



ALAN WILSON
ATTORNEY GENERAL

August 31, 2011

Mr. Grant Duffield
Tega Cay City Manager
PO Box 3399
Tega Cay, SC 29708

Dear Mr. Duffield:

We received your letter requesting an opinion of this Office concerning Stormwater Management Utility Service Charges. You asked the following questions:

1. May a City, after duly passing an ordinance with provisions for issuing credits against stormwater fees, legally issue such credits?
2. May a City, after duly passing an ordinance with provisions for exempting property from stormwater fees, legally exempt property from stormwater fees?
3. May a City legally accept a donation of property in lieu of stormwater fees?

As a way of background, you note that the City of Tega Cay Ordinance #353 allows the City to issue credits against Stormwater Management Utility Service Charges under circumstances described in Section 2.7(a) of that ordinance and explains that the City may exempt certain property from Stormwater Management Utility Service Charges under the circumstances described in Section 2.7(b).

Also, based on previous conversations with Tega Cay officials, we understand that it has been proposed that the City of Tega Cay accept a property donation from the Fort Mill School District in lieu of stormwater fees.

Law/Analysis

The Stormwater Management and Sediment Reduction Act was created in 1991 under Act No. 51, § 2. See, S.C. Code § 48-14-10 *et seq.* Stormwater Management is defined as a system that controls “the increased volume and rate of stormwater runoff caused by manmade changes to the land” and a system that reduces “pollutants that might otherwise be carried by stormwater runoff.” S.C. Code § 48-14-20(11). Stormwater utility is defined as “an administrative organization that has been created for the purposes of planning, designing, constructing, and maintaining stormwater management, sediment control, and flood control programs and projects.” S.C. Code § 48-14-20(14).

Our South Carolina Supreme Court held in State ex rel. Condon v. City of Charleston, that “[t]he Act is primarily concerned with regulating ‘land disturbing activities,’ and in that regard requires prior approval of any action which will result ‘in a change in the natural cover or topography that may cause erosion and contribute to sediment and alter the quality and quantity of stormwater runoff.’ S.C. Code Ann. § 48-14-20(8); see, S.C. Code Ann. §§ 48-14-30 thru - 110.” City of Charleston, 334 S.C. 246, 247, 513 S.E.2d 97 (1999). Also, the Act “authorizes local governments to establish a ‘Stormwater Utility,’ and to fund it either through a fee or a tax assessment. S.C. Code Ann. § 48-18-120(C)(Supp. 1998).” City of Charleston, 334 S.C. 246, 247. Similar to the City of Charleston, the City of Tega Cay, in accordance with regulations,¹ created a Stormwater Utility by ordinance and opted to fund it through a fee. See, City of Charleston, 334 S.C. 246, 248.

S.C. Code of Regulations, Chapter 72, Article 3 governs Standards for Stormwater Management and Sediment Reduction. Specifically, S.C. Code of Regulations § 72-300 explains that stormwater runoff is a source of pollution to the waters in our State and that approved stormwater management control plans would help prevent and may reduce problems with water quality and quantity. In relevant part, S.C. Code of Regulations § 72-300 states as follows:

- ... C. To the extent possible, **the Commission intends to delegate the provisions of these regulations to local governments.** Those program provisions which are subject to delegation include stormwater management and sediment control plan approval, construction and maintenance inspections, enforcement, and education and training. . .

- E. **The implementation of a stormwater utility represents a comprehensive approach to program funding and implementation. The activities which may be undertaken by a stormwater utility include not only assessment, collection, and funding activities, but also carrying out provisions of adopted stormwater management plans.** These provisions may include contracting for such services as project construction, project maintenance, project inspection, and enforcement of installation and maintenance requirements imposed with respect to approved land disturbing activities.

S.C. Code of Regulations § 72-300 (emphasis added).

