



ALAN WILSON  
ATTORNEY GENERAL

August 24, 2020

The Honorable William L. "Lee" Hewitt, III  
Member  
South Carolina House of Representatives  
District No. 108  
P.O. Box 928  
Murrells Inlet, SC 29576

Dear Representative Hewitt:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter forwards one of your constituent's concerns about a county imposed stormwater management fee. The request letter separately asks the following:

After reading the previous opinions that your Opinions Section has published on local governing bodies enacting local fees, I still have questions about S.C. Code § 6-1-300 and related Code § 6-1-330. These code sections appear to allow local governing bodies to impose local fees, which would include storm water fees.

Generally, I want to know what obligations do local governing bodies take on, once they impose storm water fees, to account for the use of the revenues they collect as storm water fees?

Specifically, if these fee revenues are spent under a local government's storm water management plan, is that sufficient? Must the local government show how revenues collected from an individual payor benefit that payor? If so, what information would have to be included in such a showing?

If the local governing body has the obligation to make such an accounting, do you also see any obligation in these South Carolina Code sections, or any other related Code sections, for the local governing body to hold any part of these revenues in reserve accounts and disperse them for emergency, hurricane, any other unexpected or force majeure related damages or repairs?

If, under SC Code § 6-1-330, the Georgetown County Council—or any other local governing body for that matter—failed to hold a public referendum on a proposed storm water fee prior to enacting it, is that failure fatal to the legitimacy of their storm water fee?

### Law/Analysis

In order to address the questions raised in the request letter, this Opinion will first discuss the Stormwater Management Act, S.C. Code §§ 48–14–10 *et seq.*, and its related regulations before addressing the extent to which S.C Code § 6-1-330 impacts the imposition and collection of stormwater management fees. The Act defines “Stormwater management” as:

- (a) quantitative control, a system of vegetative or structural measures, or both, that control the increased volume and rate of stormwater runoff caused by manmade changes to the land;
- (b) qualitative control, a system of vegetative, structural, or other measures that reduce or eliminate pollutants that might otherwise be carried by stormwater runoff.

S.C. Code Ann. § 48-14-20(11).<sup>1</sup> The South Carolina Supreme Court explained in State ex rel. Condon v. City of Charleston, 334 S.C. 246, 247, 513 S.E.2d 97, 98 (1999), the Stormwater Management Act “authorizes local governments to establish a ‘Stormwater Utility,’ and to fund it either through a fee or a tax assessment.” “Stormwater utility” is defined as “an administrative organization that has been created for the purposes of planning, designing, constructing, and maintaining stormwater management, sediment control, and flood control programs and projects.” S.C. Code Ann. § 48-14-20(14). These stormwater utilities are permitted to “fund such activities as watershed master planning, facility retrofitting, and facility maintenance.” S.C. Code Ann. § 48–14–120(C).<sup>2</sup> Moreover, a local government that establishes a stormwater utility is responsible for “implementing all aspects of the utility including long range planning, plan implementation, capital improvements, maintenance of stormwater facilities, determination of charges, billing, and hearing of appeals and petitions. The local government also will have

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<sup>1</sup> See also S.C. Code Ann. Regs. 72-300 (“A. Stormwater runoff is a source of pollution of waters of the State, and may add to existing flooding problems. The implementation of a statewide stormwater management and sediment control program will help prevent additional water quantity and quality problems and may reduce existing problems.”).

<sup>2</sup> See also S.C. Code Ann. Regs. 72-300 (“F. The activities which may be undertaken by a stormwater utility include not only assessment, collection, and funding activities, but also carrying out provisions of adopted stormwater management plans. These provisions may include contracting for such services as project construction, project maintenance, project inspection, and enforcement of installation and maintenance requirements imposed with respect to approved land disturbing activities.”).

responsibility for providing staff support for utility implementation.” S.C. Code Ann. Regs. 72-310E.

A stormwater utility may be funded by either a “fee system or tax assessment that must be reasonable and equitable.” S.C. Code Ann. § 48–14–120(C). When a stormwater utility is funded by a user charge, the South Carolina Code of Regulations additionally clarifies that “each user of the stormwater system pays to the extent to which the user contributes to the need for the stormwater system, and that the charges bear a substantial relationship to the cost of the service.” S.C. Code Ann. Regs. 72-310A. The Code of Regulations limits the use of such charges “to those purposes for which the utility has been established.” S.C. Code Ann. Regs. 72-310G. The regulations provide a non-exhaustive list of such purposes which includes “planning; acquisition of interests in land including easements; design and construction of facilities; maintenance of the stormwater system; billing and administration; and water quantity and water quality management, including monitoring, surveillance, private maintenance inspection, construction inspection, and other activities which are reasonably required.” Id.

As described in the request letter, S.C. Code Ann. § 6-1-330 generally permits local governing bodies to charge a service or user fee.

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.

