HENRY MCMASTER
ATTORNEY GENERAL

October 18, 2010

The Honorable Michael T. Rose
Member, South Carolina Senate
409 Central Avenue
Summerville, South Carolina 29483

Dear Senator Rose:

We understand from your letter that you desire an opinion of this Office concerning the Dorchester County Council's ability to impose a road impact fee on new development in Dorchester County. Specifically, you ask the following questions:

1. Whether Dorchester County has the authority to impose a road impact fee on development by Dorchester School District # 2?

. . .

2. If state law does not allow a county to impose a road impact fee on school districts, does it follow that a county is not authorized to impose a storm water fee on school districts? .
. . .

3. If the answer to question #1 above is "yes," whether Dorchester County has the authority to impose a road impact fee on new development by private businesses in Dorchester County but to exempt from that road impact fee new development by Dorchester School District 2? In particular, would such an exemption violate the 14th Amendment of the United States Constitution?

4. Whether Dorchester County has the authority to impose a road impact fee on new development by churches and other non profit entities?

5. If the answer to question #3 above is "yes," whether Dorchester County has the authority to impose a road impact

fee on new development by private business Dorchester County but to exempt from that road impact fee new development by churches and other non profit entities? In particular, would such an exemption violate the 14th Amendment of the United States Constitution?

6. Whether the 14th Amendment to the US Constitution would allow state law to exempt school districts from a road impact fee imposed on new development in a county?

7. Whether the 14th Amendment to the US Constitution would allow state law to exempt churches and other non profit entities from a road impact fee imposed new development in a county?

8. Whether the county ordinance legally can exempt from the road impact fee small businesses that meet some threshold criteria stated in the county ordinance regarding job creation or profitability. For example, could the county ordinance exempt from that fee if the business created a certain number of jobs or generated a certain amount of taxes to the county, within a certain time period? Please tell me if state law allows the county to pass into law such exemption, and whether such exemptions would violate the US or state constitutions if allowed by state law.

In our review of your questions, we find question 3 and question 6 are similar and question 5 and 7 are similar. Therefore, we will attempt to answer these questions together.

Law/Analysis

To determine whether or not Dorchester County (the "County") has the authority to impose a road impact fee on development by Dorchester School District 2 (the "School District"), we must look to the State law governing the imposition of impact fees. Chapter 1 of title 6 of the South Carolina Code contains the South Carolina Development Impact Fee Act (the "Act"). The Act allows local governmental entities meeting certain requirements to impose an impact fee on new development. In reading the Act, we believe the Legislature intended for the Act to provide a mechanism by which local governing bodies could impose a fee on new development in order to offset the additional demand for public facilities created by new development. Section 6-1-920(6) of the South Carolina Code (2004) defines "development" as "construction or installation of a new building or structure, or a change in use of a building or structure, any of which creates additional demand and need for public facilities. A building or structure shall include, but not be limited to,

modular buildings and manufactured housing. 'Development' does not include alterations made to existing single-family homes."

We understand that there is some debate as to whether the construction of schools falls within this definition of development under the Act. Some argue that the construction of additional public schools is the result of development and does not create a need for additional public facilities. To determine whether the definition of development includes the construction of public school facilities, we employ the rules of statutory interpretation, the primary of which is to ascertain and effectuate the intent of the Legislature. Media General Commc'n, Inc. v. South Carolina Dep't of Revenue, 388 S.C. 138, 147, 694 S.E.2d 525, 529 (2010).

> Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

Under the definition of development provided by the Legislature, the key determination is whether or not activity or facility "creates additional demand and need for public facilities." S.C. Code Ann. 6-1-910(6). Section 6-1-920(18) of the South Carolina Code (2004) defines "public facilities" as including facilities involved in the production of water, wastewater collection, solid waste disposal, roads, public safety facilities, parks, libraries, and recreational facilities. This provision does not list schools as public facilities for purposes of the Act. Moreover, we believe school buildings and facilities would create an additional demand for some of the public facilities specified including water production facilities, solid waste disposal facilities, and roads. Thus, reading the definition of development in light of the intent of the Legislature, we believe a court could find the construction of schools constitutes development for purposes of the Act.

