ALAN WILSON
ATTORNEY GENERAL

May 28, 2013

The Honorable Phyllis Henderson
Member, House of Representatives
530-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Henderson:

Attorney General Alan Wilson has referred your letter of December 27, 2012 to the Opinions section for a response. The following is our understanding of your question presented as asked[1] and the opinion of this Office concerning the issues based on that understanding.

Issues:

1) Is Greenwood County, as the owner of Lake Greenwood, authorized to charge an annual fee on docks as registering encroachments[2] even though the South Carolina Constitution says "navigable waters and wharfs" shall not be taxed unless authorized by the General Assembly?
2) Would an encroachment agreement by Greenwood County be authorized as a part of their permit process in registering encroachments?

Short Answers:

1) Yes, Greenwood County has cited authority that would likely authorize such a fee.
2) Yes, a court would likely find an agreement with Greenwood County as a part of the permit process renewal is authorized. However, please note this Office did not analyze the contents of the document as we leave factual questions to a court of law.

Law/Analysis:

Lake Greenwood was built by Greenwood County pursuant to Act No. 236 (1933) by damming the Saluda River. Taylor v. Davenport, 281 S.C. 497 (1984). Lake Greenwood is owned by Greenwood County even though the lake is situated in Greenwood, Laurens, and Newberry Counties. Id. Lake

[1] Though it is this Office's understanding you asked your question specifically as to registering encroachments on behalf of a constituent, the constituent had numerous questions and issues concerning his property at Lake Greenwood. This Office does not answer factual questions or become involved in property disputes between a private citizen and a county as such disputes should be determined by a court of law. This Office only issues legal opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)). In such disputes as the one in which your constituent is involved, this Office recommends the constituent hire a private attorney.

[2] Even though traditionally one might view a dock attached to real property as an appurtenance to the real property, transferred with the deed, this Opinion request deals with docks that are referred to as encroachments.

Greenwood is a public, navigable waterway with privately-owned docks. Op. S.C. Atty. Gen., March 31, 1982 (1982 WL 189229).

Based on a letter provided to this Office at our request, Greenwood County asserts it has both state and federal authority to charge and collect a fee for issuance of a permit for private piers in Lake Greenwood. Greenwood County has informed us it issues its permits for a dock only for one year. All permits must be renewed each year. It is this Office's understanding that Greenwood County charges a $50.00 fee from holders of permits for piers, boat docks and similar structures as a part of the annual permit. It cites its authority for such a fee based upon three justifications. The first reason cited by Greenwood County is pursuant to its license by the Federal Energy Regulatory Commission ("FERC"). Article 417(b) of its FERC licenses says:

> The type of use and occupancy of project lands and water for which the licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single-family type dwellings; (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline.... The licensee [Greenwood County] shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements.... **To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands a reasonable fee to cover the licensee's costs of administering the permit program**....

(emphasis added). Greenwood County says the fee as a condition of the permit is authorized by FERC to cover the costs incurred by Greenwood County for administration of the mandated permit program.

Greenwood County argues the second source of its authority for the permit fee is pursuant to South Carolina Law. The County cites South Carolina Code Section 6-1-330 (1976 Code, as amended), which states:

> (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.
> (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.
> (D) The governing body of a county may not impose a fee on agricultural lands, forestlands, or undeveloped lands for a stormwater, sediment, or erosion control program unless Chapter 14, Title 48 allows for the imposition of this fee on these lands; provided, that any county which imposes such a fee on these lands on the effective date of this subsection may continue to impose that fee under its same terms, conditions, and amounts.

Greenwood County gives as its third source for its authority to charge the permit fee Act Number 536 of 1967. That Act states, in part,:

> SECTION 1. Construction prohibited without permit. –It shall be unlawful for any person to erect or replace any structure, pier, boathouse or other installation on the waters of Lake Greenwood, or on the lands adjoining the lake owned by Greenwood County, unless a permit for construction is first obtained from the Greenwood County Finance Board.
> SECTION 2. Permits—rules and regulations by Finance Board.—**The Finance Board is hereby authorized to establish regulations and conditions for granting the permits required by Section 1 of this act. Subject to these regulations, permits may be granted for a specified or unlimited period of time as the Board may determine.**
> ...

1967 S.C. Act No. 536 (emphasis added). As Greenwood County states in its letter from its attorney, "[b]y Act 536 ... the General Assembly prohibited the erection of any structure, pier, boathouse or other installation on the waters of Lake Greenwood or on the lands adjoining 'the lake owned by Greenwood County' unless a permit for construction is first obtained from Greenwood County. Furthermore, the General Assembly awarded to Greenwood County the authority to establish regulations and conditions for granting the said permits, and provided that the permits may be granted for a specified period of time. It is the position and practice of Greenwood County that payment of the pier permit fee is a condition for the granting of a pier permit. Per the allowance of the General Assembly, the permit's effective period is made to be one year, and therefore the permit must be renewed every year and the pier permit fee must be paid every year."

