8005 Library

The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

October 21, 2005

The Honorable Dean Fowler, Jr.
Florence County Treasurer
108 N. Irby Street
Florence, South Carolina 29501

Dear Mr. Fowler:

By letter, you request our opinion regarding a continuing surplus in the Florence County Infrastructure Fund. In your letter, you explain that the excess funds collected are being carried over from year to year, that such carried over funds do not appear to be linked to any specific project or expenditure, and that such carried over funds, to your knowledge, are not contingent upon any project that would necessitate the carryover of funds. Furthermore, you note that, although the Council puts every request to expend funds to a full vote, nevertheless, it appears that individual Council members are able to save excess funds and expend them at a time that would greatly assist them in their bid for reelection. You also express that it is your belief that the public is being taxed inappropriately and that excess millage is being applied to the public to raise funds where funds are already available. Thus, you ask that we consider the applicability of S. C. Code Ann. Section 12-43-285 which provides as follows:

> (A) [t]he Governing body of a political subdivision on whose behalf a property tax is billed by the county auditor shall certify in writing to the county auditor that the millage rate levied is in compliance with laws limiting the millage rate imposed by the political subdivision.
>
> (B) If a millage rate is in excess of that authorized by law, the county treasurer shall either issue refunds or transfer the total amount in excess of that authorized by law, upon collection, to a separate, segregated fund, which must be credited to taxpayers in the following year as instructed by the governing body of the political subdivision on whose behalf the millage was levied. An entity submitting a millage rate in excess of that authorized by law pay the costs of implementing this subsection or a pro rata share of the costs if more than one entity submits an excessive millage rate.

Following our review, we advise that Section 12-43-285 pertains exclusively to the levying of property taxes and, therefore, most likely does not govern with respect to the county's uniform Infrastructure fee. Furthermore, we advise that while one can argue that it is imprudent to maintain a continuing surplus for a fund financed by a uniform service fee, a county council possesses broad discretion to do so. However, such discretion of county council is not unlimited. As explained more fully below, revenue generated by an assessment fee may, in certain rare instances, be deemed by a court as an illegal tax if the court concludes there is no reasonable correlation between the fee imposed upon users and the benefit derived to the property by the imposition of the fee. In other words, one challenging the user fee must show that the fee imposed greatly exceeds and is disproportionate to the costs for its imposition. Such is primarily a question of fact, and only a court may determine whether the Florence County Infrastructure Fund falls into this category, such that it is an illegal tax rather than a fee.

**Law / Analysis**

First, we address your question regarding § 12-43-285. To our knowledge, no South Carolina case has addressed this statutory provision. Thus, it is necessary to employ the ordinary rules of statutory interpretation. The cardinal principle is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan* , 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan, supra.* Words must be given their plain and ordinary meaning without resort to subtle or forced construction which limits or expands the statute's operation. *Id.* When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning. *Id.* When interpreting a statute, the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law should all be considered. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson, supra.*

When a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct.App.1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Id.* Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. *Id.*; *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894 (Ct.App.1998).

On its face, the language contained in Section 12-43-285 pertains exclusively *to property tax rates*. Indeed, Chapter 43, Title 12 appears to deal exclusively with this State's property tax assessment and rate scheduling. The canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*," which holds that "to express or include one thing implies the exclusion of another, or of the alternative," may be used if necessary as guidance in construing a statute. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E. 2d 578 (2000) citing Black's Law Dictionary 602 (7th ed. 1999). Here, there appears little doubt that use of the express statutory language relating to property taxes intends to exclude applicability of this provision to road maintenance fees. Furthermore, the term "millage" has been defined as "[a] tax rate on property, expressed in mills per dollar of value of the property", thus, providing further evidence that Section 12-43-285 was not intended to affect the actions of County Council with respect to execution of the Infrastructure Fund. *See*, http://www.dictionary.com, citing *The American Heritage Dictionary of English Language*, (4th ed., 2000). Accordingly, in our view, the provisions of Section 12-43-285, at least facially, do not pertain to the Florence County Infrastructure Fund.

Thus, we now turn to the Council's imposition of this Fund and whether maintaining a surplus would render the Road Maintenance Fee an illegal tax. Again, we are able to advise only as to the law governing this area, and note that the question is primarily one of fact.

Pursuant to § 5-7-30, municipalities are empowered to impose uniform service charges. Similarly, § 4-9-30 (5) (a) provides that a county may impose a road maintenance fee on all registered cars in the county as an authorized uniform service charge. Our Supreme Court has enunciated a test for determining whether a user fee is "uniform" as required by law. In *Brown v. County of Horry*, 388 S.C. 180, 417 S.E.2d 565 (1992) and subsequently in *C. R. Campbell Const. Co., Inc v. City of Chas.*,325 S.C. 235, 485 S.E.2d 437 (1997), the Court stated that a user fee is valid if

(1) the revenue generated is used for 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 upon all payers.

