July 6, 2007

Donald R. Bryant, Director
Marion County Public Works
180 Airport Road, Suite G
Mullins, South Carolina 29574

Dear Mr. Bryant:

In a letter to this office you referenced that your county's public works department has begun tearing down and hauling debris from old homes that have been abandoned. You also indicated that you are tearing down and disposing of debris from commercial buildings. You further noted that a hospital building was torn down and a lot in the downtown area has been cleared which was owned by a private citizen. You have questioned whether such demolition work is legal and/or ethical.

According to the attachment forwarded with your request, consistent with the county nuisance ordinance, prior to any action by the public works department, a letter is typically sent to a property owner informing that owner of complaints having been received against that owner's property. The letter also states that based upon a visual inspection by a code enforcement officer, it has been determined that the property is "unsafe and hazardous" for reasons outlined in the letter. As a result, the property "has been declared to be a nuisance and has been condemned." The property owner is advised that he or she may appeal such determination and outlines the steps for an appeal. The owner is also advised that failure to appeal constitutes a waiver of all rights to an administrative hearing. The owner is additionally advised that any clearing and cleaning would be at "no charge" to the property owner.

In examining your question, several statutory provisions are relevant. Generally, S.C. Code Ann. § 4-9-25 provides police power to counties stating,

> [a]ll counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order and good government

> in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

A prior opinion of this office dated May 23, 1998 recognized that

> ...counties of this State may exercise police powers...Health, public safety and sanitation are among the functions of a county...which may be regulated by a county. Abatement of a nuisance which affects public health or safety is generally deemed to be within the police power of a political subdivision...Thus, abating a nuisance, such as an unclean lot which poses a health or safety hazard, could very well be deemed a proper county function....

See also: Op. Atty. Gen. dated March 3, 1998. The term "nuisance" was defined in Shaw v. Coleman, ___ S.C.___, 645 S.E.2d 252 at 258 (Ct. App. 2007) as "...anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property." See also: Op. Nebraska Atty. Gen. dated March 6, 1981 ("A public nuisance is generally defined as something that 'injuriously affects the safety, health, or morals of the public, or works some other substantial annoyance, inconvenience, or injury to the public.'"). Consistent with the above, it appears that action by a county to improve an area deemed "unsafe and hazardous" would be within the police power of the county as it would constitute the abatement of a nuisance.

Other statutory provisions also grant counties authority to deal with derelict structures. A provision of this state's home rule legislation, S.C. Code Ann. § 4-9-30(15) authorizes counties

> ...to undertake and carry out slum clearance and redevelopment work in areas which are predominantly slum or blighted, the preparation of such areas for reuse....

The May 23, 1988 opinion of this office referenced above dealt with the examination of a county ordinance designed to regulate unfit dwellings, unclean lots, and junked automobiles. Reference was made to S.C. Code Ann. Sections 31-15-310 et seq. as the basis for such an ordinance. Section 31-15-320 states that

> [w]henever the governing body of any county of this State finds that there exists in the county dwellings which are unfit for human habitation due to (1) dilapidation, (b) defects increasing the hazards of fire, accidents, or other calamities, (c) lack of ventilation, light or sanitary facilities or (d) other conditions rendering such dwellings unsafe or unsanitary, dangerous or detrimental to the health, safety or morals or otherwise inimical to the welfare of the residents of the county, such county may, upon the approval of a majority of the resident members of the county legislative

> delegation, which the members represent, exercise its police powers to repair, close or demolish any such dwelling.

A further provision, S.C. Code Ann. §§ 31-15-330, provides that

> [u]pon the adoption of an ordinance finding that dwelling conditions of the character described in § 31-15-320 exist within the county, the county governing body may adopt ordinances relating to the dwellings within the county which are unfit for human habitation....

The remainder of such statute outlines the procedures for handling such unfit dwellings.

