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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 14, 2005

Paul S. League, Deputy Chief Counsel
SC Department of Natural Resources
P. O. Box 167
Columbia, South Carolina 29202

Dear Mr. League:

You have requested an opinion "concerning implementation in South Carolina of the National Flood Insurance Program (NFIP)." By way of background, you state the following:

> [t]he question relates to the proper means of amending municipal flood ordinances under state law. The South Carolina Department of Natural Resources serves as state coordinator of NFIP. The Federal Emergency Management Agency (FEMA) has sought a certification from the agency concerning the question presented here.
>
> In 2004, FEMA required the State Coordinator in South Carolina to develop a state model floodplain management ordinance. At the same time FEMA imposed this requirement, it noted that some states allow ordinances that automatically adopt revisions, while other states take the position that each ordinance and revision thereto must be formally adopted by the appropriate municipal governing body.
>
> The question about the appropriate lawful means of adopting and/or revising ordinances is significant as it pertains to flood insurance maps. As development progresses and conditions change, the maps also change to accurately reflect effects on floodways and floodplains. While actual maps may exist, many amendments may be made by updating files by such means as a letter amendment. Virtually all communities participating in the NFIP administer their programs as part of a zoning program. South Carolina law seems to require that zoning ordinances and maps that are part of these ordinances be adopted and revised using the typical process of adopting ordinances, using several readings. Utilizing the typical means of adopting revisions, rather than a means to automatically update ordinances, may prove over burdensome in fast-growing communities with many revisions.
>
> FEMA has requested a response from this agency by May 1, 2005.

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We concur in your analysis that South Carolina law requires "that zoning ordinances and maps that are part of these ordinances be adopted and revised using the typical process of adopting ordinances, including several readings." As will be seen below, it is the law in South Carolina that incorporation by reference of future amendments to another statute, rule or regulation constitutes an unlawful delegation of legislative power.

Law / Analysis

The National Flood Insurance Program (NFIP) is established pursuant to federal law, at 42 U.S.C.A. § 4001 *et seq.* The Program seeks "as a matter of national policy, a reasonable method of sharing the risk of flood losses ... through a Program of flood insurance which can complement and encourage preventive and protective measures." 42 U.S.C.A. § 4001. Specifically, the Act's purpose is, among others, to:

> (1) substantially increase the limits of coverage authorized under the national floor insurance program;
>
> (2) provide for the expeditious identification of, and the dissemination of information, concerning flood-prone areas;
>
> (3) *require states or local communities, as a condition of future Federal financial assistance, to participate in the flood insurance program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses. ...*

(emphasis added). 42 U.S.C.A. § 4002. Pursuant to 42 U.S.C.A. § 4011, "the Director of the Federal Management Agency (FEMA) is authorized to establish and carry out a national flood insurance program which will enable interested persons to purchase insurance against loss resulting from physical damage to or personal property related thereto arising from any flood occurring in the United States." Section 4022 further provides that "[a]fter December 31, 1971, no new flood insurance shall be provided under this chapter in any area (or subdivision thereof) unless an appropriate public body shall have adopted land use and control measures (with effective enforcement provisions) which the Director (of FEMA) finds are consistent with the comprehensive criteria for land management and use under section 4102 of this title."

Your letter indicates that in 2004, FEMA required the State Coordinator in South Carolina (DNR) to "develop a model floodplain management ordinance." The question which you have raised is whether such ordinance may provide for the automatic adoption of revisions to such ordinance which may, from time to time, be made without any further legislative action by the jurisdiction's governing body. As we understand it, as development progresses and conditions change, the maps are also modified to accurately reflect effects on floodways and floodplains. Moreover, as you note, many such changes to the map may be made by "letter amendment." In the information you have

provided, it is stated that FEMA thus needs assurance that "necessary ordinance revisions based upon new hazard data provided by FEMA as well as incorporating any future changes in NFIP floodplain management criteria" may be made. Thus, the issue is whether the Ordinance may specify that map "and subsequent revisions" are automatically adopted by the Ordinance without an amendment of the Ordinance. We do not believe that the State Constitution so permits.

