HENRY MCMASTER
ATTORNEY GENERAL

February 24, 2010

Stephen W. Hefner, Ed.D
Superintendent, Richland School District Two
6831 Brookfield Road
Columbia, South Carolina 29206

Larry C. Smith, Esquire
Richland County Attorney
Post Office Box 192
Columbia, South Carolina 29202

Dear Superintendent Hefner and Mr. Smith:

This Office received opinion requests from both of you asking for the advice of this Office on whether Richland County (the "County") has the authority to require a development site review on all of Richland County School District Two's (the "District's") facilities and to also assess a per square foot fee for this review.

Law/Analysis

According to the information provided by the County, it is our understanding that the County adopted Land Development ordinances pursuant to its authority under chapter 29 of title 6 of the South Carolina Code, allowing local governing bodies to enact zoning and land development regulations. Richland County Code, § 23-3. Included in portion of the County's Code containing such ordinances are provisions governing general development, site, and performance standards for land development. Richland County Code, § 26-171 et seq. These provisions include regulations governing such things as parking, landscaping, lighting, roads, and green space. Id. From our review of the County's Code, we understand that before any building or structure may be erected in the County, the County must issue a land development permit. Richland County Code, § 26-53. As part of the permitting process, the applicant must submit to a compliance review in which the County's planning department reviews the applicant's development plan to determine whether or not it is in compliance with the County's development, site, and performance standards. Id. In addition, we understand the County charges a fee to conduct the site plan review.

We are aware that the District takes the position that the County is prohibited from requiring the District to submit to the land development review process and paying the fee because of section 6-9-110 of the South Carolina Code (Supp. 2009). This statute provides:

> (A) A county, municipal, or other local ordinance or regulation which requires the purchase or acquisition of a permit, license, or other device utilized to enforce any building standard does not apply to a:
>
> > (1) state department, institution, or agency permanent improvement project, construction project, renovation project, or property; or
> >
> > (2) school district facility, permanent improvement project, construction project, renovation project, or property which is reviewed and approved by the State Department of Education; except that the State Department of Education or a local school district may direct that the local ordinance or regulation apply to a particular facility, project, or property.
>
> (B) After successful completion of all requirements, the State Fire Marshal shall certify personnel of the State Engineer's Office of the Budget and Control Board designated by the State Engineer. The certified personnel and deputy state fire marshals, including resident state fire marshals, have exclusive jurisdiction over state buildings, including schools, in the exercise of the powers and jurisdictional authority of the State Fire Marshal under Sections 23-9-30, 23-9-40, and 23-9-50.

S.C. Code Ann. § 6-9-110 (emphasis added). The District argues because it did not consent to the application of the ordinance, the County is prohibited from requiring it to obtain permits for the construction of new facilities.

The County, on the other hand, asserts section 6-9-110 is not applicable in this situation because the County is not seeking to apply building codes to the District, but rather is seeking to enforce its planning and zoning provisions. The County cites to section 6-29-770(A) of the South Carolina Code (2004), which provides: "Agencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances." In addition, the County points out that in City of Charleston v. South Carolina State Ports Authority, 309 S.C. 118, 121, 420 S.E.2d 497, 499 (1992), the South Carolina Supreme Court clarified that "§ 6-9-110 applies only to building codes and is inapplicable to zoning ordinances." In that case, the Court considered whether or not the South Carolina State Ports Authority, a State agency, must obtain approval from the City of Charleston's architectural review board prior to constructing a new building. Id. The Court found that the ordinance requiring the approval of the architectural review board was a zoning ordinance, not a building code. Id. The Court explained:

> Chapter 9 of Title 6 establishes a statutory scheme whereby local governments may adopt only certain listed building codes. Chapter 9 also establishes the South Carolina Building Code Council. The Council may approve or disapprove any deviations from the standard codes which local governments may adopt. Thus, the legislature had retained final approval of local building codes. Because the various codes which local governments may adopt and approved local variations differ, the legislature has exempted state agencies from the local codes. The state buildings are designed and approved at the state level under the building codes applicable to state buildings. Chapter 9 applies to such things as electrical, plumbing and gas codes, it is simply inapplicable to zoning ordinances. Zoning ordinances which regulate not only the use of the building but also the facade must be complied with by all state agencies under S.C.Code Ann. § 6-7-830.

Id.

We reiterated the Court's findings in City of Charleston in an opinion of this Office issued in 2003. In that opinion, we addressed whether a school district is required to comply with local zoning ordinances. We considered section 6-29-950 of the South Carolina Code (2004), giving municipalities and counties the authority to enforce zoning ordinances by withholding permits and stated:

> Nothing in § 6-29-950 suggests that the statute is not applicable to a school district. Indeed, § 6-29-770(A) provides that "[a]gencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances." (emphasis added).
>
> Further, in Charleston County School District v. Town of McClellanville, Order dated February 5, 1991, the South Carolina Supreme Court wrote:
>
> > [w]e clarify any earlier intimations we may have made previously on this issue and explicitly hold that we know of no law allowing a school district or other similar agency to ignore valid, local zoning requirements and therefore they may not ignore such.
>
> This statement was reaffirmed by the Court in City of Charleston v. South Carolina State Ports Authority, 309 S.C. 118, 420 S.E.2d 497

(1992). Accordingly, Richland School District One is required to comply with existing zoning requirements. Non-compliance is a violation thereof.

Based on our review of the County's Land Development ordinances, we are of the opinion that these provisions are zoning ordinances, rather than building codes. As such, we believe the District must comply with these provisions pursuant to section 6-29-770(A). Thus, to answer your question, we are of the opinion that the County has the authority to require the District to submit to a site development review prior to constructing a new facility.

In addition to your question as to the County's authority to require a review, you also ask that we provide guidance as to whether or not the County can charge a fee to conduct this review. As Mr. Smith mentioned in his letter, section 4-9-30(5) of the South Carolina Code (Supp. 2009), generally, and section 6-1-330 of the South Carolina Code (2004 & Supp. 2009), specifically, allow counties to charge and collect service or user fees. We find no provision that would prohibit the County from charging the District a fee, so long as the fee itself is valid. Therefore, we conclude the County may collect such a fee from the District.

Conclusion

We are of the opinion that the County's requirement that a development site review be conducted prior to the construction of a new building is a zoning ordinance. Because the District must comply with zoning ordinances enacted by the County, we believe the County has the authority to require a development site review for the District's facilities. Moreover, so long as the fee charge for such a review is valid in all other respects, we also believe the County can assess a per square foot fee for this review.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General