ALAN WILSON
ATTORNEY GENERAL

March 14, 2017

The Honorable Dwight A. Loftis
South Carolina House of Representatives
District No. 19
P.O. Box 14784
Greenville, SC 29610

The Honorable J.M. "Mike" Burns
South Carolina House of Representatives
District No. 17
P.O. Box 142
Columbia, SC 29202

Dear Representative Loftis and Representative Burns:

Attorney General Alan Wilson has referred your letter to the Opinions section concerning an ordinance before the Greenville County Council that is pending for a third and final reading. Your letter describes the issues to be addressed as follows:

> The Ordinance has two separate, distinct and unrelated parts. The first part provides for a fee to pay the service charge for a new communications system and the radios associated with it. This is a defined cost. The second part provides for an increase in the current road maintenance fee but with no specified use for the revenue.
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> The first question concerns the number of votes required to pass this Ordinance. Does [S.C. Code Ann. §] 6-1-330, prevent Greenville County Council from requiring a three-fourths vote as provided by Greenville County Ordinance 3867, Section 3, "A three-fourth vote by the full membership of County Council shall be required to take any action... to implement any new fee or tax assessment..." Since [S.C. Code Ann. §] 6-1-330 does not prohibit requiring more than a positive majority, is a three-fourths vote requirement acceptable as a positive majority? Also does [S.C. Code Ann. §] 6-1-330 violate the Home Rule Statute?
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> The second question is, does the attached Greenville County Ordinance violate Article 3 Section 17 of the South Carolina Constitution relating to bobtailing...

Law/Analysis

Does S.C. Code Ann. § 6-1-330 prohibit a county council from enacting an ordinance which requires a "super majority" vote to authorize the charge or collection of a service or user fee?

Initially, we note that the courts have consistently recognized the basic principle that a local ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. See McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional."), citing Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984); Op. S.C. Atty. Gen., 2003 WL 21471503 (June 4, 2003). An ordinance will not be declared invalid unless it is clearly inconsistent with general state law.

Hospitality Ass'n of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995). Only the courts, and not this Office, possess the authority to declare such an ordinance invalid. Therefore, Greenville County Ordinance 3867 would be presumed valid and must be followed until a court sets it aside or subsequent legislative action revokes or amends its application.

In Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), the Supreme Court of South Carolina described the two-step process to determine whether a local ordinance is valid. "First, the Court must consider whether the [county] had the power to enact the ordinance. ... [Second], if the [county] had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State." Id. at 361. The Constitution of South Carolina "mandates that the legislature provide by general law the powers, duties, and functions of counties and municipalities. S.C. Const. art. VIII, §§ 7 and 9." Joytime Distributors & Amusement Co. v. State, 338 S.C. 634, 647, 528 S.E.2d 647, 654 (1999). The General Assembly has provided such power to enact local legislation as follows:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-9-25 (emphasis added). The General Assembly established the procedures for a county to take legislative action by ordinance as follows:

> The council shall take legislative action by ordinance which may be introduced by any member. With the exception of emergency ordinances, all ordinances shall be read at three public meetings of council on three separate days with an interval of not less than seven days between the second and third readings. All proceedings of council shall be recorded and all ordinances adopted by council shall be compiled, indexed, codified, published by title and made available to public inspection at the office of the clerk of council. The clerk of council shall maintain a permanent record of all ordinances adopted and shall furnish a copy of such record to the clerk of court for filing in that office.

S.C. Code Ann. § 4-9-120.

Further, county governments are granted enumerated powers, subject to the general law of the State, including the power "to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county..." S.C. Code Ann. § 4-9-30(5)(a) (emphasis added). The General Assembly established the process which local governing bodies follow to impose such a uniform service charge in Section 6-1-330. The statute reads as follows:

> (A) A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. A local governing body must provide public notice of any new service or user fee being considered and the governing body is required to hold a public hearing on any proposed new service or user fee prior to final adoption of any new service or user fee. Public comment must be received by the governing body prior to the final reading of the ordinance to adopt a new service or user fee. A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.
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> ...

