ALAN WILSON
ATTORNEY GENERAL

March 30, 2012

John G. Frampton, Esquire
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P.O. Box 430
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Dear Mr. Frampton:

In your capacity as Dorchester County Attorney, you have requested an opinion of this Office concerning the interpretation of sections 5-3-310 through -315 of the South Carolina Code (2004). The facts, as you have represented them, are that the City of North Charleston ("the City") has annexed a portion of unincorporated Dorchester County that has heretofore been serviced by the Ashley River and Old Fort Fire Districts (collectively, "the Districts"). You have stated that Dorchester County collects taxes for fire protection on behalf of the Ashley River and Old Fort Fire Districts and remits those taxes to those Districts. According to your opinion request, the City has begun assessing taxes for fire protection upon the properties in the newly annexed area, but it has not adopted a service plan as required by sections 5-3-310 *et seq.* of the South Carolina Code.

You have asked (1) whether the Districts should continue to receive, and Dorchester County continue to collect, a millage for fire protection from the annexed properties; (2) whether the act of assessing taxes constitutes an election to provide fire protection service within the meaning of section 5-3-310; and (3) whether Dorchester County has a role in enforcing the requirement that the Districts and the City make a service plan.

Analysis

As an initial matter, we must note that this Office is not a fact-finding entity. Therefore, for the purposes of this opinion, we have accepted as true the facts as you have presented them. Moreover, as you have asked specifically about sections 5-3-310 *et seq.*, we assume for the purposes of this opinion only that all prerequisites to the application of those sections have been satisfied.

Section 5-3-310 provides, in relevant part:

> When all or part of the area of a special purpose district as defined in Section 6-11-1610 or a special taxing district created pursuant to Section 4-9-30 or Section 4-19-10, et seq. or an assessment district created pursuant to Chapter 15 of Title 6, or any other special purpose district or special taxing or assessment district is annexed into a municipality under the provisions of Section 5-3-150 or 5-3-300, the following provisions apply:
>
> (1) At the time of annexation or at any time thereafter the municipality may elect at its sole option to provide the service formerly provided by the district within

> the annexed area. The transfer of service rights must be made pursuant to a plan formulated under the provisions of Sections 5-3-300 through 5-3-315.
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> (2) Until the municipality upon reasonable written notice elects to displace the district's service, the district must be allowed to continue providing service within the district's annexed area.
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> . . . .
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> (5) Upon annexation of less than the total area of the district, the district's boundaries must be modified, if at all, by the plan formulated pursuant to the provisions of Sections 5-3-300 through 5-3-315. The plan must specify the new boundaries of the district.

By its plain language, section 5-3-310 establishes that an annexing municipality has the sole discretion whether to assume the responsibility for providing services currently provided by a special purpose, special taxing, or special assessment district.

Districts' right to receive taxes

Section 5-3-310(2) states that districts are entitled to continue to provide service within the annexed area until such time as the municipality might elect to assume district functions. As explained in part (1) of that section, upon the municipality's election the parties must formulate a plan to transfer service rights. Section 5-3-311(7) clarifies the rights of the district and the municipality in the interim:

> The fact that a plan has not been finalized may not in any way alter or delay the effective date of annexation; however, the district shall retain the right to operate its existing system, collect revenues, and collect taxes from or within the area annexed until such time as the municipality and the district agree on a plan or a plan is presented to the municipality and the district under item (4) above. In the event a plan is appealed to the courts, the court of common pleas for the county in which the annexed area or any part thereof lies may enter such orders under its general equitable powers as are necessary to protect the rights of parties pending final resolution of any appeal.

(Emphasis added). Accordingly, section 5-3-311(7) confers a right upon the Districts to continue to receive taxes for the annexed area until such time as a plan is made or that right is otherwise altered using the procedures in section 5-3-311.

Moreover, section 5-3-314 provides for the continued levy of taxes upon property within a district if the parties have not otherwise ensured sufficient funding for the payment of the district's bond obligations. It provides, in relevant part:

> In no event under any plan or otherwise may the obligation between the district and its general obligation bondholders or, in the case of a special tax or assessment district, the obligation between the district and the holders of the county bonds issued on its behalf, be disturbed. If adequate provision is not made for the levy of taxes or for the payment

> of the principal and interest on such bonds, it is the duty of the auditor of the county to levy . . . an ad valorem tax, without limit as to rate or amount, upon all taxable property within the district as it was constituted on the dates those bonds were issued sufficient to pay principal and interest as they become due.

Id. (emphasis added).

In sum, a district and an annexing municipality are charged with developing a plan that will accommodate the interests of their residents and ensure sufficient funding to meet the district's bond obligations. Until such plan is developed, section 5-3-311(7) preserves the district's status quo with regard to taxation.

City's right to a choice

Article X, section 6 of the South Carolina Constitution provides, in relevant part:

> Except as otherwise provided in this section, the General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including counties, municipalities, special purpose districts, public service districts, and school districts. Property tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes; provided, that on properties located in an area receiving special benefits from the taxes collected, special levies may be permitted by general law applicable to the same type of political subdivision throughout the State, and the General Assembly shall specify the precise condition under which such special levies shall be assessed.

