



HENRY McMASTER  
ATTORNEY GENERAL

August 24, 2006

The Honorable Dean Fowler, Jr.  
Florence County Treasurer  
180 N. Irby Street  
Florence, South Carolina 25901-3456

Dear Mr. Fowler:

We issue this opinion in response to your request for an opinion concerning road maintenance fees imposed by the Florence County Council ("County Council"). You convey your request is on behalf of a citizen group concerned with "the fact that the money raised, supposedly, for the purpose of maintaining roads in the County, but it appears that only a small percentage of the money is actually earmarked for the state purposed of 'road maintenance.'" In addition, you enclosed a letter you received from Licia Stone of the Florence County Citizens in Action association. You state: "Her request is concerning the legality of establishing a fee for a purpose and then siphoning off money for other unrelated purposes." You also included copies of the ordinance establishing the guidelines for the collection and use of the road maintenance fee enacted in 1992 and a subsequent ordinance amending this ordinance. Based on our assessment below, we believe County Council has authority to impose a road maintenance fee. Furthermore, although the determination of whether the road maintenance fee is valid is a factual determination best left to the courts, we believe a court would find this fee valid.

#### Law/Analysis

Article VIII, section 7 of the South Carolina Constitution instructs: "The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties . . ." Through its enactment of section 4-9-30 of the South Carolina Code (1986 & Supp. 2005), the Legislature designated the powers afforded to county governments. These powers include the power "to assess property and levy ad valorem property taxes and uniform service charges, . . . and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works . . ." S.C. Code Ann. § 4-9-30(5)(a) (1986).

Our Supreme Court, in Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992), addressed the validity of a road maintenance fee imposed by a county. In the Court's opinion, it

*Request Letter*

found the county had authority to impose such a fee pursuant to section 4-9-30. Id. The Court explained:

Without ambiguity and by its express terms, this section provides counties with additional and supplemental methods for funding improvements. This is consistent with the intention of the drafters of the Home Rule Act to provide county government with the option of imposing service charges or user fees upon those who use county services in order to reduce the tax burden which otherwise would have to be borne by taxpayers generally.

Id. at 183, 417 S.E.2d at 567. Furthermore, the Court determined: "Under Home Rule, a county can impose a service charge, as in the situation here, where it is a fair and reasonable alternative to increasing the general county property tax and is imposed upon those for whom the service is primarily provided." Id. at 184, 417 S.E.2d at 567. The Court also addressed whether the road maintenance fee was a tax as opposed to a permissible service charge. Id. The Court set forth the criteria finding the fee valid.

Although 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 Comm'rs., 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 the improvements and the improvements benefit the payors.

Courts have also looked at the objective in imposing the fee. In Craig, supra, the Missouri Supreme Court considered whether the revenues generated by the fees were to be paid into the general fund of the government to defray customary governmental expenditures. In Emerson, supra, the Massachusetts Supreme Court held that when the revenue from fees is destined for the general fund this indicates

Mr. Fowler  
Page 3  
August 24, 2006

that the fee is a tax. The Horry County ordinance provides that the fees are to go into the general fund but that they are to be specifically used for the maintenance and improvement of county roads. Therefore, because the money collected is specifically allocated for road maintenance, we hold that the fee is service charge.

Id. at 185, 417 S.E.2d at 568.

In C.R. Campbell Construction Co. v. City of Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997), the Court addressed the similar issue of the validity of a real estate transfer fee imposed by a municipal ordinance. Citing to Brown, the Court set forth a test for the validity of a uniform service charge.

[A] fee is valid as a uniform service charge if (1) the revenue generated is used to the benefit of 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 on all the payers.

Id. at 235, 481 S.E.2d at 438.

The original ordinance establishing the guidelines for use of revenue produced by the "Road System Maintenance Fee," states in its description: "The proceeds including the accrued interest, will be maintained as a separate account. The proceeds and interest will be used specifically for the maintenance and improvement of the public road system and the drainage system for the same location in Florence County." Furthermore, that ordinance provides: "The road system maintenance fee can be used only on the roads, bridges, and supporting drainage systems that are part of the Florence County road system."

