February 16, 2007

The Honorable Bill Cotty
Member, House of Representatives
8807 Two Notch Road
Columbia, South Carolina 29223

The Honorable Jimmy Bales
Member, House of Representatives
1515 Crossing Creek Road
Eastover, South Carolina 29044

Dear Representatives Cotty and Bales:

We received your letter requesting an opinion of this Office as to the validity of Richland County Ordinance No. 091-06HR (the "Ordinance"). According to your letter, the Ordinance increases Richland County's road maintenance fee from $20.00 to $44.00 for commercial vehicles, with a portion of the revenue designated for funding mass transit in Richland County. You included a copy of the Ordinance with your request. In relation to the Ordinance, you ask: "Does funding of mass transit in Richland County by revenue derived from a road maintenance fee . . . on certain vehicles of taxpayers of Richland County, benefit those persons paying the fee as envisioned in Section 6-1-330?" In addition, you ask: "Is the ordinance invalid because the funding derived from it more accurately benefits those persons who do not own vehicles and, therefore, do not pay the fees?"

Law/Analysis

In your letter, you voice concern as to whether the Ordinance is valid under provisions contained in article 3 of chapter 1 of title 6 of the South Carolina Code dealing with the authority of local governments to assess fees and taxes. Specifically, you reference section 6-1-330 of the South Carolina Code (2004), which provides 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 A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.
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> (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.
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> (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.

You also alerted us to the portion of article 3 that defines "service or user fee" as

> a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee. "Service or user fee" also includes "uniform service charges".

S.C. Code Ann. § 6-1-300(6) (2004). You indicated your concern as to whether the road maintenance fee imposed under the Ordinance qualifies as a service or user fee under section 6-1-300(6) and thereby, may be imposed under section 6-1-330.

While the first sentence of subsection (A) of section 6-1-330 appears to grant local governing bodies, which according to section 6-1-300(3) includes counties, the authority to impose service and user fees, through our research, we are of the opinion that counties possessed such authority prior to the enactment of section 6-1-330 in 1997. In Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992), the Supreme Court found a county's authority to impose service charges arises from section 4-9-30 of the South Carolina Code (1986 & Supp. 2005). Under this portion of the Code, the Legislature gives counties the authority "to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and

operations of the county, including, but not limited to, . . . transportation . . . ." S.C. Code Ann. § 4-9-30(5)(a). The Court interpreted this provision as follows:

> 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.

In reading section 6-1-330 in conjunction with the authority previously given to counties in section 4-9-30, we believe with respect to section 6-1-330, the Legislature intended to prescribe a particular methodology by which a county may impose a service or user fee, rather than giving counties the authority they already possessed under section 4-9-30. Thus, we find it more appropriate to determine whether Richland County (the "County"), under the circumstances presented in your letter, has authority per section 4-9-30 to impose a road maintenance fee. In light of the Supreme Court's decision in Brown, we are of the opinion that the County has that authority. But, in finding the County has the requisite authority to impose a fee, such does not render this particular fee valid.

Our courts have developed a four-part test to determine whether or not a proposed fee is a valid 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.

C.R. Campbell Constr. Co. v. City of Charleston, 325 S.C. 235, 237, 481 S.E.2d 437, 438 (1997) (citing Brown, 308 S.C. at 180, 417 S.E.2d at 565). If the proposed fee does not meet the above criteria, a court would likely find the fee is a tax rather than a uniform service charge.

In Brown, the Supreme Court considered whether a road maintenance fee imposed on all motorized vehicles by Horry County was a valid uniform service charge. Brown, 308 S.C. at 180, 417 S.E.2d at 565. The Court commented: "The question of whether a particular charge is a tax depends on its real nature and not its designation." Id. at 184, 417 S.E.2d at 567. The appellants argued the ordinance imposing the road maintenance fee is invalid because there is a disparity

between those who pay the fee and those who benefit from the fee. Citing to cases in other jurisdictions, the Court responded "any improvement to the 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." Id. at 185, 417 S.E.2d at 568. Furthermore, the Court found "the money collected is specifically allocated for road maintenance." Id. Based on these findings, the Court determined the road maintenance fee was a valid uniform service charge. Id.

In C.R. Campbell Construction Co., 325 S.C. at 235, 481 S.E.2d at 437, the Court considered a municipal ordinance imposing a transfer fee on the conveyance of real property. Id. The Court concluded:

> In this case, it is undisputed the transfer fee is used only for parks and recreational facilities, the payers benefit because their real property values are enhanced, the transfer fee does not generate more revenue than that spent on such facilities, and all payers pay a uniform percentage of the sale price of property conveyed. According to the facts in the record, the transfer fee is a uniform service charge and therefore valid under Brown.

