ALAN WILSON
ATTORNEY GENERAL

August 24, 2011

Thomas M. Boulware, Esquire
Brown, Jefferies & Boulware
19 Jefferson Street
Barnwell, South Carolina 29812

Dear Mr. Boulware:

In your capacity as City Attorney, you have inquired whether the City of Barnwell's proposed ordinance imposing a "public safety fee" upon each parcel of real property within the corporate limits of the City of Barnwell:

(1) "fits within the scope of authority and provision of S.C. Code Section 6-1-330(B);"

(2) satisfies the four-part test for the validity of a uniform service charge;

(3) meets "the definition of service or user fee as set forth in S.C. Code Section 6-1-300(6);"and

(4) is permissible in light of the fact that the "same fee [will be] charged for each parcel of property without [any] relationship to value."

You have explained that the "public safety fee" would "offset a portion of the City's fire department budget and a portion of its police department budget," but it would not be used to implement any new programs or services. The legislative findings set forth in the proposed ordinance include, in relevant part, the following statements: (1) the city "provides a variety of public safety programs and services as a benefit associated with paying City property taxes;" (2) "public safety services are significantly subsidized by taxes paid by [the city's] residential and business properties;" and (3) the purpose of the fee is to "provide equity to residences and businesses that exist inside the city limits and address future costs for operational management." In addition, the proposed ordinance states that the City Council may adjust the amount of the fee "as part of the General Fund Operating Budget of the City to maintain an Enterprise Fund sufficient to fund a minimum of seventeen percent (17%) of the City's prior fiscal year's total budget."

Law/Analysis

Municipal ordinances are entitled to a presumption of validity. Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 554, 397 S.E.2d 662, 664 (1990) ("[A] presumption of validity attaches to all legislation . . . ."). To evaluate the validity of a particular ordinance, a court will first "ascertain whether

the county or municipality that enacted the ordinance had the power to do so." Hospitality Ass'n of S.C., Inc. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116-17 (1995). Next, "if the local government had the power to enact the ordinance," a court will determine "whether the ordinance is inconsistent with the Constitution or general law of this State." Id.

Authority to Impose Fee (Question 1)

Section 6-1-330 of the South Carolina Code (2004 & Supp. 2010) expressly permits "[a] local governing body, by ordinance approved by a positive majority . . . to charge and collect a service or user fee," provided the body complies with certain requirements set forth in that statute. South Carolina Code section 6-1-300(6) (2004) defines a "service or user fee" as follows:

> [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."

In addition to the authority provided by section 6-1-330, section 5-7-30 of the South Carolina Code (2004 & Supp. 2010) provides as follows:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact . . . ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to . . . law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them . . . .

(Emphasis added).

Thus, a court would likely find that the city has authority to impose the proposed fee. Next, a court would determine whether the fee is valid under state law. Hospitality Ass'n of S.C., Inc., 320 S.C. at 224, 464 S.E.2d at 116-17.

Validity as a Uniform Service Charge (Questions 2 - 4)

You have asked whether the proposed fee is valid as a uniform service charge. A fee will be valid as a uniform service charge if it satisfies the following four-part test: (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 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). If a court finds the fee is not a valid

uniform service charge, it would likely find the fee is a tax.[1] Whether a particular fee is in the nature of a service charge or of a tax is a question of law. J.K. Constr., Inc. v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 166-67, 519 S.E.2d 561, 563-64 (1999).

With regard to the first prong of the four-part analysis, it is helpful to consider the purposes underlying the authority to impose uniform service charges. In Brown v. County of Horry, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992), the South Carolina Supreme Court explained that "[a] service charge is imposed on the theory that the portion of the community which is required to pay [the charge] receives some special benefit as a result of the improvement made with the proceeds of the charge." The Brown Court characterized service charges as an "alternative to increasing the general . . . property tax" intended to "reduce the tax burden which otherwise would have to be borne by taxpayers generally." Id. at 183-84, 417 S.E.2d at 567. Similarly, South Carolina Code section 6-1-330(C) contemplates that a "service or user fee" might be used "to fund a service that was previously funded by property tax revenue."

