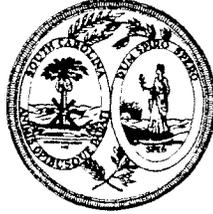


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The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLIE CONDON  
ATTORNEY GENERAL

November 20, 2000

Timothy H. Pogue, Esquire  
Marion County Attorney  
P.O. Box 790  
Marion, South Carolina 29571

**RE: Informal Opinion**

Dear Mr. Pogue:

As the Marion County Attorney, you have requested an opinion of this Office about an ordinance passed by the county concerning solid waste collection. The relevant portion of the ordinance reads:

It is the intention of the County that in addition to such other rights and remedies as may be available to the governing body in the collection of unpaid charges, so shall be available the same measures as afforded by the lien of property taxes upon real estate.

You further inform us that the county charges all property owners a fee of \$10.50 per month for the collection of solid waste. The fee is not part of any property tax bill. The county has more than \$500,000.00 in past due fees and would like to sell the property to collect the fees. Specifically the county asks if the ordinance allows the county to sell the property in the same manner as property sold for delinquent property taxes.

Your inquiry reveals the complexities of local government authority. The primary question is whether the ordinance enacted by Marion County actually allows the County to place a lien upon and sell property in the same manner as it would be sold for delinquent taxes. But a more basic issue concerns whether a county has the authority to pass such an ordinance at all. A court would address both questions if the county's actions under this ordinance were challenged.

We will begin with whether the ordinance, as worded, authorizes the county to create a lien and sell property if past due solid waste collection fees are not paid. A cardinal rule of statutory interpretation requires that when the terms of the statute are clear and unambiguous, they must be

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applied according to their literal meaning. See Green v. Zimmerman 269 S.C. 535, 238 S.E.2d 323 (1977). A court will also apply the plain language of an act in interpreting an ordinance. See Forrester v. Smith & Steele Builders, Inc. 291 S.C. 196, 352 S.E.2d 522 (1987). Thus, under the plain language of the ordinance, the county has authorized itself to take the same remedial measures as "afforded by the lien of property taxes upon real estate." Because Title 12 of the South Carolina Code of Laws provides for the sale of real property for nonpayment of ad valorem property taxes, the county is vested with the same remedy under the ordinance. As a cautionary note, if the county proceeds under this remedy, by the plain language of the ordinance all the requirements of Title 12 for the lien on property taxes must be met. Thus, the ordinance grants the county an additional remedy but also requires the county to comply with the protective measures of the Code, such as notice to creditors and property owners and their rights of redemption.

The above analysis only applies, of course, if the ordinance is valid. Frankly, however, we believe the validity of such an ordinance is questionable. The relevant portion which you have provided attempts to create a lien upon real property, which the county can then sell, as in a tax sale, to recover the delinquent solid waste collection fees. In determining the validity of an ordinance, courts will essentially employ a two part process. See Hosp. Assn. of S.C. v. County of Charleston, et al., 320 S.C. 219, 464 S.E. 2d 113 (1995). The first part asks whether the county enacting the ordinance had the power to do so. If the answer is affirmative, then the second part must ascertain whether the ordinance is inconsistent with the State's Constitution or general law. See id.

With the adoption of Article VIII of the South Carolina Constitution, the General Assembly was directed to provide, by general law, for the structure, organization, powers, duties, functions and responsibilities of local government. In addition, Art. VIII, § 17 provides:

The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

This Office has previously opined that counties possess general police power and may enact ordinances to further the public health, safety, or welfare. See Op. Atty. Gen. Feb. 3, 1987; Op. Atty. Gen. June 11, 1984. More specifically, S.C. Code Ann. § 44-55-1220 authorizes the governing body of a county "which engages in the collection and disposal of solid waste" to enact "such rules and regulations as it may deem necessary to carry out the functions authorized by this article." Finally, the South Carolina Supreme Court has noted that Section 4-9-30(5) grants counties the power to assess service charges for solid waste disposal. Skyscraper Corp. v. County of Newberry, 323 S.C. 412, 475 S.E.2d 764 (1996). Clearly, the counties are empowered to pass ordinances concerning fees for solid waste collection.

