ALAN WILSON
ATTORNEY GENERAL

June 12, 2012

Henry E. Kodama, State Forester
South Carolina Forestry Commission
P. O. Box 21707
Columbia, South Carolina 29221

Dear Mr. Kodama:

You seek an opinion "on the application of State Code 48-23-205 regarding local regulation of development affecting forest land." You note that § 48-23-205 "states that a county or municipality must not adopt or enforce any ordinance, rule, regulation, resolution, or permit related to forestry activities on forestland, with certain qualifying criteria and exemptions." Your concern is that "some local governments have been pursuing regulation of forestry by embedding requirements into zoning development, and landscaping standards and enforcing those requirements on forestry operations." By way of background, you further state the following:

> Forest industry is the number-one manufacturing segment of South Carolina's economy based on 2006 data, in terms of the number of jobs provided (90,000) and salaries paid ($4.1 billion). Forest industry impacts the state's economy by about $17.4 billion a year. Wood and wood products are the state's number-one cash crop and account for $1.3 billion in exports annually. South Carolina has 13.1 million acres of forests which account for 68% of our total land area. 88% of our forest resource is privately owned. 64% of privately owned forestland is family owned. The average family forest is about 66 acres in size, and 74%of these owners live on their land.
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> The SC Forestry Commission is charged by South Carolina Code of Laws Section 48-36-10 to provide public oversight and guidance for technical forest management practices and related forestry activities. The Commission promulgates *South Carolina Best Management Practices for Forestry*, or BMPs, as voluntary guidelines for forestry operations to protect the environment with a focus on water quality. Although this is a non-regulatory program, failure to comply with BMPs may result in enforcement action by SC DHEC, US Army Corps of Engineers, or other agencies through a variety of applicable laws and regulations including the SC Pollution Control Act, US Clean Water Act, Rivers and Harbors Act, RCRA, and others due to the Commission's partnership with these agencies.
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> Because various burdensome local regulations on forest management were being promulgated and enforced, SC Code 48-23-205 was passed to provide a consistent legal environment for the practice of forestry throughout the state. In short, the law defines

forestry activities on forestland and restricts the many local governments across the state from regulating those activities.

In order to provide this protection, the law clearly defines "forestry activities on forest lands" and provides five criteria under which an activity may meet that definition. It also provides assurance that the authority of local governments to regulate activities associated with land development or conversion of forest land to other uses is in no way limited, expanded, or otherwise altered.

Distinguishing forestry activities from land clearing for other purposes is often difficult. The SC Forestry Commission contends that forestry activities which meet the criteria specified in Section 48-23-205 must not be treated as development or land clearing by local governments, and should be afforded the full protection of this law.

Your questions are as follows:

- whether a county or municipality may impose buffer requirements of any kind on qualifying forestry activities, whether or not such buffers apply to any other land uses. This would include buffers for riparian protection, wildlife, scenic values, roads, and property boundaries.

- For example, one county requires landowners executing timber harvests to retain an undisturbed buffer around the perimeter of the property and along all roads. Another county requires all land uses, including forestry, to leave a mandatory buffer along a major river. Mandatory buffering effectively precludes private land owners from managing and using these areas for traditional forestry activities.

- whether a county or municipality may require compliance with SC Best Management Practices or other guidelines in a stand-alone rule, or as a condition for exemption from any rules or regulations. Although the SC Forestry Commission strongly promotes the use of BMPs, county mandates for such requirements become regulation of forestry by local governments.

- whether local tree protection standards, including protection of trees by size, species, or location, may be applied to forestry activities on forest lands.

- whether a local government may require notification or reporting prior to engaging in forestry activities on forest lands, or levy any fees or penalties associated with such requirements. Such requirements in other states have resulted in unnecessary delays to forestry activities and significant increases in operating costs and can effectively stop the implementation of a desired management activity.

- whether a local government may regulate the use of public roads or require permits for access to public roads in association with forestry activities on forest lands.

Such regulation can effectively stop the implementation of a desired management activity.

