



ALAN WILSON  
ATTORNEY GENERAL

December 9, 2016

The Honorable Stephen Goldfinch, Member  
South Carolina Senate, District No. 34  
P.O. Box 142  
Columbia, SC 29202

Dear Senator Goldfinch:

This Office received your request dated August 26, 2016 to the Opinions section for a follow-up opinion. This follow-up opinion is in reference to the opinion this Office issued to you dated August 19, 2016.<sup>1</sup> The following is this Office's understanding of your follow-up questions and our opinion based on that understanding.

**Questions** (as quoted from your letter):

*Your opinion dated August 19, 2016 assumed the special purpose district's fire board was located within one county. Can a special purpose fire district's board of fire control, currently elected by the legislative delegation, be elected by popular vote when the special purpose fire district is located in more than one county? If so, will that give the board the ability to raise millage without a referendum or vote by the General Assembly?*

**Law/Analysis:**

As this Office stated in the August 19, 2016 opinion addressed to you, South Carolina Code § 6-11-350 only authorizes special purpose districts located solely within one county to issue a referendum on the question of electing the governing body of a special purpose district by referendum. Thus, that law does not apply to a special purpose district in two or more counties. S.C. Code § 6-11-350. It is this Office's understanding your questions are asking about the Murrell's Inlet-Garden City Fire District located in Georgetown and Horry Counties. The General Assembly of South Carolina created specific statutes regarding the Murrell's Inlet-Garden City Fire District in Article 1 of Chapter 23 of Title 4 in the South Carolina Code of Laws. S.C. Code § 4-23-10 et seq. This Office has previously opined that the Murrell's Inlet-Garden City Fire District was created by Act No. 876 of 1966 and is a political subdivision of this State. See *Op. S.C. Att'y Gen.*, 1980 WL 121235 (S.C.A.G. May 22, 1980). South Carolina Code § 4-23-20 states concerning the Board of Fire Control for the District:

After the creation of the Murrell's Inlet-Garden City Fire District, there is established a Board of Fire Control for the District to be composed of three members from Georgetown County who must be appointed by the Governor upon

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<sup>1</sup> We encourage anyone reading this opinion to read the opinion dated August 19, 2016 to Representative Goldfinch in addition to the other opinions by this Office regarding the Murrell's Inlet-Garden City Fire District. See *Ops. S.C. Att'y Gen.*, 2016 WL 4698868 (S.C.A.G. August 19, 2016); 2014 WL 4953185 (S.C.A.G. Sept. 23, 2014); 2014 WL 4953186 (S.C.A.G. Sept. 18, 2014); 1985 WL 259095 (S.C.A.G. April 3, 1985); etc.

the recommendation of a majority of the Georgetown County legislative delegation notwithstanding the provisions of Act 515 of 1996 and three members from Horry County who must be appointed by the Governor upon the recommendation of a majority of the members of the Horry County legislative delegation. The members of the board shall serve without pay and shall file annually a report with the governing bodies of Georgetown and Horry Counties not later than the first of November of each year, showing all activities and disbursements made by the board during the year. The board shall elect a chairman from its membership and such other officers as it considers necessary. The chairman shall not vote except in case of a tie.

If at least twenty percent [20%] of the qualified electors residing in the District petition the commissioners of election by the first of September of any general election year, the commissioners shall call an election to be held at the following general election for the purpose of electing a member to the board to succeed the member whose term expires during the year, for a four-year term. Thereafter, members must be elected in each succeeding general election for terms of four years.

S.C. Code § 4-23-20 (1976 Code, as amended) (emphasis added). As referenced in the statute, Act No. 515 of 1996 states that:

Be it enacted by the General Assembly of the State of South Carolina:

**Devolution of authority**

SECTION 1. (A)(1) Except for those instances exempted in (B), in all cases where appointments to offices, boards, and commissions are made by or upon the recommendation of the House Delegation, the Senate Delegation, or the Joint Legislative Delegation of Georgetown County, or by any other member or combination of members of the General Assembly by reason of their representing all or a portion of Georgetown County, all said appointments must be made by or upon the recommendation of a majority of the members of the governing body of Georgetown County if, and to the extent that, the governing body of Georgetown County by ordinance or resolution agrees to accept the responsibility and the authority for making those appointments and notifies the Code Commissioner and the Secretary of State of its acceptance. All appointments and recommendations must be made without regard to race, religion, color, sex, or national origin.

