8/49 Library

HENRY MCMASTER
ATTORNEY GENERAL

April 21, 2006

Roy R. Hemphill, Esquire
McDonald Patrick Baggett Poston & Hemphill, L.L.P
Post Office Box 1547
Greenwood, SC 29648

Dear Mr. Hemphill:

We understand from your letter you represent the Greenwood Metropolitan District ("GMD"), a special purpose district created by the General Assembly in 1959 to establish a unified sewer system in Greenwood County. Furthermore, you state: "GMD was further empowered with the right to establish rates for the services it provides. You also provided the following information:

> In issuing construction permits, SC DHEC has recently begun to require individual grinder pump systems be maintained and operated by a public entity. A grinder pump system is typically located in a likeside homeowner's backyard and collects sewerage from the house and pumps it to the development's collection system. SC DHEC's rationale is to have a reliable entity maintaining these pumps in the future to guard against their failure and spillage into the lake.
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> GMD has decided to undertake this service and charge an additional monthly charge upon the individual users of these grinder pumps. The charge will be in addition to the monthly sewer charge which is based upon water consumption.
>
> GMD was recently able to facilitate gaining a Community Development Block Grant for the construction of sewer lateral lines in an existing development on Lake Greenwood with households of low to moderate income levels . . . The Greenwood Metropolitan Commission, GMD's governing body, is concerned that the monthly grinder pump charge, in addition to the monthly sewer charged based upon usage will be too costly for residents in this "grant area" and they will either elect not to tap into the new collection system or will discontinue the service due to it being unaffordable. As such, the

Request Letter

> Commission would like to create a process whereby these users can apply for and receive a waiver of this grinder pump maintenance charge, upon showing they have low to moderate household income, pursuant to guidelines established by the US Department of Commerce. The Commission's rationale is that these households need to be encouraged to tap the system because they currently are on old septic tanks on the shores of Lake Greenwood.

Thus, on behalf of the Commission, you request an opinion of this Office as to "whether this proposed waiver to the monthly charge for all future grinder pump users comports with the Equal Protection Clauses of the US and South Carolina Constitutions, and is otherwise legal."[1]

After review of GMD's enabling legislation and the general law applicable to GMD, we find without addressing the constitutional question raised in your letter, the Commission lacks authority to waive the monthly grinder pump charges. Thus, if the Commission desires the authority to waive charges, it must gain such authority through the enactment of general law.

Law/Analysis

Based on our review of pertinent legal authority, without reaching the issue of the constitutionality of the Commission's actions, we find the Commission lacks authority to waive service charges for grinder pump use. Our Supreme Court, as well as this Office, on numerous occasions determined administrative agencies, as creatures of statute, have no common law or inherent powers, thus, they only have such powers that are conferred to them expressly or impliedly by statute. See e.g., Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged."). Furthermore, in an opinion of this Office dated May 21, 1990, we recognized a water and sewer authority as an administrative agency and thus, subject to this principle. Op. S.C. Atty. Gen., May 21, 1990 ("The Authority, as an administrative agency and political subdivision and as a creature of statute, has no common-law or inherent jurisdiction or powers; therefore, the Authority would have only such powers as have been granted to or conferred upon it by statute, expressly or by implication."); Op. S.C. Atty. Gen., June 21, 2005.

A prior opinion of this Office, dated April 28, 1989, addressed, among other issues, whether a fee imposed by statute on cable television companies for use of right-of-ways owned by the State may be excused by the Department of Transportation. In addressing this issue, we stated:

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[1]Note: In this opinion, we solely address the issue of whether the Commission may waive monthly grinder pump charges. We do not analyze or opine on whether the GMD has the authority to undertake the maintenance of the pumps or its authority to charge a fee for this service.

"Typically, administrative officers or departments are not authorized to excuse or waive the payment of taxes or fees due and owing in the absence of express statutory authority or in the absence of common law powers as the chief legal officer of the state." Op. S.C. Atty. Gen, April 28, 1989 (citing 84 C.J.S. Taxation § 630).

As you mentioned in your letter, the Legislature created GMD in 1959 with its passage of Act No. 441. This act also established the Commission and provided a list of powers held by the Commission. 1959 S.C. Acts 978. The initial legislation did not provide for sewer service charges either generally or as part of the Commission's powers. In 1961, the Legislature amended GMD's enabling legislation. 1961 S.C. Acts 1172. Included in these amendments, the Legislature added a provision allowing the Commission to "promulgate and impose sewer service charges for the use of the facilities of the district in such amounts as they deem proper. The charges or rates may be established and altered from time to time by giving notice of thirty days in a newspaper published in Greenwood County." Id. Furthermore, the act charges the Commission, and by a subsequent amendment its agent, with the collecting the service charge. Id.; 1966 S.C. Acts 3317.

