ALAN WILSON
ATTORNEY GENERAL

January 15, 2014

Mark W. Tollison, Esquire
Greenville County Attorney
301 University Ridge, Suite 2400
Greenville, South Carolina 29601-3681

Dear Mr. Tollison:

Attorney General Alan Wilson has referred your letter of June 12, 2013 to the Opinions section for a response. The following is our understanding of your question and the opinion of this Office concerning the issue based on that understanding.

**Issue:** May Greenville County use S.C. Code Section 12-37-235 to levy a fire service fee on tax exempt real property (such as cemeteries, hospitals, synagogues, non-profit corporations and churches) on behalf of a special purpose district and remit such a fee to the special purpose district?

**Short Answer:** No, this Office does not believe a court would find a county may use S.C. Code Section 12-37-235 to levy a fire service fee on behalf of a special purpose district. This Office would caution using that statute in such a way to "tax" nonprofit organizations could infringe on State Constitutional rights and guarantees.

**Law/Analysis:**
As stated in your letter:

> *By way of background, Greenville County Council has been approached by several fire districts on the funding of fire protection services. Members of the fire services community have brought S.C. Code Ann. § 12-37-235 to the County's attention and have inquired as to whether a special purpose district created by the General Assembly engaged in fire protection may utilize this statute to impose fire protection fees. We are of the opinion that a special purpose district may not directly levy a fee under § 12-37-235; however, it is unclear whether a county may levy a fire service fee under § 12-37-235 on behalf of a separate political subdivision for services provided by a special purpose fire district and remit those fees to the district.*
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> *Therefore, on behalf of Greenville County Council, I am requesting an opinion as to whether the governing body of a county may levy a fee for fire services on behalf of a*

*special purpose district under S.C. Code Ann. § 12-37-235 for services provided to certain tax exempt properties.*

As you reference in your letter, South Carolina law states:

> **Each county and municipality in this State may charge the owners of all real property exempt from ad valorem taxation under the provisions of items (2), except property of the State, counties, municipalities, school districts and other political subdivisions where such property is used exclusively for public purposes,** (3), except public libraries, and (4) of § 12-37-220 of the 1976 Code, which is located within their respective boundaries, **reasonable fees for fire protection**; provided, that no fees may be charged by a county for protection or service provided to such owners by a municipality.
> **All such fees shall be based on the protection and services provided and which are maintained in whole or in part by funds from ad valorem taxes. No fees shall exceed the amount of taxes that would be levied on any of the subject property for any one service if the subject property were subject to ad valorem taxation.**

S.C. Code § 12-37-235 (1976 Code, as amended) (emphasis added).[1] The properties included in this statute would be any hospitals, synagogues, churches, cemeteries and nonprofits not precluded by the statute. Id. The South Carolina Constitution says: **"[t]here shall be exempt from ad valorem taxation: ... (c) all property of all public libraries, churches, parsonages and burying grounds; ...."** S.C. Const. Art. X, § 3(c) (emphasis added). **The South Carolina Constitution also prohibits taxation without representation in Article X, Section 5 where it says there should be no tax, subsidy or charge without the consent of the people or their representatives.** Additionally, Article X, Section 4 of the South Carolina Constitution bestows on the General Assembly the exclusive right to provide for the assessment of all property and that is the assessment all taxes should be levied on. Consistent with the South Carolina Constitution Article X, Section 3(c), South Carolina Code Section 12-37-220 states:

> (A) Pursuant to the provisions of Section 3 of Article X of the State Constitution and subject to the provisions of Section 12-4-720, **there is exempt from ad valorem taxation:**
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> ...
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> **(3) all property of all public libraries, churches, parsonages, and burying grounds,** but this exemption for real property does not extend beyond the buildings and premises actually occupied by the owners of the real property;
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> ...

S.C. Code § 12-37-220(A)(3) (1976 Code, as amended) (emphasis added).