(Emphasis added). Accordingly, section 5-21-110 of the South Carolina Code (2004) provides:

> All municipal taxes levied by cities and towns in this State shall be levied on all property, real and personal, not exempt by law from taxation, situate within the limits of such cities and towns.

Moreover, our Supreme Court has explained on several occasions that "uniformity of taxation must be coextensive with the territory to which the tax applies." *Smith v. Robertson*, 210 S.C. 99, 119, 41 S.E.2d 631, 640 (1947) (quoted in *Charleston County Aviation Authority v. Wasson*, 277 S.C. 480, 490, 289 S.E.2d 416, 422 (1982)).

Because state law requires taxation to be uniform within each taxing district, we do not believe the act of assessing general municipal taxes[1] upon newly annexed property can be construed as an election by the municipality to assume the functions previously performed by a special purpose district. Such a construction would deprive of the annexing municipality of the discretion conferred by the plain language

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[1] You have represented that the City is imposing a tax for fire protection, not a fee or a service charge. Accordingly, we have not considered whether the imposition of a fee or a service charge would constitute an election to provide service. *See generally* Letter to Thomas M. Boulware, Op. S.C. Att'y Gen. (Aug. 24, 2011) (discussing the distinction between a fee or charge and a tax).

of section 5-3-310(1) and other similar provisions.[2] *Id.* ("At the time of annexation or at any time thereafter the municipality may elect at its sole option to provide the service formerly provided by the district within the annexed area."); *id.* § 5-3-312(1) ("The municipality has the right, in its sole discretion, to determine whether the municipality will provide service to the area annexed directly or by contract with the district."). Moreover, as our courts have explained, the imposition of a general tax does not guarantee direct benefits to any particular property. *Cf. Davis v. County of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994) ("Taxes are levied on all property . . . for the maintenance of government in the county. Although some services are not rendered in the incorporated areas, these services are still provided for the maintenance of county government and, therefore, benefit all the residents of the county." (internal citations omitted)); Letter to Carol L. Clark, Op. S.C. Att'y Gen. (Jan. 24, 2006) (opining that article X section 6 of our constitution would prohibit a county from creating a special tax district to allow residents to "opt out" of a portion of their general tax burden based upon a perception that such residents received a reduced level of service). For these reasons, we do not believe uniformity in the imposition of a general tax can be construed as an election to provide particular services.

City and Districts' responsibility to formulate a service plan

Though section 5-3-310(1) provides the City with significant discretion, section 5-3-311 imposes a responsibility upon both the City and the Districts to ensure the timely creation of a service plan. Specifically, unless the parties agree upon a plan "within ninety days following a favorable vote at the last referendum election required to be held to authorize the annexation," section 5-3-311 calls for the appointment of a committee to formulate a plan. Further, it creates several deadlines for action by that committee and for the acceptance or rejection of the committee's plan. The mandatory language of this section suggests that a plan must be created at or shortly after annexation even if the annexing municipality chooses <u>not</u> to assume any district functions at that time.

Such intent could also be found in section 5-3-312(1), which provides in relevant part:

> The plan may provide for certain service contracts to be entered into between the municipality and the district. The municipality has the right, in its sole discretion, to determine whether the municipality will provide service to the area annexed directly or by contract with the district.

Moreover, section 5-3-312(6) provides that "[i]n no event may any plan require that the residents in the annexed area be taxed or assessed by both the municipality and the district for the provision of the same service, except as provided by the laws of this State." We do not believe a court would allow municipalities and/or districts to circumvent this requirement by avoiding the creation of a plan altogether.

For these reasons, while not free from doubt, it is our opinion that the City and the Districts are required to formulate a plan in compliance with sections 5-3-310 through -315 <u>even if</u> the City has not elected to assume any of the functions of the Districts.

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[2] We are not here concerned with whether any other law might impose restrictions on this discretion. *See generally James Island Public Service District v. City of Charleston*, 249 F.3d 323 (4th Cir. 2001) (discussing restrictions imposed as a condition of certain federal loans).

Role of the county

We find nothing in sections 5-3-310 through -315 that imposes a duty on county officials to enforce the requirement that the Districts and the City create a service plan. *See* S.C. Code Ann. § 5-3-313 (requiring the county auditor and treasurer to "take such action as is appropriate to conform with the plan finally established . . . including releasing or adjusting any levy of district taxes within any annexed area" (emphasis added)); *id.* § 5-3-314 (requiring the county auditor to levy certain taxes if necessary to ensure compliance with a district's bond obligations).

Conclusion

Sections 5-3-310 and 5-3-311(7) of the South Carolina Code confer a right upon the Districts to continue to receive taxes for the annexed area until such time as a plan is made or that right is otherwise altered using the procedures in section 5-3-311. We do not believe the act of assessing general municipal taxes upon newly annexed property can be construed as an election by a municipality to assume the functions previously performed by a special purpose district. However, we read section 5-3-311 to require a plan to be formulated regardless of whether the municipality assumes such functions. Section 5-3-311 sets specific deadlines for the formulation of such plan, and we believe the City and the Districts must comply with those deadlines.

Very truly yours,

Dana E. Hofferber

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Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General