We begin with the fundamental principle that a municipal or county council is a legislative body and in adopting an ordinance, acts in a legislative capacity. See Article VIII of the South Carolina Constitution. As was stated in an opinion of March 31, 1998, "[i]n adopting an act, ordinance or rule, a legislative body acts in a legislative capacity." And, as the South Carolina Supreme Court emphasized in *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 574, 524 S.E.2d 404 (1999), "[a] municipal ordinance is a legislative enactment ...." Ordinances are adopted by the governing body of counties and municipalities by following the procedure specified by the General Assembly. *See*, S.C. Code Ann. Section 4-9-120 (county council); § 5-7-270 (municipal council).

Further, zoning, as well as a change in zoning, is a legislative act. In *Price v. The City of Georgetown*, 297 S.C. 185, 188, 375 S.E.2d 335 (1988), our Court of Appeals noted that

> ... the doctrine of *res judicata* is generally held to be inapplicable to a change of zone case because changing a zone is a legislative act of the zoning authority (the Georgetown City Council in the case before us), which has discretion to change its determination without any showing of changed circumstances.

And, in *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 234, 489 S.E.2d 630, 632 (1997), the Court spoke to the power of municipalities to enact zoning ordinances. There, the Court stated:

> [m]unicipalities are also granted broad zoning and planning powers. S.C. Code Ann. §§ 5-23-10 - 740 (1976); S.C. Code Ann. 6-29-310 to 1200 (Supp. 1996). Further, a municipality may delegate the administration of its ordinances to a board provided the board's discretion is sufficiently limited by clear rules and standards.

Moreover, as the Court emphasized in *Dunbar v. City of Spartanburg*, 226 S.C. 360, 85 S.E.2d 281, 282 (1954), "[i]nitial passage of the Zoning Ordinance was patently legislative action on the part of City Council of the City of Spartanburg." The Court in *Dunbar* further stated that

> "'Ordinance' as a term of municipal law is the equivalent of 'legislative action' ....' 62 C.J.S., *Municipal Corporations*, § 411, p. 785. There is no contention that the City of Spartanburg is without authority to pass zoning laws. The facts of this case clearly and unmistakenly show that the Petition filed with the Mayor and Council was submitted pursuant to the provisions of Section 18 of the general Zoning

> Ordinance of the City of Spartanburg and said section provides the method, manner and conditions under which amendments of said Ordinance may be effected. Thus, petitioners thereby sought a change of or an amendment to the existing Ordinance and Council's refusal to favorably act thereon can be construed as nothing more nor less than the exercise of its legislative authority in that respect. It was within the prerogative of Council to refuse petitioners the relief sought under section 18 of the Zoning Ordinance, and the matter of amendment thereby became final ....

Id. See also, Centaur Inc. v. Richland County, 301 S.C. 374, 392 S.E.2d 165 (1990) [county zoning ordinance relating to "sexually oriented businesses" is constitutionally valid.]; *Greenville Co. v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003) [county ordinance regulating location of "sexually oriented businesses" is constitutional]; *Bear Enterprises v. County of Grvlle*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1996) [courts will not interfere with county council's zoning decision unless decision is so unreasonable as to impair constitutional rights]. *Whitfield v. Seabrook*, 259 S.C. 66, 190 S.E.2d 743 (1972) [authority of county council to adopt zoning ordinance is founded in police power and doctrine of estoppel cannot be applied to deprive county council of due exercise of its police power].

