



ALAN WILSON
ATTORNEY GENERAL

August 19, 2016

The Honorable Stephen L. Goldfinch, Jr., Member
South Carolina House of Representatives
306-A Blatt Building
Columbia, SC 29201

Dear Representative Goldfinch:

Attorney General Alan Wilson has referred your letter dated June 9, 2016 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Questions (as quoted from your letter):

"Can a special district fire board, currently elected by the legislative delegation, be elected by popular vote? If so, will that give the board the ability to raise millage without a referendum or vote by the General Assembly?"

Short Answer:

Assuming the special purpose district is located within one county and otherwise complies with the applicable statutes, we believe the voters could vote to have the special purpose district's board be elected by popular vote and thus could empower the board to set the millage rates within statutory limitations.

Law/Analysis:

South Carolina Code § 6-11-350 authorizes special purpose districts created by act of the General Assembly before March 7, 1963 located solely within one county to issue a referendum on the question of electing the governing body of a district by popular vote. This Office issued a prior opinion addressing the same question for a different special purpose district whose enabling legislation authorized appointment by the Governor at the recommendation of the legislative delegation. See Op. S.C. Att'y Gen., 2002 WL 1925756 (S.C.A.G. August 2, 2002). In that opinion, we concluded that Section 6-11-350 applied to a statutorily-created special purpose district within a single county that authorized appointment by the Governor at the recommendation of the legislative delegation. Op. S.C. Att'y Gen., 2002 WL 1925756 (S.C.A.G. August 2, 2002). While we have not reviewed the enabling legislation for the special purpose district in your question, we presume its enabling legislation was created before March 7, 1973 and would otherwise comply with South Carolina Code § 6-11-350 to authorize a referendum to allow the board to be elected by popular vote. Even though the special purpose district's enabling legislation specifically states the members are to be appointed by the legislative delegation (or the Governor at the recommendation of the legislative delegation), we believe a court will determine that South Carolina Code § 6-11-350 will prevail over any conflict as the latter in time since it was created by Act No. 397 of 1998 (which we presume is long after the enabling legislation and election provision of the statute creating the fire district you ask about). See, e.g., Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943).

The Honorable Stephen L. Goldfinch, Jr.
Page 2
August 19, 2016

Moreover, we presume you are aware of South Carolina Code § 6-11-275 which authorizes a special purpose district established before March 7, 1963 within a single county to increase millage above the statutory limitation with the annual approval of the county governing body. Additionally, this Office has previously opined concerning a legislative delegation that:

[T]he Delegation may change its rules to employ some other valid method of selection, such as a majority of a quorum or even a majority of the entire Delegation. The Delegation may make any rule not inconsistent with a statute. See Moore v. Wilson, 296 S.C. 321, 324, 372 S.E.2d 357, 358 (1988) [Delegation's rule which conflicted with statute is invalid].

Op. S.C. Att'y Gen., 2011 WL 4592367 (S.C.A.G. September 7, 2011).

As you likely are aware, the Supreme Court of South Carolina ruled in 1997 that an appointed commission's levy of a tax violated the South Carolina Constitution's prohibition on taxation without representation. Weaver v. Recreational District, 328 S.C. 83, 492 S.E.2d 79 (1997) (citing South Carolina Constitution Article X, Section 5). As this Office discussed in a previous opinion:

In response to Weaver, our General Assembly passed S.C. Code Ann. § 6-11-271 (2004), taking "all discretionary taxing power out of the hands of appointed bodies ..." Lawyer v. Hilton Head Public Service Dist. No. 1, 220 F.3d 298, 300 (4th Cir. 2000) (discussing Weaver v. Recreation District, 328 S.C. 83, 492 S.E. 2d 79 (1997) and the enactment of S.C. Code Ann. § 6-11-271).

S.C. Code Ann. § 6-11-271 (2004), titled "[m]illage levy for special purpose district" applies to a "special purpose district or public service authority, however named, created prior to March 7, 1973, by or pursuant to an act of the General Assembly of this State." S.C. Code Ann. § 6-11-271(A) (2004).

...

The statute's [§ 6-11-271(D)] purpose, which can be derived from its title as well as the history leading to its enactment, is to cap certain special purpose districts' millage rates and to provide those special purpose districts with a defined mechanism to increase their millage rates either through the vote of the district's population by way of a referendum or, for special purpose districts located wholly within a county, by approval of the governing body of the district and county in which the district is located. S.C. Code Ann. § 6-11-271(D)-(E) (2004).

Op. S.C. Att'y Gen., 2014 WL 4953185, (S.C.A.G. Sept. 23, 2014). A special purpose district's board that is popularly elected certainly may levy taxes. This Office has previously opined that a special purpose district's board that is popularly elected, along with a local governing body, has "limited authority to increase millage rates for operating expenses." Op. S.C. Att'y Gen., 2014 WL 4953185 (S.C.A.G. September 23, 2014) (citing Op. S.C. Att'y Gen., 2003 WL 21040134 (S.C.A.G. February 12, 2003)). This Office has opined as recently as 2003 that, for purposes of the opinion, we are only aware of four statutes which allow a special purpose district to increase its millage rate. See Op. S.C. Att'y Gen., 2003 WL 21040134 (S.C.A.G. February, 12, 2003). The statutes listed in the 2003 opinion are South

The Honorable Stephen L. Goldfinch, Jr.
Page 3
August 19, 2016

Carolina Code §§ 6-1-320, 6-11-271, 6-11-273 and 6-11-275.¹ While any of the statutes that apply may be utilized, we presume, without knowing the details of the special purpose district you describe, that South Carolina Code § 6-1-320 may be the most applicable as authority in raising millage without referendum or vote by the General Assembly, as you describe in your question. Section 6-1-320 authorizes a special purpose district to increase its millage rate “to the extent of the increase in the average of the twelve monthly consumer price indices for the most recent twelve-month period consisting of January through December of the preceding calendar year, plus, ...the percentage increase in the previous year in the population of the entity as determined by the Office of Research and Statistics of the Revenue and Fiscal Affairs Office.” S.C. Code § 6-1-320 (1976 Code, as amended).²

Conclusion:

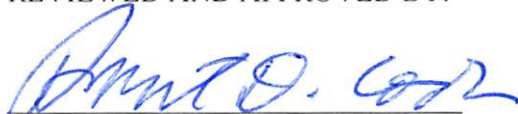
It is for all of the above reasons we believe a court will determine the answers to both of your questions to be yes. As stated above, while we have not reviewed the enabling legislation for the special purpose district in your question, we presume its enabling legislation was created before March 7, 1973 and would otherwise comply with South Carolina Code § 6-11-350 to authorize a referendum to allow the board to be elected by popular vote. Moreover, South Carolina Code § 6-1-320 may be the most applicable to a special purpose district in setting millage without referendum or vote by the General Assembly. Please feel free to request a follow-up opinion with more information if you have any further questions. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

¹ The opinion explains why S.C. Code § 12-37-251 does not authorize special purpose districts to generally increase millage rates for taxes. Op. S.C. Att’y Gen., 2003 WL 21040134 (S.C.A.G. February 12, 2003).

² Please read the full statute for further information and exceptions.