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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

January 11, 2006

The Honorable Alan D. Clemmons
Member, House of Representatives
610 18th Avenue North
Myrtle Beach, SC 29577

Dear Representative Clemmons:

Pursuant to your letter, you advised us that "[t]he City of Myrtle Beach is interested in the issue of the creation of an affordable housing trust fund that would support local affordable housing projects that help provide work force housing and housing for the elderly and disabled low income persons." Thus, you request a legal opinion regarding "the legal ability of local governments to establish a local housing trust fund that is funded by a permanent dedicated tax or fee on local revenues." In addition to your letter, you also provided us with a letter addressed to this Office from the Affordable Housing Coalition of South Carolina, Inc. (the "Coalition"). This letter states the Coalition is interested in "whether or not local governments are currently authorized to establish local housing trust funds," and "if so, do local governments have the authority to appropriate local taxes or fees on a multi-year or permanent basis as a source of revenue for a local housing trust fund?"

Following our review, we conclude the City of Myrtle Beach has the legal ability to establish a local housing trust fund pursuant to its powers under section 5-7-30 of the South Carolina Code. However, in our review of the funding options for the local housing trust fund proposed by the Coalition, we determine all three options would require action by the South Carolina General Assembly.

Law/Analysis

First, we address whether the City of Myrtle Beach has the power to establish a local housing trust fund. The South Carolina State Housing Finance and Development Authority Act of 1977 specifically allows for the establishment of the South Carolina Housing Trust Fund. S.C. Code Ann. §§ 31-13-400 et seq. (Supp. 2005). This act however, does not address the establishment of a housing trust fund by a municipality. Nevertheless, we find the City of Myrtle Beach has the power to establish such a fund without express statutory authorization.

The "Home Rule" amendments to Article VIII the South Carolina Constitution state:

> The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

Section 5-7-30 of the South Carolina Code (2004), conveying the powers conferred upon municipalities, provides in relevant part:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them . . . .

(emphasis added). In Williams v. Town of Hilton Head Island, South Carolina, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993), the South Carolina Supreme Court interpreted these two provisions to

> bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state.

Thus, if, as you assert, the City of Myrtle Beach finds the establishment of a local housing trust fund would "help provide work force housing and housing for elderly and disabled low income persons," arguably, the establishment of the fund could be necessary and proper for the general welfare of the City of Myrtle Beach. However, this determination is factual in nature and therefore, is beyond this scope of this opinion. See Op. S.C. Atty. Gen., December 12, 1983.

Second, should the City of Myrtle Beach establish a local housing fund, we address the issue of whether that fund may be financed by a permanent dedicated tax or fee on local revenues. Again,

we have no statutory guidance as to funds that may be dedicated for such a purpose and can only speculate as to possibilities. The Coalition's letter attached to your request contains suggestions of three possible funding options. We will limit our opinion to addressing these three options.

The first option presented by the Coalition to fund the trust fund is the creation of a local option increase in the real estate transfer tax. In Williams v. Town of Hilton Head Island, 311 S.C. 417, 429 S.E.2d 802 (1993), the South Carolina Supreme Court held a municipality has the power to adopt an ordinance establishing a local real estate transfer fee by virtue of the Home Rule amendments to the South Carolina Constitution. However, in 1994, the General Assembly passed section 6-1-70 of the South Carolina Code, which states:

> (A) Except as provided in subsection (B), the governing body of each county, municipality, school district, or special purpose district may not impose any fee or tax of any nature or description on the transfer of real property unless the General Assembly has expressly authorized by general law the imposition of the fee or tax.
>
> (B) A municipality that originally enacted a real estate transfer fee prior to January 1, 1991 may impose and collect a real estate transfer fee, by ordinance, regardless of whether imposition of the fee was discontinued for a period after January 1, 1991.

In Town of Hilton Head Island v. Morris, 324 S.C. 30, 484 S.E.2d 104 (1997), the Supreme Court upheld the constitutionality of section 6-1-70 and determined this statute did not violate the Home Rule provisions of the South Carolina Constitution. The Supreme Court found the statute does not prohibit a local governing body from imposing real estate transfer fees, but rather prohibits local governments from retaining the revenue generated by such fees. Accordingly, the Supreme Court held the imposition of such fees does not violate Home Rule because "the General Assembly is constitutionally empowered to determine the parameters of local government authority." Id. at 30, 484 S.E.2d at 106.