The South Carolina Code also provides general law applicable to special purpose or service districts. Section 6-11-140 of the South Carolina Code (2004), dealing with establishment of rates, applies to all special purpose or service districts. This section provides:

> The board of commissioners of any such electric light, water supply, fire protection and sewerage district shall establish and maintain just and equitable rates, rentals or charges for the use of and the service rendered by such works, to be paid by the owner of each and every lot, parcel of real estate or building that is connected with and uses such works by or through any part of the electric light system, water supply system, fire protection system and sewerage system or that in any way is served by such works and may change or adjust such rates or charges from time to time.

Also contained in the provisions pertaining to special purpose or services districts under title 6, article 7 of chapter 11 of the South Carolina Code are additional powers afforded to special purpose or public service districts involved in sewage collection. Section 6-11-1230 sets forth powers held by all commissions including the power "[t]o place into effect and revise whenever it so wishes or may be required a schedule of sewer service and sewer connection charges for the use of and connection to any sewage disposal system which it may operate." S.C. Code Ann. § 6-11-1230(1) (2004).

Based on GMD's enabling legislation and the general law applicable to GMD, clearly the Commission has the authority to impose sewer service charges. However, we find no indication, either express or implied, indicating the Legislature intended the Commission to have the authority to waive such charges based on the user's income.

In our analysis of the Commission's authority, although we found no South Carolina cases directly on point, we discovered several other jurisdictions that considered this issue. In Arkansas Gas Consumers, Inc. v. Arkansas Public Service Commission, 118 S.W.3d 109 (Ark. 2003), the Arkansas Supreme Court determined the Public Service Commission lacked the statutory authority to establish a policy allowing previously disconnected gas low-income customers to reconnect without paying a reconnection fee and payment of those customer's past due debts and future charges. The Court found the Public Service Commission to be a "creature of the General Assembly with its power and authority limited to that which the legislature confers upon it." Id. at 117. The Public Service Commission argued it had authority to establish the policy based on its general rate-making authority and its "power to set standards and regulate utilities" provided to it under the Arkansas Public Utility Code. Id. However, the Court disagreed and found the Public Service Commission void of statutory authority to implement the program. Id.

In Mountain States Legal Foundation v. New Mexico State Corp. Commission, 687 P.2d 92 (N.M. 1984), the New Mexico Supreme Court addressed an issue similar to that in Arkansas Gas Consumers, Inc. This case dealt with the State Corporate Commission's exemption of certain individuals participating in public assistance programs from telephone rate increases. Id. In finding the Commission did not have authority to establish a telephone discount rate program, the New Mexico Supreme Court stated:

> Although the Commission has been granted broad rate making powers by the New Mexico Constitution, the power to effect social policy through preferential rate making is not permitted. To find otherwise would empower the Commission to create a special rate for any group it determined to be deserving. The Commission lacks the authority to effect social programs through its rate making process. Establishing social programs to aid the elderly and indigent or any other segment of our society is the proper function of the Legislature. We therefore hold that the provisions of the rate orders in Docket No. 1002 and No. 1032 providing for the telephone discount rate program are invalid.

Id. at 94 (citations omitted).

Furthermore, we found several state attorney general's opinions concluding statutory authority as a prerequisite to offering a reduced utility rate to a class of individuals. An opinion issued by the Colorado Attorney General on September 20, 1991, addressed whether a sanitation district had the authority to waive tap fees for developers of low-income housing. Op. Colo. Atty. Gen., September 20, 1991. The opinion noted, "districts may charge differential rates and fees only when different services or facilities are provided. Conversely, the legislature has not granted authority to the districts to waive fees for the same services or facilities based upon the type of housing to be served." Id. Accordingly, the Colorado Attorney General took the position that

"[s]pecial districts may not waive fees or charges for services and facilities provided to developers of low-income housing." Id. Other attorney generals have come to similar conclusions when faced with issues of whether utilities may waive or offer reduced rates certain types of users. See Op. Mich. Atty. Gen., June 28, 1979 (finding legislative authority is required to initiate a rate classification based on age and the ability to pay for utilities); Op. Tenn. Atty. Gen., September 8, 1997 (finding municipal codes authorizing discounted water and sewer rates to charities are invalid due to lack of statutory authority to enact such codes); Op. Wash. Atty. Gen., December 31, 1980 (finding county transportation authority lacked the statutory authority to reduce of waive fares for elderly, students, and low-income individuals).

Based on our review of GMD's enabling legislation, the amendments thereto, and the general law of the State, we find the Commission lacks the required statutory authority to waive payment of grinder pump maintenance charges. Thus, in order for GMD to waive such fees for low-income households, it must seek legislative action by the General Assembly, in particular a general law affording sewerage districts' commissions the authority to waive charges.[2]

Very truly yours,

Cydney M. Milling

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General

[2]All legislation affecting special purpose districts enacted subsequent to the ratification of article VIII of the South Carolina Constitution, prohibiting the enactment of laws for specific counties or municipalities, must be in the form of general law. See Hamm v. Cromer, 305 S.C. 305, 408 S.E.2d 227 (1991).