S.C. Code Ann. § 6-1-330 (emphasis added). There are three statutorily defined terms used in the emphasized portion of Section 6-1-330(A) which clarify its application. First, "local governing body" is defined to include the governing body of a county. S.C. Code Ann. § 6-1-300(3). Second, "positive majority" is defined as "a vote for adoption by the majority of the members of the entire governing body, whether present or not. However, if there is a vacancy in the membership of the governing body, a positive majority vote of the entire governing body as constituted on the date of the final vote on the imposition is required." S.C. Code Ann. § 6-1-300(5). Finally, "service or user fee" is defined as "a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee. 'Service or user fee' also includes 'uniform service charges'." S.C. Code Ann. § 6-1-300(6).

1. S.C. Code Ann. § 6-1-330 does not conflict with S.C. Code Ann. § 4-9-30(5)(a).

Your letter asks whether Section 6-1-330 violates the Home Rule Statute. We assume the request refers to whether Section 6-1-330 conflicts with Section 4-9-30(5)(a).[1] Where statutes deal with the same subject matter, it is well established that they "are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010) (quoting Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000)). It is this Office's opinion that, when construed together, Section 6-1-330 sets specific parameters for a county to impose the uniform service charges described in Section 4-9-30(5)(a). This conclusion is consistent with this Office's February 16, 2007 which stated the following:

> While the first sentence of subsection (A) of section 6-1-330 appears to grant local governing bodies, which according to section 6-1-300(3) includes counties, the authority to impose service and user fees, through our research, we are of the opinion that counties possessed such authority prior to the enactment of [S]ection 6-1-330 in 1997. In Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992), the Supreme Court found a county's authority to impose service charges arises from section 4-9-30 of the South Carolina Code (1986 & Supp. 2005). Under this portion of the Code, the Legislature

[1] Opinion requests about whether legislation violates the Home Rule Act have previously referred to the prohibition against special legislation in the South Carolina Constitution. S.C. Const. art. VIII, § 7. Because Section 6-1-330 applies to all "local governing bod[ies]" rather than to a specific political subdivision of the State, it is this Office's opinion that a court likely would not find the statute to be prohibited special legislation. See Davis v. Richland County Council, 372 S.C. 497, 642 S.E.2d 740 (2007) (finding 2005 Act No. 207 void as unconstitutional special legislation in violation of S.C. Constitution, Article VIII).

> gives counties the authority "to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county, including, but not limited to,... transportation...." S.C. Code Ann. § 4-9-30(5)(a). The Court interpreted this provision as follows:
>
> > 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.
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> Id. at 183, 417 S.E.2d at 567.
>
> In reading section 6-1-330 in conjunction with the authority previously given to counties in section 4-9-30, we believe with respect to section 6-1-330, the Legislature intended to prescribe a particular methodology by which a county may impose a service or user fee, rather than giving counties the authority they already possessed under section 4-9-30.

Op. S.C. Atty. Gen., 2007 WL 655612, at *2 (February 16, 2007).[2] Therefore, it is Office's opinion that the authorization for counties to assess uniform service charges in Section 4-9-30(5)(a) does not conflict with the methodology for imposing or increasing such a charge in Section 6-1-330.

2. S.C. Code Ann. § 6-1-330 does not prohibit a County from requiring a three-fourths "super majority" vote to implement a service fee.

