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HENRY MCMASTER
ATTORNEY GENERAL

April 11, 2006

Aaron Pope, Zoning Administrator
City of Folly Beach
Post Office Box 48
Folly Beach, South Carolina 29439

Dear Mr. Pope:

We received your letter requesting an opinion on the Vested Rights Act. Your letter states:

> It is our understanding that the law required local governments to adopt a specific version before July of last year. If we did not, the state law became the default and we must adhere to it in place of a local ordinance.
>
> We would like to enact a local provision that is slightly different (more restrictive) than the state regulation and have received conflicting legal opinions regarding our ability to do so.

Thus, you request an opinion "as to our ability at this point to pass a local vested rights ordinance with our own language. Does the July deadline prevent us from ever adopting something other than the State's default?"

Based on our review of the Vested Rights Act (the "Act") and other pertinent legal authorities, we conclude the Act requires local governments that desire to enact their own land development ordinances or regulations pursuant to the Act, to do so by July 1, 2005. In addition, if a local government fails to enact its own provisions prior to July 1, 2005, it is subject to the default provisions provided under the Act.

Law/Analysis

The General Assembly enacted the Act in 2004 with an effective date of July 1, 2005. 2004 S.C. Acts 2849. A "vested right," as defined under the Act, is "the right to undertake and complete the development of property under the terms and conditions of a site specific development plan or

Request Letter

a phased development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter." S.C. Code Ann. § 6-29-1520(10) (Supp. 2005). Prior to the enactment of the Act, our courts considered whether the landowner had a building permit to construct the desired project and whether the landowner made expenditures after the issuance of the building permit to determine if the landowner held a vested right to continue with his or her project after the enactment or change in a zoning ordinance. See Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986). The Act provides greater assurance to landowners by allowing them to obtain a two-year vested right to develop their property prior to the issuance of a building permit. S.C. Code Ann. § 6-29-1540(5) (Supp. 2005).

The Act also directs local governments to enact land development ordinances or regulations in conformance with the Act. In enacting its own ordinances, the Act allows the local government flexibility crafting certain provisions. Section 6-29-1530 of the Act (Supp. 2005) provides:

> (A)(1) A vested right is established for two years upon the approval of a site specific development plan.
>
> (2) On or before July 1, 2005, in the local land development ordinances or regulations adopted pursuant to this chapter, a local governing body must provide for:
>
> > (a) the establishment of a two-year vested right in an approved site specific development plan; and
> >
> > (b) a process by which the landowner of real property with a vested right may apply at the end of the vesting period to the local governing body for an annual extension of the vested right. The local governing body must approve applications for at least five annual extensions of the vested right unless an amendment to the land development ordinances or regulations has been adopted that prohibits approval.
>
> (B) A local governing body may provide in its local land development ordinances or regulations adopted pursuant to this chapter for the establishment of a two-year vested right in a conditionally approved site specific development plan.
>
> (C) A local governing body may provide in its local land development ordinances or regulations adopted pursuant to this chapter for the

> establishment of a vested right in an approved or conditionally approved phased development plan not to exceed five years.

(emphasis added). Section 6-29-1540 of the Act (Supp. 2005) provides additional provisions that must be or may be contained in the land development ordinances or regulations. One such provision is section 6-29-1540(5), mandating the local government designate a vesting point for the landowner's rights, but also allowing the municipality flexibility in determining the vesting point. This section states:

> [T]he land development ordinances or regulations amended pursuant to this article must designate a vesting point earlier than the issuance of a building permit but not later than the approval by the local governing body of the site specific development plan or phased development plan that authorizes the developer or landowner to proceed with investment in grading, installation of utilities, streets, and other infrastructure, and to undertake other significant expenditures necessary to prepare for application for a building permit . . .

S.C. Code Ann. § 6-29-1540(5).

If a local governing body fails to adopt or amend land development ordinances or regulations in accordance with the Act, section 6-29-1560 of the Act (Supp. 2005) provides default provisions. Section 6-29-1560 states:

> (A) If a local governing body does not have land development ordinances or regulations or fails to adopt an amendment to its land development ordinances or regulations as required by this section, a landowner has a vested right to proceed in accordance with an approved site specific development plan for a period of two years from the approval. The landowner of real property with a vested right may apply at the end of the vesting period to the local governing body for an annual extension of the vested right. The local governing body must approve applications for at least five annual extensions of the vested right unless an amendment to the land development ordinances or regulations has been adopted that prohibits approval. For purposes of this section, the landowner's rights are considered vested in the types of land use and density or intensity of uses defined in the development plan and the vesting is not affected by later amendment

> to a zoning ordinance or land-use or development regulation if the landowner:
>
> > (1) obtains, or is the beneficiary of, a significant affirmative government act that remains in effect allowing development of a specific project;
> >
> > (2) relies in good faith on the significant affirmative government act; and
> >
> > (3) incurs significant obligations and expenses in diligent pursuit of the specific project in reliance on the significant affirmative government act.

