February 20, 2008

The Honorable Chauncey K. Gregory
Senator, District No. 16
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Gregory:

You seek an opinion regarding the validity of school facility impact fees imposed by York County. Included in your request are copies of the ordinance establishing procedures for the imposition of development impact fees and the ordinance establishing a school facilities impact fee. Both of these ordinances were adopted in 1996, prior to the enactment in 1999 of the South Carolina Development Impact Fee Act, codified at South Carolina Code Ann. Section 6-1-910 *et seq*. You also included a memo outlining the legal issues and analysis regarding the impact fees in question. We have also received copies of the 2003 and 2005 ordinances amending the 1996 ordinances by repealing those provisions authorizing waivers from the fee for retiree housing and low-income housing.

Your principal concern is the effect of the 2003 ordinance concerning York County's elimination of the waiver of the impact fee for retiree housing in light of enactment of the Development Impact Fee Act. Your questions center upon the issue of whether, by virtue of the 2003 and 2005 amendments to its ordinances, "York County lose[s] its grandfathered status and thus must fully comply with the Act?" Your questions are as follows:

1. Whether subsequent amendments – passed after enactment of the South Carolina Development Fee Impact Act in 1999 – to York County's impact fee ordinances must comply with South Carolina statutes.

2. Whether S.C. Code Ann. Section 6-1-910 *et seq*. allows development impact fees to be assessed for school facilities.

3. Assuming school impact fees do not violate S.C. Code Ann. Section 6-1-910 *et seq*., whether school facilities impact fees violate South Carolina and federal case law.

Law/ Analysis

By way of background, we first address a county's power to impose development impact fees under Home Rule. Of course, a county's ordinance, like a statute, carries with it a presumption of constitutionality. In a prior opinion of this Office, dated December 14, 2006, we stated:

> … [A]n ordinance is a legislative enactment and therefore, is presumed constitutional. Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). Our Supreme Court "has held that a duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt. City of Beaufort v. Baker, 315 S.C. 146, 153, 432 S.E.2d 470, 474 (1993). Moreover, "[w]hile this office may comment upon constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional."

Moreover, it is well established that counties possess authority to impose development impact fees. As we commented in a prior opinion, dated October 5, 2006, S.C. Code Section 4-9-30 of the Home Rule Act bestows various powers upon counties. Among such powers is the authority "to assess property and levy ad valorem property taxes and uniform service charges..." Op. S.C. Atty. Gen., October 5, 2006, citing S.C. Code Ann. Section 4-9-30 (5)(a). Further, the South Carolina Supreme Court has concluded that a county possesses such authority pursuant to this section in Brown v. County of Horry, 308 S.C. 180, 183, 417 S.E.2d 565, 567 (1992). There, the Court noted that

> [w]ithout 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.

And, in J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 172, 519 S.E.2d 561 (1999), the Court summarized the reasons for the imposition of impact fees by political subdivisions as follows:

> [l]ocal governing bodies have turned to impact fees in recent years as funds from the federal government dried up, mandates from state and federal governments increased, and local residents fought property tax hikes....The purpose of an impact fee is "to fairly distribute the capital improvement costs of growth and development among those who are generating the need for the improvements."

Based upon this authority, in 1996, York County adopted Ordinances 7196 which established procedures for the imposition, calculation and administration of impact fees to be imposed upon new developments. Ordinance 7396, adopted that same year and pursuant to Ordinance 7196, established

a school facilities impact fee to be imposed upon all new residential development. Ordinance 7196 authorized the York County Council to grant a waiver of the fee "in whole or in part ...." Ordinance 7396 (school facilities) provided that the school facilities impact fee "shall be imposed on all new residential developments in York County unless an exception or waiver is granted by the County Council pursuant to Ordinance No. 7196."

Subsequently, in 2003, York County decided to remove the waiver provisions in certain situations. Pursuant to Ordinance 903, the County amended its Code to repeal the waiver from the fee for retiree housing. In 2005, pursuant to Ordinance 605, the waiver provision was removed for low income housing. It is these amendments of York's original development impact fee ordinances which are the subject of your request.

