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OPINION NO. _____ July 17, 1989

SYLLABUS: The enclosed letter contains the general law regarding the questions you have raised. However, it must be noted that there are remedies available to non-resident recipients of municipal services who must pay higher rates for services than rates imposed on city residents. As a legislator, you would be in a position to introduce legislation to equalize rates charged to all recipients of a municipality's services; a lawsuit to challenge the rates, annexation into the city, creation of a special tax district in some parts of the county, and other avenues of relief are options potentially available to non-residents aggrieved by imposition of higher rates.

TO: The Honorable Roland S. Corning
Member, House of Representatives

FROM: Patricia D. Petway
Assistant Attorney General

The State of South Carolina

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July 17, 1989

The Honorable Roland S. Corning
Member, House of Representatives
Post Office Box 2805
Columbia, South Carolina 29202

Dear Representative Corning:

You have asked that this Office address several questions with respect to the City of Columbia providing water and sewer services to non-residents of the City:

1. Whether rates for services to non-resident customers must be the same as rates for resident customers.

2. Whether generation of revenues provided by imposing higher rates on non-resident customers may be considered taxation without representation.

3. Whether the City of Columbia is restricted in the manner in which it may expend the revenues so generated.

Background

Section 5-7-60 of the Code of Laws of South Carolina (1976) provides the following with respect to a municipality providing services outside the municipal boundaries:

> Any municipality may perform any of its functions, furnish any of its services, except services of police officers, and make charges therefor and may participate in the financing

> thereof in areas outside the corporate limits of such municipality by contract with any individual, corporation, state or political subdivision or agency thereof or with the United States Government or any agency thereof, subject always to the general law and Constitution of this State regarding such matters .... . [Emphasis added.]

Thus, the extension of services such as water and sewer services to areas outside the corporate limits of a municipality is accomplished by contract between the municipality and the party to be served. The services are paid for by charges, according to the statute; no taxes are levied on these non-resident recipients of services. See Ops. Atty. Gen. Nos. 86-83 and 86-126 (copies enclosed).

Extending and Financing Such Services

There is more than one way to extend and provide financing for water and sewer services extraterritorially by a municipality. Ops. Atty. Gen. dated August 9, 1988 and October 6, 1988. For example, Sections 5-31-1510 et seq. of the Code authorize the extension of water and sewer services to non-residents. 1/ Section 5-31-1510 specifically provides:

> Upon the written request of any property owner requesting the city or town to extend to him water and sewer service and agreeing to pay the cost thereof the city or town may provide such service and levy an assessment against the property of the owner so requesting such service for the costs thereof. 2/

1/ It is our understanding that this is not the mechanism by which the City of Columbia has provided water and sewer services to non-resident customers.

2/ An assessment is a charge placed on property to be benefited by a proposed improvement. If there is no benefit to the property, the charge is a tax. Casey v. Richland County Council, 82 S.C. 387, 320 S.E.2d 443 (1984); Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987). The assessment would also be distinguished from a monthly user fee or service charge.

Further, Section 5-31-1530 provides:

> Any incorporated city or town of this State may provide by ordinance for the payment of the costs of extending its water and sewer system to any property owner as herein provided.

Assessments constitute a lien on property and so remain for five years unless satisfied sooner. See Section 5-31-1560. Additionally, Section 5-31-1590 requires that

> [t]he amounts of money raised by such assessments shall constitute and be kept as a separate fund, to be used for the purpose for which it was raised.

None of these statutes refers to setting rates for either resident or non-resident recipients of services, however.

Another means of extending water and sewer services extraterritorially and providing financing therefor is the Revenue Bond Act for Utilities, Sections 6-21-10 et seq. of the Code. A review of these statutes reveals several which permit the municipality to set rates: Sections 6-21-390, 6-21-400, and 6-21-410 in particular. No distinction appears to be made with respect to resident or non-resident customers in the establishment of rates.

Yet another statute which permits non-residents to receive municipal water services is Section 5-31-1910 of the Code, which provides the following:

> Any city ... in this State owning a water ... plant may, ... enter into a contract with any person without the corporate limits of such city ... but contiguous thereto to furnish such person ... water from such water ... plant of such city ... and may furnish such water ... upon such terms, rates and charges as may be fixed by the contract or agreement between the parties in this behalf, ... when in the judgment of the city ... council it is for the best interest of the municipality so to do. ...

