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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

February 16, 2005

The Honorable Bill Cotty
Member, House of Representatives
522-A Blatt Building
Columbia, South Carolina 29201

Dear Representative Cotty:

You note that "[t]he Property Tax subcommittee of the Ways and Means Committee recently met to consider House Bill 3264, dealing with property tax reassessment. By way of background, you state the following:

> [d]uring the subcommittee's discussions, some concerns were raised regarding the constitutionality of the bill in light of the Supreme Court's recent ruling that overturned Charleston County's 15% cap on assessment increases for owner occupied homes. I am requesting your opinion on the constitutionality of House Bill 3264.

Law / Analysis

H.3264, by its title, seeks, with certain exceptions, "To Eliminate Increases In Fair Market Value of Owner-Occupied Residential Property Attributable to Quadrennial Reassessment In The County, And Provide The Period For Which This Exemption Applies...." Section 1 of the Bill contains new § 12-37-223 which provides in pertinent part as follows:

> Section 12-37-223. (A) For purposes of this section, 'real property' means owner-occupied residential real property eligible for the four-percent assessment ratio for property tax purposes allowed pursuant to Section 12-43-220(c).
>
> (B) There is exempt from property tax an amount of fair market value of real property located in the county sufficient to eliminate any increase in fair market value attributable to countywide appraisal and equalization program conducted pursuant to Section 12-43-217. An exception allowed by this Section does not apply to:

(1) fair market value attributable to real property or improvements to real property not previously taxed, such as new construction, and for renovation of existing structures; and

(2) real property transferred after the implementation of the values determined in the most recent countywide equalization program pursuant to Section 12-43-217.

... (D) Once the fair market value of real property is first reduced by the exemption allowed in subsection (B), that reduced fair market value remains the fair market value of the property subject to property tax except as otherwise provided in subsection (B) (1) and (2), regardless of further increases in fair market value of that real property as determined in subsequent countywide appraisal and equalization programs. When real property is transferred such that the real property is no longer eligible for the exemption provided for in subsection (B), the real property is subject to being taxed in the tax year following the transfer at its value, as determined under Section 12-37-930, at current fair market value as determined by the county assessor.

The proposed Bill also amends § 12-37-223A, which authorizes the governing body of a county by ordinance to exempt an amount of fair market value of real property located in the county sufficient to limit to fifteen percent any valuation increase attributable to a countywide appraisal and equalization program ...." The legislation would now provide that "[a]n exemption allowed by § 12-37-223A does not apply to "real property subject to the exception allowed pursuant to Section 12-37-223 ...." Thus, as we understand the legislation, owner-occupied property would be exempt from increases resulting from reassessment, while other property would be subject to fifteen percent of any valuation increase. We assume the question of constitutionality has arisen based upon this distinction.

Riverwoods, LLC v. County of Charleston

In Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002), the South Carolina Supreme Court concluded that a Charleston County ordinance which granted an ad valorem property tax exemption solely to owner-occupied primary residences conflicted with and violated § 12-37-223A. The Ordinance imposed "a tax cap on these properties such that they are not taxed on any increase in value over 15 percent." Id. at 381. While the County enacted the ordinance pursuant to § 12-37-223A, the Court noted that for several reasons, "... it chose to limit the exemption solely to owner-occupied primary residences." Id. at 382.

The Court found that the Enabling Act – § 12-37-223A – did not permit the County to limit the exemption to these residential properties only. Rejecting the County's argument that it possessed the discretion under the Home Rule Act (particularly, § 4-9-25), to enact the ordinance, the Court

instead concluded that

> [t]he County, however, misapprehends the issue before the Court. At issue is whether the Ordinance violated the enabling legislation [§ 12-37-223A] .... It is clear from a plain reading of the Enabling Act that the only real discretion which was conferred upon the County was whether to adopt the ordinance. Once adopted, however, it must be consistent with the general law of the State, i.e. the enabling legislation. See Bugsy's, Inc. v. City of Myrtle Beach[, 340 S.C. 87, 530 S.E.2d 890 (2000)] ... (to be valid, an Ordinance must be consistent with the Constitution and general law of the State); cf. Bostic v. City of West Columbia, 268 S.C. 386, 390, 234 S.E.2d 224, 226 (1977) ("enabling legislation is not merely precatory, but prescribes the parameters of conferred authority"). As discussed above, the Ordinance is inconsistent with the Enabling Act. Consequently, the County's assertions regarding Home Rule provide it no refuge.

