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# The State of South Carolina



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## Office of the Attorney General

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March 8, 1988

William W. Dreyfoos, Esquire  
Attorney, City of Isle of Palms  
Post Office Box 1840  
Charleston, South Carolina 29402

Dear Mr. Dreyfoos:

By your letter of March 1, 1988, you have requested an opinion of this Office as to the authority of a city council to review and change a decision made by the city's Zoning Board of Adjustment, prior to an appeal to circuit court. If the answer to your first questions is favorable, you have then asked about limitations placed on the city council's scope of review. You have asked that we address the issues considering the zoning statutes found in Titles 5 and 6 of the Code of Laws of South Carolina (1976, as amended), since there is no legislative history as to which statutes the City Council of the Isle of Palms followed in adopting its zoning ordinance.

You have advised that your reading of Sections 5-23-100 through 5-23-150, as well as Sections 6-7-740 through 6-7-750, suggests that a city council is not authorized to hear appeals of zoning variance decisions made by the Board of Adjustment. For the reasons following, this Office concurs with your conclusion.

### Title 5

A city council may create a board of adjustment pursuant to Section 5-23-70 of the Code and may provide that the board may "in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the [zoning] ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained."

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The general powers of the board are specified in Section 5-23-100 and include hearing appeals from the decision of administrative officials who enforce zoning laws or ordinances; deciding on special exceptions; and to authorize variances. Sections 5-23-110 through 5-23-140 provide the appellate mechanism to be provided by the board of adjustment.

Sections 5-23-150 et seq. provide the procedure and route of appeal from the board of adjustment. In particular, Section 5-23-150 provides:

Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment, any taxpayer or any officer, department, board or bureau of the municipality may present to a court of record a petition, duly verified, setting forth that a decision of the board of adjustment is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board.

Upon presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment . . . . [T]he court may, on application, on notice to the board and on due cause shown, grant a restraining order. . . . [Emphasis added.]

In Section 5-23-160, the court is permitted to take testimony or appoint a referee, who would take evidence and report back to the court. The court is empowered to assess costs against the board only if the court finds that the board acted "with gross negligence or in bad faith or with malice in making the decision from which the appeal is taken."

Section 14-5-10 of the Code provides that "[t]he circuit courts herein established shall be courts of record . . . ." The Court of Common Pleas would be the appropriate court of record, to which a petition under Section 5-23-150 should be directed. There is no mention of an appeal from a board of adjustment in which a city council would be involved as an appellate hearing body.

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## Title 6

The governing body of a municipality or county would be authorized by Section 6-7-740 of the Code to create a board of zoning appeals or zoning board of adjustment; the statute provides for procedural aspects of operations of the board, who may appeal to the board, the effect of an appeal, and the powers of the board. The board may affirm or reverse the decision of the administrative official granting the permit in question.

An appeal from the decision of the board of appeals or board of adjustment may be taken as provided in Sections 6-7-750 et seq. of the Code. In particular, Section 6-7-750 provides:

Any person who may have a substantial interest in any decision of the board of appeals or board of adjustment or any officer, or bureau of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of such court a petition in writing ... .

Action of the circuit court is also outlined in Sections 6-7-760, -770, -780, and -790 of the Code. Again, no mention of a role in the appellate process by a municipal or county governing body is made.

## Issue

Since both Sections 5-23-150 et seq. and 6-7-750 et seq. mandate an appeal from the board of adjustment or board of appeal, is a city council authorized to review and change the action of the board of adjustment or board of appeals, prior to an appeal to the circuit court? If so, what limitations would be placed on the city council's scope of review?

## Discussion

In enacting a zoning ordinance, a political subdivision such as a municipality is exercising a portion of its police power. Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965). An enactment of zoning ordinances by a local government must comport with the enabling statutes. The ordinance so adopted cannot be broader than the statutory grant of power. Holler v. Ellisor, 259 S.C. 283, 191 S.E.2d 509 (1972). "Zoning ordinances may not override state law and policy; enabling

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legislation is not merely precatory, but prescribes the parameters of conferred authority." Bostic v. City of West Columbia, 268 S.C. 386, 390, 234 S.E.2d 224 (1977). To the extent that city or county ordinances exceed the powers granted by statute, such ordinances are void or invalid. Holler v. Ellisor and Bostic v. City of West Columbia, both supra.

As stated in Fontaine v. Peitz, \_\_\_\_\_ S.C. \_\_\_\_\_, 354 S.E.2d 565 (1987), "[a] review of the decision of a zoning board is by writ of certiorari to the circuit court. S. C. Code Ann. Section 5-23-150 (1976). A writ of certiorari is appellate in nature when used for purposes of reexamining the action of an inferior tribunal." Id., 354 S.E.2d at 566. In Bishop v. Hightower, \_\_\_\_\_ S.C. \_\_\_\_\_, 356 S.E.2d 420 (Ct. App. 1987), it was noted that "findings of fact [of the county board of zoning appeals] are final and conclusive on appeal. Appeal to the circuit court is only for a determination of whether the Board's decision is correct as a matter of law." Id., 356 S.E.2d at 421. Similarly, the "findings of fact by the County Board of Zoning Appeals that the appellant had violated the Zoning Ordinance were final and conclusive." Wells v. Finley, 260 S.C. 291, 295, 195 S.E.2d 623 (1973) (right of appeal from the board to circuit court provided for in now Section 6-7-750).

A city or county may be authorized to fill in certain gaps in statutes relative to zoning, as when, for example, a statute does not state when or where a protest to a decision or hearing is to be filed. Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951). Where a city council attempts to bypass statutory provisions or even a duly-adopted ordinance, however, such will be deemed void. Cf., Lominick v. City of Aiken, 244 S.C. 32, 135 S.E.2d 305 (1964) (Aiken City Council had no legal jurisdiction to hear or decide appeals from decisions of the City's Building Inspector with respect to zoning). In denominating itself an appellate body to hear appeals from the board of adjustment or board of appeals, a city council would not be filling in gaps in existing law but would be adding to the very specific procedure already provided by Sections 5-23-150 and 6-7-750; such an appellate procedure would most probably be found to be in excess of the statutory grant of authority to the city and this void or invalid.

### Conclusion

For the foregoing reasons, it is the opinion of this Office, concurring with your conclusion, that due to the specific rights of appeal granted by Sections 5-23-150 and 6-7-750 of the Code, a city council is not authorized to serve as an appellate

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body between the board of appeals or board of adjustment and the circuit court, to review or change decisions made by the board of appeals or board of adjustment. Until changed by order of the circuit court (or higher appellate court), the board's decision will be deemed final and conclusive. A municipal ordinance varying from these statutes would most probably be found void if challenged in court.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

*Robert D. Cook*

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Executive Assistant for Opinions