ALAN WILSON
ATTORNEY GENERAL

April 5, 2021

The Honorable Jonathon D. Hill, Member
South Carolina House of Representatives
434C Blatt Building
Columbia, South Carolina 29201

The Honorable Anne Thayer, Member
South Carolina House of Representatives
519C Blatt Building
Columbia, South Carolina 29201

The Honorable West Cox, Member
South Carolina House of Representatives
436A Blatt Building
Columbia, South Carolina 29201

Dear Representatives Hill, Thayer, and Cox:

We received your letter requesting an opinion of this Office concerning the Anderson County Fire Protection Commission. Specifically, you ask the following two questions:

1) Do the procedures for raising millage by a special purpose district in Title 6, Chapter 11 supersede Act 711 of 1990 and Act 175 of 1999?

2) Should the Anderson County Fire Protection Commission in a given year wish to exceed the six-mil limit without a referendum pursuant to S.C. Code Sections 6-11-271 and 6-11-275, would the Commission need to seek approval from the legislative delegation, or from the county council? Which one is the "governing body of the county" in Anderson County?

Law/Analysis

A. General Law v. Local Law

The Legislature created the Anderson County Fire Protection Commission (the "Commission") in 1961 prior to Home Rule. 1961 S.C. Acts 294. Originally, the Legislature gave the Commission the power to levy a tax "not to exceed two mills in the aggregate on all the taxable property of Anderson County for the development and

operation of the fire protection system . . . ." Id. By Act 146 of 1969, the Legislature amended the 1961 act to give the Commission authority to "annually levy a tax not to exceed four mills in the aggregate on all of the taxable property of the county for the development and operation of the fire protection system . . . ." 1969 S.C. Acts 146.

Subsequent to Home Rule, the Legislature adopted sections 6-11-273 and 6-11-275 of the South Carolina Code (2004) in 1976. Section 6-11-273 of the South Carolina Code (2004) provides a mechanism by which a special purpose district created by the Legislature prior to Home Rule can increase its millage by initiating a referendum. This provision states:

> Notwithstanding any other provision of law, any special purpose district created by an act of the General Assembly which is authorized to levy taxes for the operation of the district may request the commissioners of election of the county in which the district is located to conduct a referendum to propose a change in the tax millage of the district. Upon receipt of such request the commissioners of election shall schedule and conduct the requested referendum on a date specified by the governing body of the district.
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> If a majority of the qualified electors of the district voting in the referendum vote in favor of the proposed tax millage change, the governing body of the district shall by resolution adopt the new millage rate which shall thereupon have the full force and effect of law.

Section 6-11-275 of the South Carolina Code (2004) allows a special purpose district located entirely within a county to increase its millage for one year without a referendum by obtaining approval from the governing body of the county.

> All special purpose districts totally located within a county, which were in existence prior to March 7, 1973, and which have the statutory authority to annually levy taxes for maintenance and operation are authorized to increase their respective millage limitations upon the written approval of the governing body of the county in which they are located. Any increase above the statutory limitation must be approved each year.
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> Any such millage increase shall be levied and collected by the appropriate county auditor and county treasurer.

S.C. Code Ann. § 6-11-275.

Section 6-11-271 of the South Carolina Code (2004) provides similar mechanisms to increase a special purpose district's millage as those provided in sections 6-11-273 and 6-

11-275. It is our understanding the Legislature added this provision in response to Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997), which ruled the levy of a property tax by an appointed commission violates the South Carolina Constitution. This provision addresses the imposition of taxes by special purpose districts created by legislative act prior to 1973 that have governing bodies who are not elected, but are authorized by their enabling legislation to levy a property tax. Sections 6-11-271(D) and (E) address increases in millage for these types of special purpose districts.

> (D) Notwithstanding any other provision of law, any special purpose district within which taxes are authorized to be levied for maintenance and operation in accordance with the provisions of subsections (B) or (C) of this section, or otherwise, may request the commissioners of election of the county in which the special purpose district is located to conduct a referendum to propose a modification in the tax millage of the district. Upon receipt of such request, the commissioners of election shall schedule and conduct the requested referendum on a date specified by the governing body of the district. If approved by referendum, such modification in tax millage shall remain effective until changed in a manner provided by law.
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> (E)(1) All special purpose districts located wholly within a single county and within which taxes are authorized to be levied for maintenance and operation in accordance with the provisions of subsections (B) or (C) of this section, or otherwise, are authorized to modify their respective millage limitations, provided the same is first approved by the governing body of the district and by the governing body of the county in which the district is located by resolutions duly adopted. Any increase in millage effectuated pursuant to this subsection is effective for only one year.
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> . . . .

S.C. Code Ann. § 6-11-271(D) & (E).

