ALAN WILSON
ATTORNEY GENERAL

June 18, 2014

Andrew Savage, Esquire
Charleston County Aviation Authority
5500 International Boulevard
Charleston, South Carolina 29418-6911

Dear Mr. Savage:

Attorney General Alan Wilson has referred your letter dated March 26, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue: Does the Charleston County Aviation Authority, as a special purpose district, have to pay building permit fees, or is the special purpose district exempt from such ordinances and regulations enacted by the county or municipality with jurisdiction over the special purpose district?

Short Answer: This Office believes a court will hold that in regards to a county or municipality with jurisdiction over a special purpose district, the special purpose district would be generally exempt from taxes but not from fees and other such ordinances and regulations regarding building permits unless specifically excluded by statute or other agreement.

Law/Analysis:
By way of background, as this Office stated in a 2014 opinion:

> *This Office previously stated concerning the Charleston County Aviation Authority: By way of background, the Charleston County Aviation Authority governs the Charleston County Airport District in order to perform the District's functions. Torgerson v. Craven, 267 S.C. 558, 230 S.E.2d 228 (1976); www.chs-airport.com/About-the-CCAA/Airport-Authority.aspx. The South Carolina General Assembly created the Charleston County Airport District ("District") by Act No. 1235 of 1970. It was created as a political subdivision of the State. 1970 S.C. Acts 1235, p. 2634ff (1970). The District was given authorization to ""appoint officers, agents, employees and servants, and to prescribe the duties of such, including the right to appoint persons charged with the duty of enforcing the rules and regulations promulgated pursuant to the provisions of this act, to fix their compensation, and to determine if, and to what extent they shall be bonded for the faithful performance of their duties." 1970 S.C. Acts 1235, p. 2638 (1970). Act No. 1235 of 1970 was amended by Act No. 329 of 1971.*

> *Op. S.C. Atty. Gen., 2013 WL 4636665 (July 26, 2013). That opinion made clear that the Aviation Authority is a political subdivision. See, also, Op. S.C. Atty. Gen., 1976 WL 23045 (August 20, 1976) (opining that the Charleston County Aviation Authority is a political subdivision); Op. S.C. Atty. Gen., 1972 WL 26113 (December 19, 1972) (opining that the Charleston County Aviation Authority is a political subdivision of the State and an ""employer" under the S.C. Retirement Act); Op. S.C. Atty. Gen., 1977 WL 37425 (September 15, 1977) (opining that an airport commission is not a state agency and is subject to its own procurement specifications).*

Op. S.C. Atty. Gen., 2014 WL 1398599 (January 14, 2014).

1. Is a special purpose district (as a political subdivision) subject to regulations and ordinances of a county/municipality regarding such building codes and enforcement? What authority do a county and a municipality have to issue a building permit fee and to regulate such construction?

As far as the regulation of construction in South Carolina, our State Legislature has stated:

> (A) All municipalities, as defined by Section 5-1-20, and counties in this State shall enforce building, energy, electrical, plumbing, mechanical, gas, and fire codes, referred to as building codes in this chapter, relating to the construction, livability, sanitation, erection, energy efficiency, installation of equipment, alteration, repair, occupancy, classification, or removal of structures located within their jurisdictions and promulgate regulations to implement their enforcement. The municipality or county shall enforce only the national building and safety codes provided in this chapter.
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> (B) With the exception of structures used primarily for offices, storage, warehouses, shop areas, or residential housing, nothing in the building codes or regulations applies to electric cooperatives, the Public Service Authority, or to a public utility corporation subject to regulation by the authorities of the South Carolina Public Service Commission or the Liquefied Petroleum Gas Board.
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> (C) To the extent that federal regulations preempt state and local laws, nothing in this chapter conflicts with the federal Department of Housing and Urban Development regulations regarding manufactured housing construction and installation.

S.C. Code § 6-9-10 (1976 Code, as amended) (emphasis added). Chapter 9 of Title 6 is titled "Local Government—Provisions Applicable to Special Purpose Districts and Other Political Subdivisions," which would imply the provisions, including the building codes, are applicable to special purpose districts. Additionally, this Office will presume for purposes of this opinion that if a court will find a special purpose district is subject to building permit fees, the same court would also likely find the district is subject to the regulations themselves. Moreover, please note a special purpose district is not exempted from building codes or regulations by municipalities and counties in this statute as electric cooperatives, the Public Service Authority and public utilities are. S.C. Code § 6-9-10(B). 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 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)). Furthermore, our Legislature has authorized municipalities and counties to form agreements with "other governmental entities" to issue such permits and to enforce the codes for the services received.[1] S.C. Code § 6-9-20 (1976 Code, as amended). South Carolina Code § 4-25-10 gives counties authority to regulate construction (among other things). It states:

> The governing body of each county in this State with a population of more than one hundred fifty thousand persons, according to the most recent official United States census, may determine those areas or sections in the county lying outside of the limits of incorporated municipalities which, by reason of density of settlement or population, or urban growth and development, residential, commercial, business, or industrial, shall come within the purview of those rules and regulations which the governing body of the county may issue pursuant to this section. The governing body may, either by resolution or ordinance, provide and prescribe reasonable rules and regulations for (a) the construction, alteration or repair of all buildings and structures of every kind, (b) the installation of electrical wiring and appliances in such buildings, (c) the licensing on the basis of their qualifications, competence and performance record, of all contractors engaged in the construction, alteration or repair of such buildings, and all electrical contractors engaged in the installation of electrical wiring and appliances in such buildings, and (d) the adoption of such other reasonable rules, regulations and codes pertaining to buildings and structures of every kind not otherwise provided by law, including but not limited to minimum housing, fire prevention, and gas codes, in any such area or section in which the governing body shall deem such rules and regulations to be necessary or proper for the protection of public health and safety in such area or section.