In 1999, the General Assembly enacted the South Carolina Development Impact Fee Act, now codified at S.C. Code Ann. Section 6-1-910 *et seq*. The purpose of the Act was to place restrictions upon the imposition of development impact fees and there is little doubt that the Act imposes substantial limitations upon local governmental entities. See, Section 4-9-30 (county's powers subject to general law). As we noted in an opinion dated January 11, 2006, this Act "... allows governmental entities ... *under specified circumstances* to impose development impact fees." (emphasis added). And, Section 6-1-930 further states that "[a] governmental entity may not impose an impact fee, regardless of how it is designated, except as provided in this article." Pursuant to § 6-1-1010(B) of the Act, "[e]xpenditures of development impact fees must be made only for the category of system improvements and within or for the benefit of the service area for which the impact fee was imposed as shown by the capital improvements plan *and as authorized in this article*." (emphasis added). Section 6-1-920(21) of the Act further defines "system improvements" as "capital improvements to public facilities which are designed to provide service to a service area." The term "public facilities" is defined by § 6-1-920(18) to mean:

> (18) "Public facilities" means:
>
> (a) water supply production, treatment, laboratory, engineering, administration, storage, and transmission facilities;
> (b) wastewater collection, treatment, laboratory, engineering, administration, and disposal facilities;
> (c) solid waste and recycling collection, treatment, and disposal facilities;
> (d) roads, streets, and bridges including, but not limited to, rights-of-way and traffic signals;
> (e) storm water transmission, retention, detention, treatment, and disposal facilities and flood control facilities;
> (f) public safety facilities, including law enforcement, fire, emergency medical and rescue, and street lighting facilities;
> (g) capital equipment and vehicles, with an individual unit purchase price of not less than one hundred thousand dollars including, but not limited to, equipment and vehicles used in the delivery of public safety services, emergency preparedness

> services, collection and disposal of solid waste, and storm water management and control;
> (h) parks, libraries, and recreational facilities.

The Development Impact Fee Act also contains a "grandfather" provision, found at Section 6-1-1060, and is designed to preserve the exercise of a political subdivision power regarding development impact fees prior to the Act's passage. Such provision states:

> (A) The provisions of this article do not repeal existing laws authorizing a governmental entity to impose fees or require contributions or property dedications for capital improvements. *A development impact fee adopted in accordance with existing laws before the enactment of this article is not affected until termination of the development impact fee. A subsequent change or reenactment of the development impact fee must comply with the provisions of this article*. Requirements for developers to pay in whole or in part for system improvements may be imposed by governmental entities only by way of impact fees imposed pursuant to the ordinance.

(emphasis added).

The issue for resolution here is the meaning of the phrase "subsequent change ... of the development impact fee" as used in Section 6-1-1060(A). In other words, the question is whether adoption of the 2003 Ordinance, repealing the provision of a grant of a waiver for retiree housing, and adoption of the 2005 Ordinance, repealing the waiver for low income housing, constitute a "subsequent change ... of the ... fee" for purposes of the Development Impact Fee Act? If so, imposition of any development impact fee upon retiree housing following repeal of the waiver provision[1] would be required to comply with the Act.

A number of principles of statutory construction are relevant here. First and foremost, is the cardinal rule of statutory interpretation which 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 other rules of statutory construction are subservient to the rule that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Hay v. S.C..Tax Comm.*, 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning without resort to a subtle or forced

[1] There is no question that the Ordinances prior to amendment in 2003 and 2005 would fall within the protection of Section 6-1-1060. Here, however, is presented the issue of the applicability of Section 6-1-1060 to amendments to those ordinances.

construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984).

Further, a rule of construction known as the "last antecedent" rule may serve as a guide in the interpretation of statutes. We summarized that rule most recently in an opinion, dated December 1, 2005, as follows:

> [t]he last antecedent consists of "the last word, phrase or clause that can be made antecedent without impairing the meaning of the sentence ... Referential and qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others more remote ..."

