HENRY MCMASTER
ATTORNEY GENERAL

July 7, 2009

The Honorable Tracy R. Edge
Member, House of Representatives
P.O. Box 2095
North Myrtle Beach, South Carolina 29577

Dear Representative Edge:

We received your letter requesting an opinion of this Office as to whether recent legislation allowing a particular school district to levy an impact fee circumvents state law. Specifically, you are concerned with a bill that passed earlier in the 2009 legislative session establishing a school impact fee in Dorchester County School District No. 2. In your letter, you provided the following information:

> This new local bill strategy raises the question whether the General Assembly is procedurally correct in allowing local bills to circumvent existing state laws? The current interpretation of the law is resulting in the General Assembly granting the state's 85 school districts the ability to impose school impact fees with not restrictions as to nexus, transparency, equality, accountability, or proportionality. The local bill strategy suggests possible conflicts with the S.C. Constitution: It would appear there are several potential violations of the State Constitution, including: [i] improper delegation of taxing authority, [ii] the enactment of special legislation where a general law should be or is applicable, and [iii] imposition of a tax without the consent of the people of or their representatives.
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> In addition, the local option bill strategy appears to be in conflict with several S.C. statutes: Several statutes that may be applicable, include: [i] the Development Impact Fee Act, [ii] the Home Rule Act, [iii] local taxing authority, [iv] the Development Agreement Act, [v] Residential Improvement District Act, and [vi] the law governing the imposition of user fees and special taxes.

Law/Analysis

As you described in your letter, in February of this year the Legislature passed a bill authorizing the Board of Trustees for Dorchester School District No. 2 to impose impact fees on developers constructing residential dwellings within the school district. S. 235, 118th Legs. (S.C. 2009). The bill, Senate bill 235 ("Bill 235 "), provides, in pertinent part: " The Board of Trustees for Dorchester School District No. 2 (the "Board") may impose an impact fee on any developer for each new residential dwelling unit constructed by the developer within the school district. The fees must be paid to Dorchester School District No. 2 or, pursuant to an agreement, to a county or municipality that pays the fees to Dorchester School District No. 2, prior to or at the issuance of a certificate of occupancy for a dwelling unit." Id. As you explained in your letter, you believe this legislation violates the South Carolina Constitution.

As stated by our Supreme Court in State v. McGrier, 378 S.C. 320, 328, 663 S.E.2d 15, 19 (2008):

> "This Court has long recognized that legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary." Bailey v. State, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). " 'It is always to be presumed that the Legislature acted in good faith and within constitutional limits; and this declaration of the Legislature is a conclusive finding of fact and imports a verity upon its face which cannot be impugned by litigants, counsel, or the courts, but is absolutely binding upon all.' " Scroggie v. Scarborough, 162 S.C. 218, 231, 160 S.E. 596, 601 (1931) (quoting State ex rel. Weldon v. Thomason, 142 Tenn. 527, 221 S.W. 491, 495 (1920)). "Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977).

Moreover, only a court, not this Office, may declare a statute unconstitutional. Op. S.C. Atty. Gen., February 20, 2009. While this Office may comment as to the constitutionality of a statute, it is solely within the province of the courts to proclaim a statute unconstitutional. Therefore, unless and until a court finds otherwise, a statute remains valid and enforceable.

In your letter, you argue this legislation is an improper delegation of taxing authority and it imposes a tax without the consent of the people or their representatives. Both of these arguments are premised on the fact that the legislation imposes a tax rather than a fee. In C.R. Campbell Const. Co. v. City of Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997), our Supreme Court stated that if the following criteria are satisfied, a fee is a valid uniform service charge rather than a tax:

> (1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is uniformly imposed on all the payers.

In a 2006 opinion, this Office considered the validity of a service fee or charge and determined that the resolution of such a question involves a question of fact. Op. S.C. Atty. Gen., August 24, 2006. "As we stated on numerous occasions, only a court, not this Office, may serve as a finder of fact and conclusively determine the outcome of a factual issue." Id. Nonetheless, we believe in this instance that a court likely would find the impact fee is a fee rather than a tax.