(2) The application of subsection (A) includes, but is not limited to:

...

(11) Murrell's Inlet-Garden City  
Fire District . . . Act 876 of 1966

...

(B) The appointment of magistrates as provided in Section 22-1-10 and the appointment of members of the Georgetown Water and Sewer District as provided for in Act 733 of 1957 are unaffected by the provisions of this act.

**Authority for levy of taxes, etc.**

SECTION 2. Authority for levy of taxes or approval of budgets or millage levels for all offices, boards, and commissions referenced in Section 1 above is vested in the governing body of Georgetown County.

**Conditional devolution**

SECTION 3. The devolution of powers provided for in this act shall occur only if, and to the extent that, the county governing body by ordinance or resolution agrees to accept the action and notifies the Code Commissioner of its acceptance. The Code Commissioner shall keep a list of such notifications and shall include the information in the statutory notes in each cumulative supplement and revised volume of the Code of Laws of South Carolina. The Code Commissioner is empowered and directed to modify all code sections which are inconsistent with this act and to indicate in the notes following a code section any action accepted by a county governing body by ordinance or resolution.

...

Act No. 515, 1996 S.C. Acts 3759. Thus, reading the plain language of Section 4-23-20 and Act No. 515 of 1996, it appears all six members of the Fire Control Board “must be appointed by the Governor.” S.C. Code § 4-23-20.<sup>2</sup> This Office has previously stated regarding “must” that:

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<sup>2</sup> Regarding an appointment by the Governor, this Office has previously stated that:

[I]t is necessary to distinguish the Governor’s role in making the appointment from the role of the delegation (as defined by the statute) in making the recommendation. In an April 3, 2003 opinion, we referenced the decision of our Supreme Court in *Blalock v. Johnston*, 180 S.C. 105, 185 S.E. 51 (1936), which had recognized this distinction. We explained that when the Governor’s power to appoint is contingent upon a legislative recommendation, the Governor’s authority is ministerial only. In that opinion, we further noted:

[t]he law imposes the positive duty upon the Governor to make the appointment at a time and in a manner upon conditions which are specifically designated. It is a simple definite duty arising under conditions admitted or proved to exist, and it leaves nothing to his discretion. It is ministerial. [*Blalock*,] 185 S.E. at 53.

Op. S.C. Att’y Gen., 2005 WL 1983357 (S.C.A.G. July 7, 2005). Additionally we addressed the two interpretations of the power of appointment in a 1991 opinion where we stated that:

What constitutes the “appointing authority” is susceptible of at least two interpretations. One interpretation separates the power of nominating a suitable candidate for appointment from the power of appointment itself. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). To nominate or recommend is to propose a candidate. To appoint would be the exercise of official authority to place a nominee in office. *Opinion of the Justices*, 115 N.H. 385, 341 A.2d 758 (1975). The bifurcated process has been recognized in South Carolina in cases such as *Blalock v. Johnston*, 180 S.C. 40, 185 S.E. 51 (1936).

Op. S.C. Att’y Gen., 1991 WL 633051 (S.C.A.G. Sept. 17, 1991).

Use of the term 'must' may be construed as 'shall.' See Moore v. Waters, 148 S.C. 326, 146 S.E. 92 (1928), and cases in 27A Words and Phrases, 'Must' p. 649 et seq. Where statutes use the terms 'must' or 'shall,' such terms connote mandatory compliance with the statutes. 2A Sutherland Statutory Construction § 57.03.

Op. S.C. Att'y Gen., 2016 WL 4917034 (S.C.A.G. Sept. 1, 2016) (quoting Op. S.C. Att'y Gen., 1984 WL 249835 (S.C.A.G. February 23, 1984)). Act No. 515 of 1996 transfers the authority to make the "appointments ... by or upon the recommendation of a majority of the members of the governing body of Georgetown County...." Act No. 515, 1996 S.C. Acts 3759. Hence while Act No. 515 of 1996 transferred the recommendation of appointment to the Murrell's Inlet-Garden City Fire Control Board, it does not appear it changed Section 4-23-20's requirement that the Governor make the appointments to the Fire Control Board of the Murrell's Inlet-Garden City Fire District notwithstanding a petition for election. S.C. Code § 4-23-20. If

at least twenty percent [20%] of the qualified electors residing in the District petition the commissioners of election by the first of September of any general election year, the commissioners shall call an election to be held at the following general election for the purpose of electing a member to the board to succeed the member whose term expires during the year, for a four-year term[.]

then the members of the Fire Control Board would be elected by the people in a general election. S.C. Code § 4-23-20 (1976 Code, as amended).

