



ALAN WILSON
ATTORNEY GENERAL

June 17, 2015

The Honorable Tom Young, Jr.
P.O. Box 651
Aiken, SC 29802

Dear Senator Young:

Our Office received your request for an opinion regarding how the Beech Island Rural Community Water District ("Beech Island") can fill upcoming vacancies on its board of directors if its bylaws and the statute creating water districts are not uniform. You explain that Beech Island was established in 1965, pursuant to Act 1022 from 1964. Section 3 of this Act provides that a Board would be comprised of five resident electors, appointed by the Governor upon recommendation of a majority of the legislative delegation.¹ However, Beech Island chose to hold elections among its customers for the board members, wherein the winner of the election would be referred to the legislative delegation. Beech Island's by-laws² require an election and it is your understanding that this has been the practice since the water district's establishment. The websites of the South Carolina Secretary of State and of Beech Island state that board members are elected by Beech Island's customers.

Beech Island has traditionally held an election on the third Tuesday in September in odd numbered years. Per this tradition, an election would be held on September 15 of this year in order to fill two upcoming vacancies. Candidates are placed on the ballot after submitting a written document indicating their desire to be on the ballot. The deadline for submission of this document was May 26, 2015 but no one expressed an interest in being on the ballot. You are asking how Beech Island should proceed in providing the legislative delegation the names of candidates to the board of directors.

LAW/ANALYSIS:

In a prior opinion, we addressed a similar situation - whether the act creating the Dalzell Water District of Sumter County superseded its by-laws or whether the by-laws controlled because the board was given

¹ Beech Island was formed pursuant to 1964 Act Number 1022, which is now codified as section 6-13-10 *et seq.* of the South Carolina Code of Laws. S.C. Code Ann. § 6-13-10 (1976 Code, as amended) provides for the creation of rural community water districts and grants them the functions of acquiring, constructing, and operating a waterworks system; utilizing water from available sources; and providing a flow of water through pipes for domestic, commercial, or industrial users. S.C. Code Ann. § 6-13-30 (1976 Code, as amended) states that the "district [the rural community water district] shall be operated and managed by a board of directors" and "[t]he board shall consist of five resident electors of the area who shall be appointed by the Governor, upon the recommendation of a majority of the county legislative delegation." Pursuant to S.C. Code Ann. § 6-13-50 (1976 Code, as amended), the board is granted certain powers, such as making "bylaws for the management and regulation of its affairs."

² Beech Island's bylaws have not been provided to this Office.

authority to create its by-laws. We determined that an enabling statute controls over the by-laws when the two conflict. We explained:

with respect to the by-laws of a water district, this Office has recognized that “[i]n the event of a conflict between state law and a provision of the District’s by-laws, state law would prevail.” Op. Atty. Gen., February 5, 1987. In that same opinion, quoting the Supreme Court in Law v. City of Sptg., supra³, the following authority in support of the proposition that any conflict between a water authority’s by-laws and a state statute would require the by-laws to yield:

[a]n ordinance which is repugnant either to the Constitution or general laws is ipso facto void.... “All ordinances or by-laws adopted by” a municipality “contrary to the laws of the land are void.” “An ordinance is the product of legislative power conferred upon the municipality. One essential to its validity is that it shall not conflict with the laws of the State.”... A statute will override a conflicting city ordinance, whether it precedes or follows the ordinance in point of time....” A State law is paramount to a conflicting city ordinance, where they both relate to a subject with reference to which the right to legislate is concurrent.”... City ordinances conflicting with State Constitution or statute are void. 148 S.C. at 234.

Applying this authority to the Daniel Morgan Rural Water District, even though the District Board possessed the express authority to “make bylaws for the management and regulation of its affairs,” we advised in the 1987 opinion that state law controlled where a by-law conflicted therewith. See also, Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984) [DHEC regulations which makes death certificates and medical examiners’ records nondisclosable to the public conflicts with FOIA is invalid]; City of North Chas. v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) [ordinance conflicted with state statutes]; Riverwoods v. Co. of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002) [ordinance which granted ad valorem property tax exemption solely to owner-occupied residences conflicted with enabling legislation].

Op. S.C. Atty. Gen., September 9, 2002 (2002 WL 3134825) (quoting Op. S.C. Atty. Gen., February 5, 1987 (1987 WL 342791)).

Based upon our prior opinion, section 6-13-30, providing for the appointment of board members by the governor upon recommendation of a majority of the county legislative delegation, prevails over Beech

³ Law v. City of Sptg., 148 S.C. 229, 146 S.E. 12 (1928).

Island's bylaws if a conflict exists. However, we do not believe there to be a conflict. In our September 9, 2002 opinion, we opined that:

[o]ur Supreme Court has recognized that a conflict occurs between a statute and an ordinance (or by-law) where both contain either express or implied conditions which are inconsistent or irreconcilable with each other; mere differences in detail do not render them conflicting and if either is silent where the other speaks, there is no conflict. Town of Hilton Head v. Fine Liquors, 302 S.C. 550, 397 S.E.2d 662 (1990).

Id. This Office in a September 12, 1973 opinion, referring to former section 59-626 *et seq.*, 1962 Code of Laws, which is now codified as section 6-13-10 *et seq.*, 1976 Code of Laws, commented that the election for Directors held by Beech Island was "advisory only, as the Directors serve under appointment by the Governor upon recommendation of the County Legislative Delegation, and the records in the Office of the Secretary of State reflect that appointments as Directors have been made by the Governor." Op. S.C. Atty. Gen., September 12, 1973 (1973 WL 26877) (emphasis added).

While the elections held by Beech Island are not contradictory to State law, they are not necessary. State law provides that it is the county legislative delegation, and not Beech Island's customers, who is responsible for choosing directors for appointment. As we explained in our February 5, 1987 opinion,

[i]t should be noted that. . .the actual exercise of discretion in choosing persons for appointment rests with the Delegation. The Governor's role in the appointment procedure is ministerial and involves no exercise of discretion. Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936). In the exercise of its discretion, the Delegation may seek input from whomever the members deem appropriate, as long as the actual decisions as to recommendations to be made to the Governor are made by the Delegation. 67 C.J.S. Officers § 40; 63A Am.Jur.2d Public Officers and Employees § 95. The actual decision-making may not be delegated. Unless the Delegation abuses its discretion, courts will not attempt to control the appointment process. Id.

Op. S.C. Atty. Gen., February 5, 1987 (1987 WL 342791)).

Since the county legislative delegation, and not Beech Island, provides recommendations to the governor, it is the delegation who chooses the method of selecting the directors. Our Office can not assist the county legislative delegation in determining a method of selecting the directors because this involves a determination of fact which is beyond the scope of an opinion; we can only assist with an opinion on a matter of law. See Op. S.C. Atty. Gen., June 25, 2013 (2013 WL 3362068).

CONCLUSION

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

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1. Section 6-13-30, providing for the appointment of board members by the governor upon recommendation of a majority of the county legislative delegation, prevails over Beech Island's bylaws if a conflict exists. While we do not believe there to be a conflict, the elections are advisory and are not necessary.
2. Since the county legislative delegation, and not Beech Island, provides recommendations for directors to the governor, it is the delegation who chooses the method of selecting the directors.

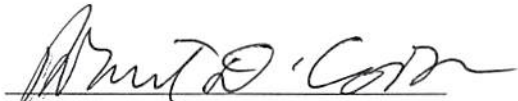
Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General