In addition, it is well recognized that one legislative body may not bind another. As we recognized in *Op. S.C. Atty. Gen.*, Op. No. 92-11 (March 23, 1992), it is "stated in the leading treatise on municipal law, [that a] ... 'municipal legislative body ordinarily cannot restrict the power of its successors to amend ordinances.'" Citing, 6 McQuillin, Municipal Corporations, § 21.02; *Op. S.C. Atty. Gen.*, June 13, 1985; *Op. S.C. Atty. Gen.*, October 9, 1985; *Manigault v. Springs*, 199 U.S. 473 (1905).

Moreover, it is a fundamental rule of law that a legislative body, such as a county or city council, "may not abdicate its essential power to legislate or delegate that power to any other power or body." *Op. S.C. Atty. Gen.*, June 24, 1997, citing *S.C. State Highway Dept. v. Harbin*, 226 S.C. 585, 86 S.E.2d 466 (1955); *Schryver v. Schirmer*, 171 N.W.2d 634 (S.CD. 1969). In that same opinion, we also stated:

> [f]urther, a statute which in effect reposes an absolute, unregulated, and undefined discretion in another body bestows arbitrary powers and is an unlawful delegation of legislative powers. See *South Carolina State Highway Department v. Harbin, supra.* In certain instances, the legislative body may authorize another agency to "fill up the details" by prescribing rules and regulations for complete operation and enforcement of the law within its expressed legislative purpose. *Id.* However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the other body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due

> consideration. *Id. Additionally, as a general rule, statutes adopting future laws, rules or regulations of other governmental bodies are unconstitutional as unlawful delegation of legislative powers. Schryver v. Schirmer, supra* (citing authority).

(emphasis added).

In that June 24, 1997 opinion, we concluded that an ordinance of the Aiken County Council was constitutionally suspect because, *inter alia*, it attempted to determine council members' salary based upon a percentage of the salary of members of the General Assembly. Our reasoning that the Ordinance was constitutionally defective was that

> ... the ordinance appears to unlawfully delegate the Aiken County Council's power to set the salaries of its members to the General Assembly without setting forth any standards for carrying out the ordinance. *See, South Carolina State Highway Department v. Harbin, supra*; *State v. Watkins*, 259 S.C. 185, 191 S.E.2d 135 (1972). Second, the Ordinance appears to be an unconstitutional delegation of legislative power because it bases the salary of members of the Aiken County Council on the adoption of future laws by the General Assembly. *Schryver v. Schirmer, supra.*

Likewise, in an Opinion dated November 13, 2003, we concluded that Florence County Council could not delegate its discretionary authority concerning how to spend county funds to individual council members. We referenced numerous authorities in support of the principle that discretionary authority generally may not be subdelegated without express statutory authority. We cited an opinion of April 4, 1996, which stated that "strictly governmental powers ... cannot be conferred upon a corporation or individual." In addition, we referenced the rule cited by our Supreme Court in *G. Curtis Martin Investment Trust v. Clay*, 274 S.C. 608, 266 S.E.2d 82, 85 (1980) that "[a] municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise." *See, also, Grant v. City of Folly Beach*, 346 S.C. 74, 551 S.E.2d 229 (2001) ["As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy."]

More specifically, numerous decisions support the principle that statutes which incorporate existing statutes, rules and regulations by reference are valid, but legislation which adopts by reference future legislation, rules or regulations, or amendments thereof constitutes an unlawful delegation of legislative power. *People v. Urban*, 45 Mich. App. 255, 206 N.W.2d 511 (1973); *Warren v. State Construction Code Comm.*, 66 Mich. App. 493, 293 N.W.2d 640 (1976); *Wallace v. Comm. of Taxation*, 289 Minn. 220, 184 N.W.2d 588 (1971); *Independent Community Bankers Assn. of S.D., Inc.*, 346 N.W.2d 737 (S.D. 1984); *City of Salem v. Jungblut*, 83 Or. App. 540, 732 P.2d 919 (1987). The Court in *Jungblut* stated that

> [a] city may adopt an ordinance that incorporates a state statute, provided that the ordinance is within the city's legislative authority. When an ordinance incorporates by reference a statute, that statute is incorporated in the form in which it exists at the time of the enactment of the ordinance. *Seale et al. v. McKennon*, 215 Or. 562, 336 P.2d 340 (1959). However, if a city adopts by reference a statute, together with any future amendments thereto, there is an unlawful delegation of legislative authority, rendering the ordinance unconstitutional. *Brinkley v. Motor Vehicles Division*, 47 Or.App.25, 613 P.2d 1071 (1980).

