ALAN WILSON
ATTORNEY GENERAL

September 28, 2015

Cheryl H. Morgan
Lancaster County Auditor
PO Box 2016
Lancaster, SC 29721

Dear Ms. Morgan:

Our Office has received your request for an opinion regarding assessments under the County Public Works Improvement Act, S.C. Code Ann. § 4-35-10 *et seq.* (1976 Code, as amended). You question whether the property owners in the Edenmoor Improvement District in Lancaster County can be billed for the assessments while the developers are not.

Our understanding is that the Edenmoor Improvement District[1] ("Improvement District") was authorized by the Lancaster County Council ("County Council"). The County Council authorized the issuance and sale of bonds to fund the improvements and the bonds are payable from and secured by annual assessments imposed on the parcels in the Improvement District.

The County Council approved forbearance agreements which deferred the 2011, 2013, and 2014 assessments for two years without interest or penalty for the developer, but not for the other property owners. (See Lancaster County Code of Ordinances Numbers 1118, 1131; Lancaster County Resolution Number 0844-R2014). The deferrals occurred prior to the assessments being imposed. County Council has recently approved a forbearance agreement which defers the developer's assessments for 2015 under the same terms. (See Lancaster County Resolution Number 0889-R2015). You have indicated that County Council believes that this is legal because the developer would essentially be repaying itself, since the developer or one of its affiliates is the owner of the bonds.

Each of your questions and its analysis follows.

LAW/ANALYSIS:

I. Can County Council defer the assessments of the developer?

[1] "Improvement district" means an area within the county designated by the governing body pursuant to the provisions of this chapter and within which an improvement plan is to be accomplished. See S.C. Code Ann. § 4-35-30(3) (1976 Code, as amended).

The answer lies in the County Public Works Improvement Act, S.C. Code Ann. § 4-35-10 et *seq.* (1976 Code, as amended) ("Improvement Act"). We have frequently discussed statutory interpretation in our opinions. In a September 18, 2013 opinion, we stated:

> "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). "[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." Harris v. Anderson County Sheriffs Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 472 (2007). "[S]tatutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable." State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007). "[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention." State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011).

Op. S.C. Atty. Gen., September 18, 2013, (2013 WL 5494616).

The Improvement Act provides that county councils can finance improvements

> by the imposition of assessments in accordance with this chapter and through the issuance of special district bonds, general obligation bonds of the county, or revenue bonds of the county, from general revenues from any source not restricted from that use by law, or by a combination of the funding sources.

S.C. Code Ann. § 4-35-40 (1976 Code, as amended) (emphasis added). In its definition of "assessment," the Improvement Act provides that the assessment is imposed with the consent of a majority of the owners[2] and that the "assessment must be made upon all real property located within the district, other than property constituting improvements. . . ." See S.C. Code Ann. § 4-35-30(1) (1976 Code, as amended) (emphasis added). Most importantly, the Improvement Act states that the assessment

> must be filed in the office of the clerk of court, and from the time of filing the assessment impressed in the assessment roll constitutes and is a lien on the real property against which it is assessed superior to all other liens and encumbrances, except the lien for property taxes, and must be annually assessed and collected with the property taxes on it.

[2] The majority must represent "at least sixty-six percent of the assessed value of all property within the improvement district." See S.C. Code Ann. § 4-35-30(1) (1976 Code, as amended).

S.C. Code Ann. § 4-35-120 (1976 Code, as amended) (emphasis added).

The Improvement Act is clear and unambiguous that assessments to improve property must be imposed in accordance with the Act. They must be upon all property in the improvement district and they must be annually assessed and collected with the property taxes. The intent of the Legislature appears to be that county councils can not defer assessments under the Improvement Act.

You indicate that County Council believes that the assessments can be deferred since the developer or one of its affiliates is the owner of the bonds and would be essentially repaying itself. However, there is no statutory authority for this under the Improvement Act.

We note that Section 4-35-90 states:

> The financing of improvements by assessment, bonds, or other revenues, and the proportions of them, must be in the discretion of the governing body, and the rates of assessments upon property owners within the improvement district need not be uniform but may vary in proportion to improvements made immediately adjacent to or abutting upon the property of each owner in the district as well as other bases as provided in Section 4-35-30.

S.C. Code Ann. § 4-35-90 (1976 Code, as amended).

It is generally understood that, unlike taxes, special assessments[3] are not uniform. The Court in Celanese Corp. v. Strange, 272 S.C. 399, 252 S.E.2d 137 (1979), stated:

> [t]he distinction between a tax and a special assessment was stated in Jackson v. Breeland, 103 S.C. 184, 88 S.E. 128 (1916), as follows:
>
> > "It is very true that in popular parlance, and even in legislative enactments, assessments are frequently called taxes, but courts will look behind mere words to find the real meaning. Taxes, in the strict sense of the word, are imposed upon all property, both real and personal, for the maintenance of the government, or some division thereof, while assessments are laid only on the property to be benefitted by the proposed improvements. This is the vital distinction running through all the cases." 88 S.E. at 130.
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> Also in Evans v. Beattie, 137 S.C. 496, 135 S.E. 538 (1926), this Court stated that " 'special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring

[3] The assessments under the Improvement Act are referred to as "special assessments" in section 4-35-150. See S.C. Code Ann. § 4-35-150 (1976 Code, as amended).

