Appropriation from the General Fund. Instead, the only appropriations to the Fund relate to the projected premiums which the General Assembly authorizes it to collect from state agencies and other non-state governmental entities in order to pay workers' compensation benefits and all of The Fund's administrative costs. As it has in the past, The Fund charges its insureds premiums, which are collected on a schedule and are all deposited into the same trust account. As a result, any payments of administrative costs and settlements under Proviso § 75.2 must come from those commingled account.

Based upon this information, we will now address each of your questions in turn.

Law/Analysis

Whether The Proviso (75.2) is a Valid Appropriation under State Law

Your first question is whether Proviso 75.2 effects a valid appropriation under state law? We conclude that it does and that it must be followed.

Art. X, § 8 of the South Carolina Constitution states that "money shall be drawn from the Treasury only in pursuance of appropriations made by law." Our Supreme Court has recognized that

> [t]he General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated money shall be spent. State ex rel. Condon v. Hodges, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); Gilstrap v. S.C. Budget and Control Bd., 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); Clarke v. S.C. Pub. Serv. Auth., 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. State v. Cooper, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90-91, 678 S.E.2d 412, 416-17 (2009). Thus, the Court has concluded that the Legislature's power ". . . over the matter of appropriations is plenary, except as restricted by the Constitution." State ex rel. Richards v. Moorer, 152 S.C. 455, 150 S.E. 269, 279 (1929). As we summarized in Op. S.C. Att'y Gen., 2006 WL 269606 (January 24, 2006),

> . . . the General Assembly possesses the exclusive power to appropriate funds. Furthermore, when the Legislature exercises its appropriation power in favor of another governmental branch, that branch is obligated to act in accordance with the Legislature's intent, meaning the funds must be expended in accordance with the will of the legislature. Accordingly when [the] General Assembly appropriates state funds, no other body or individual possesses the discretion to direct or utilize such funds for purposes other than the purpose for which they were appropriated.

See also State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002) [Governor may not divert appropriated funds to purposes other than which the Legislature has designated]; Edwards v. State, supra [mandamus issued to require Governor to accept federal funds as mandated by the Legislature]; Hampton v. Haley, et al., 403 S.C. 395, 408, 743 S.E.2d 258, 265

(2013) ["Here, if the Board (Budget and Control Board) could decline appropriated funds based on its own policy choices, it would have the unbridled power to disregard the General Assembly's appropriations and make its own appropriation decisions."].

An "appropriation" is generally defined "as the designation or authorization of the expenditure of public moneys and stipulation of the amount manner and purpose for a distinct use or for the payment of a particular amount." 63C Am. Jur.2d, Public Funds § 20. Our Supreme Court explained long ago in Walker v. Derham, 61 S.C. 258, 39 S.E. 379, 380 (1901), in broadly defining the term "appropriation," that:

> [t]o appropriate money is to set it apart – to designate some specific sum of money for a particular purpose or individual. To do this effectually it is necessary that the power in the legislature to defeat the application of the money to some particular object or individual by providing for some other use thereof cannot exist except by some legislative action afterwards to the contrary.

And in Grimball v. Beattie, 174 S.C. 422, 177 S.E. 668, 672 (1934), the Court recognized the following:

> . . . [i]t is significant that the framers of our Constitution did not require that appropriations be made by an annual appropriations act. The provisions of the Constitution do not require any arbitrary form of expression or particular words in making an appropriation. No particular expression or set of words are requisite or necessary to carry out the provisions of the Constitution. The only limitation is that the appropriations must be made by law. The object of the constitutional provision prohibiting the payment of money from the state treasury except by appropriations made by law is to prohibit expenditures of the public funds at the mere will and caprice of those having the funds in custody without legislative sanction therefor.

The Supreme Court's decision in Beaufort Co. v. S.C. State Election Commission, 395 S.C. 366, 719 S.E.2d 432 (2011) illustrates its view that a broad interpretation of a valid appropriation is warranted, particularly in a case involving the effect of a budget proviso on a permanent statute. There, the Beaufort County Court held that the 2011-12 Appropriation Act authorized the State Election Commission and county election commission to conduct a presidential primary in the next election cycle. In that case, petitioner – the Beaufort County Election Board – contended that § 7-11-20(B)(2) on its face authorized the conduct of a presidential primary only for "the 2008 election cycle." The Court found, however, that "we must consider the operative budget provisos for the current fiscal year, as well as our precedent that speaks to the relationship of a legislative proviso juxtaposed to a permanent statute." 395 S.C. at 371, 719 S.E.2d at 435.

In Beaufort County, two provisos in the 2011-12 Appropriation Act spoke to the 2012 Presidential Preference Primary. One proviso authorized the use of filing fees "to conduct" the 2012 Primary. The other stated that "the State Election Commission is authorized to carry forward and use funds originally appropriated for Ballot Security to conduct the 2012

Presidential Primary Elections and the 2012 Statewide Primaries/Runoff." The Court held the two provisos were valid, controlling and authorized the conduct of the 2012 Presidential Primary. In doing so, the Court agreed with an earlier opinion of this Office regarding the very same question. In the Court's view,

> [t]he Governor clearly understood the intent of the General Assembly to adhere to the 2008 public funding approach in fiscal year 2011-2012 and sought to oppose it. . . . The General Assembly, in turn, clearly understood the import and consequences of overriding the Governor's veto—the effect of the budget provisos was to suspend the temporal limitation in § 7-11-20(B)(2). A contrary construction of legislative intent would mean the Governor and the General Assembly were not aware what was intended by the provisos, a result which would border on frivolity.
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> Accordingly, we hold that provisos 79.6 and 79.12 suspend the temporal limitation in § 7-ll-20(B)(2) and authorize the State Election Commission and the County Election Commissions to conduct Presidential Preference Primaries in 2012. . . . If they were not so construed, the provisos would authorize the State Election Commission to carry over certain funds to perform an unauthorized act, which would be an absurd result. See Lancaster County Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008) (holding that, in construing a statute, this Court will reject an interpretation which leads to an absurd result which could not have been intended by the General Assembly); Gordon v. Phillips Util., Inc., 362 S.C. 403, 608 S.E.2d 425 (2005) (noting it is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing); Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (finding that this Court must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something).