S.C. Code Ann. § 6-1-330(A) (emphasis added). The service-fee revenue is to be used “to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid.” S.C. Code Ann. § 6-1-330(B).<sup>3</sup> Additionally, if the service-fee revenue amounts to five percent or more of the local government’s total budget, it “must be kept in a separate and segregated fund from the general fund.” Id. Finally, Section 6-1-

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<sup>3</sup> The South Carolina Supreme Court has recognized that the “surplus revenue” provision of the Revenue Bond Act, S.C. Code Ann. §§ 6–21–5 to –570, provides a limited exception to the general rule in section 6-1-330(B) that revenue must be spent on expenses related to the service for which a service fee is paid. See Azar v. City of Columbia, 414 S.C. 307, 778 S.E.2d 315 (2015).

330 also makes reference to the Stormwater Management Act where it directs that counties may not impose a fee on agricultural lands, forestlands, or undeveloped lands for stormwater, sediment, or erosion control programs adopted under Chapter 14, Title 48 of the Code unless permitted thereunder. With this statutory frame work in mind, this opinion will next address the questions raised in the request letter.

**I. What obligations do local governing bodies take on, once they impose storm water fees, to account for the use of the revenues they collect as storm water fees? Is there a requirement that the local government show how revenues collected from an individual payor benefit that payor?**

This Office has previously opined that a local government may impose a stormwater fee "so long as such a fee complies with [s]ection 48-14-120(C)'s requirement that the fee be 'reasonable and equitable.'" Op. S.C. Att'y Gen., 2014 WL 1398600 (February 28, 2014). The South Carolina Code of Regulations further clarifies that, where a stormwater utility is funded by a user charge system, "each user of the stormwater system pays to the extent to which the user contributes to the need for the stormwater system, and that the charges bear a substantial relationship to the cost of the service." S.C. Code Ann. Regs. 72-310A. (emphasis added). These considerations demonstrate that the benefit to a payor is that a stormwater utility offsets the increased need for stormwater runoff attributable to the payor.

This Office understands that your constituent is concerned with the stormwater user fee imposed in Georgetown County. The Georgetown County stormwater user fee was adopted by Ordinance No. 2007-32 on June 12, 2007 and bases its rate structure on the impervious surface area of a parcel of land. Section 8-38.1(a) of the ordinance explains the reasons for using impervious surface area as the basis for its rate structure as follows:

Impervious surface area on a given land parcel directly relates to the volume, rate and pollutant loading of stormwater runoff discharged from that land parcel to the County's structural and natural drainage systems and facilities. Therefore, impervious surface area shall be the primary parameter for establishing a rate structure to distribute the cost of services associated with the operation, repair, improvement, maintenance, and ongoing regulatory compliance of public drainage systems and facilities through a schedule of rates, fees, charges, and penalties related to the operation of a Stormwater Management Utility and Stormwater Management Enterprise Fund.

It is this Office's opinion that a court would likely hold the use of impervious surface area as a basis for establishing a stormwater user fee complies with section 48-14-120(C)'s requirement that the fee be "reasonable and equitable," as well as regulation 72-310A.'s requirement that users pay based on their contribution to the need for a stormwater system.

While section 6-1-330 requires that service-fee revenue must be kept in a separate fund from a local government's general fund when the service-fee revenue amounts to five percent or more of the local government's total budget, there is no statutory or regulatory requirement that stormwater fee revenue be kept in an account for each payor.

**II. If, under SC Code Section 6-1-330, the Georgetown County Council—or any other local governing body for that matter—failed to hold a public referendum on a proposed storm water fee prior to enacting it, is that failure fatal to the legitimacy of their storm water fee?**

It is this Office's opinion that a court would not hold a local government's stormwater utility ordinance or stormwater user fee is invalid because a public referendum was not held prior to its adoption. Section 6-1-330(A) requires that a local governing body that seeks to impose a service or user fee must provide public notice, hold a public hearing, and receive public comment prior to final reading of the ordinance to adopt the fee. The statute does not require a public referendum. The Stormwater Management Act authorizes local governments to establish stormwater utilities. See S.C. Code § 48-14-120(C). This section allows local governments to adopt a fee system specifically applicable to funding stormwater management activities, but it too does not require a public referendum prior to adoption.

**Conclusion**

As is discussed more fully above, the Stormwater Management Act, S.C. Code §§ 48-14-10 *et seq.*, authorizes local governments to establish a stormwater utility and to fund it either through a fee system or tax assessment. See State ex rel. Condon v. City of Charleston, 334 S.C. 246, 247, 513 S.E.2d 97, 98 (1999). This Office has previously opined that a local government may impose a stormwater fee "so long as such a fee complies with [s]ection 48-14-120(C)'s requirement that the fee be 'reasonable and equitable.'" Op. S.C. Att'y Gen., 2014 WL 1398600 (February 28, 2014). Further, it is this Office's opinion that a court would not hold a local government's stormwater utility ordinance or stormwater user fee is invalid because a public referendum was not held prior to its adoption. See S.C. Code §§ 6-1-330(A); 48-14-120(C).

Sincerely,



Matthew Houck  
Assistant Attorney General

The Honorable William L. "Lee" Hewitt, III

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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "R. D. Cook", written over a horizontal line.

Robert D. Cook  
Solicitor General