S.C. Code of Regulations § 72-310 sets forth the criteria for Implementation of a Stormwater Utility:

¹ The South Carolina Department of Health and Environmental Control (SC DHEC) “may delegate any or all components of stormwater management and sediment control programs to a local government.” S.C. Code § 48-14-60(A). However, SC DHEC is instructed to “provide technical and other assistance to local governments and others” in the development of a State Stormwater Management and Sediment Reduction Program and is to “promulgate regulations, minimum standards, guidelines and criteria necessary to carry out the provisions” of Title 48, Chapter 14. S.C. Code § 48-14-50(B)(1) and (C). See, S.C. Code § 48-14-120.

The implementation of a stormwater utility will necessitate the development of a local utility ordinance or special taxing assessment prior to its implementation, [containing essential components such as]:

- A. **The financing of a stormwater utility with a user charge system must be reasonable and equitable so that each user of the stormwater system pays to the extent to which the user contributes to the need for the stormwater system, and that the charges bear a substantial relationship to the cost of the service.** The use of county and municipal taxpayer rolls and accounting systems are allowed for the assessment and collection of fees.
- B. **The intent of the utility must be clearly defined** regarding program components that are to be funded through the utility. . . .
- E. As established by local ordinance or special election or petition, the **local government shall have responsibility for implementing all aspects of the utility including long range planning, plan implementation, capital improvements, maintenance of stormwater facilities, determination of charges, billing, and hearing of appeals and petitions. . . .**
- G. **The use of charges is limited to those purposes for which the utility has been established, including** but not limited to: planning; acquisition of interests in land including easements; design and construction of facilities; **maintenance of the stormwater system**; billing and administration; and water quantity and water quality management, including monitoring, surveillance, private maintenance inspection, construction inspection, and other activities which are reasonably required.

S.C. Code of Regulations § 72-310 (emphasis added). In short, authority is conferred upon a local government, such as the City of Tega Cay, to establish Stormwater utility and funding plans through a fair and reasonable fee system that ties user fees to the “extent to which the user contributes to the need for the stormwater system” and “bear[s] a substantial relationship to the cost of the service.”

Questions 1 & 2

As mentioned above, the City of Tega Cay created an ordinance to establish a stormwater management utility enterprise fund and stormwater utility user fee rates. The City of Tega Cay Ordinance #353 set forth that the “City Manager shall establish and maintain a Stormwater Management Utility enterprise fund in the City budget and accounting system, which shall be and remain separate from other funds.” Ordinance #353, Section 2.1. Also, “[i]t shall be the policy of City that **funding for the Stormwater Management Utility program, services, systems, and facilities shall be equitably derived through methods which have a demonstrable relationship to the varied demands imposed on the Stormwater program, services, systems, and facilities** by individual properties or persons and/or the level of service rendered by or resulting from the provision of Stormwater programs, systems, and facilities.” Ordinance #353, Section 2.3 (emphasis added). However, under the General Funding Policy, the ordinance explains that “[c]redits against Stormwater Service Charges may be provided for on-site Stormwater control systems and activities constructed, operated, maintained and performed to the City’s standards by private property owners or by a planned unit development

which reduce the demand for Stormwater service” Ordinance #353, Section 2.3(c) (emphasis added).

Ordinance #353, Section 2.7 governs the exemptions and credits applicable to Stormwater Utility Service Charges as follows:

- (a) **Credits – Credits against Stormwater Management Utility Service Charges are an appropriate means of adjusting fees, rates, rentals, charges, fines and penalties, under some circumstances, to account for applicable mitigation measures. Credit mechanisms may be established by the City Council and, if established, the means and measures for identifying, issuing and obtaining Credits will be provided in a Credit Manual approved by the City Council. No exception, Credit, offset, or other reduction in Stormwater management service charges shall be granted based on age, race, tax status, economic status or religion of the customer, or other condition unrelated to the demand for and cost of services provided by the Stormwater Management Utility.**
- (b) **Exemptions – Other than the following, no public or private property shall be exempt from Stormwater Service Charges:**
 - (1) **Public road rights-of-way** that have been conveyed to and accepted for maintenance by the South Carolina Department of Transportation, and that are available for use by the general public for transportation purposes; and
 - (2) **Railroad rights-of-way** with a stone base and used only for trackage.