Id. at 386. Specifically, the Court concluded that § 12-37-223A (A) (1), (2) and (3) provides only three enumerated exceptions to the granting of the exemption. With the Ordinance, "... the County enacted an ordinance which effectively created a fourth exception – all real property other than owner-occupied primary residences." Id. at 385.

In its ruling, the Court saw no need to address the validity of the Ordinance under the South Carolina Constitution. It had also been argued and the trial court had found "that because the Ordinance resulted in the taxation of owner-occupied primary residences at less than their fair market value, the Ordinance violated Article III, § 29 and Article X, § 1 of the South Carolina Constitution." Id. at 387. These provisions of the Constitution insure "equal and uniform" assessments and assessments based upon "fair market value" of the property. The Court, however, declined to address these arguments, stating that

> [i]t is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required. E.g. In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001). Our holding in Issue 1, supra is dispositive to this appeal; we therefore refrain from ruling on the constitutional questions raised. Id.

Id. at 387. Thus, Riverwoods was not dispositive of the constitutional issues raised by the tax cap. The Court addressed the single issue of whether the Ordinance in question conflicted with § 12-37-223A.

November 6, 2000 Attorney General's Opinion

Even though it was not necessary for the Court in Riverwoods to dispose of the constitutional issues presented, our opinion, dated November 6, 2000, did in fact speak to such issues. There, while

we did not address the question considered in Riverwoods – whether the Ordinance conflicted with the statute – however, we reviewed such Ordinance on the grounds that it violated the State and federal Constitutions. Although we noted that the Ordinance, in placing a reassessment tax cap on certain residential homes only, raised the possibility of "arguable violations of the South Carolina Constitution and the Equal Protection Clause" which were certainly "serious" in nature, we ultimately concluded that the Ordinance "would survive a challenge on constitutional grounds ...."

There, our reasoning consisted of the following analysis:

> [l]et us begin with the argument that the ordinance violates the South Carolina Constitution. Article X, Section 1 of the State Constitution states that "[t]he assessment of all property shall be equal and uniform..." and that "[t]he legal residence... shall be taxed on an assessment equal to four percent of the fair market value of such property." In another provision, Article III, Section 29 provides that "all taxes upon property ... shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made...." Both of these constitutional provisions concern the assessment of property for levying tax. In contrast, Article X, Section 3 sets forth an exemption from ad valorem property taxation for certain enumerated categories of property. The last paragraph of Article X, Section 3 provides that "in addition to the exemptions listed in this section, the General Assembly may provide for exemptions from the property tax, by general laws applicable uniformly to property throughout the State and in all political subdivisions, but only with the approval of two-thirds of the members of each House."
>
> Section 4 of Act No. 283 of 2000, or § 12-37-223(A) as amended, authorizes counties to "exempt an amount of fair market value of real property located in the county sufficient to limit to fifteen percent any valuation increase...." Accordingly, the County ordinance provides "an exemption for real property... sufficient to limit to 15% any valuation increase" for certain residences. Because the Act and the ordinance seek to exempt property from taxation, not to affect the property's assessment, then the provisions of S.C. Constitution Article X, Section 3 apply. In other words, the property continues to be assessed at its actual value, but the value of the property above the 15% cap is exempt from taxation. Under Article X, Section 3, the General Assembly can authorize this exemption. To further illustrate the difference, in an informal opinion of this Office dated April 6, 1998, we addressed pending legislation that attempted to restrict the increase in the fair market value of residential property to no more than the value of permanent improvements made. Aside from the general rule that pending legislation is not entitled to the same presumption of constitutionality as enacted legislation, we were concerned that the attempt to cap the increase in fair market value would run afoul of Article X, Section 1 and Article III, Section 29 of the State Constitution. In the instant case, Act No. 283

and the County ordinance make no such efforts to restrict the assessment of the property. Instead, the General Assembly and the County invoke the authority of Article X, Section 3 to exempt certain property from taxation. This distinction is essential to the success of the Act and the ordinance.