Moreover, we do not believe the Legislature intended for schools to be exempt from impact fees. As cited above, the definition of development under the Act specifically excludes "alterations made to existing single-family homes." S.C. Code Ann. § 6-1-920(6). In addition, section 6-1-970 of the South Carolina Code (2004) contains a list of structures and activities exempt from impact fees. This list includes such things as rebuilding, remodeling, and repairing existing structures. S.C. Code Ann. § 6-1-970. This provision also exempts projects determined to create affordable housing. Section 6-1-1080 of the South Carlina Code (2004), also contained in the Act, specifically exempts water and wastewater utilities from the imposition of impact fees. However, we did not find a provision in the Act exempting school buildings or facilities. Our courts follow the cannon of construction "expressio unius est exclusio alterius" or "inclusio unius est exclusio alterius," which "holds that to express or include one thing implies the exclusion of another, or of the alternative." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000)(quotations omitted). Furthermore,

our courts determined that "[t]he enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Id. (quotations omitted). Accordingly, we believe the School District would be responsible for any impact fee imposed by the County.

Next, you inquire as to whether the County can impose a storm water fee on school districts. Section 4-9-30(5) of the South Carolina Code (Supp. 2009) gives counties the authority "to assess property and levy ad valorem property taxes and uniform service charges . . ." and make appropriations for such things as drainage. In addition, section 6-1-330 of the South Carolina Code (2004) authorizes local governing bodies "to charge and collect a service or user fee." Therefore, the County has the general authority to impose a storm water fee. As our Supreme Court noted in Brown v. County of Horry, 308 S.C. 180, 183, 417 S.E.2d 565, 567 (1992), "[t]he statute does not specify the amount of such fees or the persons upon whom they can be imposed. These limitations are governed by the requirements of equal protection and reasonableness." Our Supreme Court developed the following four-prong test to determine whether a fee is valid as a uniform service charge:

> (1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is 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, 308 S.C. 180, 417 S.E.2d 565). We did not find any provision of South Carolina law prohibiting a county or other local governing body from imposing a uniform service charge on a school district. Thus, presuming the fee imposed satisfies the criteria set forth by the Supreme Court, we believe the County has the authority to impose a storm water fee on the School District.

In determining the County has the ability to impose a road impact fee, in your third question, you also ask whether the County can exempt the School District from such a fee. Similarly, in your sixth question, you ask whether the State can generally exempt school districts from road impact fees. In both questions, you specifically ask whether these exemptions violate the Fourteenth Amendment to the United States Constitution. In reviewing the Act, we note that section 6-1-930 of the South Carolina Code (2004), giving local governmental entities the authority to impose impact fees, states: "A governmental entity may not impose an impact fee, regardless of how it is designated, except as provided in this article." As previously mentioned, the Legislature specified in the Act the activities and structures exempt from the Act. Because the Legislature chose to specify such exemptions, we believe the Legislature intended for only these activities and structures to be exempt. As such, we do not believe the County, without an amendment to the Act, is authorized to exempt schools from the imposition of impact fees. Moreover, in order to comply with article III, section 34 of the South Carolina Constitution (2009), prohibiting the Legislature from

passing a special law when a general law can be made applicable, we believe the Legislature must pass a law exempting all school districts from these types of impact fees.

Nonetheless, assuming the Legislature amends the Act to allow for such an exemption, we also address your concern as to the constitutionality of providing an exemption for public school buildings. Initially, we begin our analysis with the understanding that "all statutes are presumed constitutional and, if possible, will be construed to render them valid." State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). Moreover, only a court, not this Office, has jurisdiction to declare a statute unconstitutional. Op. S.C. Atty. Gen., February 24, 2010.

