ALAN WILSON
ATTORNEY GENERAL

January 6, 2014

The Honorable J. Gregory Hembree
Senator, District No. 28
1300 Professional Drive, Suite 102
Myrtle Beach, SC 29577

Dear Senator Hembree:

This Office received your request for an opinion regarding the Regional Transportation Authority Law. Each of your questions and its analysis follows.

## LAW/ANALYSIS:

I. **In 1985, the General Assembly revised the provisions establishing law for Regional Transportation Authorities. The annotated version of section 58-25-40 seems to have added language as follows (underlined). The second paragraph of sub-paragraph (1) read: "The membership of the governing board must be apportioned among the member cities and counties proportionate to population within the authority's service area or the financial contribution to the authority by the member municipalities and counties". However, the current version of this statutory provision does not include the language underlined above relative to the financial contributions. Why did that deletion occur? Today, can proportionate funding for RTA be tied to an entity's representation on the RTA's board of directors?**

While it is unclear why the legislature deleted the language in the statute, it appears that funding for a Regional Transportation Authority ("RTA") can not be tied to an entity's representation on the RTA's board of directors.[1] We determined in a prior opinion that:

[1] The second paragraph of Section 58-25-40 of the South Carolina Code currently states:

> There must be at least five board members. The membership of the governing board must be apportioned among the member municipalities and counties proportionate to population within the authority's service area.

S.C. Code Ann. § 58-25-40 (1976 Code, as amended).

> Statutory construction must begin with the language of the statute. *Kofa v. U.S. Immigration & Naturalization Serv.*, 60 F.3d 1084, 1088 (4th Cir.1995). In interpreting statutory language, words are generally given their common and ordinary meaning. *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir.1998). Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning. *Hall v. McCoy*, 89 F.Supp.2d 742, 745 (W.D.Va.2000).

Jennings v. Jennings, 401 S.C. 1, 736 S.E.2d 242 (2012). Pursuant to the plain meaning of the statute, membership on an RTA's board is proportionate to population and not to financial contribution.

We have previously opined that "South Carolina courts consider the title or caption of an act in aid of construction to show the intent of the Legislature." Op. S.C. Atty. Gen., September 4, 2012 (2012 WL 4009947) (quoting Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972); University of South Carolina v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966)). The title to Act No. 449 stated in part that it was:

> AN ACT TO ENACT THE SOUTH CAROLINA ENERGY CONSERVATION AND EFFICIENCY ACT OF 1992; TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976. . .BY AMENDING SECTION 58-25-40, AS AMENDED, RELATING TO THE APPOINTMENT OF MEMBERS OF THE BOARD OF THE AUTHORITY, SO AS TO PROVIDE THAT THE MEMBERSHIP OF THE GOVERNING BOARD MUST BE APPORTIONED ACCORDING TO POPULATION. . .

1992 South Carolina Laws Act 449 (S.B. 1273). The Act is clear that membership of the governing board of a transportation authority can only be apportioned according to population.

We have previously found that:

> It is well established that a statute should not be retroactively applied in the absence of statutory intent. Op. S.C. Atty. Gen., June 28, 2011; State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614, 616 n. 2 (1999); Hercules Incorporated v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45 (1980); Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978) ("In the construction of statutes, there is a presumption that enactments are to be considered prospective rather than retroactive in their operation, unless there is a specific provision or clear legislative intent to the contrary"); Op. S.C. Atty. Gen., July 19, 2000 ("'[n]o statute will be applied retroactively unless the result is so clearly compelled as to leave no room for reasonable doubt ... [T]he party who affirms such

> retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough, if it is not satisfied that the Legislature did not intend such effect."' [quoting Ex Parte Graham, 47 S.C. Law (13 Rich. Law) 53, 55-56 (1864)]; see also, Am. Nat. Fire Ins. Co. v. Smith Grading & Paving, 317 S.C. 445, 454 S.E.2d 897 (1995); Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965)."). "An exception to the above-referenced presumption is that remedial or procedural statutes are generally held to operate retrospectively." Op. S.C. Atty. Gen., June 28, 2011 (*citing* Hercules Incorporated, 263 S.E.2d at 48.).

Op. S.C. Atty. Gen., September 19, 2011 (2011 WL 4592374). There is no evidence that the Legislature intended Section 58-25-40 to be applied retroactively. Therefore, the amendments to the statute should be applied prospectively and membership on the governing board of a RTA is not apportioned pursuant to financial contribution.