The Court did not elaborate further upon the test set forth in these cases. Specifically, the Court did not define further the requirement that "the revenue generated by the fee" must not "exceed the cost of the improvements."

We also note that in a November, 2003 opinion, we recognized that "[s]tate law requires county council as a body not individual members thereof, to determine how county funds are expended." There, we concluded that a court would likely find that, with respect to the use of

discretionary funds, decision-making power could not lie with the individual council member, but must reside with the council as a governing body. *Id.* As you have indicated in light of that opinion, the Florence County Council modified its voting procedure now to require that a vote by the Council as a whole is necessary before these funds are expended.

You have indicated that the monies collected by way of the Infrastructure Fund are not being expended in the same budgetary year. As a result, monies in this Fund are being continually rolled over, thereby creating a large surplus. Your concern is that such a surplus may render the Infrastructure Fund as an illegally imposed tax.

In the same November, 2003 Opinion, we also recognized "the broad discretion which county council possesses in the spending and appropriations of county funds." *See also, Ops. S.C. Atty. Gen.,* March 31, 1997 ["broad discretion of county councils in spending and appropriation of county funds."]; October 22, 1996 ["decision to spend money by a council involves considerable discretion"].

We elaborated upon such broad discretion in a subsequent opinion, dated November 18, 2004. There, we advised that Florence County's discretion included the power to maintain a surplus. In that Opinion, we advised that Council possessed discretion in "maintaining a surplus where funds allow" without rendering the Florence County Road Maintenance Fee unconstitutional We relied upon various cases and prior opinions in that Opinion, including the following: *V-1 Oil Company v. State Tax Commission,* 733 P.2d 729 (Idaho 1987) [a statute authorizing counties to carry forward a surplus from year to year, instead of reducing taxes is constitutional]' *Parker v. Bates* 216 S.C. 52, 56 S.E.2d 723, 726 (1949) ["(g)enerally where a surplus remains after the accomplishment of the purpose for which an appropriations is made, it may be diverted to other causes ...."]; *Cox v. Bates*, 237 S.C. 198, 116 S.E.2d 828, 835 (1960) {"it is generally the law ... that where surplus remains after payment of a appropriations, it may be appropriated to other purposes."]; *Op. S.C. Atty. Gen.,* March 18, 1978 ["(I)t is our opinion that the carrying forward of the surplus school purposes does not constitute ... impermissible diversion."]; *Op. S.C. Atty. Gen.,* June 3, 2003 [carrying forward a surplus "did not constitute ... impermissible diversion."]. Thus, we reasoned in the November 18, 2004 opinion that the Florence County Council's maintenance of a surplus was not in itself invalid.

We adhere to that opinion here. However, we note also that the cases cited in the November 18, 2004 opinion were generally decided prior to our Supreme Court's decision in *Brown v. County of Horry, supra* and *C. R. Campbell Const. Co., Inc. v. City of Chas., supra.* Moreover, none of the cases cited therein appear to have dealt with the problem have which was dealt with in *Brown and C. R. Campbell Const. Co.* – a user fee – as opposed to a tax. The *Brown* and *Campbell* cases did not find it necessary to elaborate more fully upon the test set forth therein regarding when a user fee might become, in effect, an unlawful tax. The only helpful language in these cases which is of any use here is the Court's statement that a user fee may not "exceed the cost of the improvement."

We have, however, located cases in other jurisdictions which also have addressed the issue of the validity of a user fee in the context of a continuing surplus. These cases indicate that while a public body retains discretion to maintain a surplus in a fund generated by a user fee, such body's discretion is not unlimited. In certain rare instances, an excessive surplus of user fee revenues may convert such fee into an illegal or unconstitutional tax.

For example, in *City of Wooster v. Graines*, 1989 WL 749 (Ohio App. 9 Dist.), the Court relied upon *Cincinnati v. Roettinger*, 105 Ohio St. 145 (1922) to conclude that the surplus generated by a uniform sewer fund did not amount to an illegal tax. However, the *City of Wooster* Court recognized that, at some point, an excessive surplus might render the fee illegal. *Wooster* quoted the following language from *Roettlinger*:

> [w]hile it is universally conceded that rates and charges not in excess of the amount necessary to meet such purposes are not classed as taxes, it does not follow that such excessive amount would not be classed as taxes. While it is quite well settled that charges for service and conveniences rendered and furnished by a municipality to its inhabitants are not taxes, *yet where the charge is in excess of the entire cost of the service and convenience, the reason for the rule no longer prevails.*

