



ALAN WILSON  
ATTORNEY GENERAL

January 18, 2017

The Honorable Wm. Weston J. Newton  
South Carolina House of Representatives  
Post Office Box 11867  
Columbia, South Carolina 29211

Dear Representative Newton:

Attorney General Alan Wilson has referred your letter to the Opinions section regarding how to interpret the Horizontal Property Act, S.C. Code Ann. § 27-31-10 et seq. (1976 Code, as amended), concerning the allocation of insurance deductibles and expenses associated with hurricane damage. A constituent's letter enclosed with your opinion request expressed an inability "to reconcile Section 27-31-250, as amended in 2006, with Section 27-31-260." The constituent described his interpretation of the two sections as follows:

[T]o the extent "property" is covered by insurance but subject to a deductible, the deductible has to be a common expense born by all of the co-owners based upon their percentage interests, particularly after the passage in 2006 of Act No. 250.

...

If the deductible has been paid and all insurance proceeds have been exhausted but there are still expenses for reconstruction and repair, maybe we can look to Section 27-31-260 where co-owners directly affected pay for those expenses or to the by-laws but this is unclear, particularly after the passage of Act 250 in 2006.

### Law/Analysis

In researching this opinion request, we have been unable to locate prior opinions issued by this Office or by our state courts interpreting Section 27-31-250 and Section 27-31-260 subsequent to the passage of the amendment in 2006 Act No. 250, § 1. As a matter of first impression, we turn to the principles of statutory interpretation to guide our analysis. The primary rule of statutory interpretation requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Further, "[a] statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), reh'g denied (Aug. 5, 2015). Where statutes deal with the same subject matter, it is well established that they "are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010) (quoting Joiner ex rel. Rivas v. Rivas, 342 S.C.

102, 109, 536 S.E.2d 372, 375 (2000)); see also Busby v. State Farm Mut. Auto. Ins. Co., 280 S.C. 330, 335, 312 S.E.2d 716, 719 (Ct. App. 1984) (“The sections here are part of the same statute, thereby presenting an even stronger case that they be construed together and reconciled.”).

Yet, there are instances where the terms and purposes of statutes cannot be reconciled harmoniously. In such instances, the Supreme Court of South Carolina has stated that the law clearly provides, “the latest statute passed should prevail so as to repeal the earlier statute to the extent of the repugnancy.” Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991); Denman, 387 S.C. at 138, 691 S.E.2d at 468 (“[W]here two statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute.”). However, it is equally clear that the Court has consistently found the law disfavors this method of repeal by implication. Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 95–96, 508 S.E.2d 848, 851 (1998) (“Repeal by implication is disfavored and is found only when two statutes are incapable of reconciliation.”); Mims v. Alston, 312 S.C. 311, 313, 440 S.E.2d 357, 359 (1994); City of Rock Hill v. South Carolina Dept. of Health & Env’tl. Control, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990) (“[T]he repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconciliation; for if they can be construed so that both can stand, the [c]ourt will so construe them.”); In Interest of Shaw, 274 S.C. 534, 539, 265 S.E.2d 522, 524 (1980) (“If the provisions of the two statutes can be construed so that both can stand, this Court will so construe them.”). The South Carolina Court of Appeals explained the basis for disfavoring implied repeal as follows, “It must be presumed that the legislature intended to achieve a consistent body of law. In accord with this principle, subsequent legislation is not presumed to effectuate a repeal of existing law in the absence of expressed intent.” Busby, 280 S.C. at 334, 312 S.E.2d at 719; see also Justice v. Pantry, 330 S.C. 37, 43–44, 496 S.E.2d 871, 874 (Ct. App. 1998), *aff’d as modified sub nom. Justice v. The Pantry*, 335 S.C. 572, 518 S.E.2d 40 (1999) (“It is presumed that the Legislature [is] familiar with prior legislation, and that if it intend[s] to repeal existing laws it would ... expressly [do] so...” (quoting State v. Hood, et al., 181 S.C. 488, 491, 188 S.E. 134, 136 (1936))).