Although the City could pass an ordinance imposing a real estate transfer fee, without a legislative amendment to section 6-1-70 of the South Carolina Code, it must remit revenues from such a fee to the State rather than using the revenues to fund the trust fund. For the City to retain the revenues from a local option increase in the real estate transfer fee, the General Assembly must amend section 6-1-70. The decision whether or not to amend this statute is a policy decision for the General Assembly, and accordingly, this Office does not take a position with respect to the prudence of enacting such an amendment.

The second option asserted by the Coalition is to broaden the permissible range and scope of the currently imposed development impact fees. The South Carolina Development Impact Fee Act (the "Act") allows governmental entities, which include municipalities, under specified

circumstances to impose development impact fees. S.C. Code Ann. §§ 6-1-910 et seq. (2004). Section 6-1-1010(B) of the Act provides: "Expenditures of development impact fees must be made only for the category of system improvements and within or for the benefit of the service area for which the impact fee was imposed as shown by the capital improvements plan and as authorized in this article." Section 6-1-920(21) of the Act defines system improvements as "capital improvements to public facilities which are designed to provide service to a service area." Section 6-1-920(18) the Act states:

> "Public facilities" means:
>
> > (a) water supply production, treatment, laboratory, engineering, administration, storage, and transmission facilities;
> >
> > (b) wastewater collection, treatment, laboratory, engineering, administration, and disposal facilities;
> >
> > (c) solid waste and recycling collection, treatment, and disposal facilities;
> >
> > (d) roads, streets, and bridges including, but not limited to, rights-of-way and traffic signals;
> >
> > (e) storm water transmission, retention, detention, treatment, and disposal facilities and flood control facilities;
> >
> > (f) public safety facilities, including law enforcement, fire, emergency medical and rescue, and street lighting facilities;
> >
> > (g) capital equipment and vehicles, with an individual unit purchase price of not less than one hundred thousand dollars including, but not limited to, equipment and vehicles used in the delivery of public safety services, emergency preparedness services, collection and disposal of solid waste, and storm water management and control;
> >
> > (h) parks, libraries, and recreational facilities.

The statute cited above does not include a provision for the supply of affordable housing for low-income individuals. Thus, in order for a local housing trust fund to be funded with proceeds from a development impact fee, the General Assembly would need to amend the South Carolina Development Impact Fee Act to include affordable housing as a public facility. Again, we note the decision to amend this Act is a policy matter for the General Assembly to determine as it sees fit.

In addition, if the General Assembly were to enact such an amendment, any impact fee must meet the requirements of a uniform service charge, as set forth by our Supreme Court in Brown v. County of Horry, 388 S.C. 180, 417 S.E.2d 565 (1992), to be valid.

Third and finally, the Coalition suggests providing "financing in tax allocation districts [sic] include costs related to affordable housing." We assume the Coalition is suggesting the creation of a special tax district.

Section 4-9-30 of the South Carolina Code (Supp. 2005) allows for counties to create special tax districts

> for appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution; sewage collection and treatment; courts and criminal justice administration; correctional institutions; public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; hospital and medical care; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above.

Generally, electors in the proposed special tax district must present a signed petition to the county council requesting the creation of a special tax district for the purposes stated above. S.C. Code Ann. § 4-9-30(5)(a). In addition, unless more than seventy-five percent of residents who own at least seventy-five percent of the assessed valuation of real property in the proposed district sign the petition or the area proposed for the special tax district consists of the entire unincorporated area of the county, an election must be held in which a majority of electors in the proposed special tax district approve the creation of the district. Id.

Unlike section 4-9-30, contained in Title 4 governing counties, Title 5 of the South Carolina Code, governing municipal corporations, does not include a provision allowing for the creation of a special tax district within a municipality. Article VIII, section 9 of the South Carolina Constitution provides: "The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law . . . ." Because the South Carolina Code does not contain a provision allowing for creation of a special tax district, the General Assembly would be required to enact a general law authorizing municipalities to create special tax districts. Additionally, the General Assembly would need to include local affordable housing projects in the enumerated list of purposes for which a special tax district may be created. The decision of whether to enact such legislation would again be a policy matter for the General Assembly, and thus, we assert no position on the prudence of such action by the General Assembly.

As explained above, all of the suggested funding options proposed by the Coalition would necessitate legislative action. Therefore, we find it imperative to note, Article VIII, Section 10 of the South Carolina Constitution provides: "No laws for a specific municipality shall be enacted . . . ." Accordingly, any of the amendments required for the Coalition's suggested funding options must be in the form of general legislation.

Conclusion

Based on our review of the applicable statutory authority and case law, we conclude the City has the power to create a local housing trust fund. However, we find the three funding options, as proposed by the Coalition, require legislative action by the South Carolina General Assembly to authorize a municipality to effectuate any of these options.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General