City of Tega Cay Ordinance #353, Section 2.7 (emphasis added).

Consistent with established law, this Office has previously concluded that “a municipal ordinance may not vary state law,” but we recognized that an “ordinance is entitled to a presumption of validity. Thus, only a court may set an ordinance aside.” *Op. S.C. Atty. Gen.*, March 3, 2008 (*citing City of North Chas. v. Harper*, 306 S.C. 153, 410 S.E.2d 569 (1991)).

The South Carolina Supreme Court held in *Skyscraper Corporation v. County of Newberry*, 323 S.C.412, 475 S.E.2d 764 (1996), that “[u]nlike a tax, a service charge or user fee is imposed on those members of the community who receive a special benefit from the proceeds of the charge. To be valid, a service charge must be uniform.” *Skyscraper*, 323 S.C. 412, 416 (*citing Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992)). In *Skyscraper*, the county had imposed a uniform service charge, by ordinance, for solid waste disposal. Property owners were responsible for payment of a charge corresponding to the solid waste generated from its building. *Skyscraper*, 323 S.C. at 416. *See*, Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 26 S.Ill.U.L.J. 505 (2002) (fees “are intended to be and should be clearly described as a charge for a particular service provided[,] should apply based on the contribution to the problem[, and] fee payers, unlike tax payers, should receive some benefit from the service for which they are paying, although the benefits may be indirect or immeasurable”).

“Equal protection requires that ‘all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed.’” *Id.*, 323 S.C. at 417 (*citing*

GTE Sprint Communications v. Public Service Commission, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986)). Under established Equal Protection analysis, the court would look to the classification made within the ordinance and then determine what level of scrutiny should be applied.

Credits

City of Tega Cay Ordinance #353, Section 2.7(a) is clear that “[n]o exception, credit, offset, or other reduction in Stormwater management service charges shall be granted based on age, race, tax status, economic status or religion of the customer, or other condition unrelated to the demand for and cost of services provided by the Stormwater Management Utility.” Therefore, credits given will be determined by the demand for and cost of services provided. Hence, a court would likely determine that such a classification must only be rationally related to legitimate government interest. The government interest is to responsibly provide Stormwater Management, so a court would likely find that the classification is rationally related to such purpose. S.C. Code § 48-14-60 (DHEC “may delegate any or all components of stormwater management and sediment control programs to a local government”); See, Avi Brisman, Considerations in Establishing a Stormwater Utility, 26 S.Ill.U.L.J. 505 (2002) (“one way to foster the necessary support [to reduce stormwater pollution] is through a credit system, which enables individuals to change the magnitude of the fee by performing certain activities which reduce the amount and impact of runoff”).

S.C. Code § 48-14-120(B) explains that “[f]ees must be based upon the costs to the implementing agency to implement and administer the program.” In addition, S.C. Regulation 72-310 requires that “each user of the stormwater management system pays to the extent to which the user contributes to the need for the stormwater system and that the charges bear a substantial relationship to the cost of the service.” S.C. Reg. 72-310(A). The credits, as explained in City of Tega Cay Ordinance #353, Section 2.7(a) are issued based on conditions related to the demand for and cost of services provided. Therefore, the City of Tega Cay Ordinance #353, Section 2.7(a) appears to be valid and not in conflict with state law. However, only a court may make such a determination as to whether an ordinance should be set aside and as to whether a credit is “reasonable and equitable” according to S.C. Code § 48-14-120(C).