As to any concerns regarding due process as to your county's method of proceeding against unsafe or hazardous structures, it is recognized that

> [t]he government's seizure or destruction of property as a result of the legitimate exercise of the police power is not a taking of it without due process. A person is deprived of property without due process of law when his or her property is confiscated under the guise of police regulation, but seizure or destruction of property as a result of the legitimate exercise of the police power of a state is not a taking of it without due process...A state may summarily seize and destroy, without violating due process, things that, either by the common law or by statute, constitute a public nuisance....

16D C.J.S. Constitutional Law Section 1848. The Louisiana Attorney General in an opinion dated October 20, 2005 has noted that "[d]ue process can be suspended in the interest of protecting the health and safety of the public by demolishing hazardous structures." In Village of Lake Villa v. Stokovich, 810 N.E.2d 13 (Ill. 2004), the Illinois Supreme Court noting the decision in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) determined that

> ...an exercise of police power to prevent a property owner from using his property so as to create a nuisance or risk of harm to others is not a "taking" in the constitutional sense.

See also: City of Seattle v. McCoy, 4 P.3d 159, 170 (Wash. 2000) ("The United States Supreme Court has held in a long line of cases that a state may use its police power to enjoin a property owner from activities akin to public nuisances without offending either the due process or takings clause."). But see: Op. Nebraska Atty. Gen. dated December 8, 1995 ("...unless the use that is made of property is such that the property can be deemed to be detrimental to the safety, health and welfare of the public or injurious to another, the property is not a nuisance. The mere fact alone that the property

has been vacant for ten years or more cannot validly be said to make it detrimental to the safety, health and welfare, and therefore, a nuisance. An attempt by a government to abate such a use or nonuse of property cannot be justified as a reasonable exercise of the police power, as there is no rational relationship between the property's vacancy and protection of basic societal interest.").

As to any claims regarding compensation for the destruction of property determined to be unsafe or hazardous, in an opinion dated March 16, 1993, the Virginia Attorney General indicated that

> [u]nlike the owner of property taken by a government's power of eminent domain, the owner of property destroyed as a public nuisance has no right to compensation for the property...

The West Virginia Attorney General in an opinion dated March 11, 1965 stated that

> [t]he reason the owner of private property is not entitled to compensation for his property which has been rightfully destroyed as a public nuisance is well stated in Joyce's "Law of Nuisances"...as follows:
>
> > "Where a municipality in the exercise of power possessed by it to abate a nuisance which endangers the public health or safety, rightfully destroys property which is a nuisance of this character, the owner thereof will not be entitled to compensation for the property so destroyed. The constitutional provision requiring compensation to be made for property taken or damaged for public purposes does not apply to property rightly condemned and destroyed as a public nuisance because dangerous to health. Such destruction for the public safety or health is not a taking of private property for public use, without compensation or due process of law, in the sense of the constitution. It is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law.

See also: City of Minot v. Freelander, 426 N.W.2d 556, 560 (N.D. 1988)("...it is well settled that the government's exercise of its police power to abate a public nuisance hazardous to the public health, safety, or welfare does not entitle the property owner to compensation."); Alger v. Department of Labor and Industry et al., 917 A.2d 508, 520 (Vt. 2006)("The prohibition on takings without compensation is not absolute. We have previously held that an exercise of the police power to abate a public nuisance...is not a compensable taking.); Op. Kansas Atty. Gen. dated March 22, 1993

("...the police power inherent in all municipalities empowers cities to adopt and enforce reasonable ordinances governing buildings...This power extends to demolishing private property without compensation where the property is found to be a public nuisance or injurious to the public health or welfare.").