In 1985, prior to the enactment of section 6-11-271, we concluded sections 6-11-273 and 6-11-275 are the methods by which the Commission may increase its millage. Op. Att'y Gen., 1985 WL 166077 (S.C.A.G. Sept. 30, 1985). "Sections 6–11–273 and 6–11–275 provide two mechanisms for increasing tax millage limitations, depending upon whether a permanent increase or merely an increase in one annual tax levy should be desired." Id. The 1985 opinion also addressed whether the Anderson County Legislative Delegation (the "Delegation") may raise the millage by introducing a new bill, stating

> neither general law nor the local acts pertaining to the Commission appear to give the Anderson County Delegation any authority to increase the millage. If an act were passed by the legislature to increase millage, such would very likely contravene Article VIII, Section 7 of the State Constitution, which prohibits the enactment of laws for a specific county. See Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976); Cooper River Park and Playground Commission v. City of North Charleston, 273 S.C. 639, 259 S.E.2d 107 (1979); Spartanburg Sanitary Sewer District v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984).

Id.

In 1990, we were asked whether the Commission could increase the millage without approval from the Delegation. Op. Att'y Gen., 1990 WL 599211 (S.C.A.G. Feb. 22, 1990). We cited to sections 6-11-273 and 6-11-275 as the two methods by which the Commission could increase its millage. Id. Further, we found approval by the Delegation was not required.

> Certain actions by Anderson County Council would be required if one of these statutes should be followed, but no approval is required therein by the Anderson County Legislative Delegation. We can locate no other means by which the Fire Commission could increase the millage rate with or without approval from the Delegation.

Id.

Despite the advice given in our 1985 opinion, the Legislature passed two acts specifically pertaining to the Commission in 1990 and 1999. In addition to providing benefits and compensation to the Commission's members, the 1990 act provides: "Pursuant to the results of a favorable referendum heretofore conducted pursuant to Section 6-11-273 of the 1976 Code, the commission, beginning with the year 1988, may annually levy a tax not to exceed six mills on all taxable property in its service area for the operation of the commission . . . ." 1990 S.C. Acts 711. In 1999, the Legislature further amended the Commission's enabling legislation, giving the Commission the power and duty to

> annually recommend to the Anderson County Legislative Delegation a tax not to exceed six mills in the aggregate on all of the taxable property of the county for the development and operation of the fire protection system except that property within the municipal limits of the cities of Anderson, Belton, Honea Path, Williamston, and that portion of Piedmont that comprises old School District No. 23.

1999 S.C. Acts 175. The 1999 act also amended the enabling legislation to provide in relevant part:

> Pursuant to the results of a favorable referendum which previously was conducted pursuant to Section 6-11-273 of the 1976 Code, the commission, beginning with the year 1988, may annually recommend to the Anderson County Legislative Delegation a tax not to exceed six mills on all taxable property in its service area for the operation of the commission. If the commission recommends and the delegation agrees to a levy of more than six mills, a referendum must be conducted, initiated by the delegation, within the service area of the commission to approve that levy.

Id.

Following the general law set forth in sections 6-11-271, 6-11-273, and 6-11-275, the Commission is a special purpose district created prior to March 7, 1973 by an act of the Legislature. See Op. Att'y Gen., 1983 WL 197508 (S.C.A.G. Dec. 30, 1983) (finding the Commission is a special purpose district). Opinions issued prior to the enactment of 6-11-271 clearly state if the Commission wishes to increase its millage, it must do so in accordance with section 6-11-273 or 6-11-275. According to the Commission's enabling legislation, the Governor appoints its members on the recommendation of a majority of the county legislative delegation. See 1961 S.C. Acts 294, amended by 1999 S.C. Acts 175. As such, if the Commission wishes to increase its millage, we would advise the Commission to follow section 6-11-271. However, the 1999 act appears to alter the general law solely in relation to the Commission. The 1999 act requires the Commission to get the approval of the Delegation to increase the millage and allows the Delegation, rather than the Commission as provided under section 6-11-271, to initiate the referendum. Thus, the issue you present is whether the Commission should follow the general law contained in chapter 11 of title 6 or the local law as provided in Act 175 of 1999 to increase the millage.

To answer your question, we first turn to the rules of statutory construction to determine which law controls.

> An elementary and cardinal rule of statutory construction is that courts must ascertain and effectuate the actual intent of the legislature. Horn v. Davis Electrical Constructors, Inc., 307 S.C. 559, 416 S.E.2d 634 (1992); Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992). Additionally, the Last Legislative Expression Rule requires that in instances where it is not possible to harmonize two sections of a statute, the later legislation supersedes the earlier enactment. South Carolina Electric & Gas Co. v. South Carolina Public Service Authority, 215 S.C.

> 193, 54 S.E.2d 777 (1949); Jolly v. Atlantic Greyhound Corp., 207 S.C. 1, 35 S.E.2d 42 (1945).

Williams v. Town of Hilton Head Island, S.C., 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993). Additionally, "[t]he general rule of statutory construction is that a specific statute prevails over a more general one." Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995). The Legislature passed Act 175 in 1999, subsequent to sections 6-11-271, 6-11-273, and 6-11-275, which were passed in 1998 and 1976 respectively. Additionally, Act 175 of 1999 is more specific than the general law provided in these statutes. Based on the rules of statutory construction, we would conclude the local law controls.