S.C. Code § 4-10-10 (1976 Code, as amended) (emphasis added). South Carolina Code § 4-25-210 states regarding county building permit fees:

> It shall be unlawful for any person to erect or construct any improvements on real estate, which cost in excess of one thousand dollars, in any county containing a municipality with a population of more than ninety-seven thousand, according to the latest official United States census, unless an application has been filed with and a permit granted by the county auditor to erect or construct such improvements; *provided*, that no application or permit shall be required for such improvements upon real estate situate within any incorporated municipality, which requires a permit for the erection or construction of such improvements.

S.C. Code § 4-25-210 (1976 Code, as amended) (emphasis added).[2] According to this statute, the county and municipality may not both require a building permit. Id. See also Op. S.C. Atty. Gen., 1980 WL 120602 (January 14, 1980). The county auditor issues the building permit on behalf of the county. S.C. Code § 4-25-230 (1976 Code, as amended).

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[1] This Office will presume for purposes of this opinion that an agreement could be made by a county or municipality with a special purpose district, but we are not aware of any such agreement in your situation at this time.

[2] While "person" is not defined in this statute, this Office will presume for purposes of your question that a special purpose district would be included in its definition.

Moreover, this Office has issued a prior opinion finding that a construction company doing construction for a school district must still apply for a building permit where the construction would occur on a school within the boundaries of the municipality. Op. S.C. Atty. Gen., 1968 WL 12629 (August 30, 1968). Since the Aviation Authority is within the bounds of a municipality, let us look to the authority a municipality has. Municipalities have statutory authority to require a permit to build. See S.C. Code § 5-25-310. In regards to municipal building permit fees South Carolina Code § 5-25-480 states:

> Cities having a population of seventy thousand or more, according to the official United States census, may establish a schedule of fees for the inspection of new buildings and the inspection of repairs to or alterations of existing buildings, which shall not exceed two dollars for any construction, repairs or alterations costing less than two thousand dollars, and shall not exceed one dollar for each and every one thousand dollars of cost of construction, repairs or alterations costing in excess of two thousand dollars.

S.C. Code § 4-25-480 (1976 Code, as amended) (emphasis added).[3] Moreover, a municipality has general statutory authority to enact regulations and ordinances for the general benefit and welfare of its citizens. See, e.g., S.C. Code § 5-7-30; Op. S.C. Atty. Gen., 1959 WL 11442 (June 12, 1959).

2. Does a political subdivision such as a special purpose district have to pay fees or taxes to a municipality or county?

This Office notes political subdivisions generally would not pay taxes to a municipality or county, but would usually pay a fee for services. For example, the Legislature created an exemption for political subdivisions not to pay ad valorem taxes in S.C. Code § 12-37-220 which states:

> A) Pursuant to the provisions of Section 3, 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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> (1) all property of the State, counties, municipalities, school districts, Water and Sewer Authorities and other political subdivisions, if the property is used exclusively for public purposes, and it shall be the duty of the Department of Revenue and county assessor to determine whether such property is used exclusively for public purposes;
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> ...

S.C. Code § 12-37-220(A)(1) (1976 Code, as amended). However, in regards to fees, the South Carolina Supreme Court held that property owned by this State was not exempt from a utility fee pursuant to the Stormwater Management Act. State v. City of Charleston, 334 S.C. 246, 513 S.E.2d 97 (1999). Under the same reasoning in the City of Charleston case, a court could find a political subdivision, as a subdivision of the State, would be subject to fees. Moreover, this Office has issued prior opinions authorizing fees such as road impact and stormwater fees apply even to school districts. Op. S.C. Atty. Gen., 2011 WL 3918173 (August 31, 2011). However, some statutes specifically exclude political subdivisions from

[3] Please note there are many other statutes and regulations regarding building permits and fees (e.g. S.C. Code §§§ 4-25-230, 6-9-5, 6-9-30, et al.). The statutes in this opinion are not intended to be inclusive but provide a few examples of the law. Also, please note, if your special purpose district has areas that are within the county but that are not within a municipality, this Office will presume the Aviation Authority will apply for a permit and pay any such fees not exempted by statute or other agreement to the county.

paying fees. See, e.g., S.C. Code § 12-24-20(B) (a deed recording fee from the state or any of the state's political subdivisions is the liability of the grantee, not the grantor); § 12-24-40(2) (exempting from the deed recording fee property to a state or its political subdivisions). Therefore, unless there is statutory law or an agreement stating otherwise, it is very likely a court will find a political subdivision would have to pay a fee and not a tax.

