

State of South Carolina
Department of Agriculture



Hugh E. Weathers
Commissioner

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June 6, 2017

The Honorable Laurie Slade Funderburk
SC House of Representatives
Legislative Oversight Committee
PO Box 11867
Columbia, SC 29211

Dear Representative Funderburk,

This letter is in response to your request for additional information following the May 2, 2017 meeting of the Economic Development, Transportation, and Natural Resources Subcommittee.

Please see the enclosed document providing a brief outline of the federal Food Safety Modernization Act (FSMA) and the areas of new regulation.

With regards to the agency's recommendation for revisions to the code of laws to clarify that commodity boards are exempt from the State Procurement Act, I request that the subcommittee issue a finding noting the related opinion by the South Carolina Attorney General, dated April 28, 2016. The Department of Agriculture has no further request at this time.

Thank you for your work and commitment to the legislative oversight process. Please do not hesitate to contact my office if you have any additional questions or if I can be of assistance.

Sincerely,

Signature redacted -
pp Stefanie Kitchens

Hugh E. Weathers

Enclosure



ALAN WILSON
ATTORNEY GENERAL

April 28, 2016

The Honorable Hugh E. Weathers
South Carolina Department of Agriculture
PO Box 11280
Columbia, SC 29211

Dear Commissioner Weathers:

We have received your opinion request inquiring whether commodity boards are exempt from the South Carolina Consolidated Procurement Code ("Procurement Code"), S.C. Code Ann. § 11-35-10 *et seq.* (1976 Code, as amended). Specifically, you ask whether the Agricultural Commodities Marketing Act ("Marketing Act"), S.C. Code Ann. § 46-17-10 *et seq.* (1976 Code, as amended), authorizes commodity boards to determine how and when assessments collected from farmers are spent. In your opinion request letter, you provide a thorough analysis of the Marketing Act:

[t]he South Carolina Department of Agriculture (SCDA), on behalf of all Agricultural Commodity Boards operating in South Carolina, needs an opinion from the Attorney General in regards to the powers of boards created under the Code of Laws governing the Marketing Act.

The South Carolina Commodities Marketing Act (Act) was passed by the General Assembly in the South Carolina Code of Laws in 1976, under Title 46, Agriculture, Chapter 17. The Act created the Agriculture Commission of South Carolina and charged it to oversee all aspects of Agricultural Commodity Boards. Duties assigned to the Agriculture Commission included a broad scope of responsibilities – managing legal requirements for individual board creation, hearings, referendums, election of directors, collections of assessments, and general oversight of board activities. These duties were to ensure that all business by the Commodity Boards was conducted as outlined under the Act and the by-laws of each individual board.

Commodity Board policy and procedure development goes through a rigorous process involving all producers affected. In the

case of determining producer interest in a marketing order for a particular crop, a referendum must be held for producers of that crop. Marketing orders are thus created for each specific commodity per the wishes and voluntary financial commitment of impacted farmers. The sole purpose of marketing orders for all crops is to fund specific activities in promotion, research, and education through a farmer paid assessment. Decisions regarding these funds are granted to boards and board members as outlined in Section 46-17-290 and stated in by-laws of each commodity board. They are also provided specific powers in Section 46-17-260 and are also clearly provided the powers and authority conferred by law upon corporations.

The Agriculture Commission collects assessments for the Commodity Board and SCDA provides financial accounting services in holding funds in individual accounts and dispersing as directed by the Board of Directors. These are not state funds and they are never co-mingled with state funds. Neither the SCDA nor the State of South Carolina can expend, transfer, or use any of these funds, except as expressed under the Act and by-laws of each commodity board under the specific direction of the Commodity Boards.

Upon passage of the Act in 1976 and the creation of the Agriculture Commission, Commodity Boards were considered exempt from State Procurement Codes, as all money collected was from farm producer assessments with no public dollars appropriated to support individual commodities. Again, these are grower funded and managed commodity boards, and are provided specific powers under the Act. The Commodities Boards are also audited annually.

In the mid 1980's legislation was enacted to govern how state agencies managed funds under specific, transparent guidelines outlined under state procurement codes. At that time a proviso to the budget was passed to exempt commodity boards from procurement codes. That proviso remained in force until 2012, when it was deleted from the state budget. As a result, Commodity Boards are now treated like a state agency in terms of how they can direct the farmers' dollars. Given the responsibility of stewardship of these funds, board members from all seven active

Commodity Boards have taken exception to the procurement rule. Rightfully so, they say it usurps their authority as outlined under the Act, and are seeking an opinion on the matter.