732 P.2d at 920. Moreover, *Ind. Comm. Bankers, supra* found that a definition could be incorporated by reference so long as not including a requirement incorporating the definition "as it may be amended in the future." 346 N.W.2d at 744. In *Wallace, supra*, the Court noted that "the principle which controls is that a state legislature may not delegate its legislative powers to any outside agency, including the Congress of the United States." 184 N.W.2d at 591. And, in *People v. Urban, supra*, the Court concluded that "[t]he Legislature ... cannot have intended to grant Congress the power to, in effect change the Michigan statute by repealing the Food, Drug, and Cosmetic Act." 206 N.W.2d at 262.

Similarly, our own opinions have reached the same conclusion. We have distinguished the incorporation of a law or rule as it presently exists, from future amendments to such legislation regulation or policy. In an opinion dated February 17, 1969, for example, former Attorney General McLeod wrote:

> [i]n the absence of such authorizing legislation, incorporation by reference can probably safely be accomplished by referring to a designated document and stating and requiring that the said document is filed in the codified ordinances of the city. The document adopted by reference should be described in such terms that its contents at the time at which it is adopted can be established. This should be done in order to avoid future changes that might be made in the document. *The authorities generally recognize that adoption of future amendments cannot validly be made.* An opinion dated July 2, 1968, expressed the view that the uniform act regulating traffic on highways may be incorporated as an ordinance of a municipality by reference. The document adopted by reference should be precisely identified and should physically be placed and kept in the codified ordinances of the city.

(emphasis added).

And, in a more recent opinion, dated August 12, 1999, we rejected any contention that the General Assembly could adopt by reference future revisions, amendments or versions of nationally recognized safety codes in state-owned buildings. There, we analyzed the question as follows:

> [i]t is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board to fill up the details by prescribing rules and regulations for the complete operation and enforcement of the law within its express general purpose. (Citations omitted) . . . "However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such a degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration." (quoting State v. Stoddard, 126 Conn. 623, 13 A.2d 586, 588 (1940)).

Thus, the legislature may delegate power to administrative officers or agencies to adopt rules and regulations to enforce statutory law, but the regulations must be consistent with a definitive legislative policy.

After determining that the legislative power may be delegated, the next step in the analysis is to determine whether agency regulations exceed the authority delegated from the legislature. Often the agency adopts nationally recognized codes to establish consistent guidelines. The adoption is either specifically authorized by statute, or again, consistent with the legislative policy. For example, in Johnson v. Roberts, 269 S.C. 119, 236 S.E.2d 737 (1977), the Supreme Court of South Carolina upheld the state fire marshal's adoption of the Fire Prevention Code. The General Assembly lawfully delegated their legislative power to the marshal's discretion in requiring conformance with minimum standards "based on nationally recognized standards." In that case, the fire marshal's choice of the Fire Prevention Code was an appropriate example of the national standards to be adopted.

Sometimes, the mandate from the General Assembly is more specific. For example, in South Carolina Code Section 6-9-50, the General Assembly requires municipalities and counties to adopt by reference "only those provisions of the latest editions of the following nationally known codes and standards referenced in the codes for regulation of construction." The section then proceeds to list several nationally recognized codes, such as the Standard Building Code, the Standard Mechanical Code, etc. The legislation under consideration here would be similar to Section 6-9-50 in that it authorizes the state agencies to adopt by reference the "latest editions" of nationally recognized codes. While the General Assembly may delegate the power to adopt such codes (see Johnson v. Roberts), use of the terms "latest edition" or "most current" or "most recent" has been the subject of litigation.

