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July 9, 1985

The Honorable Joyce C. Hearn  
Member, House of Representatives  
1300 Berkeley Road  
Columbia, South Carolina 29205

Dear Representative Hearn:

You have asked whether county council may abolish by ordinance alone a special tax district which has been created pursuant to § 4-9-30(5) of the Code of Laws of South Carolina or whether said tax district can be abolished only by a referendum of the electors of said special tax district. We have been able to find no case or prior opinion of this Office which directly answers your question. Thus, the question appears to be one of first impression in this jurisdiction and must await a final resolution by our Supreme Court. Until such time as our court finally resolves this question, we would advise that in abolishing a special tax district the safest and most prudent course would be to follow the same procedures set forth in § 4-9-30(5) in the creation of such special tax district.

Section 4-9-30(5), which is part of the Home Rule Act, permits counties to create so-called special tax districts for a multitude of purposes enumerated, among them police and fire protection, transportation, water treatment and distribution, etc. The provision expressly provides however that,

prior to the creation of any special tax district for the purposes enumerated herein, one of the following procedures shall be required:

- (a) An election, initiated by a petition of a majority of the freeholders in the proposed tax district shall be held in which a majority of

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the electors in that area voting in the election shall approve the creation of the special tax district, the nature of the services to be rendered and the maximum level of taxes authorized to be levied; or

(b) When fifteen percent of the freeholders in a proposed special tax district sign a petition requesting the creation of such a district, a referendum and election shall be held. Separate boxes shall be maintained to receive the votes of the freeholders voting in the referendum and those of the electors voting in the election. A majority of electors voting and a majority of the freeholders voting in the proposed special tax district shall approve the creation of that district, the nature of the services to be rendered and the maximum level of the taxes authorized to be levied; or

(c) When a petition is submitted to the county governing body signed by seventy-five percent or more of the freeholders owning at least seventy-five percent of the assessed valuation of real property in the proposed special tax district. The petition shall contain a designation of the boundaries of the proposed special tax district, the nature of the services to be rendered and the maximum level of the taxes authorized to be levied.

Section 4-9-30(5) further provides that "[a]fter one of the above procedures has been completed and the result is favorable for creation of a special tax district, such district shall be created by council ordinance." (Emphasis added.)

Other portions of § 4-9-30(5) require a referendum prior to the levy of taxes. For example, § 4-9-30(5) further provides:

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provided, further, that prior to the issuance of any general obligation bonds to provide a service in a particular area of the county and the levy of a tax to retire such bonds at rates different from those levied in the remainder of the county related to the nature and level of government services to be provided in such area, the qualified electors of the area shall first approve by referendum, called by the governing body of the county, the creation of a special tax district and the purposes for which special taxes may be levied therein; provided, further that prior to the levy of any tax to provide a service in a particular section of a county at rates different from those levied in other sections of the county related to the nature or level of governmental services to be provided therein, including but not limited to taxes required to retire general obligation bonds issued to provide such services, the qualified electors of that section of the county where such tax is proposed to be levied shall first approve by referendum called by the governing body of the county the creation of the separate tax district and the purposes for which special taxes may be levied therein....

A referendum is not required, however "with regard to taxes levied in the entire unincorporated area of the county"; but a referendum is required if an appropriation relative to police protection would result in reorganization or restructuring of a sheriff's department or limit the duties of the sheriff or duplicate duties and functions being performed by him.

While § 4-9-30(5) sets forth intricate and detailed procedures for the creation of special tax districts by a county, this provision, nor any other of which we are aware, provides authority or a procedure for the abolition or dissolution of such a district. There is some case law which concludes that in such a situation, the county possesses no authority to abolish a special tax district. Wilson v. Mattix, 231 S.W. (Ark. 1921). See also, Bd. of Improvement of Morrilton Waterworks Dist. v. Earl, 71 Ark. 4, 71 S.W. 666 (1903). This conclusion is consistent with an opinion rendered by this Office in 1982, which concluded that "there currently exists no express statutory

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method by which the boundaries of the [special tax] district can be altered." Op. Atty. Gen., March 24, 1982. To my knowledge, this question has not yet been addressed by our Supreme Court. 1/

Of course, it can be argued that a county would impliedly possess such authority. Article VIII, § 17 expressly provides:

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

Moreover, it is well recognized that the authority to create an office or agency generally carries with it the implied authority to abolish that office or agency. 63 Am.Jur.2d, Public Officers and Employees, § 33. At least one court opinion has so concluded in the context of the abolition of a tax district. Bd. of Improvement v. Earl, 71 Ark. 4, 69 S.W. 577 (1902) [Hughes, J.]. But see, 71 S.W. 66, supra. Such authority would certainly be consistent with the concept of Home Rule and with the idea that a county would not forever be saddled with a special tax district and its accompanying taxation which its people no longer wanted or needed.

However, even if a county possesses the authority to abolish a special tax district, it is doubtful, whether such district could be abolished by simple ordinance. As mentioned earlier, § 4-9-30(5) provides intricate procedures for the creation of such districts. In each of the procedures set forth for the creation of a district, the will of either the freeholders or electors is required. And, as also noted, referenda are mandated in several other situations envisioned by § 4-9-30(5).

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1/ Our Supreme Court has stated in Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, Op. No. 22159 (Aug. 21, 1984) citing Berry v. Weeks, S.C., 309 S.E.2d 744 (1983), a county cannot abolish a special purpose district unless given that authority through general law enacted by the General Assembly.