Likewise, the Arizona Supreme Court, in *Stewart v. Verde River Irrigation and Power Dist.*, 49 Ariz. 531, 545-546, 68 P.2d 329 (1937), amplified upon this concept of a surplus being created by an excessive user fee and thus being treated as a tax. *Stewart* stated the following:

> [w]e come then to the one question in the case which seems to be somewhat difficult of determination, and that is, whether the fee fixed by the statute is beyond the boundaries of that permissible to legislative action. In so determining, there are two factors which must be considered, (a) was the fee based upon the theory of paying the reasonable expenses to the state of furnishing the service, or was it fixed for the purpose of returning a surplus revenue to the state, and (b) if the former be true, was the scale of payment in reasonable proportion to the services rendered. To illustrate, if the expense to the state of conducting a certain department, which is maintained for the purpose of rendering services to individuals who profit directly thereby, is $50,000 a year, and the fees charged are so fixed by the Legislature that it may reasonably be anticipated that the annual returns will approximate the cost of the department, and no more, obviously the purpose of the Legislature was not to make a profit, but to pay expenses. *If, on the other hand, the probable costs of maintenance were $50,000, but the fees were such that it might reasonably be anticipated the returns would be $500,000, it is equally plain that it must be assumed the real purpose of the Legislature was revenue for the general expenses of the state, and not merely the maintenance of the department which furnishes the service.* (emphasis added).

*Mountain View Limited Partnership v. City of Clifton Forge,* 256 Va. 304, 504 S.E.2d 371 (1998) is also instructive. The question before the Virginia Supreme Court in that case was "whether a former ordinance setting rates for refuse collection constituted an impermissible tax and whether the rate classification contained in the ordinance were reasonable." There, the City maintained a surplus in the solid waste fund based upon the desire to "plan for future expenses." According to the City's independent auditor, the City held the view that if it "spent down" to zero at the end of fiscal year, it would have "'no funds with which to operate in the first month of the new fiscal year.'" 504 S.E.2d at 374.

On the other hand, the Plaintiff contended that the City's surplus "far exceeded the estimated costs" of providing the service. Plaintiff relied upon *McMahon v. City of Virginia Beach,* 221 Va. 102, 267 S.E.2d 130 (1980) and *Tidewater Assn. of Homebuilders, Inc. v. City of Va. Beach,* 241 Va. 14, 400 S.E.2d 523 (1991), arguing based thereupon that the fee imposed by the Ordinance was an impermissible tax, because the fee exceeded the actual cost of providing the service, and that there was no reasonable correlations between the benefit conferred and the burden imposed.

The Virginia Supreme Court discussed both the *McMahon* and *Tidewater* cases as follows:

> [w]e first consider the principles set forth in *McMahon* and *Tidewater*. In *McMahon*, the City of Virginia Beach had enacted an ordinance requiring landowners to connect their properties to the municipal water supply system, even if the owners did not intend to use any water from the system.... Several landowners filed a declaratory judgment suit against the City alleging, among other things, that the water connection fee was an impermissible tax. The trial court disagreed, ruling that the fee was valid.... We affirmed the trial court, holding that "because the charges imposed by the ordinance would not exceed the actual cost to the City of installing the waterlines in the streets in front of the landowners' residences, a reasonable correlation arose between the benefit conferred and the cost exacted." Thus, we concluded that the evidence refuted the landowners' contention that the ordinance was adopted solely as a revenue-generating measure....
>
> Later, in *Tidewater*, we addressed the validity of a Virginia Beach ordinance that assessed a "water resource recovery fee" on all new connections to the City's water system.... The fee was designed to finance, in part, the acquisition of water from Lake Gaston for use by the City's residents. A homebuilders' organization challenged the ordinance alleging, among other things, that the ordinance imposed a tax rather than a valid fee.... The trial court upheld the ordinance. Under the principles set forth in *McMahon*, we approved the trial court's ruling and held that under the facts presented, there was a reasonable correlation between the benefit of the service provided and the burden imposed by the fee.
>
> We did not hold in either case that a fee charged by a municipality could not exceed the projected cost of providing the service, or that a municipality may not

> maintain a surplus in anticipation of future expenses. In fact, Code § 15.2-2505 ... expressly provides that a locality may include in its budget a reasonable reserve for contingency expenditures. Under the facts presented in *McMahon* and *Tidewater*, we merely concluded that since the costs of the planned services exceeded the fees imposed for those services, there was no merit to the contention that either of the ordinances constituted an impermissible tax....
>
> In *Tidewater,* we implicitly acknowledged that a municipality may collect fees in anticipation of future expenses when we stated that the City was not only making significant expenditures presently, but would be required to make future expenditures to implement the project.... We also stated in *McMahon* that a municipality may enact ordinances in anticipation of future problems, and that there "is no requirement that protective measures be limited to actions taken after a crisis."