For example, one county is considering an ordinance that would require permits for timber harvesting and pre-approval of log truck haul routes in order to monitor damage to county roads. Other counties have considered regulations and bond requirements and bond requirements specific to logging trucks and log truck traffic that did not apply to other commercial traffic.

Law / Analysis

In 2009, the General Assembly enacted Act No. 48 of 2009, commonly known as "The Right to Practice Forestry Act." This Act added Section 48-23-205 to the South Carolina Code. The purpose of such Act was, as expressed in the Title of the legislation, "To Limit The Authority of Counties and Municipalities To Restrict or Regulate Certain Forestry Activities ...." Act No. 48 of 2009 states as follows:

(A) For purposes of this section:

(1) "Development" means any activity, including timber harvesting, that is associated with the conversion of forestland to nonforest or nonagricultural use.

(2) "Forestland" means land supporting a stand or potential stand of trees valuable for timber products, watershed or wildlife protection, recreational uses, or for other purposes.

(3) "Forest management plan" means a document or documents prepared or approved by a forester registered in this State that defines a landowner's forest management objectives and describes specific measures to be taken to achieve those objectives. A management plan shall include silvicultural practices, objectives, and measures to achieve them, that relate to a stand or potential stand of trees that may be utilized for timber products, watershed or wildlife protection, recreational uses, or for other purposes.

(4) "Forestry activity" includes, but is not limited to, timber harvest, site preparation, controlled burning, tree planting, applications of fertilizers, herbicides, pesticides, weed control, animal damage control, fire control, insect and disease control, forest road construction, and any other generally accepted forestry practices.

(B) A county or municipality must not adopt or enforce any ordinance, rule, regulation, resolution, or permit related to forestry activities on forestland that is:

(1) taxed on the basis of its present use value as forestland under Section 12-43-220(d);

(2) managed in accordance with a forest management plan;

(3) certified under the Sustainable Forestry Initiative, the Forest Stewardship Council, the American Forest Foundations Tree Farm System, or any other nationally recognized forest certification system;

(4) subject to a legally binding conservation easement under which the owner limits the right to develop or subdivide the land; or

(5) managed and harvested in accordance with the best management practices established by the State Commission of Forestry pursuant to Section 48-36-30.

(C) This section does not limit, expand, or otherwise alter the authority of a county or municipality to:

(1) regulate activities associated with development, provided that a county or municipality requires a deferral of consideration of an application for a building permit, a site disturbance or subdivision plan, or any other approval for development that if implemented would result in a change from forest land to nonforest or nonagricultural use, the deferral may not exceed a period of up to:

(a) one year after the completion of a timber harvest if the harvest results in the removal of all or substantially all of the trees from the specific area included in a building permit, site disturbance or subdivision plan in item (1), and the removal qualified for an exemption contained in subsection (B); or

(b) five years after the completion of a timber harvest if the harvest results in the removal of all or substantially all of the trees from the specific area included in a building permit, site disturbance or subdivision plan in item (1), and the removal qualified for an exemption contained in subsection (B) for which the permit or approval is sought and the harvest was a wilful violation of the county regulations;

(2) regulate trees pursuant to any act of the General Assembly;

(3) adopt ordinances that are necessary to comply with any federal or state law, regulation, or rule; or

(4) exercise its development permitting, planning, or zoning authority as provided by law.

(D) A person whose application for a building permit, a site disturbance or subdivision plan, or any other approval for development is deferred pursuant to the provisions contained in this section may appeal the decision to the appropriate governmental authority.

Before addressing your questions, we note that several principles of statutory construction are herein applicable. First and foremost is the primary obligation to ascertain the intent of the General Assembly. *State v. Martin*, 293 S.C. 46, 358 S.E. 2d 697 (1987). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *Caughman v. Cola. Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948). The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in the language used and construed in light of its intended purpose. *Stephen v. Avins Const. Co.*, 324 S.C. 334, 478 S.E. 74 (Ct. App. 1996). Further, when interpreting a statute or regulation, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute or regulation's operation. *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003); *Converse Power Corp. v. DHEC*, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002); see also Sutherland, Statutory Construction, § 46.05, p. 103 (1992) ["A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every other part or section to produce a harmonious whole"] Provisions of an act do not stand alone, but must be read in the context of an act or regulations as a whole. *Byerly v. Connor*,307 S.C. 441, 415 S.E.2d 796 (1992).