See also, *Op. S.C. Atty. Gen.*, April 23, 1962 ("Referential and qualifying words and phrases where no contrary intention appears, refer[ ] solely to the last antecedent.").

With these principles of interpretation in mind, we note that the Development Impact Fee Act does not define the term "subsequent change" or the word "change." This being the case, we deem the "grandfather" provision of the Act to be ambiguous. The provision could be read in at least two legitimate ways. One alternative construction is that *any amendment* of a "grandfathered" ordinance, subsequent to the enactment of the Development Impact Fee Act, must comply with the Act. A second construction is that the term "subsequent change or reenactment" refers to a "change" or "reenactment" of the "fee" following "termination" of the fee's existence.

It is well recognized that in adopting an amendment to a statute or ordinance, generally, it is presumed that the Legislature or the legislative body intended to change the existing law. *Key Corporate Capital, Inc. v. County of Bft.*, 373 S.C. 55, 644 S.E.2d 675 (2007) (and cases cited therein). Thus, it could be argued that any amendment to the York County development impact fee ordinances following enactment of the Development Impact Fee Act are unprotected by the "grandfather clause." If so, these ordinances must conform to the requirements of the Act. As it has been argued in the legal analysis attached to your letter,

> York County's pre-1999 impact fee ordinance was grandfathered when the Act was passed in 1999. When York County amended its ordinance in 2003, the ordinance lost its grandfathered status and therefore has to comply with the Act. The present ordinance – as amended by the 2003 action by York County to remove waivers and exemptions of impact fees – violates the Act because the Act does not allow school facility impact fees, which the ordinance imposes.

The foregoing analysis is certainly correct insofar as "the Act does not allow school impact fees, which the ordinance imposes." Schools or school facilities are not enumerated among the various "public facilities" listed in Section 6-1-920(18) of the Act. As we recognized in our January 11, 2006 opinion, in order to use the proceeds from a development impact fee for a purpose

not enumerated in Section 6-1-920(18), "... the General Assembly would need to amend the Act to include" such additional purpose. Section 6-1-930 expressly provides that "[a] governmental entity may not impose an impact fee, regardless of how it is designated, except as provided in this article." Thus, if the 2003 and 2005 amending ordinances are not grandfathered by virtue of Section 6-1-1060, we agree that the 2003 ordinance would be violative of the Act.

On the other hand, while the analysis that any amendment of a grandfathered ordinance after enactment of the Development Impact Fee Act is inviting, in our judgment, the literal text of Section 6-1-1060 may not support such analysis. First of all, Sections 6-1-1060 provides that "[a] development impact fee adopted in accordance with existing laws before the enactment of this article is not affected *until termination of the development impact fee.*" (emphasis added). Literally read, a "development impact fee" properly adopted prior to the Act's passage is fully protected by the grandfather provision until that fee terminates. Moreover, Section 6-1-920(8) defines the term "development impact fee" as "a payment of money imposed as a condition of development approval to pay a proportionate share of the cost of system improvements needed to serve the people utilizing the improvements." There can be no dispute that York County's development impact fee adopted in 1996 has not "terminated," but is still being fully imposed. Indeed, the 2003 amendment simply removed waivers and exemptions for retiree housing. Thus, pursuant to referenced sentence of Section 6-1-1060, York's development impact "is not affected ..."

Next, we examine the following sentence of Section 6-1-1060 – specifying that "[a] subsequent change or reenactment *of the development impact fee* must comply with the provisions of this article." (emphasis added). As we noted above, the term "subsequent change" is not defined. Clearly, however, the term "change" relates to the term "development impact fee." Thus, one could conclude that the "change" necessary to require compliance with the Act is a "change ... of the development impact fee ...." This reading would thus look to a change or amendment in the fee or the fee structure or system itself, rather than encompassing any and all amendments to the fee ordinance of whatever nature. This interpretation is reinforced by the use of the word "reenactment" in conjunction with the word "change." A "change or reenactment" would appear to relate to the "fee" or fee structure or system.