As a background regarding statutory interpretation, the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the

[1] Please note this is the current law at the time this opinion is written. However, there were two proposed amendments in 2013 concerning this statute.

literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)). The language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). Based on a plain reading of S.C. Code § 12-37-235, the language in the statute clearly only authorizes counties and municipalities to charge a fee for fire protection. Thus, the question is whether a special purpose district would be included in the authorization for "counties and municipalities" to charge a fee for fire protection.[2] S.C. Code § 12-37-235.

The rule of statutory construction known *as "expressio unius est exclusio alterius"* or "*inclusio unius est exclusio alterius*" meaning "to express or include one thing implies the exclusion of another, or of the alternative" would apply here. See, e.g., Ops. S.C. Atty. Gen., 2013 WL 5763370 (October 10, 2013); 2005 WL 1024601 (April 29, 2005) (citing Hodges v. Rainey. 341 S.C. at 86, 533 S.E.2d at 582(2000)). "Expressio unius est exclusion alterius" would interpret S.C. Code § 12-37-235 to mean special purpose districts are not authorized to charge a fire protection fee because if they were meant to be included as authorized, the legislature would have specifically included them in the statute. Id. This Office wrote an opinion in 2010 in which we also cited to "expressio unius est exlcusio alterius" to determine the Legislature intentionally did not intend to extend a tax exemption to include surviving spouses by their lack of inclusion in the language of the statute. Op. S.C. Atty. Gen., 2010 WL 440995 (January 20, 2010). While this Office believes a special purpose district could have been included in the statute but was not, one could argue that the term "counties and municipalities" would include all special purpose districts. However, there is case law and a legal opinion to the contrary. Michelin Tire Corp. v. Spartanburg Co. Treasurer, 281 S.C. 31, 314 S.E.2d 8 (1984), held that a special purpose district's taxes were not a county tax because the district did not have the same boundaries as the county. The case went on to say that since counties cannot abolish special purpose districts it follows that home rule does not require county taxes to include district taxes. Id. That holding is consistent with S.C. Code § 6-11-270 which states concerning separate tax collection and separate maintenance by counties:

> After the approval thereof by the county supervisor, taxes shall be levied to meet such expenses upon all assessable property in the [special purpose or public service] district and upon collection of them by the county treasurer they shall be disbursed only upon the approval of the board of commissioners of the said electric light, water supply, fire

[2] This opinion in no way address the constitutionality of S.C. Code § 12-37-235 and whether it is authorizing the renouncing of a constitutional provision as this Office was not asked to address it, and only a court may declare a statute unconstitutional. Op. S.C. Atty. Gen., 2004 WL 1557095 (June 23, 2004).

> protection or sewerage district, as the case may be, by an order on the county treasurer drawn by the supervisor of the county in which said district is located. All taxes so levied for any such [special purpose or public service] district shall be kept separate on the assessment roll from other levies and moneys so collected shall be kept in a separate fund for the [special purpose or public service] district.

S.C. Code § 6-11-270 (1976 Code, as amended).[3] Additionally, it is this Office's understanding from discussions with you that most, if not all, of the special purpose districts involved in this question are elected bodies. This Office has previously opined that there is no constitutional reason why a special purpose district (which is a separate political subdivision) with an elected governing body cannot use its taxing power without supervision by the county. Op. S.C. Atty. Gen., 2012 WL 889085 (March 2, 2012).

**Legal Conclusion: Therefore, since such special purpose districts are separate political subdivisions from a county and are authorized to tax without supervision by a county, and the legislature could have easily included special purpose districts in the statute as authorized to charge such a fee, this Office believes a court is likely to find S.C. Code § 12-37-235 only authorizes such a fire service fee for counties and municipalities, which this Office believes does not include a county acting on behalf of a special purpose district under the doctrine of *"expressio unius est exclusio alterius."***

**Further Analysis:**
**While this Office believes the above analysis is sufficient to answer your question, we want to point out some of the numerous cases, opinions, laws and relevant issues.** It should be noted this Office wrote a previous opinion concerning the statute. That opinion asked what fees may be levied by S.C. Code § 12-37-235. It stated:

> The section was enacted in 1978 as a part of Act 621. The language set forth in the Act provides in part that:
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> > 'Each county and municipality in this State may charge the owners of all real property exempt from ad valorem taxation under the provisions of items (2), except property of the State, counties, municipalities, school districts and other political subdivisions where such property is used exclusively for public purposes, (3) except public libraries, and (4) of Section 12–37–220 of the 1976 Code, which is located within their respective boundaries, reasonable fees for fire protection; provided, that no fees may be charged by a county for protection or service provided to such owners by a municipality.'
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> The above was set forth as Section 3 in the Act. Section 2 of the Act amended § 12–37–220. The rule of construction here governing is that stated in Greenville Enterprise v. Jennings, 210 S.C. 163, 41 S.E.2d 868.

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[3] The Supreme Court specified that Article VIII of the South Carolina Constitution was passed with the intent to return the power of county government to the local level. Op. S.C. Atty. Gen., 2011 WL 5304080 (October 11, 2011) (citing Terpin v. Darlington Co. Council, 286 S.C. 112, 332 S.E.2d 771 (1985)). However, home rule (including Article VIII, Section 17 of the S.C. Constitution) only applies to counties and municipalities, not special purpose districts. Evins v. Richland Co. Historic Preservation Com'n, 341 S.C. 15, 532 S.E.2d 876 (2000).

> 'All rules for statutory construction are servient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in light of intended purpose.'
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> It is here obvious that the intended purpose was to allow counties and municipalities to charge owners of exempt real property reasonable fees for fire protection. The exceptions are property of the State, counties, municipalities, school districts, other political subdivisions when used exclusively for public purposes and public libraries.
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> CONCLUSION:
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> Section 12–37–235 applies to real property exempt from ad valorem taxation by § 12–37–220, except property of the State and its political subdivisions that are exempt from ad valorem taxation and real property of public libraries.

Op. S.C. Atty. Gen., 1982 WL 155037 (November 9, 1982).

Sections (2), (3), and (4) of S.C. Code § 12-37-220 (as referenced in S.C. Code § 12-37-235) would include such institutions as charitable institutions such as hospitals, institutions caring for the handicapped, the aged, children and indigents, churches, parsonages, cemeteries, property of charitable trusts and foundations. While this Office is not going to get into the validity of such a tax or fee, some questions this Office would ask in regards to the fee itself are whether the fee would be uniform or ad valorem for each property. Additionally, would a fee be required for services rendered or in general on an annual basis? Would a cemetery pay the same fee as a four story non-profit building? While numerous opinions have been written and numerous cases have been decided concerning special purpose districts and taxes, for further reading we also suggest Ops. S.C. Atty. Gen., 2007 WL 3244893 (August 15, 2007); 2007 WL 655612 (February 16, 2007); 2009 WL 3658275 (August 19, 2009); 2011 WL 2214059 (May 18, 2011), though there are numerous other relevant sources on the subject.

By way of background, South Carolina Code § 6-1-270 authorizes the levy, collection and disbursement of taxes for special purpose districts. The statute states:

> After the approval thereof by the county supervisor, taxes shall be levied to meet such expenses upon all assessable property in the district and upon collection of them by the county treasurer they shall be disbursed only upon the approval of the board of commissioners of the said electric light, water supply, fire protection or sewerage district, as the case may be, by an order on the county treasurer drawn by the supervisor of the county in which said district is located. All taxes so levied for any such district shall be kept separate on the assessment roll from other levies and moneys so collected shall be kept in a separate fund for the district.

S.C. Code § 6-1-270 (1976 Code, as amended). The South Carolina Constitution states:

> **SECTION 1.** Taxation and assessment.
>
> The General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property. ...
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> ...
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> **SECTION 4.** One assessment for all taxes.