In hindsight, it appears that the original proviso exempting Commodity Boards from procurement rules was not necessary, as they were already exempt when the Act was passed. However, with that proviso no longer in effect, the State Procurement Office and State Auditor do not consider them exempt. Growers are adamant that these are not state dollars, and that they are provided specific powers, with checks and balances in place outlined in the Act, to ensure transparency and compliance with their by-laws.

SCDA requests a review of the Code of Laws, Title 46, Agriculture, Chapter 17, pertaining to the powers provided to Commodity Boards and their Directors. Please provide an opinion regarding an individual commodity board's authority to determine how and when assessment dollars are spent in the conduct of business. SCDA agrees that the Boards should be exempt from state procurement guidelines when they are not dealing with state dollars. SCDA has discussed with members of the General Assembly and need clarification to resolve the matter.

LAW/ANALYSIS:

We begin our analysis with a brief background on statutory interpretation. In prior opinions, we have discussed the principles of statutory construction and they are:

“[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000) . . . “[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention.” State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011). . . .

Op. S.C. Atty. Gen., September 18, 2013 (2013 WL 5494616).

Our Office has also determined that:

‘[s]ections which are part of the same statutory law of the State must be construed together. In construing statutory language, the

statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction. Statutes pertaining to the same subject matter must be harmonized if at all possible.’ In Interest of Doe, 318 S.C. 527, 531-32, 458 S.E.2d 556, 559 (Ct. App. 1995) (citations omitted). However, ‘[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.’ Capco of Summerville, Inc. v. J.H. Gayle Constr. Co. Inc., 368 S.C. 137,142, 628 S.E.2d 38, 41 (2006).

Op. S.C. Atty. Gen., July 28, 2014 (2014 WL 3886690) (quoting Op. S.C. Atty. Gen., July 11, 2008 (2008 WL 3198122)). We stated more succinctly in Op. S.C. Atty. Gen., March 20, 2006 (2006 WL 981695) (citing Criterion Insurance Company v. Hoffman, 258 S.C. 282, 188 S.E.2d 459 (1972); Op. Atty. Gen. dated August 5, 1986) that “[i]t is a rule of statutory construction that general and specific statutes should be harmonized if possible. However to the extent of any conflict between the two, the special statute usually prevails.”

We will now review the language of the Procurement Code and the Marketing Act. The pertinent section of the Procurement Code describes its application. Section 11-35-40(2) states:

[t]his code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in Section 11-35-40(3) (Compliance with Federal Requirements) and except that this code does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Intergovernmental Relations). It also shall apply to the disposal of state supplies as provided in Article 15 (Supply Management). . . .

S.C. Code Ann. § 11-35-40(2) (1976 Code, as amended).

The purpose and policy of the Marketing Act are described in sections 46-17-20 and 46-17-30. Section 46-17-20 states:

[i]t is declared to be the purpose of this chapter to promote the general welfare of the State by enabling producers of agricultural

commodities¹ to help themselves in establishing orderly, fair, sound, efficient, and unhampered marketing, grading and standardizing of the commodities they produce and in promoting and increasing the sale and proper use of such commodities. . . .

S.C. Code Ann. § 46-17-20 (1976 Code, as amended). Section 46-17-30(b) provides:

[i]t is hereby declared to be the policy of this chapter:

(b) To enable agricultural producers of this State, with the aid of the State:

(1) To develop, and engage in research and educational programs to develop better and more efficient marketing and utilization of agricultural products;

(2) To establish orderly marketing of agricultural commodities;

(3) To provide for uniform grading and proper preparation of agricultural commodities for market;

(4) To provide methods and means including, but not limited to, public relations and promotion for the maintenance of present markets and for the development of new or larger markets, both domestic and foreign, for agricultural commodities produced within this State and for the prevention, modification, or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market;

(5) To eliminate or reduce economic waste in the marketing or use of agricultural commodities;

(6) To restore and maintain adequate purchasing power for agricultural producers.