In Professional Houndsmen of Missouri, Inc. v. County of Boone, 836 S.W.2d 17 (1992), the Missouri Court of Appeals interpreted an ordinance that defined a "Rabies Compendium" as "the most current edition of a document by that name published by the National Association of State Public Health Veterinarians . . . ." The court said the incorporation by reference was appropriate, but the adoption of the document takes the provisions as they exist "at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." The court further rejected the argument that "most current edition" would include all future additions because "that would be an unlawful delegation. The right to exercise police power 'cannot be delegated to private persons.'" *Id* (citing State v. Donnelly, 285 S.W.2d 669, 674 (Mo. 1956)). Instead, the court held that the ordinance should be interpreted to mean "only the current list in effect" at the time of adoption to avoid any delegation problems. *Id.*

The Houndsmen case illustrates the difficulty in this type of legislation. The reference to "the latest edition" of the code is not in itself problematic, but the proposed provision for the automatic adoption of the latest revision or edition of the codes one year after they have been published would be an attempt to incorporate by reference all future additions. Many jurisdictions have held that this would unlawfully delegate legislative power to a private entity because such a law would, in effect, grant to the private groups the power to initiate and enact rules that become law. See International Association of Plumbing and Mechanical Officials v. California Building Standards Comm'n., 55 Cal.App. 4th 245, 64 Cal.Rptr.2d 129, 134 (1997). "Manifestly, any association may adopt a 'code' but the only code that constitutes the law is a code adopted by the people through the medium of their legislature." Columbia Specialty Co. v. Breman, 90 Cal.App.2d 372, 202 P.2d 1034 (1949).

The Attorney General of California addressed the same issue in 1980 when a provision of the Health and Safety Code authorized the Commission of Housing and Community Development to exercise its discretion to enact certain nationally recognized codes. The act further specified that "upon the failure of the commission . . . to take such action within one year of the publication of future editions of such a model code, then such model code provisions shall be considered to be adopted by the commission." 63 Ops. Cal. Atty. Gen. 566 (1980). The Attorney General said:

> Viewing these provisions broadly it seems apparent that the new methodology was intended not only to relieve the Legislature from the continuing burden of considering these detailed uniform codes each time they might be revised but also intended to permit California to be more responsive to such changes since it may be presumed that the commission might evaluate and respond to such changes in a

> more timely manner than would the Legislature. It is of considerable significance that the Legislature imposed a one-year requirement with respect to adopting such "most recent editions." This requirement supports the conclusion that the Legislature intended that each new edition be evaluated by the commission for possible revision to meet California's needs, but in the event of the commission's failure to act . . . the most recent edition would . . . go into effect.

The opinion concluded that the commission was authorized to amend their regulations as the codes are revised, appropriately thereby relieving the Legislature of their burden, but neither the Legislature nor the commission could adopt the revisions prospectively. See also Dawson v. Hamilton, 314 S.W.2d 532 (Ky Ct. App. 1958), State v. Christie, 766 P.2d 1198 (Haw. 1988); Hillman v. Northern Wasco County People's Utility District, 213 Or. 264, 323 P.2d 664 (1958) (stating neither Public Service Commissioner nor successor, "without hearing or further consideration," could adopt prospective changes in code) *overruled on other grounds by* Maulding v. Clackamas County, 278 Or. 359, 563 P.2d 731 (1977).

Similarly, the legislation now being considered attempts to provide for the same automatic adoption of future revisions of nationally recognized codes in the absence of any further consideration of the changes by the legislature or the agency charged with enforcing them. Multiple jurisdictions have struck down such attempts as impermissible delegations of legislative power to private entities, as these private organizations would have the power to formulate rules that would ultimately acquire the status of law. Therefore, no language that attempts to adopt all prospective revisions or editions, either by direct legislative mandate or by delegation to an agency, would be appropriate. The proposed legislation should contain some provision directing the agencies involved to consider future changes to the codes as they are enacted and then amend their regulations accordingly.