504 S.E.2d at 375-376. Thus, the Court in *Mountain View Ltd.* concluded that the question of whether a particular fee or charge is, in reality, a revenue-generating tax, is as follows:

> [i]n accordance with these principles, we hold that a municipal ordinance setting a fee for refuse collection and disposal is not an invalid revenue-generating device solely because the fee set by the ordinance generates a surplus. The relevant inquiry, as set forth in *McMahon* and reaffirmed in *Tidewater*, is whether there is a reasonable correlation between the benefit conferred and the cost exacted by the ordinance....

*Id.* In the Court's view, such a determination is particularly fact-specific:

> We conclude that the record contains sufficient evidence to support the finding of a reasonable correlation between the benefit conferred and the cost exacted by the 1991 Ordinance. The evidence showed that the benefit conferred by the Ordinance included the refuse collection service itself, as well as payment of projected costs relating to landfill closing regulations, greatly increased "tipping" fees, and new equipment.

*Id.*

Our Supreme Court has generally distinguished the imposition of "taxes" from assessments. In *Casey Rich. Co. Council*, 282 S.C. 387, 320 S.E.2d 443 (1984), the Court stated the following:

> [t]o be an assessment, there must be a benefit and, if not, it is a tax. Taxes are imposed on all property for the maintenance of government while assessments are placed only on the property to be benefited by the proposed improvements. *Celanese Corp. v. Strange*, 272 S.C. 399, 252 S.E.2d 137 (1979).

And, in *Brown v. County of Horry, supra*, the Court concluded that the road maintenance fee authorized by § 4-9-30(5) must meet the criteria set forth in that decision (and subsequently reaffirmed in *C.R. Campbell, supra*, as set forth above). For purposes here, the following statement from *Brown* is instructive:

> [a]lthough a service charge may possess points of similarity to a tax, it is inherently different and governed by different principles. A service charge is imposed on the theory that the portion of the community which is required to pay it receives some special benefit as a result of the improvement made with the proceeds of the charge. A charge does not become a tax merely because the general public obtains a benefit. See *Robinson v. Richland County Council, supra; Casey v. Richland County Council*, 282 S.C. 387, 320 S.E.2d 443 (1984). Appellants argue that the Ordinance is invalid because of the disparity between the people who benefit and the people who pay. In *Home Bldrs. V. Bd. of Commrs.*, 446 So.2d 140 (Fla. Dist. Ct. App. 1983), a home builders and contractors association challenged an ordinance which imposed an impact fee on any new development activity which generated road traffic to pay for road construction. The court held that any improvement of roads would in some measure benefit those who do not pay and the fee is valid as long as it does not exceed the cost of improvements and the improvements benefit the payors.

417 S.E.2d at 568.

## Conclusion

Based upon the foregoing authorities, it is clear that County Council possesses broad discretion to maintain a surplus with respect to its Road Maintenance Fee. Such authority includes the power to carry over such funds or revenues generated by the charge from year to year. As the Virginia Supreme Court stated in *Mountain View Ltd., supra*, an ordinance setting a fee "is not an invalid revenue-generating device solely because the fee set by the ordinance generates a surplus."

However, the case law, including several decisions of our own Supreme Court, also make it clear that a county council's discretion is not unlimited. In this regard, any challenge to the Council's action carries a heavy burden of proof, and it must be demonstrated in particular that "the revenue generated by the fee [exceeds] the cost of the improvement ....", *C. R. Campbell Const., Inc., supra*, or that there is, in fact, little or no "benefit" to the property for which the assessment is being charged to improve. *Casey v. Richland Co., supra.* Indeed, the courts require that it be proven that there is no "reasonable correlation between the benefit conferred and the cost exacted ...." *Mountain View Ltd., supra.* Where such proof is made, the courts will conclude that the fee is not a fee at all, but instead was imposed as a revenue-raising tax upon property. A property tax is mandated by the State Constitution to be "uniform in respect to persons and property within the jurisdiction of the body imposing such taxes." See Art. X, § 6 of the South Carolina Constitution. Thus, if the fee in question is viewed as a property tax rather than a fee, such would have to comport with Art. X, § 3, or be deemed invalid.

Judicial decisions, such as *Mountain View Ltd.*, emphasize that the inquiry as to whether a charge is an assessment or a tax is principally a factual issue. Of course, an opinion of the Attorney General cannot resolve issues of fact. *Op. Atty. Gen.*, December 12, 1983.

Accordingly, it is our opinion that a court would apply the law as set forth herein to resolve your question. Only a court could make such determination, however, as the issue would ultimately require a resolution of the facts as to whether the revenue being generated by the Road Maintenance Fee is reasonably proportionate to the need and benefit for which the Fee is imposed.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General