ALAN WILSON
ATTORNEY GENERAL

October 30, 2017

The Honorable Bill Woolsey, Mayor of the Town of James Island
P.O. Box 12240
James Island, SC 29412

Dear Mayor Woolsey:

Attorney General Alan Wilson has referred your question dated May 22, 2017 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 (as quoted from your letter):
"The Town of James Island (the Town) seeks to purchase solid waste collection from the James Island Public Service District (the District) by contract. The Town has requested that the District reduce its millage in the Town's tax district based upon the cost of providing solid waste collection and receive from the Town an equivalent amount of revenue in the form of monthly payments. Our question is whether such an arrangement is lawful. ..."

Law/Analysis:

It is this Office's understanding for purposes of your question that what you propose to do is to raise the Town of James Island's millage from 0 mils to 19.1 mils for solid waste collection. This Office has previously opined that South Carolina Code § 6-1-320 "limits increases in taxation by all local governing bodies but that it does not prohibit a municipality with a zero millage to increase its millage pursuant the limitations in Section 6-1-320 where it previously imposed a tax millage." Ops. S.C. Att'y Gen., 2017 WL 569539 (S.C.A.G. January 20, 2017); see also 2014 WL 3640923 (S.C.A.G. July 9, 2014). Moreover, as we discussed with you in our April 28, 2014 opinion to you (Op. S.C. Att'y Gen., 2014 WL 1809641 (S.C.A.G. April 28, 2014)), South Carolina Code § 6-1-310 states that "[a] local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General Assembly." S.C. Code Ann. § 6-1-310 (1997 Supp.). Quoting from the 2017 opinion, this Office opined concerning a new tax that:

> [T]his Office believes a court will determine that Section 6-1-310 ("a local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General Assembly") prohibits all new taxes imposed by any local governing body without specific authorization. S.C. Code § 6-1-310 (emphasis added). Our State's Supreme Court has previously defined a tax when it stated that "[l]egislation is said to levy a tax when it fixes the amount or rate to be imposed." Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993) (citing Wolper v. City of Charleston, 287 S.C. 209, 336 S.E.2d 871 (1985)). Black's Law Dictionary defines "new" as:

> new *adj.* (bef. 12c) 1. (Of a person, animal or thing) recently come into being <the new car was shipped from the factory this morning>. 2. (Of any thing) recently discovered <a new cure for cancer>. 3. (Of a person or condition) changed from the former state <she has a new state of mind>. 4. Unfamiliar; unaccustomed <she asked for directions because she was new to the area>. 5. Beginning afresh <a new day in court>.
>
> NEW, Black's Law Dictionary (10th ed. 2014). Therefore, we interpret a "new tax" as specified in S.C. Code § 6-1-310 to mean legislation where there has not previously been "an amount or rate [previously] imposed." Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993) (citing Wolper v. City of Charleston, 287 S.C. 209, 336 S.E.2d 871 (1985)). The General Assembly defines ""specifically authorized by the General Assembly" as "an express grant of power" granted by "a prior act; []by this act; or [] in a future act." S.C. Code § 6-1-300(7) (1976 Code, as amended). Accordingly, we strongly disagree with your assumptions that compliance with § 6-1-320 implicitly repeals § 5-7-30 and explicitly repeals § 5-1-10. It appears the General Assembly wanted to limit tax increases by municipalities (and other local governments) not eradicate their taxing ability. Regarding newly formed local governments (including a new municipality), we believe Section 6-1-310 requires the local governing body to have specific statutory authority to impose a new tax levy. Section 5-7-30 grants every municipality in this State "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 ..." S.C. § Code 5-7-30 (1976 Code, as amended). Thus, we believe a court will interpret that Section 6-1-320 does not overrule Sections 5-7-30 and 5-1-10.

Op. S.C. Att'y Gen., 2017 WL 569539, at *4 (S.C.A.G. Jan. 20, 2017) (footnote omitted). Thus, you would need to consider that South Carolina Code § 6-1-310 prohibits any new tax without specific authorization from the General Assembly.

Whether a solid waste collection charge is a tax or fee, let us refer you to McQuillin, which states on that subject that:

> 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. Of the three prongs of the test to determine whether a fee is a tax or a user fee, whether the party paying the fee paid by choice is considered the least significant.
> ...
> 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.
>
> 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.

§ 44:24. User fees distinguished from "taxes", 16 McQuillin Mun. Corp. § 44:24 (3d ed.) (footnotes omitted). Thus, it is generally recognized solid waste collection fees are a fee for a specific service. Id.; see, e.g., Skyscraper Corporation v. County of Newberry, 323 S.C. 412, 475 S.E. 2d 764 (1996). Furthermore, after checking with the South Carolina Department of Revenue, it is our understanding that generally fees may not be collected as millage without statutory authorization, nor can a fee or a tax collected for one purpose be used for a different purpose. S.C. Const. art. X, § 5.