While a statute must be construed as a whole, nevertheless, in order to be read harmoniously, it is well recognized that certain principles must apply in case of irreconcilable conflict. Our Supreme Court, in *State v. Prickett*, 47 S.C. 101, 25 S.E. 46, 47-48 (1896), expressed well a general rule of guidance regarding a seemingly irreconcilable conflict within a particular statute, as follows:

> [t]he scope of section 1 is much greater than that of section 33, and covers a wider range of subjects. In section 1 the "transportation" prohibited is more general than the "transporting" referred to in section 33. In the latter the transporting of alcoholic liquors from place to place within the state is forbidden; whereas in the former the transportation may not only cover transporting from place to place within the state, but covers also a transportation from a place outside the state to a place within the state, or a transportation from a place within the state to a place without the state. In such cases, Endlich on Interpretation of Statutes (section 215) gives the rule of construction thus: "If there are two acts or two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision." Adopting this same rule of construction, Chief Justice McIver, in City Council of Charleston v. Weller, 34 S. C. 361, 13 S. E. 629, said: "The well-settled rule is that, in construing an act, it must be considered as a whole, and such a construction must be adopted, if possible, as will give full force and effect to each one of its provisions. If they are apparently inconsistent with each other, such inconsistency must, if possible, be reconciled, in order to give full force and effect to the legislative will, as expressed by the words they have used." The paramount object in the construction of all statutes, whether penal or otherwise, is to ascertain the legislative will. Here, then, the particular intent, making transporting of alcoholic liquors from place to

> place within the state punishable only within the jurisdiction of a trial justice, as presented in section 33, must be regarded as an exception to the more general intent expressed in section 1. Therefore, it follows that all offenses of transporting such liquors from place to place within the state are exclusively within the jurisdiction of courts of trial justice. Const. 1868, art. 1, § 19; Id. art. 4, § 18; State v. McKettrick, 14 S. C. 346; State v. Harper, 6 S. C. 464; State v. Cooler, 30 S. C. 109, 9 S. E. 692. The indictment in this case, and the evidence offered to support it, show that the transportation of alcoholic liquors charged as in violation of the dispensary law was wholly within the state, and must be referred, under the conclusions herein above reached, to section 33; and it follows that the offense charged was within the exclusive jurisdiction of a trial justice.

Further, as we recognized in *Op. S.C. Atty. Gen.*, May 15, 2006 (2006 WL 1376910), an opinion which concluded that the Legislature could pass the "Right to Farm Act," consistent with Home Rule, our Supreme Court has consistently upheld the power of the General Assembly to limit the exercise of authority of counties and municipalities under Home Rule. As we stated in that Opinion,

> [i]t is clear ... that so long as the General Assembly exercises its power to limit local governments *by general law*, the exercise of such legislative authority is valid and does not conflict with Home Rule. A good example is *Town of Hilton Head v. Morris*, 324 S.C. 30, 484 S.E.2d 104 (1997). There, local governments brought an action challenging the constitutionality of a statute requiring real estate transfer fees collected by local governments to be remitted to the State. One argument mounted by the local governments was that the statute conflicted with Art. VIII, § 17 of the Home Rule Amendment. However, the Court rejected such contention concluding as follows:
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> > [t]his argument is without merit. Under Home Rule, the General Assembly is charged with passing general laws regarding the powers of local governments. S.C. Const. Art. VIII, § 7 (counties); § 9 (municipalities); § 4-9-30 (counties (Supp. 1995). *The General Assembly can therefore pass legislation specifically limiting the authority of local government.* In this case, although § 6-1-70 does not prohibit the imposition of real estate transfer fees, it prohibits local governments from retaining the revenues generated by them. The limitation on revenue-raising does not violate article VIII, § 17, since *the General Assembly is constitutionally empowered to determine the parameters of local government authority.*
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> 484 S.E.2d at 106-107 (emphasis added). The Court's ruling in *Town of Hilton Head v. Morris*, is consistent with the generally recognized principle that "... the home rule power exercised by a county cannot result in legislation which conflicts with an act of the legislature, and *it cannot be exercised in any area which has been preempted by the state.*" 20 C.J.S. Counties § 44 (emphasis added). See also, *Goodell v. Humbolt County*, 575 N.W.2d 486, 494 (Iowa 1998) (simply because local government regulation is permissible in an area "does not prevent the legislature from imposing uniform regulations throughout the state, should it choose to do so, nor does it prevent the state from regulating this area in such manner to preempt local control." [livestock