Bill 235 does not explain who benefits from the revenue generated by the fee. However, we presume that the developer will receive a special benefit from the construction of new schools as they will directly serve the residents of the development and could improve property values. While the construction of new schools may also benefit other residents within the school district, our courts conclude that "[a] charge does not become a tax merely because the general public obtains a benefit." Brown v. County of Horry, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992). Thus, we believe a court could find the revenue from the fee is used to benefit the payor.

According to the legislation, the Board may only appropriate funds from the fee for:

> (1) the construction, including preparation costs, of new public education facilities for grades K-12 within Dorchester School District No. 2; and
>
> (2) the payment of principal and interest on existing or new bonds issued by Dorchester School District No. 2 for the construction of public education facilities for grades K-12.

Thus, Bill 235 indicates that the revenue generated may only be used for the construction and preparation of new schools and to pay down the debt issued for the construction of schools.

Bill 235 does not specify that revenue generated by the fee cannot exceed the cost of the improvements. Rather, the legislation provides that "[t]he district's board of trustees shall set the impact fee at an amount not to exceed two thousand five hundred dollars per dwelling unit." Thus, a court would have to ensure that the amount of the fee set by the Board does not exceed the cost of the construction and debt service allowed under its provisions.

Lastly, Bill 235 states that the Board may impose the fee on "any developer for each new residential dwelling unit constructed by the developer within the school district." S. 235, 118th Leg. (S.C. 2009). Therefore, the fee appears to be uniformly imposed on its payors. As many of the criteria for ascertaining that a fee is a valid uniform fee appear to have been satisfied per the terms

of Bill 235, we believe a court likely will find that the fee is not a tax. However, as we explained above, the determination as to the validity of a fee requires factual determinations. As such, a court would have to ultimately resolve this issue. However, we note that on several occasions, our Supreme Court determined that impact fees imposed by local sewer districts were valid fees rather than a tax. See Ford v. Georgetown County Water & Sewer Dist., 341 S.C. 10, 532 S.E.2d 873 (2000); J.K. Const., Inc. v. Western Carolina Reg'l Sewer Auth., 336 S.C. 162, 519 S.E.2d 561(1999).

Although we believe a court is likely to find the impact fee imposed by Bill 235 to be a fee rather than a tax, assuming the impact fee is found to be a tax, we do not believe it would constitute an improper delegation of taxing authority. Our Supreme Court recognizes that article X section 6 of our Constitution "authorizes delegation of the taxing power to political subdivisions of the State." Crow v. McAlpine, 277 S.C. 240, 243, 285 S.E.2d 355, 357 (1981). Moreover, our Supreme Court recognizes that "school districts and their governing boards are generally considered political subdivisions of the State and hence may properly be vested with the State's taxing power." Id. at 243-44, 285 S.E.2d at 357 (citing Tucker v. Kershaw County Sch. Dist., et al., 279 S.E.2d 378 276 S.C. 401, 279 S.E.2d 378 (1981); Graham v. Charleston County Sch. Bd., 262 S.C. 314, 204 S.E.2d 384 (1974); Easler v. Maybank, 191 S.C. 511, 5 S.E.2d 288 (1939)). Thus, if by Bill 235 the Legislature delegated taxing authority to the Board, we do not believe the legislation constitutes an unlawful delegation of taxing authority.

Article X section 5 of the South Carolina Constitution (Supp. 2007) provides, in pertinent part: "No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled." Our Supreme court interprets this provision as follows:

> Pursuant to S.C. Constitution art. X, § 5, the power of taxation rests with the people of South Carolina who have entrusted this power to the General Assembly. While the General Assembly can delegate its taxing authority to a subordinate agency, it can only delegate this power to a body which is either composed of persons assented to by the people or subject to the supervisory control of a body chosen by the people.

Hagley Homeowners Ass'n, Inc. v. Hagley Water, Sewer, and Fire Auth., 326 S.C. 67, 75, 485 S.E.2d 92, 96 (1997). Pursuant to act 535 of 1982, members of the Board are elected. 1982 S.C. acts 3474. Thus, Bill 235 delegates authority to levy the impact fee to a body chosen by the people. As such, assuming that the impact fee is a tax rather than a fee, we do not believe the legislation violates article X section 5.