II. **SC Code of Laws Section 58-25-35 defines "Members of Authority" as ["]municipalities and counties" within a designated service area. Does the legislation require every incorporated municipality physically within an RTA's service area be a member, and as such, be due representation on the RTA's board of directors; or, are only those municipalities that fund the RTA eligible for the "member" designation: or, are only those municipalities that receive services from the RTA eligible "members"? If funding is the criteria, what level of funding qualifies a governmental entity as a "member"; and, if funding qualifies a governmental entity as an eligible "member", how is the board to be adjusted as new funding and thus, new memberships are established? Also, how and when is the board's makeup adjusted when a funder terminates its financial contributions to the RTA?**

In Op. S.C. Atty. Gen., No. 86 – 28, February 28, 1986 (1986 WL 191990), we determined that "not every municipality or county would be required to be a member . . . cities or counties within the service area which wish to do so may become members of an RTA created under the 1985 act." We explained that Section 58-25-40, which "provides a procedure for contiguous counties or cities not participating initially to become members of an RTA," and Section 58-25-30(4), which "specifies that the question to be placed before the electorate must specify the cities and counties to be involved in the RTA," would be meaningless if Section 58-25-35 were interpreted to mean that "every county and municipality within the regional transportation area. . .must be members at the outset. . ."

The statutes aren't clear what other criteria there are to be eligible as a member of a regional transportation authority. A municipality is defined as "any incorporated city or town within the regional transportation area" and a city is defined as "any municipality with a population of five thousand or more according to the latest United States Census of population located within the service area of the authority." See S.C. Code Ann. § 58-25-20 (1976 Code, as amended). Therefore, it is clear that a

member of a RTA must have a population of at least five thousand and be within the service area. Any other criteria for eligibility is going to have to be defined by the Legislature.

**III. Recognizing that SC Code of Laws section 58-25-40 (1) provides that an appointed board member may be an elected official of a local governing body, and serve in an "ex-officio" capacity. Robert's Rules of Order prescribes that 'ex officio' board members have voting rights. As to dual office holders (elected officials who also serve on an RTA's board of directors), are they to serve in an advisory capacity or as members with full voting privileges? Is there an inherent conflict of interest when a funder (i.e. member of a city council) is also designated as a board member of an RTA, thus making decisions about the use of RTA dollars?**

**A. Voting Privileges of Dual Office Holders**

Section 58-25-40 in its entirety states:

> The authority's board members, officers, and staff must be as follows:
>
> (1) The members of the authority must be represented on the governing board of the authority by appointees of the governing bodies of the municipalities and counties within the service area as set forth in Section 58-25-35. The appointees may be elected officials of these local governing bodies and if so would serve in an ex officio capacity. The governing board of the authority must be made up of not more than two times the number of authority governmental members and up to three additional members appointed by the legislative delegation as provided in this section.
>
> There must be at least five board members. The membership of the governing board must be apportioned among the member municipalities and counties proportionate to population within the authority's service area.
>
> As many as three additional members of the governing board of a transportation authority may be appointed by the legislative delegations of the member counties if approved in accordance with the procedures set forth in Section 58-25-30. If the authority receives a grant of the state funds from the general fund or the highway fund, the delegation shall appoint three additional members. Unless the agreement provides otherwise, the members of the governing board appointed by the delegation must be apportioned as determined by a majority of the delegation members, including the resident senator, provided, however, if there is no resident senator, then by a majority of the Senate delegation representing the county. No member government, regardless of population, may have less than one member on the board. County