> The General Assembly shall provide for the assessment of all property for taxation, whether for state, county, school, municipal or any other political subdivision. All taxes shall be levied on that assessment. (1976 (59) 2217; 1977 (60) 90.)
> **SECTION 5.** No tax without consent; taxes to be levied in pursuance of law.
> No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied. (1976 (59) 2217; 1977 (60) 90.)
> **SECTION 6.** Establishment of method of valuation for assessment of real property within State.
> Except as otherwise provided in this section, the General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including counties, municipalities, special purpose districts, public service districts, and school districts. Property tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes; provided, that on properties located in an area receiving special benefits from the taxes collected, special levies may be permitted by general law applicable to the same type of political subdivision throughout the State, and the General Assembly shall specify the precise condition under which such special levies shall be assessed. ...

S.C. Const. Art. X, § 4, § 5, § 6. **One other principle of statutory interpretation that could apply here is the long-recognized rule of statutory interpretation that any ambiguity in the imposition of a tax must be interpreted in favor of the taxpayer. Op. S.C. Atty. Gen., 1967 WL 12119 (April 28, 1967).** Additionally, taxation by a separate entity without a referendum could be considered taxation without representation. See e.g., Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79; S.C. Code § 6-11-21(D) (1976 Code, as amended). In Weaver the South Carolina Supreme Court struck down an act which authorized a county recreation commission to tax because the Court found the act allowed taxation without representation in violation of the South Carolina Constitution (Article X, §5). Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997).

> In *Weaver v. Recreation Dist.*, 328 S.C. 83, 492 S.E.2d 79 (1997), the South Carolina Supreme Court held that such an assessment by the District, an appointed body, violated the provision of the South Carolina Constitution forbidding taxation by unelected officials. The court, however, stated that it was aware "of the disruptive effect today's holding could have on the financial operation of numerous special purpose districts, local commissions and boards throughout this state." *Id.* at 82. The court therefore made its ruling prospective, giving the General Assembly two years to devise a new financing system, and permitted the unconstitutional procedure to continue for that period. The court did not order any remedy or refund for taxes imposed in earlier years, including the year that was specifically challenged.
> In 1998, the South Carolina General Assembly passed legislation that took all discretionary taxing power out of the hands of appointed bodies such as the District's governing board. *See* S.C.Code Ann. § 6-11-271. In its place, the General Assembly exercises its own taxing power to finance the operations of such entities.

Lawyer v. Hilton Head Public Service Dist. No.1, 220 F.3d 298, C.A.4th (S.C.) 2000. This Office also wrote an opinion on the removal of the authority of special purpose districts to tax in which we said:

> The opinion of our Court in Campbell v. Hilton Head No. 1 Public Service District, 354 S.C. 190, 192, 580 S.E.2d 137, 138 (2003), provides a useful description of the evolution of South Carolina law with respect to taxation by appointed commissions. ...The effect of section 6-11-271 is to take discretion with regard to taxation away from appointed commissions, placing the final say in the taxation of a district in the General Assembly, in the people of the district acting by referendum, or in the governing body of the county. See Weaver, 328 S.C. at 86, 492 S.E.2d at 81 (characterizing Crow v. McAlpine, 277 S.C. 240, 285 S.E.2d 355 (1981) as standing for the proposition that "the legislative power to tax may not be conferred on a purely appointive body but must be under the supervisory control of elected bodies"); Hagley Homeowners Ass'n v. Hagley Water, Sewer, and Fire Authority, 326 S.C. 67, 485 S.E.2d 92 (1997) ("While the General Assembly can delegate its taxing authority to a subordinate agency, it can only delegate this power to a body which is either composed of persons assented to by the people or subject to the supervisory control of a body chosen by the people.").

Op. S.C. Atty. Gen., 2012 WL 889088 (February 29, 2012). However, in that same opinion, this Office opined that the sewer subdistrict had the authority to charge sewer and tap fees without the approval of its county council because "a charge in exchange for a service does not constitute taxation for constitutional purposes." Op. S.C. Atty. Gen., 2012 WL 889088 (February 29, 2012) (citing Hagley Homeowner's Ass'n v. Hagley Water, Sewer, & Fire Authority, 326 S.C. 67, 75-76, 485 S.E.2d 92, 96).