Furthermore, the word "subsequent" may well refer to the "last antecedent," in which case the "change" contemplated would be "subsequent" to the "termination" of the "development impact fee." So read, thereby giving effect to the provision as a whole, it could certainly be argued that a development impact fee adopted prior to the Act's passage is grandfathered until such fee structure is terminated and is then "changed" or "reenacted."

In addition, a number of authorities have concluded that the repeal of an exemption to a tax or fee is not itself a new tax or fee. As was stated in *City of St. Mary's v. St. Mary's Native Corp*., 9 P.3d 1002, 1006 (Alaska 2000), "... repealing the exemption ... is not an increase in the rate of levy, but an application of the same rate of levy to a portion of the transaction previously immune." And, as the Attorney General of Louisiana wrote in *La. Atty. Gen. Op.* No. 78-588 (June 1, 1978),

> [t]he repeal of an exception from taxation will not result in a new tax ....

Further, the Attorney General of Colorado concluded in Op. No. 95-2 (April 14, 1995) that

> [b]ecause the present tax structure was enacted in 1990, and therefore was in place before TABOR (Taxpayer Bill of Rights) became effective on November 14, 1992, the elimination of the exception which occurs by operation of this scheme is not a tax policy change or other event within the meaning of TABOR's Subsection (4). Therefore, imposition of the tax is not a tax policy change requiring voter approval.

Such authorities would support, therefore, a reading of the "grandfather" provision to the effect that York County's repeal of the waiver or exemption provisions subsequent to enactment of the Development Impact Fee Act is not a "change" for purposes of the provision. These authorities are also consistent with the more literal interpretation, discussed above, that York County has not "changed" its development impact fee, but has simply applied such fee to a category not previously covered by the Ordinance.

Our Supreme Court has not interpreted Section 6-1-1060. Nor has this Office previously had occasion to construe this statute. While we believe the better construction of the provision is that York County has not "changed" its development impact "fee" by virtue of the 2003 and 2005 amendments to the development impact fee ordinances, we are also of the opinion that this provision is sufficiently ambiguous that other constructions of the statute are certainly possible. Therefore, we recommend that this issue be clarified by the courts through a declaratory judgment.

With respect to your question regarding the constitutionality of the school impact fee, regardless of its validity under the Development Impact Fee Act, such ordinances are, as stated above, entitled to the presumption of constitutionality. As our Supreme Court stated in *Brown v. County of Horry*, 308 S.C. 180, 184, 417 S.E.2d 565, 567 (1992), "... a county can [constitutionally] impose a service charge ... where it is a fair and reasonable alternative to increasing the general county property tax and is imposed on those for whom the service is primarily provided." A charge or fee does not become a tax merely because the general public obtains some benefit. *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*, *supra*; *Brown, supra*.

In *J.K. Construction*, our Supreme Court set forth the analysis for determining whether a required payment is a "fee," thus not requiring uniformity to all residents of a political subdivision. There, the Court held that an "account fee" imposed upon new or upgrading customers of the Sewer Authority to pay for future capital improvements of the Authority was a "fee," rather than a "tax," and was constitutionally valid. In its analysis, the *J.K. Construction* Court concluded that the following criteria were dispositive:

(1) the required payment "primarily benefits those who pay it because they receive a special benefit or service as a result of improvements made with the proceeds ....";

(2) "... proceeds from the required payments are dedicated solely to capital improvement projects ....";

(3) "... the revenue generated by the required payment will not exceed the cost of capital improvements to the system ....";

(4) the required payment is "imposed" uniformly "upon those who must pay it;"

(5) intent "to classify the payment as a charge."

Id. at 167-168, 519 S.E.2d at 564. And, in *Brown, supra*, citing *Robinson v. Richland County Council*, 293 S.C. 27, 358 S.E.2d 392 (1987), among other cases, the Court enunciated the applicable analysis under the Equal Protection Clause for a service charge to be upheld:

(1) the classification bears a reasonable relation to the legislative purpose;

(2) the members of the class are treated alike under similar circumstances;

(3) the classification rests on some reasonable basis.