This statute has been construed in cases such as Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911) and Sossamon v. Greater Gaffney Metropolitan Utilities Area, 236 S.C. 173, 113 S.E.2d 534 (1960). This statute and these cases were construed in Opinion No. 4246, dated February 5, 1976, a copy of which is enclosed; the conclusion reached in that opinion was that a non-resident purchaser

of water from a municipality would have only those rights set forth or necessarily implied from the contract to sell and furnish water, and further that the non-resident has no rights beyond those in the contract. The opinion, relying upon Sossamon, noted that "a profit could be realized by the municipality in the sale of water to nonresidents."

Section 5-7-30 of the Code, which is the general grant of power conferred upon municipalities, provides:

> Each municipality of the State ... may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, 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 ... .

The phrase "uniform service charges" has apparently not been construed by either this State's courts or by the Attorney General in a previous opinion. The scope of uniformity would most probably be within the municipality, as all powers to be exercised by the municipality as specified in Section 5-7-30 may be exercised only within the municipality (i.e., abating nuisances, levying business license taxes, granting franchises for using public streets, and the like). Extraterritorial provision of services or exercise of municipal functions, for which non-residents are not taxed, are governed by other statutes such as Sections 5-7-60 and 5-7-110. 3/

It thus appears that the establishment of higher rates or charges for the provision of water or sewer services to non-resident customers is not covered by statute but is instead a matter of contract. This Office has advised previously that a municipality has considerable discretion in entering into contracts to provide its services to persons residing outside municipal boundaries. Op. Atty. Gen. No. 86-126. As noted therein, the use of the term "may" in Section 5-7-60 "indicates that extra-territorial provision of services by a municipality, by contract with an individual, is

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3/ A challenge on the basis of equal protection will be addressed infra, with taxation without representation considerations.

within the discretion of the municipality." The setting of rates thus appears to be within the discretion of the municipality, as well; we have identified no authority which requires city residents and non-residents to be charged the same rates. See also Opinion No. 4246.

Proprietary Functions

Various legal authorities have declared that a municipality, in operating municipal utilities, acts in a proprietary rather than governmental capacity. See cases cited in 56 Am.Jur.2d Municipalities, etc. § 568; 12 McQuillin, Municipal Corporations, § 35.35; and Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346 (1929). As stated in McQuillin, "The general rule is that a municipality, in constructing or in operating its municipal [utility] plant, acts in a business, proprietary, or individual capacity rather than in a legislative or governmental capacity; this is particularly true where it operates the service or utility outside its territorial limits." Id. That section continues:

> A city may promulgate ordinances relating to utilities specifically providing for the extension of such services beyond the municipality's limits. ... Under these circumstances the city council has the sole authority to determine public policy relative to the extension of such services. Therefore, surplus water may be sold to those living outside the limits of the municipality if a series of ordinances has been enacted allowing the extension of utility service outside the city. ...

McQuillin further states in § 35.35g that "a municipality constitutionally empowerd to provide water extraterritorially at its discretion has been deemed to have full power to determine the policy in regard thereto, restricted only by pertinent constitutional and statutory restrictions ... ."

Thus, authorities on municipal law have also recognized the latitude which a municipality has in providing services such as water and sewer services, in its proprietary capacity, on an extraterritorial basis. See also Childs v. City of Columbia and Sossamon v. Greater Gaffney Metropolitan Utilities Area, both supra.

Constitutional Concerns

The most common challenge to the system of extraterritorial extension of services has been that of taxation without representation; equal protection concerns have also been raised. However, it

appears that challenges on these grounds have not generally been successful. See cases collected in "The Constitutionality of the Exercise of Extraterritorial Powers By Municipalities," 45 U. Chicago L. Rev. 151 (1977). It would appear, at least facially, that since no taxes are being imposed on owners of real property outside the municipality, there is no taxation without representation. Cf., City of Prichard v. Richardson, 17 So.2d 451 (Ala. 1944); Atlantic Oil Co., Inc. v. Town of Steele, 214 So.2d 331 (Ala. 1968). In Op. Atty. Gen. No. 86-83, this Office examined a situation in which non-residents were being served by the City of Laurens Commission of Public Works, paying for water, sewer, and gas services though not being taxed. That opinion noted that, at least facially, no taxation without representation was occurring since no taxes were being levied.

To determine whether the service charges imposed upon non-residents may amount to a tax in a respect other than on the face of it would require fact-finding and thus would be beyond the scope of an opinion of this Office. Op. Atty. Gen. dated December 9, 1983. Such would be within the province of the courts or other appropriate fact-finding body.