Id. at 237, 481 S.E.2d at 438.

The Supreme Court in J.K. Construction, Inc. v. Western Carolina Regional Sewer, 336 S.C. 162, 519 S.E.2d 561 (1999) considered a new account fee charged by a regional sewer authority to all new and upgrading customers to pay for future capital improvement projects. The Court employed the four-part test cited above to determine whether the new account fee was a valid service charge. Id. Considering whether the payment of the service charge primarily benefitted those paying it, the Court noted: "It is true that the entire area may benefit from improved and expanded sewage service, but a charge does not become a tax merely because the general public obtains some benefit." Id. at 167, 519 S.E.2d at 564. The Court also discerned the payments were solely dedicated to capital improvement projects, noting they would not be placed in a general fund. Id. at 168, 519 S.E.2d at 564. In addition, the Court found the revenue generated from the fee would not exceed the costs of the capital improvements and the sewer authority uniformly imposed the fee on all new customers. Id. Furthermore, the Court gave credence to the sewer authority's intent to classify the fee as a charge. Accordingly, the Court upheld the sewer authority's imposition of the charge. Id.

The Supreme Court found an assessment imposed by ordinance to be a tax rather than a fee in Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). In its opinion, the Court considered a county ordinance establishing sewer service for unincorporated areas of Richland County not previously receiving service. Id. at 389, 320 S.E.2d at 444. To fund the additional service, the ordinance included provisions imposing an assessment on all unincorporated areas of the county. Id. The Court stated: "To be an assessment, there must be a benefit and, if none, 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." Id. The Court acknowledged by providing sewer service to the unincorporated area, property values would be enhanced, but disagreed with the assertion that such a benefit is sufficient to make the surcharge imposed an assessment rather than a tax. Id. at 390, 320 S.E.2d at 444.

> To be an assessment, the improvement must confer a benefit on property distinguishable from the general benefit enjoyed by surrounding areas. The benefit of improved sanitary conditions would inure to all 269,735 residents of Richland County, including 101,208 residents of the City of Columbia, 42,642 people in East Richland as well as those in the unincorporated area who have private wells and septic tanks, none of whom are required to pay the surcharge. We hold the asserted benefit is general in nature and cannot be labeled an assessment.

Id.

With regard to the Ordinance, we begin our analysis with the presumption that "an ordinance . . . is presumed to be both reasonable and otherwise valid, and not to be struck down unless 'palpably arbitrary, capricious or unreasonable . . . .'" U.S. Fid. & Guar. Co. v. City of Newberry, 257 S.C. 433, 186 S.E.2d 239 (1972) (quoting Colonial Life & Accident Ins. Co. v. South Carolina Tax Comm'n, 233 S.C. 129, ___, 103 S.E.2d 908, 917 (1958)). Furthermore, only a court, not this Office, has the power to declare an ordinance invalid. Op. S.C. Atty. Gen., January 29, 1997. Therefore, despite our findings in this opinion as to the validity of Ordinance No. 091-06HR, it remains in full force and effect until a court rules otherwise.

Employing the four-part test used by the Supreme Court in the cases cited above, we consider whether the Ordinance meets the necessary requirements to render it a valid service charge. Addressing the first prong last, we begin our analysis by considering whether the revenue generated from the road maintenance fee will only be used for the improvement contemplated. The Ordinance states as follows:

> The fiscal year 2006-2007 Road Maintenance Budget is hereby amended to include an increase of $24 to the road maintenance fee for commercial vehicles and an increase of $16 to the road maintenance fee for private vehicles that will be added to the current $20 road maintenance fee, and the amount of Two Million Eight Hundred Thousand Dollars ($2,800,000.00) be appropriated for mass transit. The proceeds will go into the Road Maintenance Fund and will be designated to fund mass transit in Richland County.

> Section 22a. Richland County hereby enacts the implementation of a $24 increase in the road maintenance fee for commercial vehicles and $16 increase in the road maintenance fee for private vehicles to be collected by the Treasurer. The goal of collecting this revenue in fiscal year 2006-2007 will be to offset the cost of providing mass transit in the County.

Thus, the Ordinance specifies the increase in the previously established road maintenance fee is to fund mass transit. Presuming the funds are used for the stated purpose of funding mass transit, the second prong is satisfied.

The next prong requires consideration of whether the revenue generated by the fee exceeds the cost of the proposed improvement. The Ordinance states County Council will appropriate $2,800,000 to mass transit, but we are not aware as to whether the revenue generated by the County from the increase in the road maintenance fee will exceed this amount. Thus, we cannot determine whether under these circumstances the road maintenance fee satisfies the third prong.