> regulation]. After Home Rule, while the Legislature now cannot legislate as to a specific county, it certainly retains virtually plenary power to limit counties' power and authority by general law.

See also, *Holler v. Ellisor*, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) ["'Zoning enactments, regulations, and restrictions may not override state law and policy. They must be within the general limitations on the exercise of municipal powers , and they are subject to, and must be within, the limitations and restrictions prescribed by the enabling act authorizing them, or imposed by other legislation.'", quoting 101 C.J.S. *Zoning* § 17, p. 713]; *Bostic v. City of West Cola.*, 268 S.C. 386, 390, 234 S.E.2d 224, 226 (1977) ["Zoning Ordinance is void to the extent that it is repugnant to the general law.']. Thus, it is clear that a county or municipality's zoning or other regulatory authority must yield to a state law of general applicability.

In this regard, we also note a publication of the South Carolina Forestry Commission, entitled "Conserving South Carolina's Working Forests," (found at www.state.sco/forest/fra-cons.htm) which sets forth the reason for passage of the Right to Practice Forestry Act. Such publication points to the "undue burden" being placed "upon forest land managers whose intent was to carry out legitimate forestry operations." The publication referenced one local ordinance "which required anyone who planned to harvest trees to conduct a detailed and costly survey of the property to ensure that the provisions of the tree protection ordinance were not violated." The publication noted that "this type of ordinance could make timber harvesting and other proactive forestry management activities prohibitively expensive and time consuming." Thus, according to the publication, "South Carolina forest landowners realized the threat to forestry posed by local forestry regulation and worked with the South Carolina Forestry Commission and other forestry groups to encourage the state legislature to pass the Right to Practice Forestry Act in 2009. This law prohibits counties and municipalities from enacting ordinances that 'restrict or regulate certain forest activities,' thereby removing the burden of local regulations from those landowners who are carrying out legitimate forestry practices." Such publication appears consistent with the legislative intent gleaned from the face of the Act.

We turn now to the words of the statute at issue, the Right to Practice Forestry Act. As we noted above, the Title of Act 48 indicates that the purpose of the General Assembly, in enacting this legislation, was to place a limitation upon the authority of counties and municipalities to regulate forestry activities on forest land. Such Title is as follows:

> An Act To Amend the Code of Laws of South Carolina, 1976, By Adding Section 48-23-205 So As To Provide Certain Definitions, To Limit The Authority of Counties And Municipalities To Restrict Or Regulate Forestry Activities, To Provide The Terms and Conditions Of Certain Permitted Regulations, And To Provide Exemptions.

A "forestry activity" is deemed to include timber harvesting, site preparation, controlled burning, tree planting, applications of fertilizers, herbicides, pesticides, week control, animal damage control, fire control, insect and disease control, forest road construction and other generally accepted forestry practices.

In this regard, Subsection (B) of the Act broadly proscribes a county or municipality from regulating "forestry activities" through "any ordinance, rule, regulation, resolution, or permit" on "forest land" that is (1) taxed on the basis of its present use value as forestland under § 12-43-220(d); (2) managed in accordance with a forest management plan; (3) certifiable under the Sustainable Forest Initiative, the Forest Stewardship Council, the American Forest Foundation Tree Farm System, or any other nationally recognized forest certification system; (4) subject to a legally binding conservation easement under which the owner limits the right to develop or subdivide the land; (5) managed and harvested in accordance with the best management practices established by the State Commission on Forestry pursuant to Section 48-36-30.

