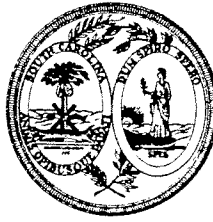


6926 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 3, 2000

William W. Doar, Jr., Esquire
Post Office Drawer 418
Georgetown, South Carolina 29442

RE: Informal Opinion

Dear Mr. Doar:

On behalf of the Georgetown County Water and Sewer District, you have requested an opinion of the Office of the Attorney General regarding the priority of a lien created by South Carolina Code of Laws Section 6-11-170. You wish to know whether the lien created by Section 6-11-170 is superior to all liens, recorded or unrecorded, with the exception of ad valorem property tax liens.

It is widely held that in determining the priority of a lien arising by operation of law, the language of the statute controls. See 51 AM. JUR. 2d § 38. South Carolina Code Section 6-11-170 reads:

All such rates or charges if not paid when due shall constitute a lien upon the premises served by such works. If any service rate or charge so established shall not be paid within thirty days after it is due, the amount thereof, together with a penalty of ten per cent and a reasonable attorney's fee, may be recovered by the board in a civil action in the name of the district and in connection with such action such lien may be foreclosed against such lot, parcel of land or building, in accordance with the laws relating thereto.

The statute establishes when the lien arises but makes no mention of its relation to other liens. Other statutes, however, contemplate priority disputes and expressly provide superiority. Compare, for example, the language of § 6-11-170 to the language of § 12-49-10, which imposes a lien for failure to pay property taxes:

All taxes, assessments and penalties legally shall be considered and held as a debt payable to the State by the person against whom they shall be charged and such taxes, assessments

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and penalties *shall be first lien in all cases whatsoever upon the property taxed, ...*

(Emphasis added). The terms "first lien" in the statute confer superior status over all other liens. See Taylor v. Mill, 310 S.C. 526, 426 S.E.2d 311 (1992). Section 6-11-170, on the contrary, confers no such status directly. Therefore, liens created pursuant to this particular statute are granted no special priority and are subject to the same priority as any other lien.

What does this mean in practicality? The § 6-11-170 lien may arise in conflict with prior recorded and unrecorded liens and subsequent recorded and unrecorded liens. The Recording Act, codified at S.C. Code Ann. § 30-7-10, requires among other things, that all recorded mortgages and liens on real property created by law are valid against subsequent creditors. Furthermore, "in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the ... subsequent lien must be filed ... for its holder to claim under this section as a subsequent creditor ... for value without notice, and the priority is determined by the time of filing for record." Thus once the § 6-11-170 lien is filed and recorded, it takes priority over all subsequent liens, both recorded and unrecorded. In relation to prior liens, public service district is the subsequent creditor when the § 6-11-170 lien arises. If the prior lien is recorded, then the prior lien is valid against the § 6-11-170 lien and takes priority over it. If the prior lien is unrecorded when the § 6-11-170 lien is filed, then the prior lien is not valid against the subsequent creditor, and the § 6-11-170 lien takes priority. Thus, in most circumstances the § 6-11-170 lien will take priority over all liens except a prior recorded lien.

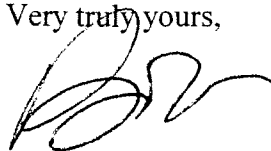
Although it is the opinion of this Office that a lien pursuant to § 6-11-170 would not take priority over a prior recorded lien, other statutes may be applicable to the Georgetown County Water and Sewer District. Article 7 of Title 6, Chapter 11 confers additional powers to special purpose districts that exercise the power to construct and operate sewer collection, disposal, and treatment facilities. Of particular interest is § 6-11-1240, which allows the public service district to place a lien upon property for failure to pay service charges, as long as the district has complied with certain procedural notice requirements. Importantly, the statute provides, "The lien herein provided shall be superior to all other liens except liens for unpaid property taxes." S.C. CODE ANN § 6-11-1240. The language of this statute is clear: the lien imposed by the sewer district takes priority over all other liens prior and subsequent, recorded and unrecorded, except for property tax liens. South Carolina Code § 6-15-100 also allows a lien for unpaid sewer service charges after notice has been given, enforceable "in the same manner and fashion as the lien of property taxes on real estate." The significance of these provisions to the Georgetown County Water and Sewer District involves numerous questions of fact beyond the scope of an opinion of this Office to address. As the attorney for the District, however, you may want to research the applicability of these statutes. Although we believe that the special purpose district is not entitled to absolute priority under § 6-11-170, other statutes may empower the district to impose a lien similar to an ad valorem tax lien and superior to prior recorded claims.

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This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. D. Cook', written in a cursive style.

Robert D. Cook
Assistant Deputy Attorney General