395 S.C. at 375-76, 719 S.E.2d at 437-38.

In our opinion, Proviso 75.2 fully meets the requirements for a valid "appropriation" as set forth in the decisions of our Supreme Court, referenced above. This Proviso expressly states that "[f]rom the funds credited to The State Accident Fund in the current fiscal year, there is established a military disability program that provides for settlement for any such member of the National Guard that became permanently disabled while serving during the catastrophic weather event in October 2015." (emphasis added). In our view, this is a clear authorization of and direction by the General Assembly to establish the "military disability program" as described "from the funds credited to the State Accident Fund in the current fiscal year." The Proviso then proceeds to set forth a number of criteria for eligibility for the military disability program. These criteria include: 1) permanent disability while serving during the October 2015 weather event; 2) settlement "must be based upon that which persons under similar circumstances in the military service of the United States receive from the United States"; 3) permanent waiver of any right to claim benefits pursuant to Section 25-1-100; 4) release of the State from any potential liability pursuant to Section 25-1-100; and 5) agreement by the recipient to appropriate offsets as

described and specified in the Proviso. Based upon these criteria in the Proviso, the General Assembly then summarized:

> [f]rom the funds credited and authorized to the State Accident Fund in the current fiscal year, the director of the State Accident Fund is authorized to offer a onetime lump sum settlement to members of the military disability program, subject to eligibility and other requirements set forth in the proviso.

(emphasis added).

The language of the Proviso is clear, straightforward, and specific. Indeed, such language is far more precise than the Provisos upheld in Beaufort County. Our case law makes it clear that Proviso 75.2 must be presumed constitutional and that an administrative officer must abide by it. Thus, we conclude that on its face the Proviso is valid and binding. See O'Shields v. Caldwell, 207 S.C. 194, 217, 35 S.E.2d 184, 193 (1945) [an administrative officer, as "a general rule . . . must obey a law found on the statute books until in a proper proceeding its constitutionality is judicially passed upon."; the officer is "not liable for paying out public money" in reliance upon such a statute]; Edwards v. State, supra. Therefore, in our opinion, Proviso 75.2 is mandatory and must be followed.

Whether the Circumstances Under Which The Fund Operates Will Negate its Ability to Legally Fund The Military Disability Program With The Premiums Collected From Its Policy Holders, Including State Agencies and Non-State Governmental Entities

The General Assembly created The State Accident Fund, and codified it at § 42-7-10 et seq. Section 42-7-10 provides:

> (A) There is established as a separate agency of state government a separate fund to be known as the State Accident Fund, hereinafter referred to as the "fund" or "state fund" in this article. This fund consists of annual premium charges, recoveries from the Second Injury Fund, recoveries by subrogation and, subject to subsection (B), of all income or revenue derived from investing these funds. Receipts for the credit of the fund and expenditures from the fund must be handled in the manner provided by law governing all state funds.

Section 42-7-40 provides that "[t]his article shall apply to the State including the State Guard and the National Guard."

Section 42-7-75 establishes that state agencies shall pay the premiums of state employees. Such Section states:

> [a]ll state agencies shall pay workers' compensation premiums according to Section 42-7-70, as determined by the State Accident Fund. . .

> The State Treasurer and the Comptroller General shall pay from the general fund of the State to the State Accident Fund any necessary funds to cover actual benefit claims paid during any fiscal year which exceed the amounts paid in for this purpose by the various agencies, departments and institutions. . . .
>
> If there are not sufficient funds in the State Accident Trust Fund to pay operating expenses and claims as they arise, the State Treasurer shall from the general fund of the State, deposit in the account monthly sufficient funds to pay expenses and claims required of law to be paid, but the amount deposited may not exceed the amount of investment income which the account would have earned from its inception if all such earnings had been credited to the fund.

Likewise, § 42-7-210 states:

> [n]otwithstanding the amounts annually appropriated as Workers' Compensation Insurance to cover Workers' Compensation benefit claims paid to employees of the state government who are entitled under state law, the State Treasurer and the Comptroller General are hereby authorized and directed to pay from the general fund of the State to the State Accident Fund such funds as are necessary to cover actual benefit claims paid and expenses relating to the operations of the agency during the current fiscal year which exceed the amounts paid in for this purpose by the various agencies, departments and institutions. The State Accident Fund must certify quarterly to the State Fiscal Accountability Authority the state's liability for such benefit claims actually paid to claimants who are employees of the State of South Carolina and entitled under state law. The amount certified must be remitted to the State Accident Fund.

Accordingly, based upon these statutes, the General Assembly deems the obligations to state employees for the payment of Workers' Compensation benefits to be a part of "the state's liability for such benefit claims actually paid to claimants." Moreover, the Legislature has put in place a mechanism to ensure that such a "liability" is paid from the General Fund in the case where, in a given fiscal year, there may not be sufficient funds "to cover actual benefit claims paid and expenses relating to the operation of the agency. . . ."

Your second question centers upon "whether the circumstances under which The Fund operates will negate its ability to legally fund the military disability pension with the premiums collected from its policy holders, including state agencies and non-state governmental entities." It is your concern that the "premiums" for funding of The Fund do not originate from direct appropriations, but from "state agencies and non-state governmental entities," such as political subdivisions. In discussions with you, the Fund is likened by you to be a "trust fund" or "special fund" set aside for payments as necessary as an employee benefit. You are concerned that if funds are taken from the State Accident Fund as directed by Proviso 75.2, you may be in breach of your fiduciary duty to the Fund.

As noted above, "[t]he power of the Legislature over the matter of appropriations is plenary, except as restricted by the Constitution." Dacus v. Johnston, 180 S.C. 329, 185 S.E.

491, 502 (1936) (citation omitted). Moreover, as we explained in Op. S.C. Att'y Gen., 1984 WL 249707 (January 24, 1984), "[e]xcept as restricted by the Constitution, the Legislature has the exclusive power to direct how, when and for what purpose the public funds shall be applied in carrying out the objects of the State government." (quoting State ex rel. Anderson v. Fadely, 308 P.2d 537, 545 (Kan. 1957) (emphasis added). Of course, in this regard, the Legislature's power to appropriate public funds is not limited to sources originating from taxation. Our opinion, Op. S.C. Att'y Gen., 1996 WL 452747 (June 18, 1996) provides a good illustration of this point. There, we commented upon the status of certain funds used for the multi-year contracts of coaches and athletic directors. We advised as follows:

> [i]t is recognized herein that oftentimes coaches and athletic directors at state universities and colleges are paid with athletic funds which are not raised through taxation. However, we addressed the nature of such funds in Op. No. 85-132 (November 15, 1985). We noted that such funds are appropriated by virtue of a provision in the State Appropriations Act, which states that ... notwithstanding other provisions of this act, funds at State Institutions of Higher Learning derived wholly from athletic or other student contents, from the activities of student organizations, and from the operations of canteens and bookstores, and from approved Private Practice plans may be retained at the institution and expended by the respective institutions only in accord with policies established by the Institutions Board of Trustees. Such funds shall be audited annually by the State but the provisions of this Act concerning unclassified personnel compensation, travel, equipment purchases and other purchasing regulations shall not apply to the use of these funds.
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> Despite the fact that such funds are not tax-generated, we concluded that they are "public funds", and thus must be expended "in accordance with the State Constitution and other statutory enactments." [citing Op. Atty. Gen., August 10, 1973]. Thus, while such funds are appropriated each year by the General Assembly to the particular college or educational institution which generates them, the General Assembly is, of course, free at any time it chooses, not to appropriate the funds for that purpose, just as it may do with respect to tax revenues or any other public funds. Thus, the general rules as to the appropriation of funds, discussed above, should be applicable to this situation as well.
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> Accordingly, while I have not examined any multi-year contract entered into by a state university or college, such contract is subject to the same legal principles as set forth in the 1982 opinion, discussed above, as well as other authorities herein. The multi-year contract is subject to the condition that the General Assembly will continue to appropriate funds therefor. State contracts with which I am familiar contain a provision making the multi-year contract contingent upon such appropriations. Based upon the foregoing, I am of the opinion that a multi-year contract by a state agency is valid, but must be "subject to" the continuing appropriation of funds therefore by the General Assembly.