On the other hand, pursuant to Subsection (C)(1), a county's or municipality's authority to "regulate activities associated with development ..." is not foreclosed altogether by the Act. While there is required a waiting period, stated as "a deferral of consideration of an application for a building permit, a site disturbance or subdivision plan, or any other approval for development that if implemented would result in a change from forest land to nonforest or nonagricultural use ...," the county's or municipality' authority to regulate development may be accomplished pursuant to the express terms of Subsection (C)(1). The Act defines "development" as "any activity, including timber harvesting, that is associated with the conversion of forestland to nonforest or nonagricultural use."

In addition, Subsection (C) contains other exemptions which do not "limit, expand, or otherwise alter the authority of a county or municipality." These include the regulation of trees pursuant to any act of the General Assembly, the authority to adopt ordinances necessary to comply with any federal or state law, regulation or rule, as well as the exercise of its (county's or municipality's) development permitting, planning or zoning authority as provided by law.

It is the latter exemption – relating to permitting, planning or zoning – which raises a legal question by appearing to create a conflict within the terms of Act 48. While Subsection (B) plainly restricts the authority of a county or municipality to regulate forestry activities, at the same time, Subsection (C)(4) exempts from such restriction a county or municipality's exercise [of] its development, "permitting, planning or zoning authority as provided by law."

Thus, we must apply the above-referenced rules of construction in order to resolve this apparent conflict. Of course, the foremost rule of construction must be to adhere to legislative intent to the extent possible. Moreover, we must avoid any construction which would render the legislation a futile endeavor. *Florence Co. Dem. Party v. Florence Co. Repub. Party*, Op. No. 27128 (June 5, 2012) [This Court will not construe a statute in a way which lends to an absurd result or renders it meaningless."] Accordingly, with these principles in mind, we are of the opinion that the dividing line between the prohibition upon the county's or municipality's regulation of forestry activities, and the ability of the county or municipality to impose regulation is the change of status of property as forest land to nonforest or nonagricultural use. In other words, counties and municipalities are prohibited from regulation by enforcement of "any ordinance, rule, regulation, resolution or permit" related to forestry activities (as defined) on forest land as defined in § 48-35-205(B)(1) through (5); on the other hand, pursuant to Subsection (C), a county or municipality may regulate "development" activities so long as the waiting period or deferral requirements are adhered to or may regulate pursuant to one of the other enumerated exemptions.

We turn now to the exemption in Subsection (C)(4), ("exercise its permitting, planning or zoning authority as provided by law"). We reconcile this provision with Subsection (B) by the same rule of construction as expressed in *State v. Prickett, supra.* We deem Subsection (B) to be controlling so long as forestry activities are being carried out on forest land as specified. A county or municipality's permitting, planning or zoning authority only comes into play or may be exercised only where the property is being or has been converted to nonforest or nonagricultural use. Otherwise, the zoning exemption contained in Subsection (C)(4) subsumes Subsection (B) and the purpose of the Act is defeated.

Of course, as you note in your letter, "[d]istinguishing forestry activities from land clearing for other purposes is often difficult." Each situation will have to be adjudged on its own facts and circumstances. Factual determinations are beyond the scope of an opinion of this Office. However, we agree with the Forestry Commission that "forestry activities which meet the criteria specified in Section 48-23-205 must not be treated as development or land clearing by local governments [and thus subject to regulation], and should be afforded the full protection of this law." Construing Subsections (B) and (C) together, as discussed above, will fulfill this protection afforded by Act No. 48.