Exemptions

Under City of Tega Cay Ordinance #353, Section 2.7(b) all properties are treated the same, except for the two express exemptions of public road rights-of-way and railroad rights-of-way. While exemptions may be permissible if a property’s contribution to the need for Stormwater management is negligible, the City of Tega Cay should be cautious when attempting to create an exemption. See, Avi Brisman, Considerations in Establishing A Stormwater Utility, 26 S. Ill. U. L.J. 505, 515 (2002) (“stormwater utilities are equitable because ‘the cost is borne by the user on the basis of the user's demand placed on the drainage system.’ This means that all owners of property, including tax exempt property, pay for stormwater management”). For example, the City of Tega Cay Ordinance #353, Sections 2.5 and 2.6(c) exempt property with less than a threshold amount of impervious land. Such an exemption may be permissible as it seems to be within the regulation requiring user fees to be based on demand and cost. In other words, an exemption is not created simply because the land is public property; exemptions from paying the

stormwater fee should rarely, if ever, be made. See, City of Charleston, 334 S.C. 246, 248 (“the exemption in § 48-14-40(H) is irrelevant to the Stormwater Utility provisions of the Act . . . State owned or managed property is subject to the fee”).

S.C. Code § 48-14-50(C)(4) explains that DHEC’s regulations should include “waivers, exemptions, variances, and appeals.” Similarly, S.C. Code § 48-14-40 and S.C. Reg. 72-302(A)(7) exempt certain activities from the Stormwater Management and Sediment Reduction Act, including “[a]ctivities relating to the routine maintenance and/or repair or rebuilding of the tracks, rights-of-way, bridges, communication facilities and other related structures and facilities of a railroad company.” S.C. Code § 48-14-40(G); S.C. Reg. 72-302(A)(7). However, such exemptions do not exempt a property from paying the user fee, but simply exempt the property from the regulatory requirements of the Stormwater Management and Sediment Reduction Act. See, S.C. Code § 48-14-40; S.C. Reg. 72-301(19);² City of Charleston, 334 S.C. 246, 248.

Question 3

As stated in previous opinions, “investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court.” Op. S.C. Atty. Gen., September 14, 2006; April 6, 2006. Therefore, we cannot opine as to the legality of the specifics of this transaction. However, we are unaware of any authority that would allow the school district to donate property in lieu of paying a fee. The Tega Cay City Council may find the “most effective and efficient” collections method; however, there is no authority to indicate that accepting a property donation in lieu of fees would be acceptable. Ordinance #353, Section 2.8.

In an opinion of this Office dated October 18, 2010, we address an analogous issue as to whether it would be constitutional for “state law to exempt school districts from a road impact fee” and opined that “we do not believe the Legislature intended for schools to be exempt from impact fees.” Op. S.C. Atty. Gen., October 18, 2010. While the road impact fee is distinct from the stormwater management utility service fee, we did not find any provision of South Carolina law prohibiting a county or other local governing body from imposing a uniform service charge on a school district in either instance. It is unlikely that a court would permit the Fort Mill School District to donate property in lieu of paying fees. Hence, the school district would likely be required to pay the stormwater fee in a traditional manner.

Conclusion

Question 1

It is the opinion of this Office that the city would be permitted to legally issue credits against stormwater fees so long as the credit is appropriately established by City Council and is granted based on the user’s demand for and cost of services provided by the Stormwater Management Utility. While only a court may make a determination as to whether an ordinance should be set aside, this ordinance, like all ordinances, carries a presumption of validity, does not likely conflict with state law assuming a court finds the credits to be “reasonable and equitable,”³ and

² “‘Exemption’ means those land disturbing activities that are not subject to the sediment and stormwater requirements contained in these regulations.” S.C. Reg. 72-301(19).

³ S.C. Code § 48-14-120(C).

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does not appear to violate Equal Protection. Therefore, the ordinance would likely be upheld by a court and may be followed as written.

Question 2

It is the opinion of this Office that the City of Tega Cay should not, under general circumstances, exempt property from paying Stormwater Management Utility Service fees. However, we do recognize that if statutory or regulatory authority permits, then the city should carefully comply with all relevant law and might be able to exempt certain property from stormwater fees under these limited circumstances. One such example might be when property has less than a threshold amount of impervious land.

Question 3

It is the opinion of this Office that the City of Tega Cay may not accept a donation of property in lieu of stormwater fees. While the Tega Cay City Council may find the "most effective and efficient" collections method, we have found no authority to indicate that accepting a property donation in lieu of fees would be acceptable.

Sincerely,



Leigha Blackwell Sink
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General