ALAN WILSON
ATTORNEY GENERAL

January 21, 2021

The Honorable Stephen Goldfinch
Member
South Carolina Senate
P.O. Box 823
Murrells Inlet, South Carolina 29576

Dear Senator Goldfinch:

We received your letter requesting an opinion of this Office as to whether a local government can collect a fee on behalf of a private home owner's association. Specifically, you ask "if there are HOA assessments that are past due, such as water, landscaping, road re-topping, etc. . . . and the HOA is unable to collect the fee or assessment, can the local government collect that fee on behalf of the HOA?"

Law/Analysis

In your letter, you did not specify whether the fees are being collected by a county or municipal government. Therefore, we look to the authority given to both to determine whether collecting such fees is authorized. After the Home Rule amendments to the South Carolina Constitution, the General Assembly gave broad authority to both counties and municipalities. Section 4-9-25 of the South Carolina Code (2021) states counties,

> 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. Furthermore, in section 4-9-30(5) of the South Carolina Code (2021), the General Assembly gave counties the specific authority to impose uniform services charges.

Similarly, section 5-7-30 of the South Carolina Code (Supp. 2020) gives municipalities the authority to levy uniform services charges as is "necessary and proper for the security, general

welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it . . . ." S.C. Code Ann. § 5-7-30. In Hospitality Association of South Carolina, Inc. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995), the Supreme Court considered county and city ordinances imposing fees on gross proceeds from rental of short-term accommodations and city ordinance imposing fees on gross proceeds derived from sale of food and beverages. The Court found the ordinances valid as they were within both the municipalities' and the county's authority given to them the General Assembly and did not run afoul of the South Carolina Constitution or the general law of the State. Id. As such, we recognize the authority of local governments to impose fees.

However, we do not believe local governments may impose fees on behalf of a private entity when such a fee is levied, not for a public purpose, but rather for the benefit of the private entity and its members. Initially, we note that both section 4-9-25 and section 5-7-30 contemplate the imposition of fees as are necessary for proper for the security, general welfare, and to preserve health, peace, order and good government. Moreover in section 4-9-30(5), the General Assembly lists items for which taxes or uniform service charges could be levied

> including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution; sewage collection and treatment; courts and criminal justice administration; correctional institutions; public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; hospital and medical care; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above.

While the authority of both counties and municipalities is interpreted broadly, and these lists indicate they are not all inclusive, we do not believe the General Assembly intended to expand the authority of counties and municipalities to include the authority to collect fees on behalf of private entities for private purposes.

Article X, section 5 of the South Carolina Constitution (2009) provides in pertinent part that "[a]ny tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." This provision requires "all taxes levied must be used towards a public purpose." S.C. Pub. Interest Found. v. S.C. Dep't of Transportation, 421 S.C. 110, 123, 804 S.E.2d 854, 861 (2017). Similarly, article X, section 11 of the South Carolina Constitution (2009) provides: "The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution." Our Supreme Court construed this provision to prohibit the expenditure of public funds for the primary benefit of private parties. State ex rel. McLeod v. Riley, 276 S.C. 323, 278 S.E.2d 612 (1981). "As a general rule a public purpose has for its objective the promotion of the public health, safety,

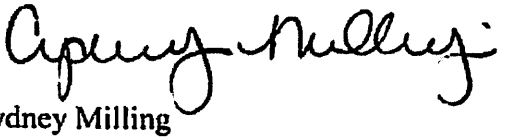
morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof." Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975).

The determination of whether a particular ordinance serves a private or a public purpose involves a determination of fact, which is beyond the scope of an opinion of this Office. See Op. Att'y Gen., 2015 WL 4497734 (S.C.A.G. July 2, 2015) ("[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts."). Nevertheless, you mentioned in your letter that the fees collected would be used for such things as landscaping and road resurfacing. Landscaping would presumably only benefit the homeowners association or the private property owners and would not be for the general welfare, security, prosperity, and contentment of all the residents of the locality. Moreover, in numerous opinions, we concluded public funds cannot be used to maintain private roads. Ops. Att'y Gen., 2016 WL 5820152 (S.C.A.G. Sept. 23, 2016); 1997 WL 569010 (S.C.A.G. July 16, 1997); 1971 WL 22281 (S.C.A.G. Oct. 20, 1971). Accordingly, we agree with your determination that a court would likely not find collecting a fee on behalf of a homeowners association serves a public purpose and would therefore, find an ordinance authorizing it constitutionally suspect.

Conclusion

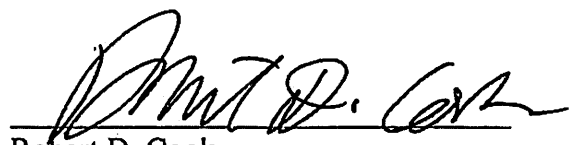
While we have not been asked to consider a specific ordinance, your opinion request asks generally if local governments can collect fees on behalf of private homeowners associations. As we explained, both counties and municipalities have broad authority to impose uniform services charges in order to further the general health, safety, and welfare of their residences. However, in this instance, we believe such fees would serve only private property owners or the homeowners association itself. Therefore, we are concerned that a court would determine that such fees are in fact for a private purpose rather than a public purpose and as such, violate article X of the South Carolina Constitution.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General