However, please note regarding the James Island Public Service District this Office has previously opined that:

> Applying a strict construction to the statutory powers conferred upon the District, it is the opinion of this office that the James Island Public Service District does not have the power to contract with private corporations, other than water distribution agencies, or private individuals for the purpose of having them act as agents to collect monthly sewer bills owed the District.

Op. S.C. Att'y Gen., 1982 WL 189194 (S.C.A.G. March 4, 1982). Furthermore, it appears that the Fourth Circuit Court of Appeals has already answered some of your questions regarding the reduction of millage for the residents of the Town of James Island and the James Island Public Service District's obligation to pay principle and interest using its bond millage (as referenced in your letter). See James Island Pub. Serv. Dist. v. City of Charleston, S.C., 249 F.3d 323, 328–29 (4th Cir. 2001). The Court stated that:

> Not only has the South Carolina General Assembly granted special purpose districts, like James Island, the power to obtain loans from the RDA, it has also

prohibited municipalities, like the City, from taking actions that impinge on the districts' ability to pay the RDA loans or on the protections afforded the districts under § 1926(b). Section 6–11–250 of the South Carolina Code states:

> Government loans.
>
> The board of commissioners of any electric light, water supply, fire protection or sewerage district may avail itself of any provision for loans to construct electric light systems, water supply systems, fire protection systems or sewerage systems from the United States Government, through any office or agency thereof, and may issue revenue bonds pledging the income from any such system in liquidation of any loan made as aforesaid by the United States Government.

S.C.Code Ann. § 6–11–250 (Law.Co-op.1976). Section 5–3–312(5) adds that:

> In no event may any provision be incorporated in any plan [of annexation] which will impair the rights of bondholders, or which will impair the statutory liens created by ... *Title 7 of the United States Code, Section 1926(b),* or which will accelerate the requirement to repay bonds, or which would violate the conditions of any grant.

S.C.Code Ann. § 5–3–312(5) (Law.Co-op.Supp.1998) (emphasis added). Thus, South Carolina has acknowledged the limits set by § 1926(b) and has clearly agreed to bind itself and its political subdivisions (including cities) to the obligations attendant to an RDA loan, specifically including the obligation under § 1926(b) to insure that the "service provided or made available through any such [district] shall not be curtailed or limited by inclusion of the area served by such [district] within the boundaries of any municipal corporation or other public body." 7 U.S.C. § 1926(b).

James Island Pub. Serv. Dist. v. City of Charleston, S.C., 249 F.3d 323, 328–29 (4th Cir. 2001) (emphasis added). Section 1926 appears to protect loans for water and waste water. 7 U.S.C.A. § 1926. Without more information, it appears removing the James Island Public Service District's service for solid waste collection could cause the District to be in violation of federal loans, as referenced in James Island Pub. Serv. Dist. v. City of Charleston, S.C.. See, e.g., Rural Water Sewer and Solid Waste Management, District No. 1, Logan County, Oklahoma v. City of Guthrie, 654 F.3d 1058 (10th Cir. 2011) (where the Rural Water, Sewer and Solid Waste Management District No. 1 of Logan County sued a water service provider for encroaching on its service area in violation of 7 U.S.C. § 1926(b)).

Conclusion:

This Office believes a court will find that South Carolina Code § 6-1-310 prohibits any new tax without specific authorization from the General Assembly and that millage for your municipality may only be raised pursuant to § 6-1-320 without specific statutory authorization. Additionally, while pursuant to Act No. 498, § 4-5 the James Island Public Service District is authorized to levy taxes for the purposes of the District, which include "(4)(t)he construction, operation, maintenance and enlargement of such system of garbage disposal as the Commission shall from time to time deem necessary to protect the health of those living in the District," generally solid waste disposal is a fee not a tax. Act No. 498, 1961 S.C. Acts 917; § 44:24.User fees distinguished from "taxes", 16 McQuillin Mun. Corp. § 44:24 (3d ed.);

Skyscraper Corporation v. County of Newberry, 323 S.C. 412, 475 S.E. 2d 764 (1996). Moreover, imposition of a service or user fee must be done pursuant to statutory authority, including pursuant to South Carolina Code § 6-1-330. Nevertheless, as we advised in our April 28, 2014 opinion to you, we again recommend seeking a declaratory judgment from a court on these and the other matters in your letter, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. 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. This opinion only addresses some of the sources in the subject area, but we can address other authority or additional questions in a follow-up opinion. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

Anita (Mardi) S. Fair

Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

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Solicitor General