March 10, 2008

Walter H. Sanders, Jr., Esquire
Allendale County Attorney
Post Office Box 840
Fairfax, South Carolina 29827

Dear Mr. Sanders:

In a letter to this office you referenced that pursuant to S.C. Code Ann. § 6-1-330, Allendale County by ordinance adopted service and user fees for fire and rescue protection. A fire and rescue protection fee of $.50 an acre or any fraction thereof was levied upon each acre of land in Allendale County. The revenue from that fee will be used to pay the costs of fire and rescue protection in Allendale County. You indicated that a question has been raised as to the validity of the fee as it is applied to all real property and the position has been taken that an acre is not a valid indicator of the users of the fee being collected.

Section 6-1-330 states that

> (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 A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.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.

> (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.

The term "service or user fee" is defined by S.C. Code Ann. § 6-1-300(6) 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.

A prior opinion of this office dated February 16, 2007 has dealt with this issue as to the validity of a county ordinance which increased the county road maintenance fee from $20.00 to $40.00 for commercial vehicles with a portion of the revenue designated for funding mass transit in the county. The opinion commented that

> [w]hile 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.
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> Id. at 183, 417 S.E.2d at 567.
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> 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.

The opinion construed the question more appropriately as to whether the County, under the circumstances stated in the letter, had authority pursuant to Section 4-9-30 to impose a road maintenance fee. It was concluded that in light of the Supreme Court's decision in Brown, we were of the opinion that the County has that authority. However, in determining that the County had the requisite authority to impose a fee, it was stated that such determination alone did not render this particular fee valid.

The opinion recognized that the Supreme Court had developed a four-part test to determine whether or not a proposed fee is a valid uniform service charge. In C.R. Campbell Construction Co. v. City of Charleston, 325 S.C. 235, 237, 481 S.E.2d 437, 438 (1997), the Supreme Court concluded that

> [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.

The prior opinion of this office stated that "[i]f 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."

The opinion stated that in Brown, supra,

> ...the Supreme Court considered whether a road maintenance fee imposed on all motorized vehicles by Horry County was a valid uniform service charge...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., supra, the Court considered a municipal ordinance imposing a transfer fee on the conveyance of real property. The Court concluded:

> [i]n 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 referenced opinion also cited the decision of the State Supreme Court in J.K. Construction, Inc. v. Western Carolina Regional Sewer, 336 S.C. 162, 519 S.E.2d 561 (1999). In that case, the Court considered a new account fee charged by a regional sewer authority to all new and upgrading customers to pay for future capital improvement projects and utilized the four-part test cited above to determine whether the new account fee was a valid service charge. In 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 concluded that the payments were solely dedicated to capital improvement projects, noting they would not be placed in a general fund. Additionally, 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. The opinion further noted that the Court gave credibility to the sewer authority's intent to classify the fee as a charge. As a result, the Court upheld the sewer authority's imposition of the charge.

However, the prior opinion noted that in Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984), the Supreme Court concluded that an assessment imposed by ordinance to be a tax rather than a fee. In Casey, the Court dealt with a county ordinance establishing sewer service for unincorporated areas of Richland County not previously receiving service. In order to fund the additional service, the ordinance included provisions imposing an assessment on all unincorporated areas of the county. The Court stated,

> [t]o 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 benefitted by the proposed improvements.

282 S.C. at 389.

The Court acknowledged that 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. The Court stated that

> [t]o 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.

282 S.C. at 390.

As stated in the prior 2007 opinion of this office, with regard to that particular ordinance at issue, we referenced 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.

The opinion stated, therefore, that despite our conclusions in the opinion as to the validity of the particular ordinance being examined, it would remain in full force and effect until a court ruled otherwise.

Consistent with the authority outlined above establishing the four-part test established by the Supreme Court, in examining the Allendale ordinance, it must be determined whether the ordinance meets the necessary requirements to render it a valid service charge. Pursuant to Section 4-9-30, a county is authorized to impose service charges for "...public safety, including police and fire protection...." Therefore, it appears that the fee imposed by the ordinance itself would be authorized. However, as stated above, according to the Allendale ordinance, a fire and rescue protection fee of $.50 an acre or any fraction thereof was levied upon each acre of land in Allendale County. The revenue from that fee will be used to pay the costs of fire and rescue protection in Allendale County. You indicated that a question has been raised as to the validity of the fee as it is applied to all real property and the position has been taken that an acre is not a valid indicator of the users of the fee being collected. However, an analysis would be dependent upon the facts. As this office stated in an opinion dated October 8, 2007 of this office, "...investigations and determinations of facts are beyond the scope of an opinion of this office and are better resolved by a court."

Based upon the analysis set forth above, it appears that a county has the authority to impose a fee for fire and rescue protection fee. However, the determination of whether the particular fee is valid appears to be dependent upon questions of fact, a matter beyond the scope of an opinion of this office, which would have to be decided based on the four-prong test outlined above. Inasmuch as only a court may determine the facts as to the validity of the fee, in order to ultimately resolve the question, a declaratory judgment action may have to be brought to determine the issue with finality.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Deputy Attorney General