Under our federal and State constitutions, no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (2009). Because an exemption of schools from impact fees does not involve a fundamental right or a suspect class, we employ a rational basis analysis to determine whether such an exemption violates the equal protection clauses. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."). Our Supreme Court explained the rational basis analysis as follows:

> If a classification is reasonably related to a proper legislative purpose and the members of each class are treated equally, any challenge under the equal protection clause fails. Robinson v. Richland County Council, supra; Medlock v. S.C. Fam. Farm Dev., 279 S.C. 316, 306 S.E.2d 605 (1983). The requirements of equal protection are satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis. Medlock, supra. In addition, the burden is upon those challenging the legislation to prove lack of rational basis. Ex parte Yeargin, 295 S.C. 521, 369 S.E.2d 844 (1988).
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> A legislatively created classification will not be set aside as violative of the equal protection clause unless it is plainly arbitrary and there is no reasonable hypothesis to support the classification. Samson v. Greenville Hosp. System, 295 S.C. 359, 368 S.E.2d 665 (1988); Medlock, supra.

Brown v. County of Horry, 308 S.C. 180, 186, 417 S.E.2d 565, 568-69 (1992).

In our research, we were unable to find any South Carolina cases discussing the classification of schools separate from other types of entities with regard to the payment of locally imposed fees. Furthermore, because the Legislature has not acted to exempt schools from impact fees, we can only

speculate as to the legislative purpose for the exemption. However, we hypothesize that the Legislature is seeking to minimize the financial burden placed on schools. Nonetheless, to fully understand the legislative purpose for the exemption, we would be required to investigate and determine factual issues, which is beyond the scope of an opinion of this Office. S.C. Atty. Gen., April 9, 2010. As such, we cannot conclusively determine whether the equal protection analysis is satisfied. Nevertheless, we note that Congress, as well as the South Carolina Legislature, on numerous occasions have exempted public schools from taxes and other governmentally imposed fees. See, e.g., S.C. Code Ann. § 12-37-220(A) (2000 & Supp. 2009) (exempting school districts from property tax); S.C. Code Ann. § 57-5-1495(M) (2006) (exempting school busses from tolls collected on South Carolina turnpikes). Accordingly, should the Legislature classify schools based on a legitimate governmental interest that reasonably relates to that purpose and the Legislature treats all schools similarly, we believe a court would likely find exempting schools from impact fees does not violate the equal protection clauses found in both the United States Constitution and the South Carolina Constitution.

In addition to your inquiry as to whether road impact fees can be imposed on school districts, you inquire as to wether such fees would apply to churches and other nonprofit entities. Based on our review of chapter 1 of title 6, we did not discover any provision exempting churches and nonprofit entities. Thus, under the same analysis used to determine that such fees would be applicable to school districts, it is our opinion that impact fees would be applicable to churches and nonprofit entities.

In determining that any impact fee imposed by the County would generally be applicable to churches and nonprofit entities, we will also address your fifth and seventh questions as to whether the County or the State can exempt these organizations from such fees. As we previously mentioned, section 6-1-930 provides that counties may only impose impact fees as provided in chapter 1 of title 6. We did not find a provision in the Act exempting churches and nonprofit entities. As such, we believe the Legislature must provide for such an exemption. Furthermore, we believe that the exemption must be enacted through general law applicable to all counties in order to avoid a violation of the constitutional provisions prohibiting special legislation. See S.C. Const. art. III, § 34 (2009); art. VIII, § 7 (2009).

We understand you are concerned as to whether exempting churches and nonprofit entities violates the Fourteenth Amendment. Because no fundamental right or suspect classification is involved, we believe a court would employ the rational basis analysis explained above. Thus, we begin with the presumption that classifying churches and nonprofits separate from other types of entities for purposes of impact facts is valid. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 489 (1977). Again, we can only speculate as to the interest served by exempting churches and nonprofit organizations from the imposition of impact fees. Therefore, we cannot opine with certainty as to whether such an exemption satisfies the three prongs of the equal protection analysis set forth above. Nonetheless, we recognize that our Legislature on several occasions exempted these types of organizations from taxes and fees. See, e.g., S.C. Code Ann. § 12-37-220(2000 & Supp. 2009) (exempting churches several types of nonprofit organizations from property tax); S.C. Code

Ann. § 12-36-2130(2000)(exempting charitable and eleemosynary operated museums from use tax); S.C. Code Ann. § 38-38-440(2002) (exempting fraternal benefit societies from taxes); S.C. Code Ann. § 43-33-90 (1976)(exempting nonprofit entities from nursery registration fees). Presumably, by exempting churches and nonprofit entities from impact fees, the Legislature is seeking to foster the public benefit these types of organizations generally provide. Nevertheless, presuming all churches and nonprofit entities are treated alike under similar circumstances, a court would have to determine whether or not the purpose provided by the Legislature for such an exemption serves a legitimate governmental interest and is rationally related to the exemption.

