



ALAN WILSON
ATTORNEY GENERAL

February 18, 2011

The Honorable Dean Fowler, Jr.
Treasurer, Florence County
180 North Irby Street MSC-Z
Florence, South Carolina 29501

Dear Mr. Fowler,

We received your letter requesting an opinion of this Office concerning the road maintenance fee (the "Fee") adopted by Florence County. You explain the situation as follows:

The fee originally was kept in a separate fund balance for road maintenance, however in the past several years the County Administrator has eliminated the fund and is now using the fund to cover the cost of operating the Public Works Department. The use of the funds to cover the cost of a budgetary item appears to make the fee a tax. The use of the fee as a tax would seem to be a misuse of the funds being collected for road maintenance. Public Works does road maintenance as a part of the function of the Department, however for the entire budget of a County Department to be funded from a fee would seem inappropriate. I would appreciate your looking into the matter and rendering an opinion regarding the use of a fee to cover a tax to the public.

Law/Analysis

With your letter, you included copies of the ordinances establishing the Fee. The initial ordinance adopting the Fee states that it "was established to help in providing funds to maintain public roads, bridges, and the supporting drainage systems in Florence County." Florence County, S.C., Ordinance No. 21-91/92 (1992). The ordinance establishes a \$15 per vehicle fee and states that 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 systems for the same located in Florence County." *Id.* Furthermore, the ordinance specifies: "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." *Id.*

As you indicated in your letter, Florence County Council (the "County Council") amended the ordinance adopting the Fee in 1994. Florence County, S.C., Ordinance No. 29

93/94 (1994). The amended ordinance calls for the proceeds of the Fee to be deposited in the general fund and requires thirty percent of the Fee be used for resurfacing of public roads.

The proceeds of the Road System Maintenance Fee collections shall be deposited in the general fund of Florence County not less than thirty percent (30%) of the funds shall be used exclusively to defray the costs of repaving publicly-owned streets and roads situated in the county, and the balance of the funds shall be used for maintaining and improving county roads, bridges, and their ditches and drainage systems.

Id. County Council later amended this ordinance to include rocking along with repaving. Florence County, S.C., Ordinance No. 22-98/99 (1999).

In 2003, County Council amended the ordinance once again. Florence County, S.C., Ordinance No. 19-02/03 (2003). This amendment increased the Fee to \$30 per vehicle per year and decreased the percentage that must be used for repaving and rocking to fourteen percent. Id. The amended ordinance reads as follows:

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 of 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 improvements of roads, bridges, and appurtenant ditches and drainage systems in Florence County.

Id.

In 2006, this Office issued an opinion concerning Florence County's (the "County's") Road Maintenance Fee. Op. S.C. Atty. Gen., August 24, 2006. In that opinion, we found County Council has the authority pursuant to section 4-9-30(5)(a) of the South Carolina Code to impose a road maintenance fee. Id. We could not specifically opine as to whether the Fee is a valid uniform service charge because this is question of fact that may only be resolved by a court. Id. But, we considered the factors our Supreme Court presented in C.R. Campbell Construction Co. v. City of Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997) to determine if the Fee is valid. Id. We stated

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.

Id. We determined that a court could find the revenue generated by the Fee benefits the payers, we presumed that the revenue would not exceed the cost of the road maintenance expenses, and we noted that a court could find that the Fee is uniformly imposed. Id. Moreover, we concluded that a court would likely find that the improvements were related to the Fee. Id. Nonetheless, we stated “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.” Id.

In your letter, you again question the validity of the Fee because the proceeds of the Fee are being used to fund the operations of the Public Works Department. You believe this use of the Fee changes it from a fee to a tax. As we stated in our previous opinion, the determination as to whether the fee is in fact a tax involves a factual determination, which can only be resolved by a court. Op. S.C. Atty. Gen., August 24, 2006. Therefore, we again cannot make the determination as to whether the Fee is a tax. Nonetheless, we advise that a court would likely follow the test set forth in C.R. Campbell Construction Co. to make this determination.

As explained in our 2006 opinion, this test specifically requires revenue from the Fee be used only for the improvements contemplated. According to the latest version of the ordinance governing the Fee, cited above, at least fourteen percent of the Fee’s proceeds must be used for repaving and rocking streets and roads in the County. Florence County, S.C., Ordinance No. 19-02/03 (2003). Additionally, the remainder of the proceeds must be used for “the maintenance and improvements of roads, bridges, and appurtenant ditches and drainage systems in Florence County.” Id. Thus, the ordinance appears to meet the requirement that the revenue be used only for the improvement contemplated.

However, you indicate the County is using the proceeds from the Fee to pay for items outside of the improvements contemplated. Specifically, you provided us with a copy of a portion of the County’s budget representing that the proceeds from the Fee are being used to fund the operations of the Department of Public Works (the “Department”). You state that the Department is responsible for road maintenance. Additionally, the budget includes line items for repaving costs, equipment costs, materials costs, wages, and other expenses that we believe a court would view as direct costs for road maintenance.

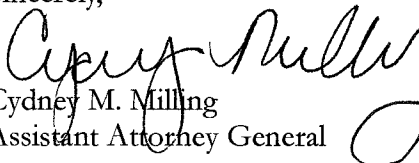
Nonetheless, we lack knowledge as to whether the Department provides services other than those related to road maintenance. If the Department conducts activities unrelated to those services contemplated by the Fee, we believe a court could find funding the Department's entire budget with proceed from the Fee creates an issue with regard to satisfying the second prong of the test set forth in C.R. Campbell Construction Co. Furthermore, we also note that the Department's budget includes administrative expenses such as postage, telephone expenses, and advertising. Our courts have not addressed whether administrative expenses constitute an integral part of road maintenance.

As we previously mentioned, this Office does not have the ability to conduct an investigation to determine exactly how the proceeds from the fee are being used. Therefore, we cannot make a conclusion one way or another as to whether or not the Fee satisfies this prong of the test presented in C.R. Campbell Construction Co. Nonetheless, we advise the County to be cautious when making expenditures from Fee proceeds and make sure that those expenditures are narrowly tailored to the purposes for which the Fee is intended.

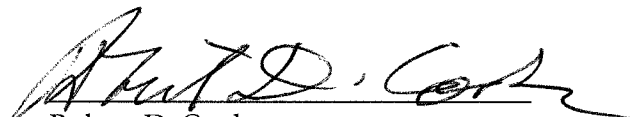
Conclusion

As we previous explained in our 2006 opinion, this Office is not in a position to opine on questions of fact. Thus, we cannot fully address your concerns with regard to the validity of the Fee imposed by the County. Nonetheless, we believe that if a court were to consider the validity of the Fee, it would employ to test as provided by the Supreme Court in C.R. Campbell Construction Co. Accordingly, a court would consider whether or not revenue generated by the Fee is used for the specific improvements contemplated by the ordinance establishing the Fee. Thus, a court would look to see if the proceeds from the Fee are used for maintenance and improvements of roads, bridges, and appurtenant ditches and drainage systems in Florence County and specifically, repaving and rocking. Should a court determine that some portion of the Public Works Department's budget falls outside of the improvements contemplated by the ordinance, we believe a court could find the Fee to be a tax rather than a valid uniform service charge. Nonetheless, because the answer to this question requires investigation into the facts surrounding the Fee, we believe only a court may address your question with finality.

Sincerely,


Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:


Robert D. Cook
Deputy Attorney General