Moreover, it is important to note that in Edwards v. State, supra, the Supreme Court issued a mandamus against Governor Sanford who refused to spend federal funds as directed by appropriations of the General Assembly. The Court explained its reasoning as follows:

> "Once the legislature enacts a law, all that remains is the efficient enforcement and execution of that law." Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002). The administration of appropriations is a function of the executive department. State ex rel. McLeod v. McInnis, 278 S.C. at 314, 295 S.E.2d at 637. Executive agencies are required to comply with the General Assembly's enactment of a law until it has otherwise been declared invalid. Layman v. State, 376 S.C. 434, 450, 658 S.E.2d 320, 328 (2008).

383 S.C. at 91, 678 S.E.2d at 417. Accordingly, the General Assembly's power and obligation with respect to the appropriation of non-taxation public funds is plenary, as is its power to direct executive officers as to how that money is to be spent. Likewise, absent a constitutional restriction, the Legislature's power to divert such funds from one public purpose to another is also unlimited.

The question of diversion of public funds appropriated for one purpose and then diverted to another purpose was specifically addressed by our Supreme Court in Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993). In that instance, gasoline tax revenue (SHIMS funds) were diverted from the SHIMS (Strategic Highway Plan for Improving Mobility and Safety) account to the General Fund to pay indebtedness resulting from damage caused by Hurricane Hugo. Plaintiffs brought an action to enjoin the diversion, claiming a violation of Art. X, §§ 5 and 7(a) of the State Constitution. The Supreme Court ruled that the appropriation diverting the SHIMS monies was valid and constitutional.

The Supreme Court noted in Myers that in State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526 (1940) (Edwards I) and State ex rel. Edwards v. Osborne, 195 S.C. 295, 11 S.E.2d 260 (1940) (Edwards II), it had been held that "former S.C. Const. art. X, § 3 prohibited the diversion of gasoline tax revenue to purposes other than those for which the tax was levied." 315 S.C. at 251, 433 S.E.2d at 843. However, the Court distinguished the SHIMS case from these Edwards cases, noting that the former Article X, § 3 had been revised since those cases were decided. The Court explained:

> [h]ere, the plaintiffs contend that article X, § 5, the successor of article X, section 3, similarly prohibits the diversion of SHIMS tax revenue to pay debts arising from Hurricane Hugo. We disagree.
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> Former article X, section 3, as applied in the Edwards cases, stated:
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> > No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object the tax shall be applied. (Emphasis added).
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> Former article X, section 3 was substantially amended in 1977 and provisions similar to those contained in that section were incorporated into article X, section 5, which currently provides:

> No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. *Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.* (Emphasis added).

In our view, the effect of the 1977 amendment was to remove the Constitution's limitation of the Legislature's power to appropriate revenues as needed among legitimate government objectives. Accordingly, we hold that article X, section 5 only requires the Legislature to state the public purpose for which taxes are levied. Article X, section 5, unlike former article X, section 3, does not prohibit the Legislature from amending the public purpose to which tax proceeds may be applied.

Turning to the facts of this case, we find that the appropriation of SHIMS revenues to the General Fund does not violate article X, section 5. Article X, section 5 applies only to tax levies and not to legislation which creates no new tax. Wolper v. City of Charleston, 287 S.C. 209,336 S.E.2d 871 (1985). Legislation is said to levy a tax when it fixes the amount or rate to be imposed. Morton, Bliss & Co. v. Comptroller General, 4 S.C. 430,455 (1873). The provisions of Act 501 challenged in this case do not fix the tax rate and, therefore, do not levy a tax. Accordingly, article X, section 5 does not apply and cannot prohibit the appropriations made by Act 501.

For the foregoing reasons, it is the judgment of this Court that sections 129.65 and 124.27 of 1992 Act No. 501 do not violate article X, section 5 of the South Carolina Constitution. Our holding renders it unnecessary to address the plaintiffs' claim that the Legislature has violated the balanced budget requirement of article X, section 7(a).

315 S.C. 251-2, 433 S.E.2d at 843-4 (emphasis added).

Prior to the Myers decision, this Office had addressed the SHIMS Fund in two separate opinions. In Op. S.C. Att'y Gen., 1991 WL 632944 (March 13, 1991) and Op. S.C. Att'y Gen., 1992 WL 575616, Op. No. 92-09 (March 19, 1992), we had concluded that the SHIMS monies could not be diverted by the Legislature. The first opinion concluded that SHIMS funds constituted a "special fund." The 1992 opinion found that SHIMS was a "trust fund." Both of these opinions relied upon Cox v. Bates, 237 S.C. 198, 116 S.E.2d 828 (1960) which had recognized that there are situations where the Legislature may not divert monies from a special fund. According to the Cox Court,

> [t]he appropriation to the [counties] . . . is contingent upon the existence of a surplus in the state treasury. If and when it exists, it corresponds to the 'special fund' of the Briggs case [Briggs v. Greenville Co., 137 S.C. 288, 135 S.E. 153, 156 (1926)]. However, the legislation is not in the nature of a contract and is subject to repeal by the General Assembly. Nor does it deal with the proceeds of taxes which were levied for an object yet unaccomplished, as in the gasoline tax diversion cases of State ex

> rel. Edwards v. Osborne, 195 S.C. 158, 7 S.E.2d 526, and State ex rel. Edwards v. Osborne, 195 S.C. 295, 11 S.E.2d 260.

237 S.C. at 215, 116 S.E.2d at 835. Notwithstanding these Attorney General opinions, however, the Myers decision concluded that, with the amendment of Art. X, § 3 in 1977, no constitutional provision precluded diversion of SHIMS monies in order to fund Hurricane Hugo debt financing. Myers is thus controlling.

Since Myers v. Patterson was decided, our Supreme Court has rendered a few decisions finding special or unique circumstances where funds may not be diverted by legislative action. See S.C. Dept. of Mental Health v. McMaster, 372 S.C. 175, 642 S.E.2d 552 (2007); Layman v. State, 368 S.C. 631, 630 S.E.2d 265 (2005). In McMaster, the Court concluded that the "Bull Street" property, owned by the Department of Mental Health, and the site of the old "State Hospital" was impressed with a charitable trust and that such property could not be terminated or altered by the General Assembly. Any sale of such property, according to the Court, would need to be judicially approved and the proceeds devoted to the charitable purpose, which was the treatment of the mentally ill.