With regard to uniformity, the Ordinance specifies the additional amount to be paid by commercial users is $24, while the additional amount to be paid by private users is $16. Thus, we believe the Ordinance imposes a uniform fee on all vehicles depending upon their use.

Finally, we address the first prong requiring a benefit to the payers, which we believe is the crux of your concern. In examining this prong, our courts require the benefit to the payer to be distinguishable from the benefit received by the general public. Robinson v. Richland County Council, 293 S.C. 27, 33, 358 S.E.2d 392, 396 (1987). However, our courts also recognize that because the public benefits along with the payer, such does not make the fee a tax. J.K. Const., Inc. v. Western Carolina Reg'l Sewer Auth., 336 S.C. 162, 167, 519 S.E.2d 561, 564 (1999).

In your letter, you comment that the fee benefits those who do not own vehicles, but is paid by vehicle owners. Thus, you question whether a specific benefit is receive by the payers. The recitals to the ordinance are as follows:

> WHEREAS, mass transit in Richland County provides people with mobility and access to employment, community resources, medical care, and recreational opportunities, and helps build economically thriving communities; and
>
> WHEREAS, a viable mass transit system reduces the number of vehicles on the County road system, thereby reducing vehicle congestion and the daily wear and tear on the roads; and

> WHEREAS, according to the American Public Transportation Association, an average of 78% of mass transit users are either going to work, school, or shopping, thus greatly benefiting the County economy; and
>
> WHEREAS, due to the significant impact of mass transit on the commercial economy, County Council finds that commercial users of County roads enjoy a greater benefit from thriving mass transit than private users, and therefore, intends to impose a $44 road maintenance fee on commercial vehicles and a $36 road maintenance fee on private vehicles . . . .

Certainly, the Ordinance itself expresses the benefit received by the public as a result of an increase in the road maintenance fee to fund mass transit. But, it does not state a specific benefit received by the payers of the fee. You raise an important observation that it would appear those directly benefitting from the fee are those riding the bus, who may not own vehicles and therefore, do not pay the fee. However, in stating that commercial users receive a greater benefit than the private users, the Ordinance indicates both commercial and private users of county roads receive some special benefit. Furthermore, one could argue reducing the number of vehicles on the County's road system and thereby reducing congestion and wear and tear on the roads, benefits vehicle owners. Nonetheless, presuming the Ordinance expressed the special benefit received by the payers of the road maintenance fee, the determination as to whether such a benefit is sufficient under the four-prong analysis established by the courts involves a determination of fact. As stated in numerous prior opinions, only a court, not this Office, may resolve questions of fact. Op. S.C. Atty. Gen., September 14, 2006. Therefore, assuming we were aware of the proposed benefit to the payers of the road maintenance fees supporting the Ordinance, we do not have the capacity to determine whether these payers actually benefit from the fees.

While the Ordinance provides some indication as to whether the four requirements for a valid service charge are satisfied, due to the factual determinations, we are unable to conclude whether the Ordinance satisfies the requirements of a valid uniform service charge. Furthermore, as we previously stated, any determination as to the validity of the Ordinance must be made by a court. However, we note that should a court find the ordinance fails to satisfy one or more of the requirements, we believe the court would hold the increase in the road maintenance fee to be a tax.

If a court were to find the Ordinance imposes a tax rather than a uniform service charge, we find it pertinent to note that the County must comply with provisions of the Regional Transportation Authority Law (the "RTAL"). As we noted in our October 16, 2006 opinion addressed to Representative Bales, under the RTAL, when a new source of revenue, such as a new tax, is to be used to fund a regional transportation authority, the municipalities and counties within the authority's service area must amend their agreement to provide for the new source of revenue. In addition,

section 58-25-60 of the South Carolina Code (Supp. 2005), contained in the RTAL, states: "Property tax revenue must not be used to support operation of the authority unless the authority has been approved by referendum pursuant to Section 58-25-30." Per section 58-25-30 of the South Carolina Code (Supp. 2005), the referendum must encompass all electors in the service area. Therefore, should a court determine the road maintenance fee is a tax, we alert you that in addition to amending the agreement to account for the new source of funds, section 58-25-60 requires a referendum.

Conclusion

Based on our analysis above, we believe a county has the authority to impose a uniform service charge, such as the road maintenance fee imposed by the County. However, the determination of whether the road maintenance fee is valid appears to depend upon important questions of fact, which a court must decide based on the four-prong test as set forth in several opinions of our Supreme Court. Nonetheless, if a court were to rule the increase in the road maintenance fee by the County does not meet the requirements for a valid uniform service charge, the court would find such a fee to be a tax requiring a referendum under the RTAL. Because only a court may determine the facts surrounding your concern, in order to ultimately resolve your concerns, a declaratory judgment action must be brought before a court of competent jurisdiction.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General