According to the amending ordinance, prior to this amendment, "the proceeds of the road system maintenance fee shall be deposited in the general fund of Florence County, with not less than 30% of such proceeds to be used exclusively to defray the cost of re-paving and rocking publicly owned streets and roads situated in the County, with the remainder to be used for the maintenance and improvement of County roads, bridges, and appurtenant ditches and drainage systems." The amendments to the ordinance state as follows:

1. The fee Ordinance is amended as follows:

(A) Section 11-171(b) is deleted in its entirety and replaced with the following provision:

Mr. Fowler  
Page 4  
August 24, 2006

The proceeds of the road system maintenance fee collection shall be deposited in the general fund of Florence County, not less than fourteen percent (14%) of such proceeds shall be used exclusively to defray the costs fo re-paving and rocking publicly owned streets and roads situated in Florence County, and the balance of such proceeds shall be used for the maintenance and improvement of roads, bridges, and appurtenant ditches and drainage systems in Florence County.

Clearly, based on section 4-9-30 and Brown, County Council has authority to impose a road maintenance fee. However, whether or not the road maintenance fee imposed by County Council is a valid uniform service charge involves a question of fact. As we stated on numerous occasions, only a court, not this Office, may serve as a finder of fact and conclusively determine the outcome of a factual issue. Op. S.C. Atty. Gen., April 29, 2004. However, based on our general review of a current version of the ordinance, we believe a court would find it valid.

In regard to the first factor a court would consider, the ordinance provides the owners of licensed motorized vehicles in Florence County are to pay the fee. Presumably, the owners of these vehicles benefit from the County's maintenance of county streets, roads, bridges and their associated drainage systems. Thus, we believe a court could find the revenue generated by the fee benefits the payers of the fee.

Skipping the second requirement for now, we address the third requirement that the revenue from the fee not exceed the cost of the improvement. We are not aware of whether or not the revenue generated by the fee will exceed the cost of the road maintenance expenses. Thus, a court should investigate this factor in making its determination. However, for purposes of this analysis we will presume the fee meets this requirement and will move on to the other factors.

Next, we consider the uniformity requirement. The ordinance imposes a flat fee of \$30.00 per year per vehicle on all vehicles licensed in Florence County. Therefore, we assume a court would find the fee is uniformly imposed on all the payers.

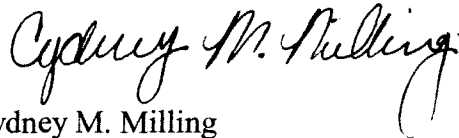
Finally, we address what we gather is your and the Florence County Citizens in Action's primary concern, that the revenues generated be "used only for the specific improvement contemplated." While the ordinance allocates the road maintenance fee revenue between "re-paving and rocking publicly owned streets and roads" and "maintenance and improvement of roads, bridges, and appurtenant ditches and drainage systems," we believe all of the improvements are related to the purpose of road maintenance for which the fee is assessed. However, this determination is especially factual in nature as a determination of whether maintenance of bridges and drainage systems are contemplated by a road maintenance fee. Although we believe such expenditures are contemplated, only a court may make the ultimate determination.

Mr. Fowler  
Page 5  
August 24, 2006

### Conclusion

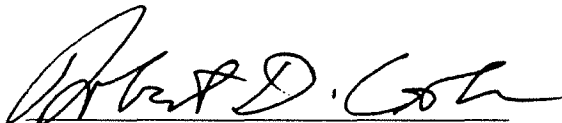
Clearly, County Council has authority pursuant to section 4-9-30 to impose a road maintenance fee. However, while it appears the road maintenance fee imposed by County Council is a valid uniform service charge rather than an illegal tax, we must defer to the courts for final determination of this issue. Furthermore, this issue along with your previous opinion request expressing your concern that the revenue generated by the road maintenance fee is disproportionate to the need or benefit for which the fees is being imposed, indicate your general concern over the imposition of these fees. Op. S.C. Atty. Gen., October 21, 2005. While we appreciate your concern regarding these matters, as we concluded in this and our prior opinion, the ultimate determination of these issues must be left to a court. Therefore, given your concern and our inability to make a conclusive determination of the factual matters surrounding these issues, we suggest you seek final resolution from the courts, possibly through a declaratory judgment action.

Very truly yours,



Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General