In Layman, the Court addressed whether a statute, creating the prior version of the Teacher and Employee Retention Incentive Program (TERI) created a contractual right such that the contractual right could not be altered by subsequent legislation. According to the Supreme Court, "[g]enerally, statutes do not create contractual rights." The exception to this rule is that "if the statute indicates that the legislature intended to bind itself contractually, a contract may be found to exist." In South Carolina, "contractual rights are created by statute only when they are expressly found in the language of the statute." 368 S.C. at 637-38, 630 S.E.2d at 268. In the Court's opinion, the language of the old TERI statute demonstrated an intent by the Legislature "to bind itself." 368 S.C. at 639, 630 S.E.2d at 269.

In our opinion, a court would likely find that these unique exceptions are inapplicable in this instance. Decisions elsewhere, which will be discussed below, have concluded that a Workers' Compensation Fund, such as here, is subject to legislative control and re-appropriation. These decisions expressly reject the "trust" or "contract" theories.

For example, in Wash., D.C. Assn. of Realtors, Inc. et al. v. Dist. of Cola., 44 A.3d 299, 305 (D.C. App. 2012), the Court noted that "[c]ontinuing authority to control the fate of special funds is a logical incident of the power to create them, if they are to serve the efficient operation and changing needs of government." Moreover, in Barber v. Ritter, 196 P.3d 238 (Colo. 2008), the Colorado Supreme Court, en banc, held that the Legislature's transfer to the general fund from the Colorado Children's Trust Fund, the Severance Tax Trust Fund, and the Unclaimed Property Trust Fund did not constitute a misappropriation of a trust corpus by the Legislature. In Barber, the Court concluded:

> [t]he status of the three cash funds as public trusts does not, and constitutionally cannot, have any limiting effect on the legislature's plenary power to award or repeal

> those funds' enabling statutes. The legislature's amendment of the cash funds' enabling statutes to allow for the transfer of funds to the General Fund did not, therefore, constitute a misappropriation of the trust corpus, and did not trigger a fiduciary obligation to repay the transferred monies. Thus, we hold that, even if the cash funds are public trusts, they are not irrevocable trusts, and the legislature has the authority to amend them to allow for the transfer of monies to the General Fund.

196 P.3d at 254 (emphasis added).

Notably, two decisions address the question of diversion of funds from Workers' Compensation funds: Ind. Comm. of Arizona, et al. v. Brewer, 290 P.3d 439 (Ariz. 2012) and Meth. Hosp. of Brooklyn v. State Insurance Fund, et al., 102 A.D.2d 367, 479 N.Y.S.2d 11 (N.Y. 1984). In Brewer, the Court upheld the allocation of funds "from the Special Fund of the Industrial Commission of Arizona ("ICA") to the state's general fund." 290 P.3d at 440. The Court noted that "[t]he Special Fund receives no general tax revenue." Id. at 442. According to the Court, the statute in question required the ICA to direct the payment into the state treasury of a certain percentage of the larger premiums received by the state compensation fund and private insurance carriers. It was there contended that the insurance proceeds were held in trust for the benefit of covered employees and that the employees had "vested rights" in these benefits and beyond the appropriative powers of the Legislature. On the other hand, the State argued that the funds were not held in trust and that these funds were "public funds" subject to allocation by the Legislature as it desired.

The Brewer Court rejected the argument that the Legislature possessed no appropriative authority over the Fund it had created. Even though the statute in question provided that the monies in the Fund were "held in trust" the Court nevertheless concluded that the Fund was not a "legal trust" but a "public fund." 290 P.3d at 444-45. With respect to the "vested rights" argument, the Court said this:

> [a]lthough employers and injured workers receiving payments from the Special Fund have vested interests or rights . . . in its continued vitality, there is no evidence that the transfer would impair the ability of the Special Fund to meet its obligations for the relevant fiscal year. And, to the extent that the Special Fund may not have sufficient monies to pay future claims, there is a statutory provision that would require funds to be transferred from the State Compensation Fund if the Special Fund is not actuarially sound. . . . (omitting citations).

290 P.3d at 445.

The Court's decision in Methodist Hospital, supra is similar to that in Brewer. In Methodist Hospital, the Legislature transferred $190 million from the State Insurance Fund to the general fund of the State. The transfer was challenged "on several Federal and State grounds." 479 N.Y.S.2d at 13. It was alleged by the plaintiffs that the transfer "constitutes an impairment of their contractual obligations with the State Insurance Fund, thereby violating Art. I, § 10 of

the federal Constitution (impairment of contract), constituted a taking of property without due process, as well as other constitutional grounds.

The Methodist Hospital Court first invoked the strong presumption of constitutionality to which any legislation is entitled. Unquestionably, concluded the Court, "the State Insurance Fund is a state agency" and thus subject to the "exercise of the sovereign power of the State in respect to a State agency." Id. at 15-16. Moreover, the Court noted that "'. . . the Workmen's Compensation Law blueprints the administration of an indubitable governmental function, and that the Fund is a primary and essential actor in such administration.'" According to the Court,

> [t]he statutory provisions respecting the composition of the Fund, discussed above and the further requirement of the submission of quarterly estimated budgets by the Fund to the Director of the Budget for his approval with the additional requirement of his approval for administrative expenditures in excess of those specified in the budget, the requirement that none of the funds of the SIF may be paid, expended or refunded except upon audit by the Comptroller, make clear that ". . . the Legislature intended to integrate the fund as a necessary and integral part of a carefully planned and developed structure for the administration of the Workmen's Compensation Law, and that it designedly lodged this entire structure in the State Department of Labor."

479 N.Y.S.2d at 16 (citations omitted).

Likewise, the Court in Methodist Hospital rejected a second argument – that the diversion of funds from the SIF "is none-the-less an outright seizure of funds held by the State in a 'fiduciary' capacity, which are not raised by taxation, but are funds in which they, as policyholders have a beneficial property interest deriving both, from their policies of insurance and the specific covenants set forth in the WCL (Workers' Compensation Law)." Instead of creating a "property interest," or contract, however, the Court found that the statutory language "is more reasonably read as a declaration of legislative policy rather than . . . manifest[ing] a legislative intent to create private rights of a contractual nature enforceable against the State." Id. at 19. In the Court's view,

> [w]e find nothing in the language of those provisions of the WCL relied upon by plaintiffs that constitute "clear and irresistible evidence" that the Legislature intended to "fetter its power in the future" in respect to the uses to be made of SIF funds or in respect to the level of reserves to be maintained for policy claims or premium rates for the policies issued by SIF or the payment of dividends. Premiums to be charged are required to be set at the "lowest possible rates" "consistent with reasonable reserves and a surplus" and "dividends may be credited or paid" or may be declared. This language is clearly permissive, not mandatory, and does not evince a legislative intent to "create private contractual or vested rights.". . . .
>
> That certain benefits may have enured to plaintiffs (and other policyholders as a result of the implementation of those policy declarations, does not transform them into contractually created property rights enforceable against the State.