The Tennessee Attorney General in an opinion dated November 28, 1990 concluded that as to the entitlement of compensation,

> [t]he answer to this question depends upon whether...(there)...is a valid exercise of the police power. If it is, there is no right to just compensation...In Jackson v. Bell, 143 Tenn. 452, 226 S.W. 207 (1920), the court held that a statute which authorized the fire commissioner to remove, demolish, or tear down premises which were found to be "especially liable to fire" did not create an unlawful taking of property, and that the owner of the property was not entitled to compensation. Similarly, in Thien v. Porter, 82 Tenn. 621 (1885), it was held that the summary abatement of a nuisance by destroying the property which caused the nuisance does not violate the constitutional prohibition against taking private property for public use without compensation.

The Fourteenth Amendment to the United States Constitution requires that no state shall "deprive any person of life, liberty or property, without due process of law." The United States Supreme Court has construed such provision to require notice and a predeprivation hearing before property is taken. See: Fuentes v. Shevin, 407 U.S. 67 (1972). As to any possible concerns regarding procedural due process in the situation addressed by you, according to your statement as to how matters regarding property determined to be "unsafe and hazardous" are handled, procedural due process is provided. As set forth in your letter, written notice is provided to the property owner of complaints having been received as to that owner's property. The owner is further advised that the property has been determined to be "unsafe and hazardous" and, as a result, has been condemned. The property owner is advised of his right to appeal and is informed of the steps for appeal. Such notice and opportunity to be heard would appear to satisfy procedural due process concerns. See: Village of Lake Villa v. Stokovich, 810 N.E.2d 13 (Ill. 2004).

Concerning the expenditure of public funds for the clean up of such buildings, this office has consistently acknowledged provisions of the State Constitution which require public funds to be expended for public purposes. See, e.g., Ops. Atty. Gen. dated January 11, 2006 and October 8, 2003. Article X, Section 5 of the State Constitution requires that taxes be spent for public purposes. Article X, Section 11 of the Constitution states that

> The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any

> religious or other private education institution except as permitted by Section 3, Article XI of this Constitution.

The State Supreme Court has interpreted this provision so as to prohibit the expenditure of public funds for the primary benefit of private parties. State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981). This office has determined generally that counties and municipalities cannot spend public funds to perform work on private property unless a public purpose is undertaken. See: Ops. Atty. Gen. dated February 3, 2005, April 2, 1987, and August 2, 1985.

As has been indicated in prior opinions, determining what is or is not a public purpose is not an easy undertaking. See: Op. Atty. Gen. dated January 11, 2006. However, referencing the test as set forth in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), this office has determined that

> [a]s a general rule, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose.

As noted in a prior opinion of this office dated March 20, 2007,

> [g]enerally, South Carolina courts give deference to a legislative body in its determination of a public purpose. WDW Prop. v. City of Sumter, 342 S.C. 6, 12-13, 535 S.E.2d 631, 634 (2000). "[T]he courts will not interfere unless it appears that the legislative body was clearly wrong." Caldwell v. McMillan, 224 S.C. 150, 158, 77 S.E.2d 798, 801 (1953). In Nichols v. South Carolina Research Authority, 290 S.C. 415, 429, 351 S.E.2d 155, 163 (1986), our Supreme Court affirmed the test for the determination of a public purpose, as set forth in a prior opinion. "The Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree." Id. (quoting Byrd v. Florence County, 281 S.C. 402, 407, 315 S.E.2d 804, 806 (1984)).

With regard to such, if a public purpose is found in the removal of an unsafe or hazardous structure, it appears that the expenditure of public funds for the removal of such structure would be justified.

I would note that it has been determined that slum clearance constitutes a public purpose. See: Op. Atty. Gen. dated March 17, 1976. In its decision in McNulty v. Owens, 188 S.C. 377, 199 S.E. 425 (1938), the public purpose approved by the court was the elimination of slums. Consistent

with the above, it appears that action taken consistent with your county nuisance ordinance as outlined above could be upheld. The elimination of property determined to be "unsafe and hazardous" would appear to be a valid public purpose. Consistent with the above, it appears that the procedures outlined in the county nuisance ordinance as set forth previously may be upheld.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General