HENRY MCMASTER
ATTORNEY GENERAL

April 9, 2010

Kenneth E. Gaines, Esquire
Columbia City Attorney
Post Office Box 667
Columbia, South Carolina 29202

Dear Mr. Gaines:

In a letter to this office you indicated that the City of Greenville enacted a business license ordinance which abates Greenville's business license tax upon new businesses meeting the requirements of a "new business qualifying for incentives." According to your letter, the City of Columbia is considering adopting a similar ordinance. Another proposal for consideration would be an ordinance to abate the City of Columbia's business license tax one hundred percent for the first taxable year or any portion thereof during any new business' operation in the City of Columbia. Existing businesses operating in the City of Columbia would continue to be assessed the normal business license tax. You have questioned the constitutionality of both proposals.

As stated in an opinion of this office dated March 6, 2006,

> [a] municipal ordinance is a legislative enactment and is presumed to be constitutional." Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999). The unconstitutionality of an ordinance must be proven beyond a reasonable doubt. Peoples Program for Endangered Species v. Sexton, 323 S.C. 526, 532, 476 S.E.2d 477, 481 (1996). While this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state statutes. Thus, we have recognized that an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction. Op. S.C. Atty. Gen., January 3, 2003.

See also: Op. Atty. Gen. dated August 15, 2007 ("...we must keep in mind that an ordinance is a legislative enactment and therefore, is presumed to be constitutional. Harkins v. Greenville County,

340 S.C. 606, 533 S.E.2d 886 (2000). Moreover, only a court, not this Office, may declare an ordinance unconstitutional. Op. S.C. Atty. Gen., December 14, 2006.").

A prior opinion of this office dated May 13, 1974 determined that a county council could levy and collect a business license tax "provided the same is uniform to all such businesses throughout the county." Obviously, a question such as yours raises equal protection concerns. As set forth in an opinion of this office dated December 21, 1998, the State Supreme Court

> ...has frequently noted that the equal treatment required by the Equal Protection Clause [of the 14th Amendment and Art. I, § 3 of the South Carolina Constitution] must extend to both the privileges conferred and liabilities imposed. Samson v. Greenville Hosp. System, 295 S.C. 359, 368 S.E.2d 665 (1988). The Court has stressed that equal protection requires that the classification in question not be arbitrary and that there be a reasonable relationship between the classification and proper legislative purpose.

The referenced 1998 opinion dealt with the question of the constitutionality of a model ordinance which imposed a tax of 3% of gross receipts on all telecommunications companies doing business within the municipality. That ordinance imposed the 3% gross receipts rate on telecommunications services and also imposed a penalty of 5% per month on delinquent payments. It was stated that "[t]his rate is substantially in excess of and disproportionate to the rate for other business license classifications." That opinion referred to several decisions of the State Supreme Court which dealt with the issue of whether certain business license taxes violated the Equal Protection Clause. See: Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985); Southern Bell Tel. and Tel. v, City of Aiken, 279 S.C. 269, 306 S.E.2d 220 (1983; United States Fidelity and Guaranty Co. v. City of Newberry, 257 S.C. 433, 186 S.E.2d 239 (1972). The opinion stated that as to the Spartanburg case,

> [a]pplying the rule that an ordinance is a legislative enactment and is presumed to be constitutional, the Court reaffirmed its holding in U.S.F.& G. requiring the need for a "reasonable basis" for disparate treatment. Concluded the Court:
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> > [t]he gross disparity in the license tax rate imposed by the Spartanburg ordinance is reflected by the fact that Southern Bell pays a tax of 1% of its gross receipts ($238,875 in 1981 and $267,262 in 1982) while a textile mill or manufacturing plant with the same revenue as Southern Bell pays a maximum of $725...The city has advanced no reasonable basis for the differential treatment. The amendment was not part of any overall reform of the ordinance. Nor did the city prove that Southern Bell benefitted more from city

> services than did other businesses. United States Fidelity and Guaranty Co. v. City of Spartanburg, 263 S.C. 169, 209 S.E.2d 36 (1974). Moreover, since Southern Bell is the highest ad valorem taxpayer in the city, it contributes greatly to the cost of city government. Apparently, the sole consideration in drastically increasing the tax on Southern Bell was that, since Duke Power had agreed by contract to pay the city 3% of its gross revenues, Southern Bell's taxes should be increased. We conclude that the rate disparity between Southern Bell and other companies not parties to contracts with the city is palpably unreasonable and violative of equal protection of the laws. 285 S.C. at 496.

Reference was also made to the holding in United States Fidelity and Guaranty Co., supra, where the opinion stated that in that decision,

> [t]he Court noted that "[i]t is conceded that the city had the right to classify for the purpose of license taxes and considerable discretion as to the rate to be imposed upon the respective classifications..." However, the "cardinal issue here is whether the city had any rational basis for such a gross disparity and differentiation between the rate charged property insurers, such as the plaintiff, and those charged to the various other business and professional licensees." In the Court's view, while differences in organization, management, and type of business might justify a particular classification, "...acts or ordinances which arbitrarily impose different rates of taxation on different occupations or privileges, without any reasonable basis for such distinction are void as a denial of equal protection of the law." In order to pass constitutional muster, a classification must not be "arbitrary and [must] bear a reasonable relation to the legislative purpose sought to be effected, and ...all members of each class must be treated alike under similar circumstances." Id. at 241.

With respect to the question of the constitutionality of the Greenville business license ordinance and the proposed ordinance for Columbia that would abate the business license tax for new businesses operating in Columbia as compared to other existing businesses, a response may be dependent on the determination of facts. As we stated in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts. See: Ops. S.C. Atty. Gen. dated March 16, 1010 and March 20, 2007. Moreover, as stated previously, municipal ordinances are presumed constitutional and any unconstitutionality must be proven beyond a reasonable doubt. Also, as set forth, while this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state statutes. As a result, an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction. Op. S.C. Atty. Gen., January 3, 2003.

Therefore, any determination with regard to the constitutionality as to whether the referenced Greenville ordinance or the proposed City of Columbia ordinance would be up to a court.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General