However, as we warned in our 1985 opinion, we are concerned that any local law pertaining to the Commission passed subsequent to the Home Rule amendments to the South Carolina Constitution is likely unconstitutional. As we explained in our 1985 opinion, section 7 of article VIII of the South Carolina Constitution mandates the Legislature "provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties . . ." and prohibits the Legislature from enacting laws "for a specific county" or exempting a specific county from the general laws. S.C. Const. art. VIII, § 7. Essentially, section 7 of article VIII prohibits the Legislature from enacting legislation "relating to a specific county which relates to those powers, duties, functions and responsibilities, which under the mandated systems of government, are set aside for counties." Kleckley v. Pulliam, 265 S.C. 177, 183, 217 S.E.2d 217, 220 (1975). Our Supreme Court explained: "While Article VIII, § 7 did not dissolve pre-home rule special purpose districts, it does apply to legislation enacted post-home rule that concerns a special purpose district created prior to the rule." Cty. of Florence v. W. Florence Fire Dist., 422 S.C. 316, 322, 811 S.E.2d 770, 774 (2018) (concluding Home Rule precludes local legislation pertaining to fire protection services provided by a local fire district). In Cooper River Park and Playground Commission v. City of North Charleston, 273 S.C. 639, 642, 259 S.E.2d 107, 108-09 (1979), the Court stated:

> Section 7 is not only applicable to special legislation creating a district, but also to special legislation dealing with districts created prior to the ratification of new Article VIII or the amendment of prior special legislation. Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976). Thus, these provisions of Article VIII have divested the General Assembly of authority to deal by special act with special purpose districts performing functions now delegated to counties under "Home Rule".

Based on this authority, we believe a court would likely find Act 711 of 1990 and Act 175 of 1999 are special legislation precluded under article VIII of the South Carolina Constitution because they only apply to the Commission. Furthermore, section 34 of article

III of the South Carolina Constitution prohibits the Legislature from enacting special laws "where a general law can be made applicable." S.C. Const. art. III, § 34. In this case, general law can be made applicable as the Legislature enacted general law providing a procedure for special purpose districts to increase their millage by enacting sections 6-11-271, 6-11-273, and 6-11-275.

Although we believe a court would find Acts 711 and 175 violate the South Carolina Constitution, as we stated in a previous opinion,

> [i]n considering the constitutionality of an act of the General Assembly, the presumption is that the act is constitutional in all respects. The court will not declare such an act void unless its unconstitutionality is clear beyond any reasonable doubt. Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, to declare an act unconstitutional is solely within the province of the courts of this State.

Op. Att'y Gen., 1993 WL 720131(S.C.A.G. June 16, 1993). As such, we advise that requirements under Acts 711 of 1990 and 175 of 1999 should be followed unless and until a court rules they are unconstitutional.

B. Proper Body to Approve the Millage Increase

Next, you inquire as to who approves a millage rate increase if the Commission wishes to increase its millage without a referendum. Pursuant to section 6-11-271(E)(1), a special purpose district can increase its millage for one year without a referendum if the governing body of the county approves the increase. For purposes of the Commission, we believe the governing body of the county is the Anderson County Council. However, Act 175 of 1999 requires the Commission to submit an annual budget to the Delegation, who approves the budget before the "necessary levy is sent to the county auditor who shall levy a tax on all taxable property of the county adequate for raising such sums needed, but the levy may not exceed six mills." As we discussed above, we believe the constitutionality of Act 175 is questionable. Nonetheless, until a court rules otherwise, its provisions must be followed. Accordingly, pursuant to Act 175 of 1999, the Commission must seek the approval of the Delegation each year in order to levy the millage necessary to fund its operations. Furthermore, if the Commission desires to increase the millage above six mills, Act 175 of 1999 requires that the Delegation agree to the increase and initiate a referendum in which voters residing in the Commission's service area must approve.

Conclusion

Sections 6-11-271, 6-11-273, and 6-11-275 provide general law as to the procedures by which a special purpose district existing prior to Home Rule may increase its millage. The Legislature passed legislation in 1990 increasing the millage for the Commission from four to six percent. The Legislature also passed legislation in 1999 giving the Delegation the authority to determine the annual tax levy for the Commission and the authority to initiate a referendum should the Commission and Delegation wish to increase the millage above six mills. In keeping with prior opinions of this Office, we believe a court would find the 1990 and 1999 acts are unconstitutional special legislation. Nonetheless, only a court may declare an act of the Legislature unconstitutional. Unless and until a court rules these acts are unconstitutional, we recommend the Commission comply with their requirements. According to Act 175 of 1999, the Delegation must annually approve the Commission's budget upon which the tax levy is based. Additionally, pursuant to Act 175, if the Commission desires to levy a tax exceeding six mills, the Delegation must initiate a referendum to approve the levy.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General