¹ “‘Agricultural commodity’ means a distinctive type of agricultural, horticultural, viticultural, floricultural, aquacultural, vegetable, or animal product, either in its natural or processed state. . .” S.C. Code Ann. § 46-17-40 (1976 Code, as amended).

S.C. Code Ann. § 46-17-30 (1976 Code, as amended).

We have also reviewed the powers provided to commodity boards under the Marketing Act. The Marketing Act is to be administered under the direct control and supervision of the Agriculture Commission, including such administrative requirements of marketing orders and agreements not specifically assigned to commodity boards. See S.C. Code Ann. § 46-17-50 (1976 Code, as amended). However, the Marketing Act grants commodity boards many powers. Commodity boards can exercise the powers and authority conferred by law upon corporations.² S.C. Code Ann. § 46-17-260 (1976 Code, as amended). Commodity boards have the powers assigned to them by marketing orders and agreements, such as preparing and enforcing plans for promoting and advertising the sale of agricultural commodities; establishing research programs for control of insects or disease, economic causes and effects, harvesting, storing, transporting, handling, processing, or any other research which would benefit a commodity; and establishing educational programs designed to acquaint producers, handlers, processors, and other interested persons with the results of research. See S.C. Code Ann. § 46-17-270 (1976 Code, as amended); S.C. Code Ann. § 46-17-290 (1976 Code, as amended). Commodity boards can appoint or utilize committees and individuals to advise them or the Agriculture Commission and can fix the compensation for such services, which may be paid from the funds of the board. S.C. Code Ann. § 46-17-250 (1976 Code, as amended).

It should be noted that commodity boards and the Agriculture Commission can only use the assessments collected from farmers to pay the expenses and costs arising in connection with the administration, amendment or termination of the marketing orders and agreements. S.C. Code Ann. § 46-17-340 (1976 Code, as amended). Additionally, both the commodity boards and the Agriculture Commission are required to keep accurate records of all assessments, collections, receipts, deposits, withdrawals, disbursements, paid-outs, monies, and other financial

² Under the South Carolina Business Corporation Act of 1988, S.C. Code Ann. § 33-1-101 *et seq.* (1976 Code, as amended), corporations have the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power to . . .

(4) purchase, receive, lease, or otherwise acquire and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located. . .

(7) make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income. . .
. . .

(15) make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

S.C. Code Ann. § 33-3-102 (1976 Code, as amended).

transactions made pursuant to an order or agreement, and the records must be audited at least annually in accordance with generally accepted auditing standards. S.C. Code Ann. § 46-17-380 (1976 Code, as amended).

In a prior opinion of our Office, one of the issues was whether it was a violation of the State Procurement Code for section 23-9-430 for the South Carolina State Firemen's Association to receive a percentage of money received from the one percent tax on fire insurance for the purpose of the betterment and maintenance of skillful and efficient fire departments within the county. We determined that:

[i]t is the opinion of this Office that the State Procurement Code is inapplicable in this situation. The Legislature has mandated that the funds are to be spent through the use of the [Firemen's] Association by virtue of creating the statutory provisions that allowed the S.C. State Firemen's Association to spend the money as instructed in Title 23, Chapter 9, Article 3. The Legislature has precisely determined what must be done and specified in the statutes guidelines for how the money should be allocated. See, e.g., S.C. Code § 23-9-430. Therefore, no bidding process is necessary. One legislature is not bound by another.

Op. S.C. Atty. Gen., May 5, 2011 (2011 WL 2214073).

In that opinion, we also stated that "the Legislature, pursuant to its plenary powers, may expressly authorize the [Firemen's] Association's duties and powers, irrespective of other statutes, such as the State Procurement Code. . . ." Id.

The Legislature may exempt certain functions from the Procurement Code and we believe that the Legislature intended for commodity boards to be exempt. In sections 46-17-20 and 46-17-30, the Legislature makes it clear that the purpose and policy of the Marketing Act is to enable farmers, or to give them the power³, to help themselves with the aid of the State and its agencies with the marketing and sale of agricultural products. The Marketing Act is unique in that it is the farmers, and not the State, who benefit. Farmers of a specific agricultural product are only assessed and commodity boards only exist due to the consent and voluntary financial commitment of the farmers. See S.C. Code Ann. § 46-17-70 (1976 Code, as amended); S.C. Code Ann. § 46-17-190 (1976 Code, as amended).