479 N.Y.S. 2d at 19 (citations omitted). The Court then added:

> [t]hese policy declarations and their implementation "... may open a chance for benefits to those who comply with its conditions, but it does not address them and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in an action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law."

Id. (citations omitted).

The situation at hand is similar to those in the foregoing cases. Proviso 75.2 must be presumed valid. Moreover, the State Accident Fund is, pursuant to § 42-7-10, established as "a separate state agency of state government a separate fund. . . ." Further, § 42-7-10 requires that "[r]eceipts to the credit of the fund and expenditures from the fund shall be handled in the manner provided by law governing all state funds." (emphasis added). The Fund is administered by a director appointed by the Governor with the advice and consent of the Senate. Pursuant to § 42-7-75, "[a]ll state agencies shall pay workers' compensation premiums according to Section 42-7-70, as determined by the State Accident Fund." Importantly, § 42-7-75 requires that "[t]he State Treasurer and the Comptroller General shall pay from the general fund of the State to the State Accident Fund any necessary funds to cover actual benefit claims paid during any fiscal year, which exceed the amounts paid in for this purpose by the agencies, departments and institutions."

In addition, § 42-7-75 mandates that the State Accident Fund shall certify quarterly to the State Fiscal Accountability Authority the State's liability for the benefit claims actually paid to claimants as employees of any agency or political subdivision of this State and who are entitled to such payments under state law." (emphasis added). Furthermore, § 42-7-210 speaks to the fact that "[n]otwithstanding the amounts annually appropriated as Workers' Compensation Insurance to cover Workers' Compensation benefit claims paid to employees of the state government" who are so entitled, the Treasurer and Comptroller are "authorized and directed" to pay from the General Fund to cover any deficiency in funds available for claims in a given fiscal year. (emphasis added). Thus, while the Fund may not receive direct appropriations to it, and the Legislature refers in § 42-7-75 to the Fund as a "Trust Fund," there is no doubt that the Fund consists of "public funds" authorized by the General Assembly and appropriated by it at least in an indirect sense through each state agency's budget.

Further, as we have opined on numerous occasions, "public funds" are "those monies belonging to a government, be it state, county, municipal or other political subdivision, in the hands of a public official." Op. S.C. Att'y Gen., 1985 WL 166100, No. 85-132 (November 15, 1985). Such funds need not be tax generated revenue. Our Supreme Court cited with approval in Elliott v. McNair, 250 S.C. 75, 90, 156 S.E.2d 421, 429 (1967) the definition of "public money" from State v. Town of North Miami, 59 So.2d 779, 785 (1952), which stated that "[i]t

does not matter whether the money is derived from ad valorem taxes, by gift or otherwise." Thus, in our opinion, the funds possessed by the State Accident Fund for payment of benefits are indeed "public funds."

Therefore, as we emphasize above, the General Assembly possesses plenary authority to appropriate public funds except as restricted by the Constitution. State ex rel. Condon v. Hodges supra (and cases cited therein). In our view, no constitutional provision is invoked here, as the State Accident Fund was limited by and belongs to the State. As noted, the General Assembly has required the Fund to be refurbished in case of deficit on a fiscal year basis. Nowhere in the language of the State Accident Fund statute is there evidence that the General Assembly sought to "tie its hands" in the future. There is not, in other words, as there was in Layman, "contractually significant" language here. The rule expressed in Layman is that ordinarily "statutes do not create contractual rights." Indeed, § 42-7-210 speaks of covering benefit claims for employees by the "amounts annually appropriated. . . ." While there is no doubt that employees are "entitled" to have their claims met, such obligation appears to be a matter of public policy established by the General Assembly.

Of course, one General Assembly cannot bind another with respect to legislation. Op. S.C. Att'y Gen., 2004 WL 2745662 (November 18, 2004). Thus, absent a constitutional prohibition – which we believe is not present here – the General Assembly is free to enact Proviso 75.2 requiring that "[f]rom the funds credited to the State Accident Fund in the current fiscal year" it establish a "military disability program" which provides a settlement for any such member of the National Guard that became permanently disabled while serving during the catastrophic weather event in October, 2015." The Proviso is presumed valid. Moreover, there is no evidence that such an appropriation in this limited form ("catastrophic weather event" of 2015) will jeopardize the State Accident Fund's ability to pay Workers' Compensation claims in a given fiscal year. Even so, § 42-7-75 and -210 require payment from the General Fund if such payment of claims is, in any way, threatened.

Therefore, the answer to your second question is "no." The circumstances under which the Fund operates do not, in our opinion, negate the Fund's ability to legally fund the military disability pension program with the premiums collected from its policy holders, including state agencies and non-state governmental entities.

Whether There Are Any Other Legal Impediments To The Fund Paying Settlements In The Form Of Either A One-Time Lump Sum Settlement Or Periodic Payments To Be Made During The Lifetime Of The Claimants

As noted, proviso 75.2 is part of the 2019-20 Appropriations Act. Such Proviso states:

> (A) From the funds credited to the State Accident Fund in the current fiscal year, there is established within the State Accident Fund a military disability program that provides a settlement for any such member of the National Guard that became permanently disabled while serving during the catastrophic weather event in October

> 2015. The settlement must be based upon that which persons under similar circumstances in the military service of the United States receive from the United States. The director may seek assistance in establishing the program from the Adjutant General or any other agency or entity with such expertise.
>
> (B) A National Guard member may only participate in this program if the member permanently waives any right to claim benefits pursuant to Section 25-1-100 and releases the State from any potential liability pursuant to Section 25-1-100, and further agrees that any amounts due under this proviso are subject to appropriate offsets to avoid compensation in excess of what the member would have received from the federal government if permanently disabled while performing federally paid duty. Offsets include benefits received, or to be received, under Title 42 of the 1976 Code as a result of these injuries (State Workers Compensation), benefits received, or to be received, pursuant to Chapter 10 of Title 9 of the 1976 Code (SC National Guard Retirement System), as well as any benefits received, or to be received, from the federal government such as severance pay, military retirement pay, or VA benefits relating to the same disabilities at issue in the State military disability claim.
>
> (C) From the funds credited and authorized to the State Accident Fund in the current fiscal year, the director of the State Accident Fund is authorized to offer a onetime lump sum settlement to members of the military disability program, subject to eligibility and the other requirements set forth in the proviso.

(emphasis added).