Regarding your second question, this Office has previously opined regarding the Murrell's Inlet-Garden City Fire District's millage. See, e.g., Ops. S.C. Att'y Gen., 2014 WL 4953185 (S.C.A.G. Sept. 23, 2014); 2014 WL 4953186 (September 18, 2014); 1985 WL 259095 (S.C.A.G. April 3, 1985). In the September 18, 2014 opinion this Office concluded that the Murrell's Inlet-Garden City Fire District could hold a referendum to increase millage pursuant to 6-11-271(D), and that such a referendum would be binding. Op. S.C. Att'y Gen., 2014 WL 4953186 (S.C.A.G. September 18, 2014). Quoting from that opinion we stated:

As noted in a prior opinion of this office, local governing bodies, including special purpose districts, have limited authority to increase millage rates for operating expenses. Op. S.C. Att'y Gen., 2003 WL 21040134 (Feb. 2003). Campbell v. Hilton Head No. 1 Public Service District, 354 S.C. 190, 192, 580 S.E.2d 137, 138 (2003) provides a useful explanation of the reason behind the limitations placed on a special purpose district's ability to levy taxes. Specifically, the Court addressed Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997), noting that:

[i]n Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997), we ruled that the statute which authorized [a] recreation district's appointed commission to levy a property tax violated the State Constitution's provision forbidding taxation by unelected officials. The general holding from Weaver is that any legislative delegation of taxing authority to an appointed body unconstitutionally permitted "taxation without representation." *Id.* The Weaver Court, however, ordered only prospective relief, stating the following:

We are cognizant... of the disruptive effect today's holding could have on the financial operation of numerous special purpose districts, local commissions and boards throughout this state. Accordingly, in order to give the General Assembly an opportunity to address this problem, we hold this decision shall be applied prospectively beginning December 31, 1999.

*Id.* at 87-88, 492 S.E.2d at 82. In response, the Legislature passed legislation in 1998 that removed the taxing power from appointed bodies such as the District's commission. *See* S.C. Code Ann. § 6-11-271 (Supp. 2002).

Thus, in summary, pursuant to the Supreme Court's ruling in Weaver, property taxes assessed by an appointed governing body of a special purpose district violate the South Carolina Constitution forbidding taxation by unelected officials. In response to the Supreme Court's ruling, our General Assembly passed S.C. Code Ann. § 6-11-271 (2004), taking "all discretionary taxing power out of the hands of appointed bodies such as the District's governing board." 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).

**a. 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). As noted above, the MI-GC Fire District was created in 1966 and constitutes as a "special purpose district" pursuant to the definition of such set forth in S.C. Code Ann. § 4-8-10 (1986). Therefore, it follows that the provisions of S.C. Code Ann. § 6-11-271 (2004) are applicable to the MI-GC Fire District.

Pursuant to the holding in Weaver, S.C. Code Ann. § 6-11-271(2004) defines the millage rates for special purpose districts and also provides a mechanism for increasing millage rates by way of a referendum held within the district. Because S.C. Code Ann. § 4-23-20 (1986) provides for appointment of the MI-GC Fire District's Board of Fire Control by the Governor and S.C. Code Ann. § 4-23-40 (1986) caps the MI-GC Fire District's millage rate at a certain amount, the guidelines for its millage rate limitations falls within the parameters of S.C. Code Ann. §§ 6-11-271(B)(1)-(2).

...

While S.C. Code Ann. §§ 6-11-271(B)(1)-(2) (2004) in effect prevents MI-GC Fire District from levying taxes, S.C. Code Ann. § 6-11-271(D) (2004) does set forth a mechanism for special purpose districts to propose an increase in its millage rate by referendum.

assembled.” In the September 23, 2014 opinion this Office concluded that voters could determine the millage rate pursuant to a referendum as outlined in South Carolina Code § 6-11-271. Op. S.C. Att’y Gen., 2014 WL 4953185 (S.C.A.G. Sept. 23, 2014).