> property that property should pay for the improvement'." Our cases are clear that, unlike a tax, a special assessment is not restricted by the uniformity requirements of Article X. See Evans v. Beattie, supra.[4]

In sections 4-35-90 and 4-35-30, assessments under the Improvement Act can vary according to improvements made immediately adjacent to or abutting upon the property of each owner in the district as well as assessed value, front footage, area, per parcel basis, the value of improvements to be constructed within the district, or a combination of them, as the basis is determined by the governing body of the county. See S.C. Code Ann. § 4-35-90, supra; S.C. Code Ann. § 4-35-30, supra. These code sections do not suggest that any of the property owners do not have to pay the assessments or that they can be deferred. And section 4-35-120 is plain in stating that the assessments must be collected annually.

Additionally, our State Constitution provides:

> [n]o law shall be enacted permitting the incurring of bonded indebtedness by any county for sewage disposal or treatment, fire protection, street lighting, garbage collection and disposal, water service or any other service or facility benefitting only a particular geographical section of the county unless a special assessment, tax or service charge in an amount designed to provide debt service on bonded indebtedness or revenue bonds incurred for such purposes shall be imposed upon the area or persons receiving the benefit therefrom.

S.C. Const. art. X, § 12 (emphasis added). In Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987), the Court explains that "[a]rticle X, § 12 of the Constitution *requires* the charge be assessed only on those who will benefit from the new facilities."

In essence, the assessments are payments by property owners whose property is receiving some kind of a benefit from the improvements. The State Constitution requires that a special assessment be imposed on any property owner who is receiving the benefits of the improvements to their property. There is no provision for the assessments being delayed.

II. Can County Council waive the late fees and penalties for the developer's non-payment of the assessments?

As discussed above, assessments pursuant to the Improvement Act must be annually assessed and collected with the property taxes. Under section 12-45-180, penalties are incurred for delinquent taxes and assessments. It states:

> When the taxes and assessments or any portion of the taxes and assessments charged against any property or person on the duplicate for the current fiscal year are not paid before the sixteenth day of January or

[4] Evans v. Beattie, supra, was overturned on other grounds by Weaver v. Recreation Dist., 328 S.C. 83, 85, 492 S.E.2d 79, 80 (1997).

> thirty days after the mailing of tax notices, whichever occurs later, the county auditor shall add a penalty of three percent on the county duplicate and the county treasurer shall collect the penalty. If the taxes, assessments, and penalty are not paid before the second day of the next February, an additional penalty of seven percent must be added by the county auditor on the county duplicate and collected by the county treasurer. If the taxes, assessments, and penalties are not paid before the seventeenth day of the next March, an additional penalty of five percent must be added by the county auditor on the county duplicate and collected by the county treasurer. . . .

S.C. Code Ann. §12-45-180(A) (amended on other grounds by SC LEGIS 87 (2015), 2015 South Carolina Laws Act 87 (S.379)).

We stated in a prior opinion that under section 12-45-180, "[c]ounties are required to charge a late penalty set by statute on all taxes and assessments against any property." Op. S.C. Atty. Gen., July 3, 2014 (2014 WL 3414950)). We wrote as a footnote to that opinion that "neither a county governing body nor a political subdivision is authorized to waive or lower a penalty." Id., footnote 2 (quoting Op. S.C. Atty. Gen., 1990 WL 482394 (January 15, 1990)). We also noted:

> [c]ounty auditors, treasurers and assessors may correct mistakes in penalties. SC Code §§ 12-47-70, 80, 90; 12-39-250. Waiving a late penalty is solely within the discretion of the county treasurer. S.C. Code § 12-45-185. Nonetheless, in addition to other powers, the S.C. Department of Revenue may extend the time for collection of county taxes and postpone the time for imposition of tax penalties. S.C. Code § 12-4-520, *et al.*

Id., footnote 2.

Unlike other county officials, County council does not have the authority to waive the penalties provided for in section 12-45-180. County Council, unlike the State Department of Revenue, also does not have the power to postpone the penalties.

III. How are penalties to be apportioned that are added per S.C. Code of Law section 12-45-180? When a fee is added per Title 4, Chapter 35, do the penalties collected on this fee go to the fee account or distributed to all taxing entities since this is not a taxing entity?

We believe you are asking who receives the penalties under section 12-45-180 for delinquent taxes and assessments. We determined in Op. S.C. Atty. Gen., July 3, 2014, supra, that the late penalties go to the county for its general funds and not to the entity for whom property taxes are levied unless specifically authorized otherwise by statute. Since we can not find any law stating otherwise, we stand by our prior opinion and determine that the late penalties from the assessments should be distributed to the Lancaster County general fund.

CONCLUSION:

In conclusion, we believe that County Council does not have the authority to defer the assessments of the developer under the County Public Works Improvement Act and Article X, § 12 of the State Constitution. County Council is not authorized to waive the late fees and penalties for the developer's non-payment of the assessments as they are required by Section 12-45-180. In our opinion, the late penalties from the assessments should be distributed to the Lancaster County general fund.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,

Elinor V. Lister

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General