Use of Revenues

Certain statutes governing the use of monies relative to extending water and sewer services may be found within the Code. For instance, Section 5-31-1590 requires that the "amounts of money raised by such assessments shall constitute and be kept as a separate fund, to be used for the purpose for which it was raised." Section 5-31-1530, cited supra, makes it clear that the assessment is the cost of extending the water and sewer system to the property owner. Use of monies generated by the user fees or service charges is not governed by these statutes.

If bonds have been issued under Section 6-21-10 et seq. of the Code, certain provisions therein would require that the rates of service be set to reflect the payment of the interest and principal of such bonds. See Section 6-21-390. In particular, Section 6-21-440 requires segregation of gross revenues of the system into several funds: the "bond and interest redemption fund," "operation and maintenance fund," "depreciation fund," and "contingent fund." That section finally provides: "Any surplus revenues thereafter remaining shall be disposed of by the governing body of the borrower [the municipality] as it may determine from time to time to be for the best interest of the borrower." Thus, there is some latitude for the use of these revenues, assuming that all required funds have been adequately funded as required, if water and sewer services are provided by the Revenue Bond Act for Utilities, subject to whatever general law may be applicable (if any exists). City of Spartanburg v. Blalock, 223 S.C. 252, 75 S.E.2d 360 (1953).

There may be other relevant statutes, but none has been located by this Office as yet. In addition, a given municipality may have put certain restrictions on use of its revenues by an ordinance relative thereto. This Office would, of course, have no knowledge of the existence of such an ordinance. Further, if such an ordinance did exist, it would be subject to modification as the municipal council should see fit.

Further Considerations

Because policy and contractual questions would appear to be the controlling factors in establishing rates to be charged to non-residents for the provision of water services, as discussed above, the specific question you raised about charging non-residents in northeastern Richland County a higher rate to extend sewer lines in southeastern Richland County has not been addressed. Further, how the revenues thus raised are to be used (to be put in the general fund or to be held for expansion of the water and sewer systems) appears to be a question of fact which must be decided before other questions, such as whether a tax has been imposed on non-residents, may be decided. This determination must necessarily be made by the courts of this State.

Conclusions

Section 5-7-60 of the Code of Laws of South Carolina (1976) makes it clear that provision of municipal services to non-residents is a matter of contract. This Office has advised that a municipality has considerable discretion in entering into such contracts. See Ops. Atty. Gen. Nos. 4246, 86-83 and 86-126 and cases such as Childs v. City of Columbia and Sossamon v. Greater Gaffney Metropolitan Utilities Area, both supra. Taxation without representation would not result, at least facially, since no taxes are being levied on the non-residents; instead, the recipients of services would pay user fees or services charges (or whatever other name they may be called). Op. Atty. Gen. No. 86-126. Thus, provision of such services and imposition of rates therefor becomes a question of policy rather than a question of law which may be addressed by an opinion of this Office. How revenues may be used may or may not be addressed by statute, depending on the funding mechanism, establishment of a sinking fund, and so forth. Resolution of your taxation questions may ultimately reside with the courts of this State.

In advising you that policy considerations rather than legal questions are involved in this situation, we are mindful of the concerns expressed by Richland County Council and others as to the burden that higher rates will be to some non-residents; however, we are also aware of the realities of the market-place. Those so affected are not without a remedy: introduction of legislation in the

General Assembly to equalize rates charged to residents and non-city residents is one possibility; establishment of a special tax district to provide these services in the unincorporated area of the county is another possibility. Non-residents might wish to challenge imposition of the higher rates as imposition of a tax (though such is not a tax on its face), for example. Annexation into the municipality by contiguous property owners would be another alternative, among others. Making factual findings as to appropriate use of the revenues may well be required to resolve any constitutional issues, as well.

In conclusion, the questions you have raised appear to be more matters of policy and contract, rather than questions of law, to be worked out between the City of Columbia and the non-resident recipients of municipal services. Aggrieved non-resident recipients of such services might wish to consider the various alternatives available to them if their dissatisfaction with the City of Columbia continues. 4/

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

4/ This Office has not consulted with the City of Columbia in the preparation of this Opinion. There are undoubtedly many facts which are unknown to this Office which would be of great value in fully resolving these questions; however, fact-finding is not a function of this Office. Further, development of facts would then perhaps dictate which, if any, statutes are to be followed. Thus, of necessity, this Opinion can comment only on general legal principles.