S.C. Code § 6-11-140 says "[t]he board of commissioners of any such electric light, water supply, fire protection and sewerage district shall establish and maintain just and equitable rates, rentals or charges for the use of and the service rendered by such works, to be paid by the owner of each and every lot, parcel of real estate or building that is connected with and uses such works by or through any part of the electric light system, water supply system, fire protection system and sewerage system or that in any way is served by such works and may change or adjust such rates or charges from time to time." The boards of commissioners of special purpose districts are to be politic bodies and may establish charges for the use of fire protection (among other things). S.C. Code § 6-11-100. S.C. Code § 6-11-150 requires a public hearing with all property owners being served notice before any rates are changed or before any charges are established. S.C. Code § 6-11-270 allows for the levy of taxes with the approval of the county supervisor, and S.C. Code § 6-11-273 allows legislatively-created special purpose districts to conduct a referendum to propose a change in the tax millage. Let us look to S.C. Code § 6-11-271. It says:

> (A) For purposes of this section, "special purpose district" means any special purpose district or public service authority, however named, created prior to March 7, 1973, by or pursuant to an act of the General Assembly of this State.
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> (B) (1) This subsection applies only to those special purpose districts the governing bodies of which are not elected but are presently authorized by law to levy for operations and maintenance in each year millage up to or not exceeding a given amount and did impose this levy in fiscal year 1997-98.

> (2) There must be levied annually in each special purpose district described in item (1) of this subsection, beginning with the levy for fiscal year 1999, ad valorem property tax millage in the amount equal to the millage levy imposed in fiscal year 1998.
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> (C) (1) This subsection applies only to those special purpose districts, the governing bodies of which are not elected but are presently authorized by law to levy for operations and maintenance in each year millage without limit as to amount.
> (2) There must be levied annually in each special purpose district described in item (1) of this subsection, beginning with the levy for fiscal year 1999, ad valorem property tax millage in the amount equal to the millage levy imposed in that special purpose district for operations and maintenance for fiscal year 1998.
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> (D) Notwithstanding any other provision of law, any special purpose district within which taxes are authorized to be levied for maintenance and operation in accordance with the provisions of subsections (B) or (C) of this section, or otherwise, may request the commissioners of election of the county in which the special purpose district is located to conduct a referendum to propose a modification in the tax millage of the district. Upon receipt of such request, the commissioners of election shall schedule and conduct the requested referendum on a date specified by the governing body of the district. If approved by referendum, such modification in tax millage shall remain effective until changed in a manner provided by law.
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> (E)(1) All special purpose districts located wholly within a single county and within which taxes are authorized to be levied for maintenance and operation in accordance with the provisions of subsections (B) or (C) of this section, or otherwise, are authorized to modify their respective millage limitations, provided the same is first approved by the governing body of the district and by the governing body of the county in which the district is located by resolutions duly adopted. Any increase in millage effectuated pursuant to this subsection is effective for only one year.
> (2) Any millage increase levied pursuant to the provisions of item (1) of this subsection must be levied and collected by the appropriate county auditor and county treasurer.

S.C. Code § 6-11-271 (1976 Code, as amended) (emphasis added).[4]

Therefore, a pertinent issue is whether the fire service fee pursuant to S.C. Code § 12-37-235 is a fee or a tax. As stated by the South Carolina Supreme Court in a 1992 case:

> The question of whether a particular charge is a tax depends on its real nature and not its designation. *Powell v. Chapman,* 260 S.C. 516, 197 S.E.2d 287 (1973); *Jackson v.*

[4] Please note the only type of taxes non-elected special purpose districts are authorized to issue are ad valorem taxes pursuant to this statute. S.C. Code § 6-11-271. Any modification in the tax millage for such special purpose districts must be done so by requesting the election commissioners to conduct a referendum to propose the modification. Id. See also S.C. Code § 6-11-273, et al..