Even assuming that Article X, Section 3 authorizes this exemption, an argument might be made that the ordinance is invalid because the reassessment tax cap does not apply uniformly to all properties in the County. On the other hand, Section 3 allows the exemption "by general laws applicable uniformly to property throughout the State." It is the general laws that must be applicable uniformly, not the exemption. The uniform applicability requirement is met when each county council is empowered to provide the exemption, at its option and in its discretion, in its county. Quirk v. Campbell, 302 S.C. 148, 394 S.E.2d 320 (1990). In Quirk, the constitutionality of the fee-in-lieu of tax provisions of Code § 4-29-67 were challenged, in part, on the basis that they violate the uniformity provisions of Article X of the South Carolina Constitution. Rejecting the contention that only certain industries (not all) benefit from the tax exemptions under the statute, and for those industries that qualify, different results can obtain in the negotiation process provided in the statute, the Court concluded that uniformity and equal protection requirements are met if all businesses are "granted the opportunity to negotiate for fees in lieu of taxes." Id. Likewise, in Charleston County Aviation Auth v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982), it was argued that procedures used to implement the property tax exemption provided in S.C. Constitution Article X, Section 3(a) violated the uniformity requirements because the procedures could result in unequal treatment of otherwise similarly-owned properties. The Court rejected that argument and further held that a failure to tax or exempt similar property in another county, while not desired, constitutes no legal basis to void a proper application in Charleston County where there is equal treatment. Thus, despite the differences in the treatment of properties among the counties, because the counties are uniformly empowered to opt in to the exemptions provided for by the general law, Article X, Section 3 has not been violated.

The next issue, which is somewhat related, concerns a challenge on Equal Protection grounds. The federal courts have acknowledged that the States have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-527(1959). A State might, for example, decide to tax property held by corporations at a different rate than property held by individuals. Allegheny Pittsburgh Coal Co. v. County Comm'n. of Webster County. W. Va., 488 U.S. 335 (1989) (citing, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356). In dividing property into

classes, the State must still meet the requirements of Equal Protection under the U.S. Constitution. The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is invidious discrimination. See Lehnhausen, supra.

Where taxation is concerned and no specific federal right apart from Equal Protection is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. Id. And a legitimate State purpose in making those classifications may be ascertained even when the legislative or administrative history is silent. Nordlinger v. Hahn, 505 U.S. 1, 112 S.Ct. 2336, 120 L.Ed.2d 1 (1992). The appropriate standard of review for such classification systems is whether the difference in treatment from one category to another rationally furthers a legitimate state interest. Id. For purposes of this rational-basis review, the latitude of discretion is notably wide in the granting of partial or total exemptions from taxation upon grounds of policy. Id.

Council has articulated several reasons for its classification system for tax exemption, at least two of which have been reviewed and considered valid by the United States Supreme Court. As stated in Nordlinger, the State has a legitimate interest in local neighborhood preservation, continuity, and stability, and in order to inhibit displacement of lower income families by the forces of gentrification, the State can allow older owners to pay progressively less in taxes than new owners of comparable property. Nordlinger, 505 U.S. at 12. In addition, the purposes to be served by an ordinance such as that proposed by Council are that (1) it prevents property taxes from reflecting unduly inflated and unforeseen current values and (2) it allows property owners to estimate future liability with substantial certainty. As in the Nordlinger case, Council's exemption plan rationally furthers legitimate government interests.

Again, we believe the State Constitution and Equal Protection arguments present serious legal issues which a court would have to address. However, it is our opinion that that the Charleston County ordinance violates neither state nor federal law. Indeed, for all of the foregoing reasons, we are convinced that the ordinance would withstand a challenge based on these grounds. Of course, we make no attempt to advise the County Council on whether it should, in fact, enact the ordinance. That decision must be made in the discretion of the Council.

Case Law In Other Jurisdictions

Courts in other jurisdictions have concluded that the State possesses a rational basis in

treating owner-occupied residential property differently from other property for purposes of ad valorem taxation. These decisions have thus held that such disparity in treatment is not unconstitutional. See, Howell v. Malone, 388 So.2d 908 (Ala.1980); Simmons v. Idaho State Tax Commission, 111 Idaho 343, 723 P.2d 887 (1986); Roosevelt Properties Co.v. Kinney, 12 Ohio St. 3d 7, 465 N.E.2d 421 (1984). The Court reasoned in Howell with respect to a distinction between "single-family owner-occupied residential property" and other residential property as follows:

> [a]fter examining the law and the judgment of the trial court, we conclude that the State has a "rational basis" for classifying real property for ad valorem taxation based upon the use to which the property is devoted. In this case, that classification, based upon use, discriminates in favor of the owners of residential property who use it as single-family residences; however, that a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. We think the policy of Amendment 373, regarding the taxation of residential property is plain-the State intended to tax owners of single-family residences at a lower rate than owners of other residential property, because residential property which is not used as a single-family residence generally is used as income-producing property. We recognize that some residential property, as the facts of this case show, would fall within the Class II category, but would not be income-producing, but we are confident that the equal protection clause imposes no "iron rule of equality." The fact that Amendment 373 discriminates in favor of owners of single-family residences does not render it arbitrary because the discrimination is founded upon a reasonable distinction or difference in state policy.