> population must be determined after subtracting the member municipality population in that county. The terms of the representatives serving on the governing board of the authority must be staggered so that the terms of approximately one-third of the governing board expire each year. After the initial terms as set forth in the agreement to achieve staggered terms, subsequent terms must be for three years. Members of the governing board of the authority may be reimbursed for expenses incurred in connection with their service on the authority but they may not receive salaries, per diem, or other compensation. Members shall adopt and abide by rules governing meeting attendance.
>
> (2) No county or municipality may be a member in more than one authority except that a metropolitan government may be a member of more than one authority when the services provided by the authorities are different.
>
> (3) Subsequent to the activation of the authority, contiguous counties or municipalities not participating initially may become members of the authority with the same benefits as the initial members pursuant to the procedure set forth in Section 58-25-30 and with the approval by a majority vote of the board of the authority. If an election is required, it must be held only in the contiguous counties or municipalities that are seeking to become members of the authority.
>
> (4) The board of the authority shall elect one of its members as chairman, one as vice-chairman, and other officers as may be necessary, to serve for one year in that capacity or until their successors are elected and qualify. A majority of the board constitutes a quorum. A vacancy on the board does not impair the right of the authority to exercise all of its rights and perform all of its duties. Upon the effective date of his appointment, or as soon after appointment as practicable, each board member shall enter upon his duties.
>
> (5) A board member of the authority may be removed from office by the governing body which appointed him for misconduct, malfeasance, or neglect of duty in office. Any vacancy so created must be filled as provided above.
>
> (6) The authority may employ an executive director, who may serve as secretary or treasurer, to serve at the pleasure of the authority. The executive director may employ any employees as may be necessary for the proper administration of the duties and functions of the authority and may determine the qualifications of the persons. The authority shall adopt compensation plans for employees.

S.C. Code Ann. § 58-25-40 (1976 Code, as amended).

We have a prior opinion, Op. S.C. Atty. Gen., April 4, 2006 (2006 WL 1207268), in which we addressed whether the Governor or his designee had a vote on the Medical University of South Carolina's Board of Trustees. We explained the definition of "ex officio" in the opinion and then addressed voting privileges of an "ex officio" board member as follows:

> In a prior opinion, we explained the meaning of the phrase "ex officio" as: "'[f]rom office; by virtue of the office' or '[f]rom office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position.'" Op. S.C. Atty. Gen., May 27, 2004 (quoting Lobrano v. Police Jury of Parish of Plaquemines, 150 La. 14, 90 So. 423 (1921)). We also addressed an ex officio member's authority to vote in that opinion, finding: "While ex officio members are often designated as non-voting members, the fact that an ex officio member may vote is not a factor to defeat ex officio membership; an ex officio member of an entity is a member for all purposes, including voting, unless the enabling legislation directs otherwise." Id. See also Op. S.C. Atty. Gen., March 13, 2003; Op. S.C. Atty. Gen., July 18, 1989; Op. S.C. Atty. Gen., January 3, 1985; Op. S.C. Atty. Gen., March 4, 1976.

Op. S.C. Atty. Gen., April 4, 2006 (2006 WL 1207268).

A review of the plain wording of Section 58-25-40 does not indicate an intention by the Legislature to restrict the ex officio members from voting. We also examined Section 58-25-50, which provides the powers and duties of the authority, and Section 58-25-90, which gives the RTA the sole responsibility for operations of transportation services, through its board, officers, and staff. Neither of these statutes prohibited ex officio board members from voting. Accordingly, we reach the same conclusion that we reached in the April 4, 2006 opinion cited above, which was "we believe to read these statutes as prohibiting certain members [of the board] from voting would result in impermissibly adding a term to these statutes not expressed by the Legislature." Id. Therefore, we believe that ex-officio board members would vote the same as any other members of the board of an RTA.

**B. Conflict of Interest**

You have also questioned whether or not there is a conflict of interest when a local official of a member municipality or county is designated a board member of an RTA. We can not determine whether a conflict of interest exists because this Office is not a fact-finding entity; investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court. Ops. S.C. Atty. Gen., September 29, 2010; September 14, 2006; April 6, 2006. However, we can provide you with the law.

When opining on issues of conflict of interest, the matter of master-servant relationship must be considered. As we have stated on prior occasions, a conflict of interest may arise from a master-servant relationship as follows:

> "[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts."
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> Op. S.C. Atty. Gen., May 21, 2004 (quoting Op. S.C. Atty. Gen., January 19, 1994).
>
> Moreover, our Supreme Court in McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1022 (1913) stated: "No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity." Thus, we recognize if a master-servant conflict exists, a public official is prohibited from serving in both roles.

*See* Op. S.C. Atty. Gen., July 19, 2006 (2006 WL 2382449).

As shown above in Section 58-25-40(1) and (5), the member municipalities and counties of the RTA can appoint their local officials to represent them on the board. The statute provides that the local officials would serve in an ex officio capacity. The member municipalities and counties can remove their appointee from the board for misconduct, malfeasance, or neglect of duty in office.