Under the first step of the Foothills Brewing test, Greenville County Council is authorized to take legislative action by ordinance. S.C. Code Ann. §§ 4-9-25, 30, 120. The second step of the Foothills Brewing test requires this Office to render an opinion regarding whether Greenville County Ordinance 3867, Section 3 is consistent with the Constitution and the general law of the State. Ops. S.C. Atty. Gen., 1990 WL 599185 (May 15, 1990) ("[M]unicipalities and counties are not free to adopt an ordinance which is inconsistent with or repugnant to general laws of the State."); 1990 WL 599171 (February 8, 1990) ("We can advise that neither counties nor municipalities would be authorized to adopt ordinances in conflict with the general laws of this State."); 1986 WL 289894 (December 1, 1986) ("[A] county council is not authorized to adopt an ordinance which would vary general laws or the Constitution of this State."); 1976 WL 30709 (March 15, 1976) ("[A] local ordinance cannot conflict with state-wide legislation covering the same subject matter.").

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[2] This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in applicable law. Ops. S.C. Atty. Gen., 2013 WL 6516330 (Nov. 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984).

> Greenville County Ordinance 3867, Section 3, in relevant part, states the following:
> A three-fourth vote by the full membership of County Council shall be required to take any action, which would raise taxes or fees or harm the County's AAA credit rating. Such actions include the following: ... to increase the amount of any fee assessment established by County Council; to implement any new fee or tax assessment...

As discussed above, Section 6-1-330 requires the approval of a "positive majority" of the Greenville County Council before the council is "authorized to charge and collect a service or user fee." Again, "positive majority" is defined as "a vote for adoption by the majority of the members of the entire governing body, whether present or not..." It is this Office's opinion that 6-1-330 establishes a floor by which Greenville County Council must vote in approval for a service charge. By requiring a positive majority, the General Assembly required that a majority of a local governing body must vote in favor of such a fee instead of simply requiring quorum and a majority of the votes cast. There is no clear statement of legislative intent expressed in the text of the statute to prohibit a local governing body from requiring a super majority, in the enabling legislation, or subsequent amendments. See 1997 Act No. 138, § 7; 2009 Act No. 75, § 2.

This Office's March 18, 1980 opinion to Assistant Greenville County Attorney Edward B. Latimer considered whether Greenville County Council could establish rules requiring a two-thirds or three-fourths majority vote for the passage of ordinances. Op. S.C. Atty. Gen., 1980 WL 121101 (March 18, 1980). The opinion concluded, "[I]n the absence of statutory directive to the contrary, it would appear that a county council has the authority to require more than a simple majority vote for the enactment of ordinances." Id. It is this Office's opinion that, because 6-1-330 does not expressly prohibit a "super-majority" vote requirement for a local governing body to increase a fee assessment or implementing a new fee and there is a presumption in favor of a county ordinance's validity, a court is likely to find Greenville County Ordinance 3867, Section 3 is a valid ordinance.

Does the pending ordinance before the Greenville County Council violate the "bobtailing" prohibition contained in Article 3, Section 17 of the South Carolina Constitution?

It is this Office's opinion that the pending ordinance does not violate the "bobtailing" prohibition described in Article 3 Section 17 of the South Carolina Constitution. This provision of the Constitution states that "[e]very Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. art. III, § 17. In S.C. Pub. Interest Found. v. Lucas, 416 S.C. 269, 272, 786 S.E.2d 124, 126 (2016), the Supreme Court of South Carolina explained the three objectives of Article 3 Section 17 are:

> "(1) to apprise the members of the General Assembly of the contents of an act by reading the title; (2) to prevent legislative 'log-rolling',[4] and (3) to inform the people of the State of the matters with which the General Assembly concerns itself." Am. Petroleum Inst. v. South Carolina Dep't of Revenue, 382 S.C. 572, 576, 677 S.E.2d 16, 18 (2009).
> Sea Cove Dev., LLC v. Harbourside Comm. Bank, 387 S.C. 95, 101, 691 S.E.2d 158, 161 (2010).

"Log-rolling" is defined as a "legislative practice of including several propositions in one measure ... so that the Legislature ... will pass all of them, even though these propositions

> may not have passed if they had been submitted separately." Am. Petroleum at 577, 677 S.E.2d at 18, citing Blacks Law Dictionary 849 (7th ed.1999).

The Court noted that this process has also been described as "bobtailing" and "hodgepodge. Id. at 126 n.4.