In a prior opinion, we further explained how commodity boards and the assessments are unique:

³ "Enable" means "to make able; give power, means, competence, or ability to; authorize." See dictionary.com at <http://www.dictionary.com/browse/enable>

[t]he unusual nature of a commodity board and its intended activities is borne out by the unusual nature of the commodity board assessments, in that, unlike other funds which flow into the state treasury through any of the State's boards, departments or institutions, these funds are not paid by the public-at-large in the form of a general income or sales tax nor are they collected from the recipients of various forms of government regulatory services such as the purchasers of permits or licenses. In fact, the commodity levy is assessed against a group of citizens engaged in a particular occupation who have by their voluntary expression of support elected to contribute to a fund established to help themselves to develop, expand and improve the market for their product.

As further evidence of the non-public nature of the funds, the General Assembly in 1968 directed the Agriculture Commission through Section 46-17-370 to deposit all monies collected pursuant to the Agricultural Commodities Marketing Act in separate accounts. This direction to handle these funds in a specific manner is bolstered by a direction in Section 46-17-350 that any funds remaining after the termination of a marketing order be withdrawn from the approved depository and then paid into the state treasury.

A third, but equally important, indication of the unique character of the collected assessments is found in the fact that a peanut producer may, as authorized by Section 46-17-350 and Regulation 5-164(5), apply for and receive a complete refund of all assessments which have been paid to the Commission and the commodity board during any marketing season.

It can be concluded on the basis of these statements of policy and other indicators of characteristics that the activities which the Peanut and other commodity boards could reasonably be expected to engage in are unique when compared with other types of activities ordinarily encountered in the course of the operations of the State government and, therefore, that the General Assembly intended that only specifically provided restraints be placed on the use of any collected commodity board assessments.

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Op. S.C. Atty. Gen., May 20, 1978 (1978 WL 22577)⁴.

Furthermore, the Legislature has in our opinion granted the commodity boards the authority to spend the assessments by giving them the powers of a corporation to purchase, make payments, and make contracts as well as the power to pay the expenses and costs arising in connection with the marketing orders and agreements. The fact that the commodity boards are required to keep financial records and be audited also indicates that the Legislative intent was for the commodity boards to have control of the assessments. We therefore concur with our May 5, 2011 opinion that the bidding process of the Procurement Code is not necessary when the Legislature imbues a particular group with the authority to expend money. We also agree with your opinion request letter that the proviso to the budget exempting commodity boards from procurement codes was not necessary, as they were already exempt under the Marketing Act.

CONCLUSION:

Our opinion is that the specific provisions of the Marketing Act prevail over the general terms of the Procurement Code. Therefore, commodity boards are exempt from the Procurement Code and have the authority to determine how and when assessments collected from farmers are spent. Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter and that the Legislature may wish to clarify this matter.

Sincerely,


Signature Redacted

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:


Signature Redacted

Robert D. Cook
Solicitor General

⁴This opinion was published prior to the enactment of the Procurement Code.

Food Safety Modernization Act (FSMA)

- Considered to be the most significant update to federal food safety laws in 70 years.
- 4,000 farms in South Carolina will be affected by Produce Safety and FSMA rules.
 - Covers produce normally consumed raw.
- SCDA will be the leading agency for outreach and compliance.
- Comprised of 7 rules:
 - 1) ***Produce Safety Rule***
 - This is SCDA's new department and where 100% of FDA grant monies go. New Law 39-26 enables SCDA to enforce.
 - 2) ***Preventive Controls for Human Food***
 - Adopted by reference in SC Food & Cosmetic Act.
 - 3) ***Preventive Controls for Animal Food***
 - Adopted by reference in SC Food and Cosmetic Act.
 - 4) ***Sanitary Transportation of Human and Animal Food***
 - 5) ***Prevention of Intentional Contamination/Adulteration***
 - 6) ***Foreign Supplier Verification Programs***
 - 7) ***Accreditation of Third-Party Auditors/Certification Bodies***
- Implementation of Rules 2-7 will be handled by SCDA's existing Food/Feed Safety and Compliance department.
- Working in cooperation with Clemson Extension, through a memorandum of understanding, to provide outreach and educational sessions to producers.
- Compliance for Produce Safety Rule
 - ***General Compliance*** Dec 2017
 - ***Small Business*** Dec 2018
 - ***Very Small Business*** Dec 2019