With these principles in mind we turn to the text of the statutes in question. The Horizontal Property Act (“the HPA”) requires the council of co-owners to “insure the property against risks.” S.C. Code Ann. § 27-31-240 (1976 Code, as amended). “Property” is defined within the HPA to mean and include “(1) the land whether leasehold or in fee simple and whether or not submerged, (2) the building, all improvements, and structures on the land, in existence or to be constructed, and (3) all easements, rights, and appurtenances belonging thereto.” Section 27-31-20(k). The “Council of co-owners” is defined as “all the co-owners as defined in subsection (d).” Section 27-31-20(e). “Co-owner” is defined as a “person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns an apartment within the building.” Section 27-31-20(d). “Building” is further defined as “an existing or proposed structure or structures, containing in the aggregate two or more apartments, comprising a part of the property.” Section 27-31-20(b). When read together, these sections require all the owners of apartments on the property to insure the land, buildings, improvements, structures, and easements against risks.

Prior to March 24, 2006, Section 27-31-250 required insurance benefits to be applied as follows:

In case of fire or any other disaster, the insurance indemnity must, except as provided in the following paragraph, be applied to reconstruct the building or other structure.

Reconstruction is not compulsory where it comprises the whole or more than two-thirds of the property. In this case, and unless otherwise unanimously agreed upon by the co-owners, the indemnity must be delivered pro rata to the co-owners entitled to it in accordance with provision made in the bylaws or in accordance with a decision of three-fourths of the co-owners if there is no bylaw provision.

Should it be proper to proceed with the reconstruction, the provisions for this eventuality made in the bylaws shall be observed, or, in lieu thereof, the decision of the council of co-owners shall prevail.

S.C. Code Ann. § 27-31-250 (2007). When the subject property is not insured or where costs are in excess of insurance benefits, Section 27-31-260 directs the costs of reconstruction are to be shared as follows:

Where the property is not insured or where the insurance indemnity is insufficient to cover the cost of reconstruction, the rebuilding costs shall be paid by all the co-owners directly affected by the damage, in proportion to the value of their respective apartments, or as may be provided in the bylaws; and if any one or more of those composing the minority shall refuse to make such payments, the majority may proceed with the reconstruction at the expense of all the co-owners benefited thereby, upon proper resolution setting forth the circumstances of the case and the cost of the works, with the intervention of the council of co-owners.

The provisions of this section may be changed by unanimous resolution of the parties concerned, adopted subsequent to the date on which the fire or other disaster occurred.

S.C. Code Ann. § 27-31-260 (Supp. 2016) (emphasis added).

The need for clarification which this opinion request concerns arose from the 2006 amendment to Section 27-31-250. 2006 Act No. 250 is titled as follows:

AN ACT TO AMEND SECTION 27-31-250, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO USE OF INSURANCE PROCEEDS TO RECONSTRUCT DAMAGED PROPERTY GOVERNED BY THE HORIZONTAL PROPERTY ACT, SO AS TO PROVIDE FOR REPAIR OR RECONSTRUCTION UPON A VOTE OF EIGHTY PERCENT OF THE CO-OWNERS, OR MORE IF REQUIRED BY THE PROPERTY BYLAWS, AND TO PROVIDE, FURTHER, FOR DISTRIBUTION OF INSURANCE PROCEEDS.

As amended, Section 27-31-250 states the following:

(A) A portion of the property for which insurance is required pursuant to Section 27-31-240 and which is damaged or destroyed must be repaired or replaced promptly by the council of co-owners unless:

(1) repair or replacement is illegal under a state statute or local health ordinance;  
or

(2) eighty percent of the co-owners, including the owner of an apartment which is not to be rebuilt, vote not to rebuild; except that the property bylaws may expressly require a percentage greater, but not less than, eighty percent of the co-owners.

(B) The cost of repair or replacement in excess of insurance proceeds and reserve must be considered a common expense.

(C) If the entire property is not repaired or replaced, the insurance proceeds:

(1) attributable to the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the property;

(2) attributable to apartments and limited common elements that are not rebuilt must be distributed to the owners of those apartments and to the owners of those apartments to which limited common elements were allocated, or to the lienholders, as their interests may appear;

(3) remaining must be distributed to all of the co-owners or lienholders, as their interests may appear, in proportion to the percentage as described in Section 27-31-60.

