1999 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

August 19, 2005

Chris Noury, Esquire
North Myrtle Beach City Attorney
1018 Second Avenue South
North Myrtle Beach, South Carolina 29582

Dear Mr. Noury:

In a letter to this office you requested an opinion regarding a proposed ordinance that would prohibit the filling of privately owned lakes and ponds within the boundaries of a municipality. In the specific situation you addressed, the owner of a portion of a non-navigable, privately-owned lake approximately two acres in size applied to the Corps of Engineers and to SCDHEC-Office of Ocean and Coastal Resource Management for a permit or authorization to fill his portion of the lake He is seeking the filling of the lake in order to add to existing dry ground that would be used to construct single-family residential homes. You indicated that if the property owner is not allowed to fill the portion of the lake that he applied for, the current dry ground is insufficient in size to allow a structure to be placed upon it.

You have indicated that the Corps of Engineers has issued a letter to the applicant stating that it does not have jurisdiction regarding the particular body of water. Also, SCDHEC/OCRM has issued a letter authorizing the fill activity applied for by the applicant. According to your letter, a group of citizens that reside across the street from the lake are adamantly opposed to the lake being filled and have requested that the city council pass an ordinance which would prohibit the filling of privately owned lakes or ponds within the city.

Pursuant to the provisions of S.C. Code Ann. § 5-7-30 (2004) which state:

> (e)ach municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

> necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it....

Therefore, in examining any ordinance a determination would have to be made as to whether a proposed ordinance conflicts with the Constitution and general law of the State.

You indicated that the lake is non-navigable. Therefore, consistent with the statement of the State Court of Appeals in White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 129, 609 S.E.2d 811, 817 (2005), the lake "...is not subject to a general right of the public to access its waters." As further noted by the Court in White's Mill Colony,

> (u)nder the common law rule, "the owners of the fee in land underlying the surface waters of a man-made, nonnavigable lake are entitled to the exclusive control of that portion of the lake lying over the land as to which they own the fee...Consequently, owners of all or a part of a pond or lake bed have the right to exclude others from accessing or using the surface waters above their property.

363 S.C. at 130. The Court in its decision indicated that it would follow the common law rule. The Court then held that to the extent a property owner is the fee simple owner of the pond bed, "...it has the exclusive right to the use of the surface waters above its property and may exclude all others from access to those waters." 363 S.C. at 135. In Sea Cabins On The Ocean IV Homeowners Association, Inc., et al v. City of North Beach, 345 S.C. 418, 431, 548 S.E.2d 595, 602 (2001), the State Supreme Court noted that "...the right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

A prior opinion of this office dated August 24, 1981 also dealt with the question of whether a property owner could control access to a portion of an artificially created lake. As to the right to control access, the opinion, referencing the decision of the State Supreme Court in Morris v. Townsend, 253 S.C. 628, 634, 172 S.E.2d 819 (1970), determined that "...such a right exists where the person seeking to control access owns the bed of the lake." In Morris, the court had stated:

> ...the defendant, as owner in fee simple of his land, clearly has the exclusive right to use and control that part of the lake which lies above his own land, and has the right to exclude plaintiffs and all other persons claiming by, under or through them, from any use whatsoever of the defendant's lands and waters above said lands.

253 S.C. 628 at 634. Consistent with such, in my opinion, the fee simple owner of a portion of a nonnavigable lake or pond would be authorized to fill in that portion of the lake lying above the portion of the lake owned by that individual. As a result, in my opinion, a municipality would not be authorized to enact an ordinance prohibiting such.

Furthermore, a court could possibly conclude that such an ordinance if enacted would constitute a taking for which the landowner should be compensated. The Fifth Amendment to the United States Constitution provides that "...nor shall private property be taken for public use, without just compensation." In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992), the United States Supreme Court citing its earlier decision in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) stated that

> ...the Fifth Amendment is violated when land use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."

As to any argument that the enactment of an ordinance would not amount to a total "taking" of the property in that title to the property under water would remain with the landowner and, therefore, a landowner would retain some "economically viable use of his land" if it remained as lake property, in responding to such an argument a complete review of all the facts involved in such situation would be necessary in order make a complete determination as to the question. However, such is beyond the province of this office in the issuance of an opinion in that this office has repeatedly stated that an opinion of the Attorney General cannot determine facts or resolve factual issues. Ops. Atty. Gen. dated October 4, 2004 and December 12, 1983.

Nevertheless, in construing whether the enactment of an ordinance prohibiting the filling or a pond or lake would constitute a "taking" in such circumstances, reference may be had to the described "balancing test" which may be applied to determine whether there has been a taking as set forth in Sea Cabins, supra. Such was referenced in Lucas, 505 US. at 1019, fn.8 citing Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). In Sea Cabins, the State Supreme Court noted that

> Three factors are typically balanced to decide whether the public benefit from a regulation or law outweighs the private harm to a landowner: (1) the character of the government action; (2) the economic impact of the regulation on claimant: and (3) the degree to which the regulation/law has interfered with distinct investment-backed expectations.

548 S.E.2d at 601. See also: McQueen v. South Carolina Coastal Council, 354 S.C. 142, 148, fn. 5, 580 S.E.2d 116 (2003) ("(w)hen there has been a partial taking by government regulation, the court determines if compensation is due by a complex of factors referred to as the Penn Central factors." Again, however, the factual determination as to whether an ordinance prohibiting the filling of a private lake or pond would constitute a compensable taking under such test involves facts and is not a matter for resolution by an opinion of this office.

With kind regards, I am,

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General