The next step in the analysis asks whether the particular ordinance is inconsistent with the

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State's Constitution or general law. It is at this step that the county's efforts to impose a lien upon real property in the same manner as a property tax lien are the most troubling.

As a general rule, "it is within the power of the legislature, subject to constitutional limitations, to provide for liens to secure the payment of debts and other obligations, and legislative authority exists to create by statute a right of lien where no such right existed at common law." 51 AM. JUR. 2D *Liens* §36 at 174 (1970). Furthermore, in a previous opinion of this Office we questioned a county's authority to impose a lien for service charges for garbage collection, citing the following:

Special assessments are generally secured by a lien on the property benefitted by the improvement by virtue of statute or municipal charter, and the constitutionality of such laws has been upheld. But the municipality as such has no lien for special assessments levied upon property within its corporate limits. Taxes are not a lien unless expressly made so by statute; and special assessments stand on the same footing. Municipal corporations have no power to create liens by ordinance or otherwise unless such power has been expressly conferred upon them.

See Op. Atty. Gen. Jan. 17, 1977 (citing 14 MCQUILLIN §38.161 at 385 (now reworded slightly and found at 470)). This authority suggests that in the absence of a statute specifically enabling counties to impose a lien for charges for the collection of solid waste, the county cannot create the lien for itself by ordinance alone.

This reasoning increases the concerns that the ordinance fails the second part of the two part test for validity; namely, it is inconsistent with the State's Constitution or general law. By placing the lien upon real property in the same manner as the lien on property taxes, the county changes its status as a creditor of the property owner. The county, by likening the lien to the property tax lien, gives itself superpriority over other creditors. State statute allows this in some instances. See, e.g., S.C. CODE ANN. § 6-11-170 (authorizing a lien for public service districts for unpaid charges); § 5-31-2040 (municipalities may enforce lien for sewer charges). It appears, however, that the General Assembly has not provided counties with similar authority in the collection of solid waste disposal fees. Thus, the creation of a lien by ordinance when not expressly authorized by the General Assembly could jeopardize the due process rights of the property owner and other creditors.

Finally, S.C. Code Ann. § 4-9-30(14) provides authority to a county:

to enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violations thereof not to exceed the penalty jurisdiction of magistrates' courts. Alleged violations of such ordinances shall be heard and disposed of in courts created by the general law including the magistrates' courts of the county. County officials are further empowered to seek and obtain compliance with ordinances and regulations

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issued pursuant thereto through injunctive relief in courts of competent jurisdiction...."

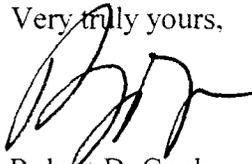
As stated, the county may not enact an ordinance in conflict with general law. The general law as set forth above provides the means and procedures the county is to follow to enforce the payment of the charge for the collection of garbage. A sale of the property in the same manner as a sale for delinquent taxes would contradict this provision.

In sum, although an ordinance is entitled to a presumption of validity, we express concern that this particular ordinance oversteps the boundaries of the county's authority. Because of the potential to displace the rights of property owners and creditors, the creation of a lien requires the approval of the General Assembly. In the instant case, a county appears to have no express authority to impose a lien for the collection of solid waste disposal fees. Indeed, the county is directed to seek remedy through the magistrates courts or seek injunctive relief in a court of competent jurisdiction. Until the courts speak further, it is the opinion of this Office that the Marion County ordinance is of questionable validity. In the exercise of caution, the county should to pursue other remedies. For example, the county could first seek a judgement against the property owner which could result in a lien upon the property. Be advised, however, that this is an undecided area of law in South Carolina. There appears to be no case law directly on point. You may wish to seek a declaratory judgement to resolve the issue with finality.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General