> *Breeland,* 103 S.C. 184, 88 S.E. 128 (1915) (in distinguishing assessments from taxes the court held that courts will look behind mere words). In any doubtful case, however, the intent of the legislature as expressed in its characterization of the fee must be given judicial respect. *Emerson College v. City of Boston,* 391 Mass. 415, 462 N.E.2d 1098 (1984) (citing *Associated Indus., Inc. v. Comm'r. of Revenue,* 378 Mass. 657, 393 N.E.2d 812 (1979)).
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> ...
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> Although a service charge may possess points of similarity to a tax, it is inherently different and governed by different principles. A service charge is imposed on the theory that the portion of the community which is required to pay it receives some special benefit as a result of the improvement made with the proceeds of the charge. A charge does not become a tax merely because the general public obtains a benefit. *See Robinson v. Richland County Council, supra; Casey v. Richland County Council,* 282 S.C. 387, 320 S.E.2d 443 (1984).

Brown v. County of Horry, 308 S.C. 180, 184-185, 417 S.E.2d 565, 567-568 (1992). The test implemented in the Brown case to determine whether a charge is a service charge is a fee or tax is:

1) Is the revenue generated used to the benefit of the payers, even if the general public also benefits?
2) Is the revenue generated used only for the specific improvement contemplated?
3) Does the revenue generated by the fee exceed the cost of the improvement?
4) Is the fee uniformly imposed on all the payers?

C.R. Campbell Const. Co. v. City of Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997) (citing Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992)). Based on the facts as provided to this Office, it is likely a court could find that the fire service fee is really a tax under the Brown test because the revenue generated is not used for a specific improvement but for general use, the fee does not expire at the completion of any improvement, nor is it uniformly imposed (it is not imposed by use but is imposed for those non-profits, charities, etc. in the statute regardless of how large the nonprofit is or how much it may or may not use the fire services), nor do other property owners pay this fee (because they pay property taxes or else are exempt by the statute). As the Brown case also states:

> S.C. Code Ann. § 4-9-30 (1991), which sets out the general powers which counties may exercise under the Home Rule Act, grants counties the power:
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> > (5)(a) to assess property and levy ad valorem property taxes and *uniform service charges* ... and make appropriations for functions and operations of the county, including ... *roads,*...; water,....; sewage.... (emphasis added).
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> 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.

Id. at 183. However, the Brown case clarified that a charge must be uniform under S.C. Code Section 4-9-30(5). Id. at 186. This Office wrote an opinion in 2011 outlining the Brown test concerning road maintenance fees. In that opinion this Office restated that determining whether a fee is a tax is a factual question that should be determined by a court. Op. S.C. Atty. Gen., 2011 WL 782317 (February 18, 2011) (citing Op. S.C. Atty. Gen., 2006 WL 2593077 (August 24, 2006)).

Additionally, The U.S. Fourth Circuit Court of Appeals held a municipal fire protection service fee was a tax because the fee was based on property ownership not use of the service. Folio v. City of Clarksburg, WV, 134 F.3d 1211 (1998). However, cities are not bound by that decision where there is no federal right involved. City of Clarksburg v. Grandeotto, Inc., 204 W.Va 404, 513 S.E.2d 177 (1998). While there are also other prior opinions by this Office worth mentioning, a 2010 opinion concerning a road impact fee on a new development concluded that without legislative action, nonprofit entities would generally be subject to impact fees imposed by a county.[5] See Op. S.C. Atty. Gen., 2010 WL 4391638 (October 18, 2010).[6]

Moreover, it is a well-recognized principle of law that an act which is forbidden to be done directly cannot be accomplished indirectly. Ops. S.C. Atty. Gen., 2000 WL 1803581 (November 13, 2000); 1990 WL 599265 (July 31, 1990) (citing State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526 (1940); Lurey v. City of Laurens, 265 S.C. 217, 217 S.E.2d 226 (1975); Westbrook v. Hayes, 253 S.C. 244, 169 S.E.2d 775 (1969)). As the State Supreme Court cautioned in Richardson v. Blalock, 118 S.C. 438, 110 S.E. 678 (1922), "[t]hat which cannot be done directly cannot be done indirectly." As this Office previously stated, "the purpose of this rule is to prevent circumvention of the law by ruse or artifice." Op. S.C. Atty. Gen., 2003 WL 21471505 (June 10, 2003). As this Office stated in a 2006 opinion:

> Article X, Section 6 of the South Carolina Constitution plainly sets forth: "Property tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes." This provision then carves out an exception for "properties located in an area receiving special benefits" and allows for "special levies" on such properties. This provision does not, however, provide properties that do not receive special benefits may be permitted to receive special credits or reductions in taxes. This interpretation of Article X, Section 6 is consistent with the numerous opinions of South Carolina Supreme Court holding "[t]he plain language of Article X, § 6 does not impose uniformity on the distribution of taxes. Under Article X, § 6, uniformity is obtained when property taxes are levied equally within the county." Davis v. County of Greenville, 313 S.C. 459, 464, 443 S.E.2d 383, 386 (1994). See also Westvaco Corp. V. South Carolina Dep't of Revenue, 321 S.C. 59,

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[5] This Office has written numerous opinions on related issues. See, e.g. Op. S.C. Atty. Gen., 1968 WL 8865 (June 11, 1968). It should be noted this Office answered a question of whether a county's increase in the millage from for fire service was limited by S.C. Code Section 6-1-320. Op. S.C. Atty. Gen., 2007 WL 1934802 (June 26, 2007).

[6] S.C. Code § 6-1-930 allows an exception for special purpose districts created prior to 1973 by the legislature which, previous to the passing of § 6-1-930, imposed development impact fees, and such fees are not prohibited from continuing, whereas no other government entities may impose an impact fee unless it is pursuant to that Article.

> 62, 467 S.E.2d 739, 741 (1995); Yeargin v. Wicker, 295 S.C. 521, 525, 369 S.E.2d 844, 846 (1988).
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> Article VIII, Section 7 of the South Carolina Constitution and section 4-9-30 of the South Carolina Code provide to counties the "power to tax different areas at different rates of taxation related to the nature and level of governmental services provided." Although this constitutional provision and this statute appear to afford counties with the ability to charge different tax rates to different residents in the County, when read in conjunction with Article X, Section 6, we find these provisions do not abrogate the requirement that property taxes be uniformly levied. Rather, these provisions simply allow counties to create special levies for special benefits received as provided in Article X, Section 6. Therefore, the South Carolina Constitution and section 4-9-30 of the South Carolina Code do not provide an express mechanism in which residents may use a special tax district to reduce their general obligation to pay ad valorem taxes imposed by the County. Furthermore, in our opinion, and for a county to use a special tax district for this purpose would circumvent the uniformity in taxation requirement of Article X, Section 6 of the South Carolina Constitution and result in a constitutional violation.
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> In analyzing the constitutionality of the proposed special tax district, we also find it imperative to note a recent South Carolina Supreme Court decision dealing with uniformity of taxation. In City of North Charleston v. County of Charleston, 363 S.C. 527, 611 S.E.2d 920 (2005), the Supreme Court addressed the issue of uniformity of taxation with regard to Article X, Section 3 of the South Carolina Constitution (requiring uniformity in the enactment of property tax exemptions). The Court found a statute allowing counties to enact property tax caps unconstitutional, stating: "Where our Constitution requires statewide uniformity, a local option law is not valid." Id. at 530, 611 S.E.2d 920, 922. Although the issues as presented to us, pertain to other provisions of the South Carolina Constitution, we find the Supreme Court's holding in City of North Charleston instructive. The creation of a special tax district for the purpose of lowering certain residents ad valorem taxes, would result in the destruction of the uniformity of taxation throughout the County. In addition, a court may find such a special tax district creates an property tax exemption for those residents, violating Article X, Section 3 of the South Carolina Constitution under the Supreme Court's holding in City of North Charleston.

Op. S.C. Atty. Gen., 2006 WL 269604 (January 24, 2006).

