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The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

November 17, 1997

The Honorable Mickey Whatley  
Member, House of Representatives  
P.O. Box 62826  
North Charleston, South Carolina 29419-2826

Re: Informal Opinion

Dear Representative Whatley:

Attorney General Condon has forwarded your recent opinion request to me for reply. You seek clarification on two issues which have come to your attention following the South Carolina Supreme Court's recent decision Weaver, et al. v. Recreation District, et al., (S.C. Sup. Ct. filed October 13, 1997)(Davis Adv. Sh. No. 29 at 8).

The Weaver case involved the constitutionality of Act No. 317 of 1969, the act which created the Richland County Recreation Commission. This act authorized the Recreation Commission, in pertinent part:

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

The plaintiffs contended that the delegation of authority to an appointed body to levy up to 5 mills per year unconstitutionally permitted taxation without representation in violation of Article X, Section 5 of the South Carolina Constitution. Article X, Section 5 provides, in pertinent part:

*Request Letter*

No tax ... shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled....

The Court found that Act No. 317, which gave the Recreation Commission the complete discretion to determine its annual budget, and to levy anywhere from one to five mills taxes to meet its budget, to be an impermissible delegation of the taxing authority.<sup>1</sup> In reaching this decision, the Court cited its prior decisions in Crow v. McAlpine, 277 S.C. 240, 285 S.E.2d 355 (1981); Stone v. Traynham, 278 S.C. 407, 297 S.E.2d 420 (1982); and Bradley v. Cherokee School District No. One, \_\_\_ S.C. \_\_\_, 470 S.E.2d 570 (1996).

Crow v. McAlpine is the seminal case in this area of law. In Crow, the Court was faced with a legislative delegation of authority to an appointed board, the Marlboro County Board of Education, to levy and collect all tax millage necessary to meet the school district's operating budget. The Court found such a delegation of authority violated Article X, Section 5 as the legislative power to tax may not be conferred on a purely appointive body but must be under the supervisory control of elected bodies, stating:

The unlimited power of taxation attempted to be conferred by the Act under consideration is itself a forcible reminder that the power to fix and levy a tax should only be conferred upon a body which stands as the direct representative of the people, to the end that an abuse of power may be directly corrected by those who must carry the burden of the tax.

Accordingly, the Court held the act unconstitutional stating "the General Assembly may not, consistent with Article X, Section 5, delegate the unrestricted power of taxation to an appointive body."

In light of the Court's decision in Weaver, you have raised two questions. First, "[D]o members of the Special Purpose Districts have to be elected by the voters only if that Special Purpose District levies taxes?" Second, "[A]re Special Purpose Districts who indirectly levy taxes through County Council affected by this ruling?"

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<sup>1</sup> In order to reduce the disruptive effect of the Weaver decision on the financial operation of numerous special purpose districts, local commissions and boards, the Court held that the Weaver decision shall be applied prospectively beginning December 31, 1999.

The Honorable Mickey Whatley

Page 3

November 17, 1997

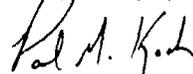
In regards to your first question, the Weaver decision does not require that the members of the governing body of a Special Purpose District be elected in all cases. What the Weaver decision requires is that if the Special Purpose District has the authority to levy and collect taxes, the members of the governing body must be elected by the people or under the supervisory control of a body chosen by the people. Conversely, if a Special Purpose District is controlled by an appointed board that does not have taxing authority, that Special Purpose District would not fall within the purview of the Weaver decision since there would not be an Article X, Section 5 problem.

As to your second question, Weaver, and the string of cases cited therein, stand for the proposition that the power to tax should only be conferred upon a body which is a direct representative of the people so that any abuse of that power may be corrected by those who carry the burden of the tax. Thus, the power to tax may not be delegated to a body composed of persons not assented to by the people nor subject to the supervisory control of a body chosen by the people. Weaver, et al. v. Recreation District, et al., supra; Crow v. McAlpine, supra; Stone v. Traynham, supra; Bradley v. Cherokee School District No. One, supra. Therefore, a general answer to your question is that if the County Council has the ultimate authority to fix and determine the amount of the tax to be levied for the Special Purpose District, the holding of Weaver would not be violated since the tax would be imposed by a body elected by the people. However, as to a specific Special Purpose District, the enabling legislation would have to be analyzed to determine the exact nature of the taxing authority.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,



Paul M. Koch

Assistant Attorney General