In addition to your concerns that Bill 235 improperly delegates taxing authority and imposes a tax without the consent of the people or their representatives, you are concerned that Bill 235 constitutes special legislation. Two provisions in the South Carolina Constitution prohibit the

passage of special legislation. Article VIII, section 7 of the South Carolina Constitution (1976), enacted as part of the home rule amendments to the Constitution, prohibits the Legislature from passing laws for a specific county. Article III, section 34(IX) of the South Carolina Constitution (1976) provides that no special law shall be enacted where a general law can be made applicable.

In Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975), our Supreme Court considered the constitutionality of a statute changing the method by which the boards of trustees for a particular county school boards are elected. The Court determined:

> Creation of different provisions for school districts does not impinge upon the 'home rule' amendment because public education is not the duty of the counties, but of the General Assembly. The General Assembly has not been mandated by any constitutional amendment to enact legislation to confer upon the counties the power to control the public school system. To the contrary, the command of new Article XI, Section 3, is 'The General Assembly shall provide for the maintenance and support of a system of free public schools.'

Id. at 143, 217 S.E.2d at 37. Finding that article VIII, section 7 solely deals with local government, the Court held that it is not applicable school districts. Accordingly, the Court upheld the statute as constitutional.

Subsequently, the Supreme Court addressed the constitutionality of an act allowing the Horry County Higher Education Commission to levy an ad valorem tax. Horry County v. Horry County Higher Educ. Comm'n, 306 S.C. 416, 412 S.E.2d 421 (1991). The Court acknowledged that in prior opinions it recognized the broad legislative power given to the Legislature with regard to education pursuant to article XI of the Constitution. Id. at 419, 412 S.E.2d at 423. However, the Court clarified that "legislation regarding education is not exempt from the requirements of Article III, § 34(IX)." Id. Finding the legislation in question applies to only one county and one institution, the Court concluded that it is special legislation. Id. The Court explained:

> The Commission admits that it is unaware of any other institution of higher education which receives funding from ad valorem property taxes imposed on the county in which the institution is located. The problem of funding for institutions of higher education is not a problem unique to Coastal Carolina; it is a problem which applies equally to all state funded colleges and universities. A general law could be fashioned to provide ad valorem property tax funding for all of these colleges and universities. Further, the record is devoid of any peculiar local conditions which require special treatment for Coastal Carolina.

Id. at 420, 412 S.E.2d at 423-24. Thus, the Court found the legislation violates article III, section 34(IX). Id. at 420 412 S.E.2d at 424.

In Bradley v. Cherokee School District No. One of Cherokee County, 322 S.C. 181, 470 S.E.2d 570 (1996), the Supreme Court clarified its decisions in Moye and Horry County while considering whether an act allowing a particular school district to impose a sales tax constitutes unconstitutional special legislation pursuant to article III, section 34. The Court explained:

> Horry County did not overrule Moye and the line of cases upholding legislation relating to school districts. In Horry County, the County was authorized to levy a tax sufficient to pay the interest and principal on bonds issued to finance the activities of the Horry County Higher Education Commission. The Horry act was found to be special legislation because while the tax was imposed on all taxable property within Horry County, the funds collected from the tax were not used for the benefit of all persons residing within the area. Additionally, the funds in Horry were used solely for the benefit of one institution of higher learning. Although the court in Horry concluded that legislation regarding education is not exempt from the requirements of Article III, § 34(IX), it also found that it does not prohibit all special legislation.

Id. at 186, 470 S.E.2d at 572. The Court held: "A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34(IX)." Id. Finding the tax imposed by the act to be "a lawful tax limited in application and incidence to persons or property in Cherokee County," the Court concluded it was not unconstitutional special legislation. Id. at 186,470 S.E.2d at 573.

The Court in Moye made clear that article VIII, section 7 does not apply to school districts. Because the legislation in question deals specifically with Dorchester School District No. 2, we do not believe the legislation violates article VIII, section 7. However, we are concerned with the constitutionality of the legislation under article III, section 34(IX). Although, the Court in Bradley found that article III, section 34(IX) does not prohibit all special legislation pertaining to school districts, it also recognized, as the court found in Horry County, that legislation involving education is not exempt from this provision. Thus, as you suggest, we must consider whether the legislation constitutes as special law "where a general law can be made applicable." S.C. Const. art. III, § 34(IX).