Since funding for the RTA could come from the member municipalities and counties and they have the power to appoint and to remove their board appointee, a court may determine that a master–servant relationship, and thus a conflict of interest, may exist if a local official is designated as an RTA board member.

Conflict of interest issues may also arise under the State Ethics Reform Act. The pertinent section is Section 8-13-700, which states:

> (A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a family member, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials,

> personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use that does not result in additional public expense.
>
> (B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a family member, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a family member, an individual with whom he is associated, or a business with which he is associated shall:
>
> > (1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision. . .
> >
> > (5) if he is a public member, he shall furnish a copy to the presiding officer of an agency, commission, board, or of a county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause such disqualification and the reasons for it to be noted in the minutes. . .

S.C. Code Ann. § 8-13-700 (1976 Code, as amended).

If one serves as an RTA board member, he would likely be considered a "public member." A "public member" is defined as "an individual appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services." S.C. Code Ann. § 8-13-100(26) (1976 Code, as amended).

It appears that a local official serving as an RTA board member would be in a position to use his board membership to further the economic interests of his local government. However, the board member may recuse himself under the statute. Thus, if such a conflict arises, a board member may be prohibited from participating in certain matters but may not be prohibited from serving.

Because the State Ethics Commission was given authority by the Legislature to interpret and issue opinions pertaining to the provisions of the State Ethics Act, we suggest you contact the State Ethics Commission for further advice or information.

**IV. If representation among governmental members is based on population, how often should the board's make-up be revisited- at each decade upon the release of Census figures, or at other intervals? What mechanics are to be employed to this end?**

You are referring to the second paragraph of Section 58-25-40 of the South Carolina Code which states in regard to the board of an RTA:

> There must be at least five board members. The membership of the governing board must be apportioned among the member municipalities and counties proportionate to population within the authority's service area.

S.C. Code Ann. § 58-25-40 (1976 Code, as amended).

The answer appears to lie in the South Carolina Code. Section 58-25-20 provides definitions for the Regional Transportation Authorities Act. Section 58-25-20 states the following:

> As used in this chapter. . .
>
> (2) "City" means any municipality with a population of five thousand or more according to the latest United States Census of population located within the service area of the authority. . .
>
> (4) "County" means any county of this State, all or any part of which may be included in an "urbanized area" as defined by the United States Bureau of the Census and as further defined in this chapter. . .
>
> (7) "Municipality" means any incorporated city or town within the regional transportation area. . .
>
> (16) "Urbanized area" means an area so designated by the most recent United States Census of Population. . .

S.C. Code Ann. § 58-25-20 (1976 Code, as amended).

The definitions explain that the "latest" or "most recent" census must be utilized when determining population of the member municipalities and counties of the RTA. Representation on the board is apportioned amongst the member municipalities and counties proportionate to the population within the authority's service area. Therefore, it appears that the board's make-up should be revisited each decade upon the publication of the latest census.

The process to be used to re-configure the board is not clear from the statutes and the fact that Section 58-25-40 provides terms for board members would be a consideration. Accordingly, the Legislature may wish to provide guidance on this matter.

**V. Does the board of an RTA have the right to amend its By-Laws to allow for additional board membership as a matter of choice? For example, if an RTA agrees with a funding governmental entity with a proportionately large population within the RTA's service area that the entity should have added representation on the RTA's board, might the RTA's board opt to increase the entity's number of representatives? Can by-laws be amended to add advisory members of a board?**

Pursuant to Section 58-25-40, members of the regional transportation authority are restricted to the following when it comes to representation on the board:

> (1) a minimum of five board members; (2) a maximum of two times the number of authority governmental members; (3) no more than three additional members appointed by the legislative delegation; (4) membership apportioned among the member municipalities and counties proportionate to population within the service area; and (5) each member government must have at least one member on the governing board.

Section 58-25-50 grants the authority the power, among other things, to "promulgate regulations to carry out the provisions of this chapter [of the Code]." See S.C. Code Ann. § 58-25-50(s) (1976 Code, as amended).

The board of an RTA would have the right to make and amend regulations and by-laws in order to carry out the provisions of the Regional Transportation Authorities Act. However, it would not have the right to make or amend regulations or by-laws which would conflict with any part of the Act. Therefore, the board could not have more members than provided in the statute.