388 So. 2d at 913-914.

And, in Simmons, supra, the Court concluded that, with respect "to Simmons's equal protection arguments, the homeowners are not a suspect class and the exemptions does further legitimate State interests, such as fostering home ownership and equalizing the tax burden between residential and business properties." 723 P.2d at 893. In Roosevelt Properties Co., the Court concluded that "[t]he requirement of owner occupancy is certainly rationally related to a tax reduction factor targeted to homeowners, as opposed to commercial or business concerns, in light of recent inflationary trends." 465 N.E.2d at 427.

While these cases are not factually identical to the proposed legislation, they are particularly instructive. Such authorities demonstrate that the Legislature may treat different types of property differently, and that there is a rational basis in treating owner-occupied property differently from other properties for purposes of ad valorem taxation.

With that background in mind, we turn now to an analysis of the proposed legislation. If the General Assembly were to enact the Bill, such Act would of course, carry a heavy presumption of

validity. As we have often stated, any act of the General Assembly

> ... is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939).
>
> Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent inequity or unconstitutionality, we may not declare the Act void. Put another way, a [duly enacted] statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997. Furthermore, pursuant to the constitutional principles of separation of powers it is well established that only the General Assembly can repeal a statute which it has enacted.

Op. S.C. Atty. Gen., September 4, 2003.

The South Carolina Supreme Court has stated that it is the "fundamental rule" that

> ...a State Legislature has the right to make reasonable classifications of persons and property for public purposes. It is elementary that if the classification bears a reasonable relation to the legislative purpose sought to be effected, and if the constituents of each class are all treated alike under similar circumstances and conditions, the equal protection of the laws' provisions of the Constitutions is fully complied with.

Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865, 872 (1930). More specifically, the Court has stated in Holzwasser v. Brady, 262 S.C. 481, 205 S.E.2d 701, 704 (1974) that

> "[g]enerally, within constitutional limitations, the state has power to classify persons or property for purposes of taxation, and the exercise of such power is not forbidden by the constitutional requirement that taxation be uniform and equal provided the tax is uniform on all members of the same class and provided the classification is reasonable and not arbitrary." 84 C.J.S. Taxation s 36, P. 112

quoting Newberry Mills v. Dawkins, 259 S.C. 7, 190 S.E.2d 503 (1972).

In this regard, the Attorney General of Maryland has opined that "[w]e have no doubt that a classification distinguishing 'owner-occupied residential property' from other property is constitutionally permissible." This conclusion is consistent with our November 6, 2000 opinion and with case authorities from other jurisdictions, referenced above. See also, Supervisor of Assessment of Harford Co. v. Otremba, 440 A.2d 403 (Md. 1982) [Homestead exemption statute allowing decrease in assessment of a single-family or two-family owner-occupied residential dwellings is not violative of equal protection in that distinction between owner-occupied and nonowner-occupied dwellings is reasonable].

Conclusion

As we earlier concluded in our opinion of November 6, 2000, legislation which distinguishes between owner-occupied residential property and other property for ad valorem tax purposes, raises serious questions under the State and federal Constitutions. See also, Op. S.C. Atty. Gen., April, 6, 1998. However, such legislation as H.3264, if enacted, would carry a heavy presumption of validity. The "statute would have to be followed until a court of competent jurisdiction declares otherwise." Op. S.C. Atty. Gen., April 6, 1998, supra..

We note also that while the Supreme Court in Riverwoods did not reach the issue of whether the Ordinance in that case violated the State and federal Constitutions, the circuit court did reach that issue and struck down the Ordinance on that basis as well as on the grounds that the Ordinance violated § 12-38-223A. Such a ruling by the circuit court, although not a decision of our highest court, must be given weight.

Nevertheless, we reiterate our conclusion in the November 6, 2000 opinion that a distinction may be made constitutionally between owner-occupied property and other property for ad valorem tax purposes. Other authorities elsewhere support this conclusion.

Accordingly, while we believe the question is a close one, it is our opinion that a court would likely uphold H.3264. Such legislation seeks to provide tax relief to homeowners, and courts elsewhere have concluded that such purpose is not arbitrary. Moreover, the legislation, if enacted, would be presumed valid and must be enforced until a court declares otherwise. As we stated in the opinion of November 6, 2000, it would be advisable for a taxpayer or some other interested party to seek the ruling of a court regarding the constitutionality of legislation such as H.3264 if enacted.

Very truly yours,

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RDC/an