As can be seen, the Proviso relates only to a "settlement for any member of the National Guard that became permanently disabled" during the October 2015 flood. In order to be eligible for such "settlement," the member otherwise qualified "must permanently waive [ ] any right to claim benefits pursuant to Section 25-1-100 and release [ ] the State from any potential liability pursuant to Section 25-1-100. . . ." In addition, the member must agree "that any amounts due under this proviso are subject to appropriate offsets" as described therein. If the member is otherwise eligible, the director of the State Accident Fund is authorized to offer a onetime lump sum settlement from "the funds credited and authorized to the State Accident Fund in the current fiscal year. . . ."

Section 25-1-100 provides:

> [e]very member of the National Guard of South Carolina who shall be wounded or disabled while on duty in the service of the State or while reasonably proceeding to or returning from such duty shall be taken care of and provided for at the expense of the State, and if permanently disabled, shall receive the like pensions or rewards that persons, under similar circumstances in the military service of the United Sates received from the United States. But no pension shall be granted by the State for any disability received while in the service of the United States or while proceeding to or returning from such service. Before the name of any person is placed on the pension

> roll under this section proof shall be made, under such regulations as the Governor may from time to time prescribe, that the applicant is entitled to such pension.

Some form of § 25-1-100 dates back to at least 1794. In 1792, Congress enacted "An Act More Effectually to Provide for the National Defence by Establishing an Uniform Militia Throughout the United States." Pursuant to the federal Constitution, in Art. I, § 8, Congress was given the express power "for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions. . . ." Further, Art. I, § 8 empowered Congress

> [t]o provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. . . .

As part of the 1792 Military Act, Congress specified in Section 9 "[t]hat if any person, whether officer or soldier, belonging to the militia of any state and called out into the service of the United States, be wounded or disabled while in actual service, he shall be taken care of and provided for at the public expense." Ch. 33, 1 Stat. 271 (1792).

Pursuant to the federal Militia Act, South Carolina enacted Act. No. 1582 of 1794, entitled "An Act To organize the Militia Throughout the State of South Carolina, In conformity with the Act of Congress." Section XII thereof provided in pertinent part that "if any person be wounded or disabled while in actual service in opposing any invasion or insurrection, or in suppressing the same, he shall be taken care of and provided for at the public expense, without regard to the rank such person may hold." One authority has concluded that "[n]ot only did this legislation meet the . . . federal regulations," but exceeded them. Flynn, "South Carolina's Compliance With the Militia Act of 1792," South Carolina Historical Magazine, Vol. 69, No. 1, 26-29 (Jan. 1968).

The 1794 South Carolina Act repealed previous acts relating to the militia except laws concerning the Charleston battalion of artillery. Flynn, id. at 38. Moreover, according to Flynn, "the South Carolina system remained the same although in 1859 a military commission appointed by the legislature submitted a plan to improve it," but the Legislature took no action. Id. at 40-41.

Another authority has noted that "[a]fter the Civil War, the Reconstruction government replaced the antebellum militia with new, segregated companies." Meyer, "Militia," South Carolina Encyclopedia. In 1869, the General Assembly enacted Act No. 143 entitled "An Act To organize and Govern the Militia of the State of South Carolina." The Militia was renamed the National Guard of South Carolina by this Act. However, an examination of the Act, reveals no provision similar to the 1794 statute relating to provision for those "wounded or disabled." No statute of which we are aware deals with the issue of pensions for wounded or disabled members of the National Guard until the enactment of a predecessor version of § 25-1-100 in 1922.

The origins of § 25-1-100 may be found in Act No. 501 of 1922. That Act was entitled "An Act to Repeal an Act Entitled 'An Act to Revise the Military Code of South Carolina' Approved March 1, 1917, and Known as Act Number Two of the Act of 1917 and Adopt a New Military Code in Lieu Thereof." Section 45 thereof closely resembled § 25-1-100 and the 1794 Act discussed above. Act No. 501 of 1922 provided as follows:

> [e]very member of the Organized Militia of South Carolina who shall be wounded or disabled while on duty in the service of the State, and, if permanently disabled, shall receive the like pensions or rewards that persons under similar circumstances in the military service of the United States receive from the United States: Provided, that no pension shall be granted for any disability received while in the service of the United States or while proceeding to or returning from such service. Before the name of any person is placed upon the pension roll under this section proof shall be made, under such regulations as the Governor may from time to time prescribe, that the applicant is entitled to such pension.

Section 45 of the 1922 Act relating to pensions for members of the National Guard wounded or disabled in the line of duty was codified and continued in the 1930, 1932 and 1942 Codes. See § 845 of the 1930 Compiled Code of South Carolina; § 2929 of the 1932 Code, and § 2929 of the 1942 Code. Then, in 1950, the General Assembly enacted Act No. 76 of 1950 entitled "An Act to Provide A Defense Force and a Military Code for South Carolina." Section 43 of that Act contains the present version of § 25-1-100. This provision was codified in the 1952 Code at § 44-10 and in the 1962 Code at § 44-10. The provision is presently found at § 25-1-100 of the 1976 Code. Although we have searched, we have found no evidence that § 25-1-100 has been utilized through a line item, appropriation of funds therefor.

Provisions such as those contained in § 25-1-100 are not uncommon elsewhere. Examples are found in Illinois, see Streitmatter v. State, 9 Ill. Ct. Cl. 34 (1935) [member of National Guard or Naval Reserve wounded or disabled on duty]; West Virginia [State ex rel. Cashman v. Sims, 43 S.E.2d 805 (W.Va. 1947) [member of National Guard who, without fault, is wounded or disabled in the performance of duty]; and New York [1952 N.Y. Op. Att'y Gen. No. 14 (Nov. 25, 1952) [member of the National Guard who "without fault or neglect on his part" is "wounded or disabled while performing any lawfully ordered duty"].

In State v. Dickerson, 174 S.W.2d 244, 245 (Tex. 1943), the Supreme Court of Texas interpreted a statute which provided that the State would provide and care for "[e]very member of the military forces of this State who shall be wounded or disabled while in the service of this State. . . ." Dickerson's heirs sought damages against the State, but the claim was dismissed. The Court noted that

> [w]hile the statute may have constituted sufficient authority to authorize a proper officer of the State, upon timely application therefor, to supply the benefits therein provided for, it does not evidence legislative intent to allow those entitled to such benefits to supply the benefit themselves or to contract with others therefor and

> thereafter hold the State liable for the cost or value thereof. There are many statutes and constitutional provisions in this State which pledge the State to furnish certain benefits to its citizens, such as pensions to certain classes care for its dependent and neglected children, and free schools and free text-books for its children, and maintenance of its indigent . . . [mentally ill]. But it is not thought that these pledges are contractual in their nature so as to authorize a suit for damages for a breach thereof. It is the general rule that those entitled to such benefits must make timely application therefor to the proper officer, and that the State supplies such benefits as it can at the time in its own way.