It is not clear whether by-laws can be amended to add advisory members of a board. Accordingly, the Legislature may wish to provide guidance on this matter.

**VI. Is there a population number below which a governmental entity within a service area may be excluded from an RTA's board? In times past, a threshold of 5,000 in population was required for full voting membership on the RTA's board. Smaller towns had representatives serve on an advisory capacity only (Andrews, Atlantic Beach, Aynor, Briarcliff Acres, Loris, Pawley's Island, and Surfside Beach).**

Members of an RTA are represented on the board. S.C. Code Ann. § 58-25-35 (1976 Code, as amended). The members of an RTA are the "municipalities within the service area" and the "counties within the unincorporated areas of the service area." S.C. Code Ann. § 58-25-35 (1976 Code, as amended). A "municipality" is defined as any incorporated city or town within the regional transportation area" and a "city" is defined as "any municipality with a population of five thousand or more according to the latest United States Census of population located within the service area of the authority." S.C. Code Ann. § 58-25-20(2),(7) (1976 Code, as amended). Therefore, a municipality must have a population of at least 5000 to be a member of an RTA and thus to have representation on the board.

**VII. If at all, how does the expansion of the Waccamaw (Coast) RTA into North Carolina affect its board? Should municipalities and counties in the expanded service area be represented on this board?**

It doesn't appear that North Carolina municipalities and counties would be represented on the Coast RTA board. "The members of the authority must be represented on the governing board of the authority by appointees of the governing bodies of the municipalities and counties within the service area as set forth in Section 58-25-35." S.C. Code Ann. § 58-25-40 (1976 Code, as amended). "The members of a regional transportation authority created under authority of this chapter must be the municipalities within the service area as defined by this chapter and the counties within the unincorporated areas of the service area of the authority." S.C. Code Ann. § 58-25-35 (1976 Code, as amended). "'County' means any county of this State, all or any part of which may be included in an 'urbanized area' as defined by the United States Bureau of the Census and as further defined in this chapter. . ." S.C. Code Ann. § 58-25-20(4) (1976 Code, as amended). "'Municipality' means any incorporated city or town within the regional transportation area." S.C. Code Ann. § 58-25-20(7) (1976 Code, as amended). "'Regional transportation area' means that area pursuant to the groupings of counties as set forth in Article 3 of Chapter 7 of Title 6." S.C. Code Ann. § 58-25-20(13) (1976 Code, as amended). "The regional councils of government, including more than one county, shall be grouped in accordance with the following geographic areas. . Georgetown, Horry and Williamsburg. . ." S.C. Code Ann. § 6-7-110 (1976 Code, as amended).

The members of a regional transportation authority have representation on the board. The county members must be "of this State." The municipal members must be "within the regional transportation area." The regional transportation area is a grouping of counties. Georgetown, Horry, and Williamsburg counties are grouped together per the statute. North Carolina municipalities and counties can not be members of the Coast RTA and thus it appears that they can not have representation on the board.

**VIII. Is there an inherent conflict of interest when a funder (i.e. member of a city council) is also designated as a board member of an RTA?**

We believe that this question was answered in our response to Question III above. Please let us know if this is not the case.

## CONCLUSION

In conclusion, this Office believes that the law is as follows:

1. Membership on the governing board of a RTA is not apportioned pursuant to financial contribution.
2. Municipalities and counties within the service area which wish to do so may become members of an RTA but they are not required to do so.
3. A member of a RTA must have a population of at least five thousand and be within the service area. Any other criteria for eligibility is going to have to be defined by the Legislature.
4. Ex-officio board members can vote the same as any other members of the board of an RTA.

5. A court may determine that a master–servant relationship, and thus a conflict of interest, may exist if an official of a member municipality or county is designated as an RTA board member.
6. It appears that a local official serving as an RTA board member would be in a position to use his board membership to further the economic interests of his local government. However, the board member may recuse himself under the statute. Thus, if such a conflict arises, a board member may be prohibited from participating in certain matters but may not be prohibited from serving.
7. An RTA board's make-up should be revisited each decade upon the publication of the latest census. The process to be used to re-configure the board is not clear from the statutes.
8. The board could not have more members than provided for by statute. It is not clear whether there can be advisory members of the board.
9. North Carolina municipalities and counties can not be members of the Coast RTA and thus it appears that they can not have representation on the board.

Sincerely,

Elinor V. Lister

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General