The legislative findings in support of the "public safety fee" suggest the fee would be imposed in order to fund ongoing citywide expenses rather than a particular improvement that creates some special benefit in favor of the property owners paying the fee. Specifically, the council finds that the fee would be imposed to "address future costs for operational management" of public safety programs. This finding would likely weigh in favor of a determination that the "public safety fee" is more akin to a tax than to a service charge. See Brown, 308 S.C. at 184, 417 S.E.2d at 567 ("The question of whether a particular charge is a tax depends on its real nature and not its designation."); Casey v. Richland County Council, 282 S.C. 387, 389, 320 S.E.2d 443, 444 (1984) ("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."); cf. J.K. Constr., Inc., 336 S.C. at 168-69, 519 S.E.2d at 564-65 (finding a "new account fee" imposed upon persons connecting to a sewer system was a service charge, not a tax, where the "required payment primarily benefit[ed] those who must pay it" and the proceeds were "dedicated solely to capital

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[1] If the fee is not a valid uniform service charge, it likely would not qualify as any other kind of "service or user fee." As an initial matter, if the fee does not satisfy the first prong of the four-part test set forth above—requiring a "special benefit" to the person paying the fee—then it likely would not satisfy the similar requirement of section 6-1-300(6). Moreover, the fee does not appear to be a "user fee" as that term is commonly understood:

> [T]o qualify as a valid user fee, [the fee] must normally meet three criteria. First, the fee must be charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society. Secondly, it must be paid by choice, in that the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge. Finally, the charges collected must be [used] to compensate the governmental entity . . . for its expenses and not to raise revenues.
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> User fees which have been approved include sewer fees, fees imposed by airport authorit[ies] on car rental companies, landfill charges . . . . Fees for providing fire protection and other traditional core government services are usually considered taxes and are subject to constitutional limitations.

McQuillin, The Law of Municipal Corporations § 44.62.20.

improvement projects . . . not placed in a general fund to be spent on [the special purpose district's] ongoing expenses and maintenance, which is a hallmark of a tax").[2]

In addition, it appears the proposed fee would increase the financial burden borne by city property tax payers. Thus, rather than functioning as an alternative to increasing the property tax, it appears the fee would have an effect similar to a property tax increase. Increases to the ad valorem tax on real property are subject to various restrictions imposed by state law. See, e.g., Letter to Edwin C. Haskell, III, Esquire, Op. S.C. Att'y Gen. (June 26, 2007) (opining that "any increase in the millage rate levied by a county for the purpose of providing fire protection services . . . is limited by section 6-1-320(A), unless the increase is due to one of the exemptions provided under section 6-1-320(B)"). Moreover, municipalities may not impose new taxes of any other kind "unless specifically authorized by the General Assembly." S.C. Code Ann. § 6-1-310 (2004). Accordingly, in determining whether the "public safety fee" is a tax, a court would likely consider whether the fee would have the effect of circumventing specific restrictions applicable to taxes on real property.

Ultimately, whether a particular group of fee-paying citizens has received a "special benefit" is a fact-specific inquiry, and only a court can finally resolve the issue. See Letter to The Honorable N. R. "Bob" Salley, Sr., Op. S.C. Att'y Gen. (Nov. 18, 1996) ("[T]his Office possesses no authority to declare an ordinance invalid. Only a court may do so.").

Turning to the second prong of the four-part analysis, a court would next consider whether "the revenue generated [by the fee] [would be] used only for the specific improvement contemplated." The proposed ordinance does not place any express restrictions upon the uses for which the proceeds of the fee may be expended. Rather, the proposed ordinance makes reference to using the proceeds of the fee to "maintain an Enterprise Fund sufficient to fund a minimum of seventeen percent (17%) of the City's prior fiscal year's total budget." It is not clear from the face of the ordinance whether the "Enterprise Fund" would be expended solely for the purpose of financing police and fire services. For this reason, a court is likely to find that the fee is not used only for the contemplated purpose. Moreover, if the ordinance would allow the proceeds of the fee to be placed in the city's general fund, this fact would provide further evidence that the fee is a tax rather than a service charge. See J.K. Constr., Inc., 336 S.C. at 168, 519 S.E.2d at 564 (citing the fact that proceeds were not placed in a general fund as evidence that a fee was not a tax); Brown, 308 S.C. at 185, 417 S.E.2d at 568 (citing cases in which courts of other jurisdictions "considered whether the revenues generated by the fees were to be paid into the general fund of the government to