(emphasis added). The Court went on to note that

> [i]t appears that the State had not set up any organization or system for carrying the provisions of the above statute into effect. It is also uncertain as to whether any appropriation had been made to cover the expenditures therein provide for.

174 S.W.2d at 245.

And in Cashman v. Sims, supra, the West Virginia Court observed with respect to a comparable statute that in Woodall v. Daust, 77 S.E. 264, 266 (W.Va. 1912), it had been stated that such a statute serves

> . . . as an inducement to the claimant in that case to enlist in the military service of the State, and expressed the view that he had a right to expect that, if injured while performing his duty, he would be compensated from the public treasury. . . .

As we have noted previously, "[t]he general rule for construing statutes providing for pensions and other benefits is to accord such statutes [a] liberal construction." Op. S.C. Att'y Gen., 1980 WL 121209 (May 7, 1980). The reason for the rule is to encourage military service. In that regard, it was long ago stated in United States v. Hall, 98 U.S. 343, 346, 350-51 (1878) that

> [p]ower to grant pensions is not controverted, nor can it well be, as it was exercised by the States and by the continental Congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and has been continued without interruption or question to the present time. . . . Such laws had their origin in the patriotic service, great hardships, severe suffering and physical disabilities contracted while in the public service by the officers, soldiers and seaman who spent their property, lost their health, and gave their time for their country in the great struggle for liberty and independence, without adequate or substantial compensation. . . . Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements. Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled, or otherwise rendered invalids while in the public service, even in cases where no prior promise was made, or antecedent inducement held out.

The word "pension" is ordinarily thought of as a "fixed sum paid regularly to a person." See www.merriam-webser.com/dictionary/pension Thus, the permanent statute, § 25-1-100, speaks of a "pension," while Proviso 75.2 anticipates payment of a "lump sum." In order to receive the lump sum payment, the Proviso requires that the member of the National Guard who is permanently disabled must "permanently waive [ ] any right to claim benefits pursuant to Section 25-1-100 and release [ ] the State from any potential liability pursuant to Section 25-1-100. . . ." Accordingly, the Legislature, through enactment of the Proviso, has presented an alternative to the § 25-1-100 pension and a limitation thereof. And in contrast to § 25-1-100, the Proviso enacts an express funding mechanism – "[f]rom the funds credited to the State Accident Fund. . . ." Moreover, the Proviso is far more limited in that it is restricted to those National Guard members who were permanently disabled while "serving during the catastrophic weather event in October 2015."

It is, of course, the cardinal rule of statutory construction to ascertain and effectuate the intent of the General Assembly. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). As our Supreme Court emphasized in Hodges, the purpose of an enactment will prevail over the literal import of the statute. Id. at 582. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942). Statutes are to be interpreted with a "sensible construction" and must, where possible, be given a "reasonable application." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1949). In other words, the dominant factor concerning statutory construction is the intent of the Legislature. Sptg. Sanitary Sewer Dist. v. City of Sptg., 283 S.C. 67, 321 S.E.2d 258 (1984).

Moreover, our Supreme Court has emphasized that it is the "General Assembly's prerogative to modify or repeal legislation and to make policy decisions." Amisub of South Carolina, Inc. v. S.C. Dept. of Health and Environmental Control, 407 S.C. 583, 597, 757 S.E.2d 408, 415 (2014). All statutes must be read together and implied repeals are disfavored. Op. S.C. Att'y Gen., 2000 WL 773737 (March 8, 2000). General and specific statutes must be read together, and harmonized if possible. But to the extent of any conflict between the two, the special statute must prevail. Op. S.C. Att'y Gen., 1979 WL 43483 (July 25, 1979) (quoting Criterion Ins. Co. v. Hoffman, 258 S.C. 282, 188 S.E.2d 459 (1972)). Even though authority may be concurrent, a subsequent specific authorization prevails over an earlier, more general one. Op. S.C. Att'y Gen., 1983 WL 181792 (March 14, 1983). In that same vein, "[i]n numerous opinions, this Office [has] recognized the legal principle that 'in case of conflict between a Proviso in the state Appropriations Act and a permanent provision of law, the proviso is generally controlling for that fiscal year.'" Op. S.C. Att'y Gen., 2008 WL 5476551 (December 2, 2008) (citing Opinions).

In our view, provided the requirements of Proviso 75.2 are met, such Proviso is controlling. The Proviso is later in time. Section 25-1-100 was first enacted in 1922, but some form of this statute dates back to 1794. Moreover, the Proviso is the specific statute, relating only to the October 2015 flood, whereas § 25-1-100 encompasses any permanent disability by a

member of the National Guard received while serving the State. By no means does Proviso 75.2 impliedly repeal § 25-1-100, but simply modifies it during this fiscal year and is controlling so as to authorize a "one-time lump sum payment" under the narrower circumstances set forth in the Proviso. Thus, the Proviso serves to modify § 25-1-100 under those circumstances.

Additionally, we note that Art. X, § 16 of the South Carolina Constitution, relating to pension and retirement funds, provides as follows:

> [t]he governing body of any retirement or pension system in this State funded in whole or in part by public funds shall not pay any increased benefits to members or beneficiaries of such system above the benefit levels in effect on January 1, 1979 unless such governing body shall determine that funding for such increase on a sound actuarial basis has been provided or is concurrently provided.
>
> The General Assembly shall annually appropriate funds and prescribe member contributions for any state-operated retirement which will insure the availability of funds to meet all normal and accrued liability of the system on a sound actuarial basis as defined by the governing body to the system.
>
> Assets and funds established, created and accruing for the purpose to paying obligations to members of the several retirement systems of the State and political subdivisions shall not be diverted or used for any other purpose.
>
> Notwithstanding the provisions of Section 11 of this article, the funds of the various state-operated retirement systems may be invested and reinvested in equity securities.

Art. X, § 16 appears to relate to "state-operated retirement systems." In Wehle v. S.C. Retirement System, 363 S.C. 394, 398-99, 611 S.E.2d 240, 242 (2005), the Supreme Court adopted the Referee's Order, and the Court stated:

> [t]he South Carolina retirement systems (collectively, the "System") service several groups of state employees, active and retired. Of the four separate pension funds administered by the South Carolina Budget and Control Board, (the Board), this case concerns two largest funds, consisting of approximately 200,000 active employees and approximately 80,000 former employees in retired status.

We note that § 9-16-10(8) defines the term "Retirement system" to mean "the South Carolina Retirement System, Retirement System for Judge and Solicitors, Retirement System for Members of the General Assembly, National Guard Retirement System, and Police Officers Retirement System established pursuant to Chapters 1, 8, 9, 10 and 11 of Title 9." Based upon these provisions, we do not believe the State Accident Fund could reasonably be deemed a state-operated "retirement system" for purposes of Art. X, § 16. Thus, the provision contained in Art. X, § 16 prohibiting diversion of Retirement System funds for other purposes would not be applicable to the State Accident Fund.