In order to determine whether a general law may be made applicable, we must gain an understanding of the Legislature's reasoning for specifically allowing Dorchester County School District No. 2 to impose an impact fee when to our knowledge, the Legislature has not granted such authority to any other school district in the State. The legislation itself is devoid of any findings as

to why Dorchester School District No. 2 in particular should be granted such authority. Thus, we would have to gain knowledge of facts surrounding the passage of the legislation to make this determination. This Office, unlike a court, does not have the authority to investigate and make factual determinations. Op. S.C. Atty. Gen., August 13, 2008. Therefore, we are not in a position to determine whether a special circumstance exists with regard to Dorchester School District No. 2 to make it impossible to create a general law and require the Legislature to enact special legislation. This determination must ultimately be made by a court.

Nonetheless, we understand that Dorchester County has experienced a great deal of growth in recent years and this growth has produced a need to expand and add additional schools. Accordingly, the school districts in Dorchester County are faced with the problem of how to fund the construction and expansion of its schools. While this situation may support the Legislature's passage of the act with regard to Dorchester County School District No. 2, a court could find that other school districts in the State are faced with similar challenges. Accordingly, the reasons for allowing Dorchester County School District No. 2 to impose an impact fee would not be unique to that particular school district. Therefore, a Court may find that a general law could be fashioned to provide all school districts with the ability to impose impact fees in order to fund the construction and expansion of their schools.

In addition, you argue that general law not only could be, but is applicable through the South Carolina Development Impact Fee Act. S.C. Code Ann. §§ 6-1-910 et seq. (2004). This act essentially allows counties and municipalities meeting certain criteria to impose an impact fee to fund the construction of specified infrastructure projects. These provisions do not allow school districts to impose impact fees and the infrastructure projects listed do not include construction or expansion of schools. Thus, this act provides evidence that not only is it possible to create general law that is applicable to govern impact fees, but the Legislature has already taken action to provide such legislation with regard to counties and municipalities. Accordingly, based on our limited knowledge of the facts and circumstances surrounding the passage of Bill 235, we believe a court could find that it violates article III, section 34 of the South Carolina Constitution. However, as we explained above, this determination must ultimately be made by a court and the act is valid unless and until a court makes this determination.

In addition to your concerns as to Bill 235's constitutionality, you also expressed your concern that it appears to be in conflict with several South Carolina statutes. You indicate that the legislation conflicts with the Development Impact Fee Act, the Home Rule Act, local taxing authority, the Development Agreement Act, the Residential Improvement District Act, and laws governing the imposition of user fees and special taxes. On numerous occasions, our courts recognized that the Legislature has the authority to enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions. Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services, 346 S.C. 158, 169, 551 S.E.2d 263, 269 (2001). Moreover, the Legislature has the plenary power to amend statutes. Simmons v. Greenville Hosp. System, 355 S.C. 581, 586, 586 S.E.2d 569, 571 (2003). Thus, if the legislation in question does not violate the

Constitution, the Legislature has the authority to adopt it despite the fact that it may conflict with or amend existing law.

Conclusion

We understand you are concerned that recently passed legislation giving Dorchester County School District No. 2 the authority to impose an impact fee runs afoul of several constitutional provisions. Although we do not believe the impact fee allowed by Bill 235 constitutes a tax rather than a fee, if it were considered a tax, we are of the opinion that it likely does not constitute an improper delegation of taxing authority by the Legislature or an imposition of a tax without the consent of the people or their representatives. Furthermore, because our Supreme Court determined in Moye that article VIII section 7 of the Constitution, prohibiting the enactment of special legislation for counties, does not apply to school districts, we do not believe Bill 235 is unconstitutional special legislation pursuant to this provision. However, after making factual determinations as to whether a general law can be made applicable to the imposition of impact fees by school districts, we believe a court could find that the legislation violates the prohibition on special legislation pursuant to article III, section 34. Nonetheless, this determination must be made by a court and unless or until this determination is made, the legislation remains valid and enforceable.

In addition, to your concerns surrounding the constitutionality of Bill 235, we understand you are also concerned that it conflicts with State law. Because the Legislature has the authority to enact or make amendments to legislation that are not contrary to the Constitution, we do not believe the fact that the legislation conflicts with existing State law impacts its validity.

Very truly yours,

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