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[2] We note, however, that while a county sheriff's department is required by statute to provide police protection, no such statute requires a municipality to provide police services. S.C. Code Ann. § 23-13-70 (2007) (requiring deputy sheriffs to "patrol the entire county"). Instead, municipalities are empowered to choose whether to engage in police services. S.C. Code Ann. § 5-7-110 (2004) ("Any municipality may appoint or elect as many police officers . . . as may be necessary for the proper law enforcement in such municipality . . . ." (emphasis added)). Thus, it could be argued that owners of real property within corporate limits obtain a "special benefit" by funding municipal police protection rather than relying upon the law enforcement services of the county sheriff. Moreover, it could be argued that property owners, as opposed to city residents in general, are the primary beneficiaries of such protection. Cf. City of Huntington v. Bacon, 473 S.E.2d 743, 755 (W. Va. 1996) (finding a municipal service fee for fire and flood protection was "sufficiently related to the use of the special service for which the fee [was] imposed," even though it was imposed only on property owners rather than on all service recipients, because "common sense dictates that owners of property benefit most by these services").

defray customary governmental expenditures" as part of their analyses of whether the fees were service charges or taxes).

The third prong of the four-part analysis requires that "the revenue generated by the fee does not exceed the cost of improvement." A determination regarding this prong would require findings of fact, and therefore, is beyond the scope of an opinion of this Office.

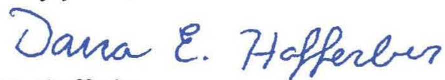
Finally, a court would turn to the uniformity prong of the analysis. This prong does not appear to require that the amount of the fee bear a relationship to the value of property. Rather, there is authority for the proposition that a flat fee will satisfy the uniformity requirement. E.g., Skyscraper Corp. v. County of Newberry, 323 S.C. 412, 475 S.E.2d 764 (1996); Brown, 308 S.C. at 186, 417 S.E.2d at 568.

In sum, a court would likely find the proposed "public safety fee" fails to satisfy one or more of prongs of the four-part test for the validity of a uniform service charge.[3] Consequently, a court would likely find the "public safety fee" is a tax, and it would then proceed to determine whether the tax is consistent with the laws of this State, including the restrictions on property tax increases.

Conclusion

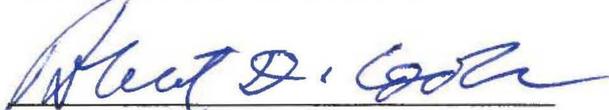
A uniform service charge is a "service or user fee" within the meaning of section 6-1-300(6) of the South Carolina Code, and it does not appear that such a charge must be tied to the value of the property upon which it is imposed. A municipality is authorized to impose a uniform service charge pursuant to sections 6-1-330 and 5-7-30 of the South Carolina Code. However, the validity of a uniform service charge will depend upon whether the charge satisfies the four-part test set forth by the South Carolina Supreme Court. While this Office cannot offer a definitive determination regarding the validity of a uniform service charge, it is the opinion of this Office that a court is likely to find the "public safety fee" imposed by the City of Barnwell's proposed ordinance fails to satisfy one or more prongs of this four-part test.

Very truly yours,



Dana E. Hofferber
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

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[3] On the other hand, if the fee is a valid uniform service charge, the city would need to comply with section 6-1-330(B) in handling the proceeds of the fee. Accordingly, the proceeds of the fee would have to be "used to pay costs related to the provision of the service[s] or program[s] for which the fee was paid." Further, if the fee generated "five percent or more of the [city's] prior fiscal year's total budget," the city would have to keep the proceeds of the fee "in a separate and segregated fund."