Lastly, you inquire as to whether the County can exempt small businesses from road impact fees. For the same reasons explained above with regard to schools, churches, and nonprofit organizations, we believe that the Legislature must provide for such an exemption and the exemption must be in the form of a general law. Again, presuming the Legislature takes action to create an exemption for small business, whether or not such an exemption passes constitutional muster under the equal protection clauses of the United States and South Carolina Constitution depends on whether such an exemption "is reasonably related to a proper legislative purpose and the members of each class are treated equally . . . ." Brown, 308 S.C. at 186, 417 S.E.2d at 568. In our research, we discovered a Tennessee District Court decision recognizing the protection of smaller enterprises is a legitimate governmental purpose. Rebel Motor Freight, Inc. v. Freeman Drywall Co., 914 F.Supp. 1516 (W.D. Tenn. 1994). In that case, the Court considered whether a small business exception to the Negotiated Rates Act violated equal protection. Id. The Court found no violation of the equal protection clause in part because protecting smaller enterprises is a legitimate governmental purpose. Id. at 1523. We believe our courts would also likely find protecting smaller businesses is a legitimate governmental purpose. Therefore, presuming the Legislature crafts the exemption in such a way that all small businesses are treated equally, we believe a court would find that such an exemption does not violate equal protection. However, as we mentioned before, we can only speculate as to the Legislature's aim in exempting small business. Therefore, we believe only a court, which can investigate and determine factual issues, may make a conclusive determination as to the constitutionality of such an exemption.

Conclusion

Based on our reading of the South Carolina Development Impact Fee Act, we are of the opinion that the School District would be responsible for any road impact fee imposed by the County. Moreover, we believe the County has the general authority to impose fees on the School District through its authority under section 4-9-30 of the South Carolina Code. We do not believe the County has the ability to exempt the School District from a road impact fee. However, we are of the opinion that the Legislature could amend the Act to provide for such an exemption so long as it does so by enactment of general law. Such an exemption would be presumed to be constitutional and we do not believe that a court would find such an exemption violative of the equal protection clauses contained in the United States and South Carolina Constitutions. However, because the equal protection analysis requires an examination of facts, we believe a court must determine the constitutionality of such an exemption, should the Legislature act to create one.

We also believe churches and nonprofit entities are generally subject to impact fees imposed by the County pursuant to the Act. Similar to our conclusion with regard to school districts, we believe legislative action in the form of an amendment to the Act is required in order to exempt churches and nonprofit entities from impact fees. Again, any exemption created by the Legislature is presumed valid and constitutional. Moreover, while we believe a court would likely find exempting such entities to be related to a proper legislative purpose, only a court can make this determination. Presuming a proper legislative purpose is served, so long as the Legislature crafts the exemption to treat all churches and nonprofit entities equally, we are of the opinion that a court would likely uphold the exemption under the equal protection clauses.

Finally, using a similar analysis to that used to answer your questions in regard to the exemption of schools, churches, and nonprofit entities, we opine that the Legislature, not the County, must act to exempt small businesses from road impact fees. Once again, we believe a court would initially presume that such an exemption created by the Legislature is valid and constitutional. Furthermore, a decision in another jurisdiction indicates that creating an exemption for small businesses promotes a legitimate governmental interest. Therefore, should our courts follow the same analysis and find that all small businesses are treated equally, we believe they would conclude that exempting small businesses from impact fees does not constitute a violation of the equal protection clauses. However, because these determinations involve factual questions, only a court can make such determinations.

Very truly yours,

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