As we concluded in *Op. S.C. Atty. Gen.*, August 24, 2006, the validity of a service fee or charge "involves a question of fact. ... [O]nly a court, not this Office may serve as a finder of fact and conclusively determine the outcome of a factual issue."

Given the presumption of validity of the school impact fee, a court may well conclude that the fee is constitutionally valid under the *J.K. Construction, Inc., supra* and *Brown v. County of Horry* tests. The County Attorney has provided the following arguments to us:

> [t]he school facilities impact fee, like the required payments in J.K. Construction and *Ford* [*v. Georgetown County Water and Sewer District*, 341 S.C. 10, 532 S.E.2d 873 (2000)] has been uniformly imposed upon those required to pay it, and the required payment was intended and has been classified as a development impact fee or charge.

Furthermore, the County Attorney contends that

> [t]he school facilities impact fee has been imposed uniformly on the owners of new residential development in Fort Mill School District. The owners of new residential development in Fort Mill School District receive a special benefit in capital improvements consisting of new schools and expanded classrooms and other capital

> facilities to accommodate the demand for school facilities resulting from new residential development in Fort Mill School District. While the general public may obtain some benefit from the construction of new schools, it is "eminently fair and reasonable to require" the owners of new residential units "to shoulder a portion of the costs of future expansions their presence will demand." *Ford v. Georgetown County Water and Sewer District, supra*; *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority, supra*.

With respect to the *Brown* case, the County Attorney opines that

> [t]he school facilities impact fee imposed on new residential units in Fort Mill School District provides a special benefit to new residents by making capital improvements to local schools to accommodate the growth and new development. The school facilities impact fee is imposed on all new residential development uniformly, and the owners of new development obtain the benefit of additional capital improvements and capacity in the public schools of the district.

These are certainly credible arguments which a court may well find persuasive. Again, however, while we believe a court may well uphold the constitutional validity of the York County school facilities development impact fee, such validity of the fee will ultimately depend upon the development of a factual record. Accordingly, we recommend a declaratory judgment to make such a determination.

Conclusion

It is our opinion that school facilities development impact fees are not authorized by the South Carolina Development Impact Fee Act. As we have previously concluded, the purposes for which proceeds of development impact fees may be used are expressly enumerated in the Act. Such Act does not include schools or school facilities. Thus, the validity of the 2003 and 2005 York County Development Impact Fee ordinances will depend upon the applicability to the ordinances of the "grandfather" provision contained in the Act and found at Section 6-1-1060. No court decisions or opinions of this Office have interpreted this provision of the Act. As any ordinance, the York County 2003 and 2005 ordinances will be presumed valid.

Our reading of the grandfather clause is that it is ambiguous and subject to alternative constructions. While we believe the better reading is that the grandfather provision protects the 2003 and 2005 ordinances, because these ordinances do not constitute "subsequent changes or reenactment" of the development impact "fee," such a construction is not free from doubt. Alternatively, the provision can be credibly read as encompassing *any* amendment to the development impact fee ordinances following enactment of the Development Impact Fee Act. Thus, we recommend a declaratory judgment to determine the validity of the ordinances in question.

With respect to the constitutionality of the school facilities fee, again, we must presume such fee to be valid. On its face, it appears that the fee meets the requirements set forth under the state and federal constitutions for imposition of a valid service charge. However, the constitutional validity of York County's school facilities fee will depend in large part upon a factual record. Determinations of fact are beyond the scope of an opinion of this Office. Thus, again, a declaratory judgment is advisable to determine the constitutionality of York's school facilities development impact fee.

Accordingly, in order to resolve these issues with finality, we recommend a declaratory judgment.

Very truly yours,

Henry D. McMaster
Attorney General

By: Robert D. Cook
Deputy Attorney General

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