Our own Supreme Court addressed the possible unlawful delegation of legislative power in *Santee Mills et al. v. Query*, 122 S.C. 158, 115 S.E. 202 (1922). There, the question before the Court was whether the incorporation by reference in the South Carolina Tax Law of the federal income tax laws and regulations constituted an unconstitutional delegation of legislative power. In concluding that the statute was valid, the Court was careful to note that the statute was limited to the present Act of Congress and not to "future laws, rules, and regulations of the federal government." *Id.* at 205. The Court appears to be setting forth the applicable law in South Carolina in this area, by stating state

> [t]he next contention ... is that the act incorporated by reference laws made and to be made by Congress and regulations made and to be made thereunder by federal officers, and that it thereby contravenes section 1 of article 3 of the state Constitution

> and section 4 of article 4 of the United States Constitution in delegating to the United States Congress and to federal officers the nondelegable legislative powers of the General Assembly. There can be no doubt that "the enactment of laws is one of the high prerogatives of a sovereign power," and that "it would be destructive of fundamental conceptions of government through republic institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws." In re Opinion of the Justices, 239 Mass. 606, 133 N. E. 453. But we do not think the contention that the act adopts or attempts to adopt future laws, rules, and regulations of the federal government is warranted by the language of the statute. The reference (section 2 of the act) is to the United States Income Tax Act of November 23, 1921, and acts amendatory thereto "which have been passed and approved prior to the time of the approval of this act." The "rules and regulations promulgated by the Department of Internal Revenue under and by virtue of said acts" are also adopted in the state act. While the language used with respect to said "rules and regulations" is perhaps broad enough to cover future rules and regulations, in the absence of a clear indication of a different intention, it will be presumed that it was the intent of the lawmakers to restrict the application of the statutory provision in question to the legitimate field of legislation (6 R. C. L. p. 80; School Town of Andrews v. Heiney, 78 Ind. 1, 98 N. E. 628, 43 L. R. A. [N. S.] 1023, Ann. Cas. 1915B, 1136; Commonwealth v. People's Express Co., 201 Mass. 564, 88 N. E. 420, 131 Am. St. Rep. 416), and that the rules and regulations thus adopted by reference were those in force at the time of the approval of the act. So construed, the income tax imposed by the state act is a sum equal to 33 1/3 per cent. of the United States income tax for which the taxpayers subject to the state tax were liable to the United States government under the designated acts of Congress, and the regulations made thereunder, in force at the time of the approval of the state act. It is conceivable that changes in the federal law occurring subsequent to the approval of the state act might lead to complications in its enforcement. But such considerations, especially in the absence of any showing of fact in the case at bar tending to establish an infringement of plaintiffs' rights in that regard, afford no sufficient warrant for holding the act invalid.

Along these same lines, our Court of Appeals has indicated that a zoning ordinance may not delegate the power of enactment or amendment to another body or person. In *Peterson v. City of Clemson, supra,* a rezoning ordinance was attacked as an unlawful delegation of legislative power because the ordinance contained a provision stating that "City Council hereby goes on record that the City of Clemson will not initiate the rezoning of residential parcels" adjacent to a particular property tract. Rejecting the argument of an unlawful delegation, the Court read the suspect provision as "... simply an expression of the position of City Council *at the time* of the adoption of the motion. It in no way delegates to another person or body the authority to perform a legislative act." 312 S.C. at 167.