3. Is a building permit fee a fee or tax?
Concerning whether a fee is a fee or a tax, McQuillan states:

> In determining whether a charge imposed by a municipality or a state or local board functions as a fee, rather than an invalid tax, there are two types of fees: user fees, where a fee is assessed for the use of the governmental entity's property or services; and regulatory fees, where a fee is assessed as part of government regulation of private conduct. User fees are payments given in return for a government provided benefit. Using this revenue raising device has become more common over the years for cash-strapped municipalities. A problem arises, however, when a municipality tries to avoid constitutional restrictions by calling a tax a user fee.
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> In order to qualify as a valid user fee, it must normally meet three criteria. First, the fee must be charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society. Secondly, it must be paid by choice, in that the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge. Finally, the charges collected must be to compensate the governmental entity providing the services for its expenses and not to raise revenues.
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> User fees which have been approved include tolls, sewer fees, fees imposed by airport authority on car rental companies, landfill charges, transportation utility fees for street maintenance, utility fees for storm water management, and boat mooring fees. Fees for providing fire protection and other traditional core government services are usually considered taxes and are subject to constitutional limitations.
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> A municipality may charge a higher user fee to a nonresident so long as the higher fee was rationally related to the goal of equalizing the burdens on residents and nonresidents in paying for the service. Fees charged by a municipality are not unlawful taxes even if the only way to avoid payment is to relinquish the right to develop one's property.
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> In determining whether a charge imposed by a municipality is a valid fee or an illegal tax, reasonable latitude must be given to the municipality in fixing the amount of charges, and such charges should not be scrutinized too curiously, even if some incidental revenue were obtained as a result of the charge.

16 McQuillin Municipal Corporations § 44.24 (3rd ed.). In 1974 this Office opined that a church is not exempt from a building permit fee. Op. S.C. Atty. Gen., 1974 WL 21384 (November 13, 1974). In that opinion this Office concluded that even though a building permit fee increases with the cost of

construction, the fee is not an ad valorem tax, which would be prohibited. In that opinion this Office stated:

> *You have expressed concern over the fact that the building permit fee provided under Section 3 of the Act is progressive with the cost of construction until the fee reaches $25.00 when the cost of construction exceeds $200,000. Even though the building permit fee increases with the cost of construction, it is the opinion of this office that the building permit fee is not an ad valorem property tax. As stated at 71 Am. Jur. 2d, State and Local Taxation, Section 20: 'An ad valorem property tax is invariably based upon ownership of property and is payable regardless of whether the property is used or not.' The building permit on the other hand imposes a fee in the nature of an excise or license because more than ownership is involved. It has been held that a building permit fee is distinguishable from a tax. See St. Paul v. Dow, 37 Minn. 20, 32 N. W. 860. The case of Maine v. Grand Trunk Railway Co., 142 U. S. 217, 12 S. Ct. 121, cited at Section 25 of 71 Am. Jur. 2d, supra, appears to be directly on point. It holds that if a tax is in the nature of an excise, it does not become a property tax because it is proportioned in amount to the value of the property used in connection with the privilege or act which is taxed.*

Id. In an opinion issued earlier this year, this Office discussed a fee versus a tax. In that opinion we stated:

> As stated by the South Carolina Supreme Court in a 1992 case:
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> > 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. 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'n. 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).
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> 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 fee or a tax:
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> > 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)).

Op. S.C. Atty. Gen., 2014 WL 1398601 (January 15, 2014). See, also, J.K. Const., Inc. v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 519 S.E.2d 561 (1999) (finding a new account fee for a new sewer line or upgrading to a larger water line was a service charge and not a tax, so it did not need to apply uniformly to all residents because the customers paying received a special benefit, the proceeds were used for capital improvements not general funds and the fee was uniformly imposed based on anticipated water usage). While this Office does not know all the facts surrounding your building permit fee nor how the revenue is spent, it is likely a court could find that the building permit fee is a fee not a tax under the Brown test and using the J.K. Const., Inc. analysis depending on how the revenue is spent since it is this Office's understanding the fee is uniformly imposed based on anticipated construction.

Conclusion: This Office believes a court is likely to find a special purpose district would be generally exempt from taxes but not from a building permit fee and other such construction ordinances and regulations by any municipality or county whose jurisdiction the political subdivision is in unless the special purpose district is specifically excluded by statute or other agreement. Furthermore, unless there is sufficient evidence to the contrary, it is also likely a court will find your building permit fee is a fee and not a tax.[4] However, this Office is only issuing a legal opinion based on the current law at this time. 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. For a binding determination, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. S.C. Code § 15-53-20, et al. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[4] Please note there are penalties under the law for failure to obtain a building permit. S.C. Code §§§ 4-25-260, 4-25-280, 6-9-80, et al. However, there was a joint resolution passed in 2013 concerning extensions of expired building permits and other related matters. See 2013 S.C. Acts 112; Op. S.C. Atty. Gen., 2014 WL 1398578 (April 1, 2014).