(D) If the co-owners vote not to rebuild an apartment, that apartment's allocated interest must be reallocated automatically upon the vote and the council of co-owners promptly shall prepare, execute, and record an amendment to the master deed reflecting the reallocations.

S.C. Code Ann. § 27-31-250 (2016 Supp.) (emphasis added).

Neither the text of Section 27-31-250, as amended, nor any additional language in 2006 Act No. 250 explicitly repeals Section 27-31-260. However, the plain and unambiguous language of both Section 27-31-250(B) and Section 27-31-260 relates to how to allocate costs in excess of insurance proceeds paid out under policies insuring property governed by the HPA. Although Section 27-31-250(B) refers to “repair or replacement” and Section 27-31-260 refers to “reconstruction” and “rebuilding,” these phrases clearly relate to the same subject matter of fixing damaged property. Because we interpret both statutes to refer to the same subject matter, they “must be construed together, if possible, to produce a single, harmonious result.” *Denman*, 387 S.C. at 138. However, to the extent the statutes cannot be construed together, Section 27-31-250(B) will prevail as it is the latest statute passed. Thus, Section 27-31-250 repeals Section 27-31-260, as the earlier statute, but only to the extent of the repugnancy. *Hair*, 305 S.C. at 79.

It is this Office’s opinion that Section 27-31-250(B) repealed Section 27-31-260 regarding the allocation of costs of reconstruction where a horizontal property association has insured the property in compliance with Section 27-31-240, and Section 27-31-260 remains effective when the property is not

insured. Section 27-31-250(B) states that costs in excess of both insurance proceeds and reserve funds must be considered “a common expense.” In contrast, Section 27-31-260 states that when property is “not insured or where the insurance indemnity is insufficient” rebuilding costs are to be paid by “all the co-owners directly affected by the damage, in proportion to the value of their respective apartments.” The statutes direct mutually exclusive methods of cost allocation. However, by its express terms Section 27-31-250(B) only applies when “[t]he cost of repair or replacement [is] in excess of insurance proceeds and reserve.” In contrast, Section 27-31-260 applies when either “the property is not insured or where the insurance indemnity is insufficient.” The conflict between the two statutes is only present in the latter of the two situations to which Section 27-31-260 applies. Therefore, this Office interprets Section 27-31-260 to be implicitly repealed where a horizontal property association is insured against risks as required by Section 27-31-240 and that Section 27-31-260 continues to control where such property is not insured.

It is this Office’s opinion that the HPA names the council of co-owners as the party responsible for providing funds in the amount of an insurance deductible as part of its mandatory duty to insure the property against risks pursuant to Section 27-31-240. Section 27-31-250(B) directs how costs are allocated when they are “in excess of insurance proceeds and reserve.” Black’s Law Dictionary defines “deductible” as “[u]nder an insurance policy, the portion of the loss to be borne by the insured before the insurer becomes liable for payment.” DEDUCTIBLE, Black’s Law Dictionary (10th ed. 2014). Further, Black’s Law Dictionary defines “excess” as “1. The amount or degree by which something is greater than another. 2. The action of exceeding one’s authority or overstepping a prescribed limit or going beyond one’s rights...” EXCESS, Black’s Law Dictionary (10th ed. 2014). Because a deductible is a loss borne by an insured before an insurer becomes liable for payment, it would be inconsistent to interpret a deductible as a cost which is greater than insurance proceeds. Therefore, it is this Office’s opinion that a court would likely find such a deductible should be paid by the same parties in the same manner as the insurance policy payments pursuant to Section 27-31-240.

### **Conclusion**

We hope the guidance provided above will assist you and your constituents regarding the allocation of deductibles and costs in excess of insurance proceeds pursuant to the Horizontal Property Act. This Office is, however, 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 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 (1976 Code, as amended). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

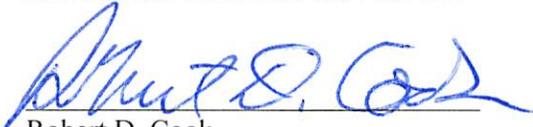
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Sincerely,



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