S.C. Code Ann. § 6-29-1560(A). This statute continues by listing "significant governmental acts allowing development of a specific project." Id. § 6-29-1560(B).

Initially, we note, the Legislature has the prerogative to limit a municipality's ability to enact their own vested rights ordinances. A municipality's authority is limited by the Constitution and the general law of this State. S.C. Code Ann. § 5-7-30; Town of Hilton Head Island v. Morris, 324 S.C. 30, 34, 484 S.E.2d 104, 106 (1997). "Under Home Rule, the General Assembly is charged with passing general laws regarding the powers of local government. The authority of a local government is subject to the general laws passed by the General Assembly." Town of Hilton Head Island, 324 S.C. at 34, 484 S.E.2d at 106 (citing S.C. Const. Art. VIII, § 9). Thus, the Legislature in the delegation of its authority to local governments to enact their own vested rights ordinances, may also limit the municipalities' authority by requiring them to enact their versions by a particular date.

In our review of the provisions of the Act cited above, we keep in mind the cardinal rule of statutory interpretation, "to ascertain and effectuate the intention of the Legislature." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, __, 626 S.E.2d 6, 10 (2005).

> In ascertaining the intent of the Legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.

Croft v. Old Republic Ins. Co., 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005) (citations omitted).

In Infinger v. Edwards, 268 S.C. 375, 234 S.E.2d 214 (1977), the South Carolina Supreme Court addressed, among other issues, whether a court could approve the postponement of a county referendum for the selection of its method of election and form of government pursuant to Home Rule past the date prescribed in the Home Rule Act. As provided in the Court's opinion, the portion of the Home Rule Act under review stated:

> "Each county, after at least two public hearings which shall have been advertised in a newspaper of general circulation in the county and wherein the alternate forms of government provided for in this chapter are explained by the legislative delegation of the county, may prior to July 1, 1976 conduct a referendum to determine the wishes of the qualified electors as to the form of government to be selected or become subject to the provisions of subsection (b) of this section. The referendum may be called by an act of the General Assembly, resolution of the governing body, or upon petition of not less than ten percent of the registered electors of the county
>
> . . .
>
> Notwithstanding any other provisions of this chapter, unless otherwise determined by referendum prior to July 1, 1976, the county concerned shall, beginning on that date, have the form of government . . . most nearly corresponding to the form in effect in the county immediately prior to that date . . .

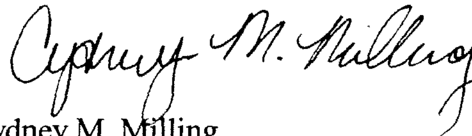
Id. at 379, 234 S.E.2d at 215-16 (quoting S.C. Code § 14-3701 (recodified at S.C. Code Ann. § 4-9-10)) (emphasis added). The Court determined under the plain wording of the Home Rule Act, the July 1, 1976 deadline for the referendum is mandatory and cannot be judicially extended. Id.

> There is no constitutional right to a referendum to select a form of county government; the legislative authorization of such a right renders it purely statutory. The statutory right to a referendum was clearly circumscribed by the time allowed to exercise the right. Not only did the legislature contemplate and specifically provide for the contingency of counties not selecting a form of government, it further specified that the initial form could not be changed for a period of two years after its inception.

Id. at 380, 234 S.E.2d at 216 (citations omitted).

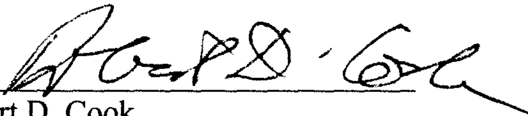
The Vested Rights Act clearly evidences the intent of the Legislature to enact a general law to provide landowners a statutory vested right to develop their property under the terms and conditions of a development plan. From the plain wording of sections 6-29-1530 and 6-29-1540, these provisions legislatively authorize local governments to enact their own vested rights ordinances, but require them to do so by July 1, 2005. Like in Infinger, this interpretation is supported by the fact that the Legislature also provided default provisions in section 6-29-1560, if local governments failed to adopt or amend their ordinances. Additionally, the Act does not reference a local governments ability to take action after the specified date. Thus, in our opinion if the City of Folly Beach failed to enact local legislation pursuant to the Act prior to the July 1, 2005 deadline, it is prohibited from doing so. Accordingly, the City of Folly Beach must operate under the default provisions as described in the Act.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General