Your question concerning such a permit fee included a reference to a possible prohibition of such a fee by the South Carolina Constitution. According to the South Carolina Constitution Article 14, Section 4 "[a]ll navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and **no tax, toll, impost or wharfage shall be imposed, demanded or received from the owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly**."[3] After examining Greenwood County's response, even if the

[3] S.C. Code § 49-1-10 says "All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are

prohibition would apply in this situation, the County has offered other authorization by the General Assembly for such a fee.[4]

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hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly. If any person shall obstruct any such stream, otherwise than as in Chapters 1 to 9 of this Title provided, such person shall be guilty of a nuisance and such obstruction may be abated as other public nuisances are by law."

[4] Even though the legal question is answered with authorization "otherwise provided by the General Assembly," when this Office looked to the South Carolina Constitution, we found that wharf is not defined in that section. In order to ascertain if a dock might be included in the meaning of wharf, the next place we looked was the reasonable definition intended by the legislature. We looked at the meaning of wharf and found Black's Law Dictionary defines wharf as:

> "Wharf. A structure on the margin or shore of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded, or a space of ground, artificially prepared, for the reception of merchandise from a ship or vessel, so as to promote the discharge of such vessel.
> Private wharf. One whose owner or lessee has the exclusive enjoyment or use thereof. The M. L. C. No. 10, C.C.A.N.Y., 10 F.2d, 702.
> Public wharf. One to which vessels and the public can resort, either at will or on assignment of a berth by a harbor authority. Kafline v. Brooklyn Eastern Dist. Terminal Co., 180 App.Div. 858, 168 N.Y.S. 120, 121.

Black's Law Dictionary 1595 (Centennial ed., 6th ed., West Publishers 1990). Wharf is also defined as "a structure, on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. The term 'wharf' may indicate a locality as well as an actually existing artificial structure. A wharf is an artificial landing-place, built or constructed for the purpose of loading or unloading goods. It is a structure, on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded... ." 94 C.J.S. Wharves § 1 (2013). Additionally this Office looked at some of case law at the same time this language prohibiting taxes on wharfs originated (in the mid-nineteenth century) and found based on that preliminary research that a dock on navigable water may likely fit under that definition, though further research would be required for a full legal opinion on that issue. See 94 C.J.S. Wharves § 1 (2013); U.S. v. Baltimore & Ohio Railroad Co., 34 S.Ct. 75, 58 L.Ed. 218 (1913); U.S. v. Bain, 2 Hughes 593, 24 F.Cas. 940, No. 14,496 (1879); Dewees v. Adger & Black, 2 McCord 105, 13 S.C.L. 105 (Ct.App. 1822), et al.

It is this Office's understanding that it is undisputed that the constituent built and owns a dock. South Carolina law defines a private dock as:

> § 54-13-10: For the purpose of this chapter, a privately owned dock is defined as any dock which is constructed on or appurtenant to property on which the person constructing the dock owns a leasehold interest in or title to or has obtained permission, express or implied, from the title owner to construct the dock.

This Office also recognizes traditionally any ambiguity in the imposition of a tax must be interpreted in favor of the taxpayer except when there is any ambiguity regarding a tax exemption. An exemption should be strictly scrutinized and that any such ambiguity should be resolved against the exemption and in favor of the tax. Ops. S.C. Atty. Gen., 1967 WL 12119 (April 28, 1967); 1979 WL 42729 (January 2, 1979) (citing Chronicle Publishers, Inc. v. South Carolina Tax Commission, 244 S. C. 192, 136 S.E.2d 261(1964)). However, we feel it is likely such an exemption found in our South Carolina Constitution would be interpreted broadly in favor of the taxpayer by the court. It should also be noted that the language in the Constitution providing that "owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable

It is this Office's further understanding that as a part of all dock permit applications, Greenwood County requires an encroachment agreement to be signed by all dock owners. While this Office will not analyze all contracts and agreements by a county, it will presume the agreement does not violate any state or federal laws, regulations, the Constitution, the FERC license, or any other applicable authority. Assuming no such violations, it is likely such an agreement would be permissible as a part of the permit process based upon the authority given. However, it should be noted that this Office believes the intent of the South Carolina Constitution is clear in ensuring all of South Carolina's navigable waters are open for navigation and use by the public. Therefore, with the above caveats, as long as any such encroachment agreement is reasonable, it is likely it will be upheld by a court.

Conclusion: Based on the general question of encroachment fees and agreements, this Office has attempted to offer an opinion on the law. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

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stream," is likely referring to commercial use. However, this Office believes a court could consider tour guides, fishermen and others on the lake as such as owners of any merchandise or commodity. We also believe that a court would likely interpret "for the use of the shores or any wharf erected..." to include a dock fee, but a court would need ultimately to determine such interpretation.

It should also be noted that S.C. Code §12-43-230(c) (which says "[t]he department may further provide by regulation for definitions not inconsistent with general law for real property and personal property in order that such property must be assessed uniformly throughout the State") authorizes the South Carolina Department of Revenue to define real and personal property by regulation. South Carolina Regulation 117-1700.1 defines fixed river, lake or tidewater wharves and docks as real property for the purposes of taxation.