ALAN WILSON
ATTORNEY GENERAL

August 23, 2012

Chief Wendell Davis, Director
Department of Public Safety
1320 Middleton Street
Orangeburg, South Carolina 29115

Dear Chief Davis:

You have requested an opinion of this Office concerning a proposal to "add the cost of fire service fees to the billing cycles of the existing and future customers of the [c]ity-owned Department of Public Utilities." You clarify that the city currently provides fire protection both within its boundaries and beyond. Customers within municipal boundaries "pay for fire suppression services through their city property taxes." Customers beyond the municipal boundaries pay according to their contracts with the city. Based upon these facts, you have asked the following two questions:

(1) Can a flat monthly fire service fee be added to the public utilities billing cycle?

(2) When instituting the new billing procedure, would a public hearing be necessary or could a motion to City Council with the standard approval process be sufficient?

Analysis

Section 6-1-330 of the South Carolina Code (2004 & Supp. 2011) provides the procedure for imposition of a new service or user fee within a municipality, as follows:

> (A) A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. A local governing body must provide public notice of any new service or user fee being considered and the governing body is required to hold a public hearing on any proposed new service or user fee prior to final adoption of any new service or user fee. Public comment must be received by the governing body prior to the final reading of the ordinance to adopt a new service or user fee. A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.
>
> (B) The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid. If the revenue generated by a fee is five percent or more of the imposing entity's prior fiscal year's total budget, the proceeds of the fee must

> be kept in a separate and segregated fund from the general fund of the imposing governmental entity.
>
> (C) If a governmental entity proposes to adopt a service or user fee to fund a service that was previously funded by property tax revenue, the notice required pursuant to Section 6-1-80 must include that fact in the text of the published notice.

(Emphasis added). A "positive majority" vote "means a vote for adoption by the majority of the members of the entire governing body, whether present or not." S.C. Code Ann. § 6-1-300(5) (2004). Thus, to adopt the service fee, a majority of the total membership of city council would have to vote in favor of the fee. As stated in section 6-1-330, a public hearing also is required. In addition, the notice required by section 6-1-80, concerning adoption of the municipal budget, must include the fact that the fee would be used to fund a service previously funded by property taxes.

Whether such a fee will be valid depends upon a number of fact-specific considerations. We have explained previously as follows:

> A court evaluating the validity of a particular fee will consider whether such fee is paid in exchange for a "special benefit" to the payers and whether the fee is used to fund the service for which it is imposed. *See, e.g.*, *Brown v. County of Horry*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992) ("A service charge is imposed on the theory that the portion of the community which is required to pay [the charge] receives some special benefit as a result of the improvement made with the proceeds of the charge."). If the fee is a general revenue-raising measure, as opposed to a reasonable charge for services, a court will find that it is in the nature of tax. *See id.* at 184, 417 S.E.2d at 567 ("The question of whether a particular charge is a tax depends on its real nature and not its designation.").

Letter to The Honorable Murrell Smith, Op. S.C. Att'y Gen. (Aug. 25, 2011). In this regard, a court will consider the following factors: (1) whether "the revenue generated is used to the benefit of the payers, even if the general public also benefits;" (2) whether "the revenue generated is used only for the specific improvement contemplated;" (3) whether "the revenue generated by the fee does not exceed the cost of the improvement;" and (4) whether "the fee is uniformly imposed on all the payers." *C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 237, 481 S.E.2d 437, 438 (1997). There is authority for the proposition that a flat fee will satisfy the uniformity requirement. *E.g.*, *Skyscraper Corp. v. County of Newberry*, 323 S.C. 412, 475 S.E.2d 764 (1996); *Brown*, 308 S.C. at 186, 417 S.E.2d at 568. However, in light of the fact-specific nature of the four-prong inquiry, we refer you to your city attorney for further analysis should you choose to proceed.

As to those customers beyond the municipal boundaries, section 5-7-60 (2004) provides:

> Any municipality may perform any of its functions, furnish any of its services, except services of police officers, and make charges therefor and may participate in the financing thereof in areas outside the corporate limits of such municipality by contract with any individual, corporation, state or political subdivision or agency thereof or with the United States Government or any agency thereof, subject always to the general law and Constitution of this State regarding such matters, except within a designated service

> area for all such services of another municipality or political subdivision . . . . For the purposes of this section designated service area shall mean an area in which the particular service is being provided or is budgeted or funds have been applied for as certified by the governing body thereof. *Provided*, however, the limitation as to service areas of other municipalities or political subdivisions shall not apply when permission for such municipal operations is approved by the governing body of the other municipality or political subdivision concerned.

(Emphasis added). As made clear by this provision, a municipality may impose charges for services provided outside its corporate limits by contract. Thus, whether the city may bill its fire service contract customers a flat fee on a monthly basis would depend upon the terms of the fire service contract. Likewise, whether existing utility service customers outside municipal boundaries may be required to accept fire service and pay for it by monthly fee would depend upon the terms of their utility service contracts. *Cf. Sloan v. City of Conway*, 347 S.C. 324, 555 S.E.2d 684 (2001) (where existing contracts did not impose a duty on a city to provide water service to non-residents upon demand, the city could require annexation as a condition on the provision of water service). Finally, as noted in section 5-7-60, the municipality may not infringe upon the service area of other political subdivisions without permission. Thus, if the existing fire service area is not co-extensive with the service area for other municipal utilities, the city may not unilaterally expand its fire service area simply by changing its billing procedure.

Conclusion

For customers within the municipal limits, section 6-1-330 of the South Carolina Code provides the procedure by which a service fee may be imposed. A determination as to the validity of such fee would require a fact-specific inquiry. For customers beyond the municipal limits, section 5-7-60 governs. That section authorizes service by contract. Therefore, whether a particular fee is authorized will depend upon the terms of the applicable contracts.

Very truly yours,

Dana E. Hofferber

Dana E. Hofferber
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General