As noted, however, this constitutional provision (Art. X, § 16) mandates that the governing body of "any retirement or pension system" in this State must determine that the funding of any increase in benefits be "on a sound actuarial basis. . . ." If it is adjudged that the

system is not actuarially sound, the General Assembly "must provide funding necessary to restore the fiscal integrity of the system." Wehle, 363 S.C. at 399, 611 S.E.2d at 243. The term "sound actuarial basis" is not defined in Art. X, § 16.

Typically, the term "actuarially sound" means "assets over liabilities." Borough of Ellwood City v. Ellwood City Police Dept. Wage and Policy Unit, 786 A.2d 342, 346 (Pa. 2001). As has been stated elsewhere,

> [t]he term "actuarially sound" when used to describe a retirement system or plan may be best defined to mean that the operation of the retirement plan is being conducted and may reasonably be expected to continue to be conducted in such a manner that the fund's current assets, plus anticipated contributions and investment earnings, are expected to be sufficient to provide all benefit payments and expenses of the fund at all future points in time. . . .

State of W.Va. v. W.Va. Investment Mgmt. Bd., 508 S.E.2d 130, 142 (W.Va. 1998) (Davis, C.J., dissenting and quoting affidavit).

While this Office is unable to determine particular facts in an Opinion, and assuming Art. X, 16 is applicable here, it appears on the face of the statutes involved that the "military disability program" would meet the requirements of Art. X, § 16. As noted, the program is limited to those members "of the National Guard that become permanently disabled while serving during the catastrophic weather event in October 2015." Moreover, the funds for the military disability program "are obtained from the funds credited to the State Accident Fund during the current fiscal year. . . ." As discussed above, § 42-7-210 guarantees funding for the State Accident Fund from the General Fund in any given year where the assets cannot meet the liabilities for that fiscal year. Thus, based upon the information before us, we believe that the military disability program (or the State Accident Fund for that matter) meets the requirements of Art. X, § 16.

Finally, you ask whether you, as Director of the Fund, possess the requisite authority to offer periodic payments as an alternative to a lump sum payment, such periodic payments to be made during the lifetime of the claimants. Of course, as you are aware, the Fund may, pursuant to Proviso 75.2, use its Fiscal Year 2019-20 appropriations to fund the settlement. It is well established that the Fund may not, without additional appropriative authority, enter into any obligation to make periodic payments from future fiscal year appropriations. As noted, Proviso 75.2 expressly so states. See Op. S.C. Att'y Gen., 1982 WL 189182 (February 22, 1982) [contract which obligates public funds beyond the fiscal year where there is no existing appropriation providing for the expenditure of such funds is invalid].

Nevertheless, Proviso 75.2 gives you, as Director, the discretion to negotiate a "settlement" with a member of the National Guard, who is wounded or disabled while serving during the October 2015 flood, "based upon that which persons under similar circumstances in the military service of the United States receive from the United States." Accordingly, within

the limitations set forth above, that you must make all settlement payments within the 2019-20 fiscal year, we believe you could, within your discretion, negotiate a settlement which effectively provides for periodic payments to claimants for life and a potential return of unpaid funds to the State. For example, we assume the Fund and claimants could contract with a company which provides structured payments to claimants for either a set amount of time, or for life, as well as payment for residual amounts to a designated beneficiary. The Fund would fully pay for the settlement by employing this fiscal year's appropriations. Periodic payments could then be made by the company with any residual amounts designated to flow back to the State of South Carolina. Of course, such residual funds would be deposited into the General Fund, absent an appropriation otherwise.

In our opinion, the foregoing would be in keeping with the principle that such settlement must be paid from this fiscal year's appropriation, which is a mandatory requirement. Of course, such negotiation with any claimant, whether it be a lump sum or recurring payment as specified above, is a function which you, as Director of the Fund, must exercise. We merely point out that such an alternative, as discussed above, is consistent with the authority given you by Proviso 75.2.

Conclusion

It is our opinion that Proviso 75.2 is binding and must be followed. As the United States Supreme Court has recognized in U.S. v. Hall, supra, the "[p]ower to grant pensions is not controverted, nor can it well be. . . ." Proviso 75.2 requires that a military disability program be established from "funds credited to the State Accident Fund in the current fiscal year for any member of the National Guard that became permanently disabled while serving during the catastrophic weather event in October 2015." According to the Proviso, the Director of the State Accident Fund "is authorized to offer a onetime lump sum settlement to members of the military disability program, subject to eligibility requirements set forth in the proviso."

Applying the rules of statutory construction, we believe the Proviso is valid and binding appropriation under state law and that you, as director of the State Accident Fund, are required to adhere to it. Edwards v. State, supra. In our view, the Proviso is a limitation upon § 25-1-100 for this fiscal year. The Proviso is related specifically to disability of members of the National Guard in service during the 2015 flood, whereas § 25-1-100 covers all situations in which the National Guard member is wounded or disabled while on duty in service to the State. According to well-settled rules of construction, a later in time Proviso, one which is far more specific, will control over an earlier statute more general in nature. Thus, based upon the Proviso's express and specific terms, the Director of the State Accident Fund is authorized to offer a lump sum settlement to members of the military disability program meeting the eligibility requirements of the Proviso.

Secondly, the nature of the State Accident Fund does not prevent you as Director from following the requirements of the Proviso. While we have discussed herein provisions of the

Constitution, such as the Contract Clause, as well as trust law, we do not believe there are any limitations in the Constitution or otherwise which prevent you from following the requirement of the Proviso. As the Court stated in Edwards, supra, "[e]xecutive agencies are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid." While concern for your fiduciary duty is indeed admirable, and we applaud it, the General Assembly, as the lawmaking body, has made the policy choice which must be carried out by the Executive Branch.

Moreover, in our judgment, there is no reason to believe that Proviso 75.2 is not in compliance with Art. X, § 16 of the Constitution requiring state-operated pension funds to be actuarially sound. The Proviso sets up a very narrow class of situations applicable to it, and provides a funding mechanism therefor. Further, the State Accident Fund should not be jeopardized because the General Assembly has provided for a mechanism requiring that the General Fund pay all State Accident fund liabilities in a particular fiscal year if there are not sufficient funds in the Accident Fund to cover them.

Finally, with respect to your question as to whether you are authorized by the Proviso to offer periodic payments as an alternative to a lump sum payment to a claimant, we stress again that any settlement must be paid from this fiscal year's appropriated funds, consistent with the express language of the Proviso. You cannot obligate funds from future fiscal years. However, within these limitations, you may, within your discretion, negotiate a settlement which provides periodic payments for life with a potential return of unpaid funds to the State, as discussed above. The terms of any settlement are, of course, beyond the scope of an opinion of this Office, but instead, are within your discretion as Director.

In summary, we believe Proviso 75.2 is a valid appropriation and must be followed.

Sincerely,

Robert D. Cook
Solicitor General