While some other states have faced similar questions, a North Dakota Attorney General's opinion stated that fire protection and other such "user" fees were a tax because the "services to be charged for are generally available to all profit entities for fire and police services where the services to be charged for are generally available to all entitles within the city, tax exempt or non-tax exempt alike, and where only tax exempt entities would actually be charged." Op. N.D. Atty. Gen., 1999 WL 1939432 (March 30, 1999) (citing Op. N.D. Atty. Gen., 1994 WL 16004790 (April 15, 1994)). A 1994 North Dakota opinion stated in regards to fire and police service fees:

"Whether an exaction is called a 'fee' or a 'tax' is of little weight in determining what it really is." Scott v. Donnelly, 133 N.W.2d 418, 423 (N.D. 1965). It is the nature of the charge rather than its designation that is controlling. Id. "A 'tax' is an enforced contribution for public purposes which in no way is dependent upon the will or consent of the person taxed." Ralston Purina Company v. Hagemeister, 188 N.W.2d 405, 409 (N.D. 1971). "[A]ny payment exacted by the State as a contribution toward the cost of maintaining governmental functions, where special benefits derived from their performance are merged in the general benefit, is a tax." Menz v. Coyle, 117 N.W.2d 290, 297 (N.D. 1962). The theory of the Menz case would apply equally to cities.

Conversely, fees "are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society,' they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (citations omitted). See also 1993 N.D. Op. Att'y Gen. 25.

Your query relates to a charge for services generally available to all entities in the city. The entities cannot choose to receive the services nor decline them and they do not benefit the party paying the charge in a manner not shared by other members of society within the city. Rather, the charges would appear to be an enforced contribution for public purposes not based on the will or consent of the entity being charged. Therefore, regardless of how the charge was imposed, that is, on an annual premium basis or on a per occurrence basis, the charge you are contemplating would be a compelled charge to support general (or core) government services and not to reimburse the city for certain specified expenses in providing an individual service. See U.S. v. City of Huntington, 999 F.2d 71, 73-74 (4th Cir. 1993). Further, the fact that the contemplated charge would only be applied to tax exempt property is another indication that the charge is a tax to support core government services and not a fee to cover the costs of a service rendered.

Therefore, it is my opinion that a home rule city may not charge a fee to the federal or state governments nor to tax exempt charitable or nonprofit entities for fire and police services where the services to be charged for are generally available to all entities within the city, tax exempt or non-tax exempt alike, and where only tax exempt entities would actually be charged, because the charge imposed would be a tax and the entities you propose to charge are tax exempt under the constitution of North Dakota. See N.D. Const. art. X, § 5.[7]

[7] Please note while North Dakota's analysis of a fee v. tax would consider the fire service fee a tax, North Dakota's Constitution limited taxes to nonprofits, etc. while the South Carolina Constitution only prohibits ad valorem taxes in its Constitution. Whether or not such a fee pursuant to S.C. Code § 12-37-235 is a tax or a fee was not asked, nor was it asked whether S.C. Code § 12-37-235 is constitutional in lieu of S. C. Constitution Art. X, Section 3 and Art.

Op. N.D. Atty. Gen., 1994 WL 16004790 (April 15, 1994) (emphasis added).

**Conclusion: This Office believes a court would likely find the doctrine of "*expressio unius est exclusio alterius*" would prevent a county from imposing a fire service fee pursuant to S.C. Code § 12-37-235 on behalf of a special purpose district.** Whether or not such a fee pursuant to S.C. Code § 12-37-235 is a tax or a fee and whether S.C. Code § 12-37-235 is constitutional in lieu of S. C. Constitution Art. X, Section 3 and Art. X, Section 5 and other authority would be questions for a court to also answer. 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 S. Fair

Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

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X, Section 5. However, S.C. Code § 12-37-235 only authorizes such a fee for counties and municipalities, which, as previously explained herein, this Office believes does not include special purpose districts under the doctrine of *"expressio unius est exclusio alterius."*