Moreover, if the qualified electors vote to elect members of the Murrells-Inlet Garden City Fire Control Board pursuant to § 4-23-20, the special purpose district may be authorized pursuant to other statutes to raise the millage rate. As you are aware, the auditors and treasurers of Georgetown and Horry Counties may levy a tax of up to five (5) mills on all taxable property within the district pursuant to South Carolina Code § 4-23-40. However, this Office has previously noted that the rate was increased to 10 mills in 1992. See 1992 Act No. 598, 1992 S.C. Acts 3630; Op. S.C. Att’y Gen., 2014 WL 4953186 (September 18, 2014). This Office has previously opined that a fire district with a board whose members are elected by popular vote may increase its millage pursuant to South Carolina Code § 6-1-320. See Op. S.C. Att’y Gen., 2003 WL 21040134 (S.C.A.G. February 12, 2003). In that opinion we stated that:

As you can see, Section 6-1-320 provides for a limited increase in the millage rate based on increases in the consumer price index. The limitation on yearly increments to the consumer price index does not apply in certain circumstances, as evidenced by subsections (B) and (C) above. Subsection (C) allows the limitation to be overridden upon a vote of the governing body. This provision would allow certain special purpose districts, for example, to increase the millage rate above the change in the consumer price index after the proper steps are taken to provide notice to the public of a meeting to vote on the change. See Op. Atty. Gen. dated October 16, 2000.

Further, S.C. Code Ann. §§ 6-11-271, 6-11-273 and 6-11-275 provide additional authority for special purpose districts to raise millage rates.

Id. While § 6-11-275 would not apply because the Murrell’s Inlet-Garden City Fire District is located within more than one county, § 6-1-320 and § 6-11-273 may apply. South Carolina Code § 6-11-273 authorizes certain special purpose districts to levy taxes by stating that:

Notwithstanding any other provision of law, any special purpose district created by an act of the General Assembly which is authorized to levy taxes for the operation of the district may request the commissioners of election of the county in which the district is located to conduct a referendum to propose a change in the tax millage of the district. Upon receipt of such request the commissioners of election shall schedule and conduct the requested referendum on a date specified by the governing body of the district.

If a majority of the qualified electors of the district voting in the referendum vote in favor of the proposed tax millage change, the governing body of the district shall by resolution adopt the new millage rate which shall thereupon have the full force and effect of law.

As you can see, § 6-11-273 authorizes a referendum to raise millage. Thus, it appears § 6-1-320 could be a means to increase millage without a referendum, though the statute limits an increase based on consumer price indices. S.C. Code § 6-1-320. As you are aware, the special purpose district must be able

to meet all the requirements of South Carolina Code § 6-1-320 or § 6-11-271(D)<sup>3</sup> if it proposes to increase millage.

**Conclusion:**

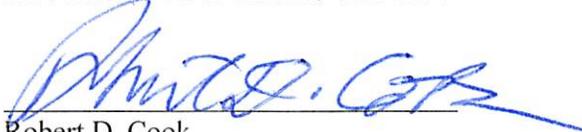
No; we believe a court will determine the Murrell's Inlet-Garden City Board of Fire Control may not be elected by popular vote unless and until South Carolina Code § 4-23-20 authorizing the Governor to appoint the members of the Board of Fire Control for the Murrell's Inlet-Garden City Fire District is amended or unless there is a successful referendum held pursuant to § 4-23-20.<sup>4</sup> As discussed above, South Carolina Code § 4-23-40, in addition to the subsequent Act No. 598 of 1992, authorizes the auditors and treasurers of Georgetown and Horry Counties to levy and collect up to ten (10) mills, and any such further increase in millage must be done in accordance with a statute such as South Carolina Code § 6-1-320 or § 6-11-271(D). Raising millage without a referendum or vote by the General Assembly would require statutory authority, such as in § 6-1-320, if the special purpose district qualifies under the statute.<sup>5</sup> Nevertheless, even if the Board has statutory authority to increase millage pursuant to § 6-1-320, it cannot violate Article X, Section 5 of the South Carolina Constitution prohibiting taxation without "the consent of the people or their representatives lawfully assembled." 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 you have any follow-up questions or additional concerns, please let us know. Otherwise, we hope this answers your questions.

Sincerely,



Anita (Mardi) S. Fair  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General

<sup>3</sup> Or the requirements of any other applicable code section. Please note § 6-11-271(E) only applies to special purpose districts within a single county.

<sup>4</sup> We limit our answers to the Murrell's Inlet-Garden City Board of Fire Control since each special purpose district would need to be evaluated on a case-by-case basis.

<sup>5</sup> Please note that § 6-1-320 has restrictions such as Section (G) which limits applicability to special purpose districts that serve less than seven hundred (700) homes.