We have also located an opinion of the North Dakota Attorney General which addresses your precise question. In 2004 N.D. Op. Atty. Gen. No. L-66, 2004 WL 247203 (October 29, 2004), the question presented to the Attorney General of that state was "whether a county, city, or township may adopt an ordinance intended to allow the automatic adoption of revisions to the community's flood insurance study and flood insurance rate map." The Attorney General of North Dakota answered in the negative, stating the following:

> [n]umerous courts, including the North Dakota Supreme Court, have held that a statute attempting to incorporate future changes of another statute, code, regulation, standard, or guideline is an unconstitutional delegation of legislative power to the entity publishing the referenced item. McCabe v. Workers Compensation Bureau, 567 N.W.2d 201, 204 (N.D. 1997). A state statute may adopt by reference the laws or regulations of another entity that are in existence at the time of the enactment of the adopting state statute without creating an unlawful delegation of legislative power. State v. Julson, 2o2 N.W.2d 145, 151 (N.D. 1972). If the state statute that adopts by reference the other entity's law or regulation provides that it is adopting the law or regulation "as amended," that adoption will be interpreted to mean the act or regulations as amended at the time of the enactment of the state statute, and will not include changes made subsequent to the enactment of the state statute. Id. .... This rule includes adoption by reference of federal laws or regulations. Id.
>
> Rules of statutory construction apply to ordinances, City of Fargo v. Ness, 551 N.W.2d 790, 792 (N.D. 1996). Consequently, an ordinance that attempts to adopt subsequent modifications of a law, rule, guideline, etc., will also be unconstitutional. See Professional Houndsmen of Missouri, Inc. v. County of Boone, 836 S.W.2d 17, 21 (Mo. 1992); City of Salem v. Jungblut, 732 P.2d 919, 920 (Or. 1987).
>
> Therefore, it is my opinion that a county, city, or township ordinance may adopt by reference a flood insurance study and flood insurance rate map that is in existence at the time of enactment, but may not adopt subsequent revisions except by amending the ordinance. ....

See also, *Joytime Distributors and Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999) [statewide referendum to determine legality of video poker in South Carolina is an unconstitutional attempt to delegate legislative power]; *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992) [Legislature may delegate legislative power to the Budget and Control Board by giving Board absolute, unregulated and undefined discretion]; *Eastern Federal Corp. v. Wasson*, 281 S.C. 450, 316 S.E.2d 373 (1984) [statute which delegates to Motion Picture Association the power to rate movies "X" or not and to impose tax based upon Association's rating is unlawful delegation of legislative power].

Conclusion

Based upon the numerous authorities, referenced above, it is our opinion that a provision contained in a zoning ordinance stating that all future amendments or modifications in the flood insurance maps, as well "subsequent revisions," are incorporated by reference would constitute an unlawful delegation of legislative power. While a legislative body, such as a municipal or county council, may incorporate other legislation or rules, regulations, policies or maps *as these may presently exist*, any incorporation of future changes to such enactment or documents unlawfully delegates to another body, person or entity the power to alter the ordinance – a power reserved to the council itself. As stated in our earlier August 12, 1999 opinion with respect to incorporation of future safety codes, "... no language that attempts to adopt all prospective revisions or editions, either by direct legislative mandate or by delegation to an agency, would be appropriate. The proposed legislation should contain some provision directing the agencies involved to consider future changes to the Codes as they re enacted and then amend their regulations accordingly."

S.C. Code Ann. Section 4-9-120 provides in part that "[county] ... councils shall take legislative action by ordinance" and that "all ordinances shall be read at three public meetings on three separate days with an interval of not less than seven days between the second and third readings ...." As we previously recognized, "[i]n order for an ordinance to be properly amended or repealed, a new ordinance must be passed." *Op. S.C. Atty. Gen.*, September 30, 2002. *See also,* § 5-7-270 ["(n)o (municipal) ordinance shall have the force of law until it shall have been read two times on two separate days with at least six days between each reading."]

Accordingly, we concur in your analysis that South Carolina law does not constitutionally permit local governing bodies to incorporate by reference *future revisions* in flood insurance maps. While a body such as city or county council may incorporate by reference present maps or other documents, for that body to incorporate future changes or revisions therein would unlawfully delegate its legislative power.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an