We note also that although the terms may be somewhat different, Right to Practice Forestry Acts, such as the General Assembly has enacted by Act No. 48 of 2009, are not uncommon in other jurisdictions which have an abundance of forest lands. It is our understanding that at least 17 other states now have such laws. Such laws "attempt to ensure that forest owners can continue to grow and harvest timber by limiting the ability of local units of government to restrict forest practices." See U.S. Dept. of Agriculture 2002 Report at http://www.srs.fs.usda.gov/sustain/report/socio3/socio3-59htm. See also, e.g. *Westhaven Community Development Council v. County of Humboldt*, 61 Cal. App. 4th 365, 71 Cal. Reptr.2d 536 (1998) (unpublished) [plain language of Forest Practice Act of 1973 preempted application of county zoning regulations requiring county use permit for timber operations on land area larger than three acres]; *1000 Friends of Oregon v. Land Conservation and Development Comm.*, 303 Or. 430, 737 P.2d 607 (1987) (en banc). As the Supreme Court of Oregon states in *1000 Friends*,

> ... uniformity of regulation was one of the legislature's main goals in enacting the FPA .... The standard applied by the Court of Appeals allows county planning authority to supplant this overriding legislative purpose. We believe that the Court of Appeals gave insufficient consideration to the legislature's intent to achieve uniform regulation of commercial forest operations.

737 P.2d at 441-442.

Finally, we recognize that this Office issued an Opinion, dated February 3, 2010, relating to § 48-23-205. There, we stated that "we presume that the Legislature intended for this provision to provide uniformity among counties with respect to forestry activities." We further opined that § 48-23-205 was limited to the regulation of "forestry activities" and forestland as defined in the Act.

In the Opinion, we concluded that the Richland County Land Development Code does not "appear to involve tree planting for the production of timber. Thus, we do not believe a court would generally find that the Land Development Code regulates forestry activities."

In addition, the Opinion contained language, not central to the Opinion's conclusion, which seems to suggest that "forestry activities" on forest land, as specified, could still be regulated independently pursuant to a county's or municipality's zoning authority. There, it was stated that "[t]hus, even if a court were to determine that the contents of the Land Development Code constitute forestry activities, we do not believe the County would be prohibited from enacting such provisions as they related to the exercise of its planning and zoning authority." Upon further reflection we do not believe this is a correct construction of the Act. This statement undoubtedly goes too far in light of the legislative intent of Act No. 48 of 2009 and our construction based thereupon, set forth above. Thus, we deem such language to be non-binding upon this Office and decline to adopt it herein. To reiterate, "forestry activities," as defined in the Act, which meet the criteria specified in the Act, may not be treated as development of land or land clearing by local governments and thus subject to regulation, including zoning. Such activities are fully protected by the Act.

Conclusion

Turning now to your specific questions, we assume that forestry activities on forest land, as defined in Act No. 48, are occurring. Based upon this presumption, and in accord with the foregoing analysis, we advise as follows:

(1) a county or municipality may not impose buffer requirements of any kind on qualifying forestry activities, whether or not such buffers apply to any other land uses. The whole purpose of the Act is to protect forestry activities on forest land. Establishment of a buffer zone while such activities are ongoing, defeats the purpose of the Act.

(2) a county or municipality may not require compliance with SC Best Management Practices or other guidelines in a stand-alone rule, or as a condition for exemption from any rules or regulations. Such mandates for such requirements are most probably the regulation of forestry activities by local governments. Again, if such regulation may occur, the whole purpose of the Act is defeated.

(3) local tree protection standards, including protection of trees by size, species or location, may not be applied to forestry activities on forest lands. Such standards by local governments would defeat the Act's purpose of uniformity.

(4) a local government may not require notification or reporting prior to engaging in forestry activities on forest lands, or levy any fees or penalties associated with such requirements. Such would defeat the Act's purpose of uniformity.

(5) a local government may not regulate the use of public roads or require permits for access to public roads in association with forestry activities on forest lands. Again, such regulation would defeat the Act's purpose uniformity.

As noted above, each circumstance must be determined based upon all the facts. This Office is unable to advise as to particular factual circumstances. However, the intent of Act No. 48 is to broadly preempt a county's or municipality's regulation of forestry activities, as defined, on forest land, as specified. The purpose of the Act is to create a uniform system, statewide, for the practice of forestry. Thus, a court will most likely determine that if there are forestry activities on forest land, local regulation thereof (as opposed to state or federal regulation) is preempted. To conclude otherwise would, in our view, render Act No. 48 of 2009 superfluous and defeat the Legislature's purpose in protecting these activities. *Florence Co. Dem. Party, supra.*

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an