The second question presented by your letter asks whether Section 2 of the pending ordinance regarding a "Public Safety Telecommunications Fee" and Section 3 regarding a "Road Maintenance Fee Amendment" can be included within the same ordinance without violating Article 3 Section 17 of the South Carolina Constitution. The Court has held that Article 3 Section 17 explicitly refers to legislative actions taken by the General Assembly. State v. Gibbes, 60 S.C. 500, 39 S.E. 1 (1901) ("The caption of article 3 is 'Legislative Department.'"). In Gibbes, the Court declined to find that an ordinance enacted by the City of Charleston could violate Article 3 Section 17 where it said, "We fail to see wherein this provision has any application whatsoever to an ordinance of a municipal corporation." Id., see also 5 McQuillin Mun. Corp. § 16:17 ("A state constitutional requirement of this character ordinarily does not apply to the passage of municipal ordinances, since ordinances are not considered to be laws within the meaning of the constitutional requirement..."). While Gibbes specifically refers to municipal ordinances, it is this Office's opinion that a court will likely find that Article 3 Section 17 is similarly inapplicable to county ordinances.

Does Greenville County Ordinance 3867, Section 3 apply to all future Greenville County Councils?

An opinion request from the Greenville County Council regarding the subject matter of this opinion asks the further question if Greenville County Ordinance 3867, Section 3 is applicable to all future Greenville County Councils? In a September 30, 2002 opinion, this Office described the application of county ordinances, their duration, and the process of amending or repealing such ordinances as follows:

> Any ordinance enacted by a county council has the same local force and effect as a state statute. See OP. ATTY. GEN. DATED APRIL 28, 1998. Once a county council passes a valid ordinance, they are bound to operate according to its provisions. See OP. ATTY. GEN. DATED NOVEMBER 28, 2000 (county council cannot violate its own ordinance in expanding number of members on parks and recreation commission); and OP. ATTY. GEN. DATED MARCH 8, 1988 (action of council in bypassing duly-adopted ordinance will be deemed void). See also Springville Citizens for a Better Community v. City of Springville, 979 P.2d 332 (Utah 1999)(City is not entitled to disregard its mandatory ordinances).
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> Moreover, repealing or amending an existing ordinance would also be considered a "legislative action." In order for an ordinance to be properly amended or repealed, a new ordinance must be passed. Simpkins v. City of Gaffney, 315 S.C. 26, 431 S.E.2d 592 (Ct. App. 1993); Lominick v. City of Aiken, 244 S.C. 32, 135 S.E.2d 305 (1964). Accordingly, in repealing an ordinance, county councils must follow the procedures outlined in Section 4-9-120. That is, the ordinance must "... be read at three public meetings of council on three separate days with an interval of not less than seven days between the second and third readings..." Until and unless this procedure is followed, the repeal of an ordinance cannot be accomplished and the ordinance in question would remain in effect.

Op. S.C. Atty. Gen., 2002 WL 31341813 (September 30, 2002). Accordingly, it is this Office's opinion that the Greenville County Council must continue to follow the voting requirements of Greenville County Ordinance 3867, Section 3 until it is amended or repealed by a subsequent ordinance or other legislation.

Conclusion

We hope that the guidance provided above will assist you and the Greenville County Council regarding the pending ordinance and voting requirements. In summary, it is this Office's opinion that S.C. Code Ann. § 4-9-30(5)(a) does not conflict with the parameters for authorizing a service charge in S.C. Code Ann. § 6-1-330; Greenville County Ordinance 3867, Section 3 is valid as there is presumption of validity of an ordinance and a court would likely find there is no express conflict with S.C. Code Ann. § 6-1-330; Greenville County Ordinance 3867, Section 3 is binding until an ordinance amending or repealing it is passed; and Article 3 Section 17 of the South Carolina Constitution is inapplicable to county ordinances. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly 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. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any further questions or issues, please let us know.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General