HENRY MCMASTER
ATTORNEY GENERAL

August 18, 2008

The Honorable Ted Pitts
Member, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Pitts:

We understand you desire an opinion of this Office "relating to fees that municipalities charge to non-resident customers of their water and sewer services." Specifically, you ask:

> [W]hen a municipality charges the out of town customer a maintenance or other line item fee and then uses the revenue from this fee for some other non related expenditure, is this allowed? The example I give you is the City of Columbia charges all customers a line maintenance fee, but it has been disclosed that the revenue from this maintenance fee is being reallocated for other City related expenses.

Law/Analysis

Section 5-7-60 of the South Carolina Code (2004) allows municipalities to provide services outside their boundaries. Sections 5-31-1510 et seq. of the South Carolina Code (2004) governs the extension of water and sewer service outside a city's corporate limits. Pursuant to section 5-31-1530 of the South Carolina Code, the city or town "may provide by ordinance for the payment of the costs of extending its water and sewer system to any property owner . . . ." Section 5-31-1590 limits the use of assessments collected pursuant to section 5-31-1530 in that it requires these funds "be used for the purpose for which its was raised." Accordingly, with regard to costs associated with the extension of a water or sewer line to a non-resident, we are of the opinion that any assessments imposed for this purpose may only be used for this purpose.

Nonetheless, from your letter, we believe you are referring to the fees imposed on nonresidents in exchange for providing continuous service, rather than assessments levied to extend service to non-residents. Based upon our research of the pertinent statutes, we are of the understanding that the fees charged to non-residents are governed by contract, as opposed to statute. Sections 5-31-1910 et seq. of the South Carolina Code (2004) allow municipalities to enter into

contracts to provide utility services to residents and non-residents. In particular, section 5-31-1910 of the South Carolina Code provides as follows:

> Any city or town in this State owning a water or light plant may, through the proper officials of such city or town, enter into a contract with any person without the corporate limits of such city or town but contiguous thereto to furnish such person electric current or water from such water or light plant of such city or town and may furnish such water or light upon such terms, rates and charges as may be fixed by the contract or agreement between the parties in this behalf, or for manufacturing purposes, when in the judgment of the city or town council it is for the best interest of the municipality so to do. No such contract shall be for a longer period than two years but any such contract may be renewed from time to time for a like period.

In a 1989 opinion, we addressed the similar issue of whether the City of Columbia could charge different rates to non-residents for municipal services. Op. S.C. Atty. Gen., July 17, 1989. In that opinion, we looked to a previous opinion of this Office in which we concluded a "nonresident purchaser of water from a municipality would have only those rights set forth or necessarily implied from the contract to sell and furnish water, and further that the non-resident has no rights beyond those in the contract." Id. (citing to Op. S.C. Atty. Gen., February 5, 1976). In addition, we reviewed the statutory authority allowing municipalities to provide services to non-residents and found that

> the establishment of higher rates or charges for the provision of water or sewer services to non-resident customers is not covered by statute but is instead a matter of contract. This Office has advised previously that a municipality has considerable discretion in entering into contracts to provide its services to persons residing outside municipal boundaries. Op.Atty.Gen. No. 86-126. As noted therein, the use of the term "may" in Section 5-7-60 "indicates that extra-territorial provision of services by a municipality, by contract with an individual, is within the discretion of the municipality." The setting of rates thus appears to be within the discretion of the municipality, as well; we have identified no authority which requires city residents and non-residents to be charged the same rates. See also Opinion No. 4246.

Id. In addition, we addressed whether the City of Columbia was restricted in the manner in which it may expend revenues generated from the higher rates charged to non-residents. Id. In that respect, we found no particular statute limiting the way in which the City could expend such funds.

However, we recognized the way in which the City expended revenue from such charges may be restricted in cases in which bond financing was used or if the municipality imposed a restriction by ordinance. Id.

Subsequent to our 1989 opinion, our Supreme Court issued an opinion as to whether the City of Conway had a duty to charge non-residents a reasonable fee for water service. Sloan v. City of Conway, 347 S.C. 324, 555 S.E.2d 684 (2001). According to the facts of the case, the City of Conway passed an ordinance raising rates for non-resident customers for a reason unrelated to the service provided to the non-residents. Id. at 327-28, 555 S.E.2d at 685. The Court concluded as follows:

> Our decision in Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911), is dispositive here. In Childs, we held a municipality has "no public duty to furnish water to [a nonresident] at reasonable rates or to furnish it at all." 70 S.E. at 298. Any right a nonresident has arises only by contract. Further, a city actually has "an obligation to sell its surplus water for the sole benefit of the city at the highest price obtainable." Id. (emphasis added). We concluded the nonresident plaintiff had no basis to challenge the out-of-city rate which, in that case, was four times the in-city rate. See also Calcaterra v. City of Columbia, 315 S.C. 196, 432 S.E.2d 498 (Ct. App. 1993) (following Childs and holding higher rates for out-of-city water customers cannot be challenged under the S.C. Unfair Trade Practices Act).

Id. at 330, 555 S.E.2d at 686. Based upon Childs, the Court determined "[a]bsent a specific legislative directive, there is no reasonable rate requirement for water service to nonresidents . . . Further, under Childs, [the City of Conway's] duty to appellants arises only from contract. " Id. at 300, 555 S.E.2d at 687. Thus, the Court concluded "[b]ecause City has no duty to charge reasonable rates other than by agreement, and its rates comply with this agreement, summary judgment was properly granted." Id. at 331, 555 S.E.2d at 687.

Based on the authority cited above, we do not believe a municipality must charge residents and non-residents the same maintenance or other fee unless provided for under the contract between the non-resident customers and the municipality or some provision of local law. Furthermore, although section 5-31-1590 restricts how assessments imposed on non-residents are used, we do not find a similar provision restricting the way a municipality may use other fees imposed on non-residents. Accordingly, absent such a restriction provided for in the non-residents' contract with the municipality or by some provision of local law, we do not believe a municipality is limited as to how such funds may be expended.

Very truly yours,

Henry McMaster
Attorney General

Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General