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Moreover, in establishing a special tax district, § 4-9-30(5) provides that upon a favorable result for the creation of such district, council "shall" establish such district by ordinance. Such would appear to be merely an instrumentality to put the will of the people into effect. Allen v. Hollingsworth, 246 Ky. 812, 56 S.W.2d 530 (1933). In such instances, it has been held that the governing body possesses a mandatory duty to put the will of the people into effect and may be compelled to do so by the courts. Id. For this reason, it would be doubtful that the General Assembly authorized the abolition of a district by simple ordinance alone where the Legislature had required a referendum or freeholder initiative for its creation; where the people of the district are the precipitating force in the creation of a tax district, it is likely the General Assembly did not intend that such should be abolished without the input of the electors or freeholders. If such were the case, the will of the people could be easily frustrated.

Language in a recent decision of our Supreme Court appears to support this reasoning. In City of Myrtle Beach v. Richardson, Op. No. 22034 (Jan. 19, 1984), our Court, in commenting upon § 4-9-30(5) stated:

There is no avoiding the conclusion that after the adoption of the Home Rule Act the creation of any special tax district became a matter of freeholder initiative. The procedure provided by 1974 Act 1167, whereby such power resides exclusively in the county governing body, is wholly at odds with the plain and direct language just quoted from 1975 Act 283 [§ 4-9-30(5)]. Not only has the initiative for fire protection districts been passed from the hands of a county government, but the power to approve designated boundaries, specified services and levels of taxation now rests with freeholders and/or electors. Under the terms of 1974 Act 1167, such power resided solely in the county governing body... (Emphasis added.)

The Court thus concluded that § 4-9-30(5) had repealed by implication 1974 Act 1167. Therefore, it is clear that our Court has read § 4-9-30(5) as placing primary emphasis under the referendum and freeholder initiative with respect to the creation and operation of special tax districts. Again, it would appear doubtful to conclude that, if the county may

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abolish a special tax district, such could be done by county ordinance only.

Finally, general law in other states appears to be in accord. Abolishment of special tax districts almost always occurs by referendum. See, 28 C.J.S., Drains, § 9; Weaver v. Newton Co. Supply Dist., 346 S.W.2d 156; Newton Co. Supply Dist. v. Bean, 320 S.W.2d 158; Minish v. Hanson, 390 P.2d 704. Moreover, it has been stated generally that

To render the power of initiative and referendum effective and prevent its circumvention by a change of law by the municipal council or other legislative assembly, the legislative power of the council is commonly restricted by a provision that an ordinance or amendment to an ordinance adopted by the electors shall not be repealed or amended by the council. In such case, the ordinance or the amendment to an ordinance can be repealed or amended only by a vote of the electorate in the same manner in which it was adopted.

6 McQuillin, Municipal Corporations, § 21.03. While such limitation is often expressly provided by statute or constitutional provision, courts have implied the rule even where there existed no specific enactment.

For example, in Allen v. Hollingsworth, *supra*, voters chose a particular form of government and set the salary of the governing board pursuant to a referendum. The question arose whether by ordinance alone city council could alter the established salary. The Kentucky Court ruled that such could not be done. The Court stated:

Looking for specific authority in relation to referendum acts of general operation or concerning municipal legislation along other lines, it is found that in order to render the plan of referendum effective, the legislative power of the city council is commonly restricted by the express provision that no ordinance or amendment to an ordinance adopted by the electors shall be repealed or amended by the council. "In such cases an ordinance or amendment thereto adopted by a vote of the electorate can be repealed or amended only

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in the same manner." ... Such specific limitations on the power of the board of commissioners is not made by the statute under consideration, but we think the restriction is there by implication. Such is the rationale of the decisions we have cited.

56 S.W.2d at 533. Here, § 4-9-1230 mandates that county council is bound by the wishes of the electorate with regard to ordinances proposed by the initiative and referendum method. By the same reasoning adopted by the Court in the Allen case and by reading the aforementioned statutes in pari materia a court could certainly imply that those ordinances creating special tax districts, could not be repealed except pursuant to the methods set forth in § 4-9-30(5). This reasoning is particularly supported by the Court's analysis in City of Myrtle Beach v. Richardson, supra.

Of course, arguments can be made to support abolition of the district by simple ordinance. It could be argued, for example, that the special tax district is merely a county agency and can be abolished pursuant to § 4-9-30(6). It could also be argued that the absence of a specific statute prohibiting council from abolishing a district by simple ordinance is controlling and that any county ordinance adopted can be repealed through the normal processes. See, 1A Sutherland Statutory Construction, § 22.06. Further, it could be argued that the ordinance is the final act in creating the district and thus repeal of the ordinance would be sufficient. Finally, the presence of an express limitation upon council in § 4-9-1230 may indicate the Legislature intended no such limitation in § 4-9-30(5). See, Home Bldg. and Loan Assn. v. Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938). Our Supreme Court has never addressed these considerations.

However, in the absence of controlling case authority, it is the opinion of this Office that the safest course in a county's attempting to abolish a special tax district it created, would be to do so only pursuant to the method of creation, i.e. pursuant to one of the three methods outlined in § 4-9-30(5). Again, we would caution that no express statutory authority exists for the county to abolish such district by any mechanism and if such authority is found it must be by implication. However if the county chooses to attempt the abolition of the tax district, we would advise that the safest and most prudent

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course would be to do so only pursuant to the referendum or  
freeholder initiative processes set forth in § 4-9-30(5). 2/

Very truly yours,



Robert D. Cook  
Executive Assistant for Opinions

RDC:djg

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2/ Of course, in the abolition of any tax district, there  
must be "due regard to vested rights... ." 28 C.J.S., Drains,  
§ 9. Questions concerning existing contracts, indebtedness,  
etc. usually must be resolved prior to any dissolution. Id. I  
do not address this issue.