September 14, 2007

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Dear Mr. Jones:

From your letter, we understand you serve as the Town Attorney for the Town of Edisto Beach (the "Town") and thus, on behalf of the Mayor of the Town of Edisto Beach, you request an opinion of this Office on two issues:

> 1. Does the Town of Edisto Beach Town Council have the authority to adopt an ordinance prohibiting the Board of Zoning Appeals from granting a variance from a height limitation for structures within the Town of Edisto Beach contained in the Zoning Ordinance?
>
> 2. What is the process for determining the proper portion of indebtedness that is to be transferred upon the annexation of property from one county to another? This question has two subparts: What is included in the term indebtedness?" And how is that indebtedness to be apportioned?

Law/Analysis

Chapter 29 of title 6 of the South Carolina Code sets forth the provisions of the South Carolina Local Government Comprehensive Planning Enabling Act (the "Act"). Section 6-29-720 of the South Carolina Code (2004), as part of the Act, allows local governing bodies to adopt zoning ordinances to implement a comprehensive zoning plan. This provision specifically affords authority to local governing bodies to regulate "the size, location, height, bulk, orientation, number of stories, erection, construction, reconstruction, alteration, demolition, or removal in whole or in part of buildings and other structures . . . ." S.C. Code Ann. § 6-29-720(A)(2). The Act also contains a provision allowing local governing bodies to establish a board of zoning appeals. S.C. Code Ann. § 6-29-780 (2004). As you point out in your letter, section 6-29-800 of the South Carolina Code (Supp. 2006) sets forth the powers and authority supplied to a board of appeals. These powers

include the power to hear appeals for variances from the requirements of established zoning ordinances. S.C. Code Ann. § 6-29-800(A)(2). This provision states a board of appeals has the power

> to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:
>
> > (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;
> >
> > (b) these conditions do not generally apply to other property in the vicinity;
> >
> > (c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
> >
> > (d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.
> >
> > > (i) The board may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.
> > >
> > > A local governing body by ordinance may permit or preclude the granting of a variance for a use of land, a building, or a structure that

> is prohibited in a given district, and if it does permit a variance, the governing body may require the affirmative vote of two-thirds of the local adjustment board members present and voting. Notwithstanding any other provision of this section, the local governing body may overrule the decision of the local board of adjustment concerning a use variance.
>
> (ii) In granting a variance, the board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety, or general welfare . . .

S.C. Code Ann. § 6-29-800(A)(2). Thus, while section 6-29-800(A)(2) allows a board of appeals to grant variances, subsection (d)(i) allows the governing body to preclude the grant of a variance concerning the "use of land, a building, or a structure."

You argue in your letter that section 6-29-800(A)(2)(d)(i) may be read two different ways.

> This language could mean that the words "land," "building," and "structure" are each objects of the preposition "of" and thus this sentence limits governing bodies to restrict variances as to "uses." However, another reading of the sentence could be that "use of land," "building," and "structure" are each objects of the preposition "for." Under such an interpretation Council could limit variances for uses as well as nonconforming structures and buildings.

In order to resolve this conflict, we employ the rules of statutory construction. "The primary function in interpreting a statute is to ascertain the intent of the legislature." Florence County v. Moore, 344 S.C. 596, 601, 545 S.E.2d 507, 510 (2001). Moreover, "statutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable." State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007).

We do not believe the Legislature intended the word "use" as presented in this provision to be limited to the use of land and thus, allowing local governing bodies to enact ordinances precluding the grant of variances that pertain generally to buildings or structures. First, we believe such a reading would produce an absurd result. We cannot fathom why the Legislature would limit a governing body's ability to prohibit variances pertaining to land, allowing such variances only when they pertain to the use of land, while at the same time allowing local governing bodies to preclude variances dealing with buildings and structures generally. Second, in the sentence just after the one in question, the Legislature gives local governing bodies the authority to overrule the decisions of local boards concerning a "use variance." We believe this provision emphasizes the Legislature's intent to set use variances apart from other variances.

This understanding of the Legislature's intent is supported by the fact that numerous jurisdictions make a distinction between a "use variance" and what is termed an "area variance" or "dimensional variance." A use variance is described as "one which permits the use of land which is proscribed" or "defines the relief sought when an owner seeks to employ land for a use not permitted in that zoning district under the applicable zoning ordinance." 83 Am. Jur. Zoning § 757. Whereas, an area or dimensional variance "provides relief from one or more of the dimensional restrictions that govern a permitted use of a lot of land, such as area, height, or setback restrictions." Id. Many states differentiate between use and area variances in their zoning ordinances and tend to place less stringent standards on area variances because an area variance does not seek to change the essential use of the property. 83 Am. Jur. Zoning §§ 808; 807. Furthermore, a height restriction specifically, as described by the Kansas Supreme Court, does not involve a change in use, but "places a limitation on the use of property." City of Merriam v. Board of Zoning Appeals of City of Merriam, 748 P.2d 883, 887 (Kan. 1988).

Although the Legislature did not make a specific distinction between use and area variances when enacting the legislation under chapter 29 of title 6, by the language used under section 6-29-800(A)(2)(d)(i), we believe it sought to treat use variances differently. Like other jurisdictions, the Legislature appears treat use variances more stringently by allowing local governing bodies the ability to prohibit or restrict the grant of such variances in addition to the ability to overrule a decision of a board of appeals with regard to such variances. S.C. Code Ann. § 6-29-800(A)(2)(d)(i). This rationale comports with the consensus that use variances are of greater importance because they involve a change to the use of property that is wholly inconsistent with the zoning regulations. The grant of an area variance, such as one allowing a property owner to exceed height restrictions, simply allows the property owner to deviate from the zoning regulations while continuing to use the property in accordance with the other zoning requirements. Based on this understanding of the differences in types of variances, we are of the opinion that section 6-29-800(A)(2)(d)(i) allows local governing bodies to preclude the grant of a use variance.

Finding section 6-29-800(A)(2)(d)(i) only addresses use variances, we further believe the Legislature likely intended for this provision to apply to use variances alone to the exclusion of other types of variances. This belief is based on the maxim of statutory construction "expressio unius est

exclusio alterius" or "inclusio unius est exclusio alterius," meaning by expressing or including one thing in legislation implies the exclusion of another, or of the alternative. Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002). Thus, because we are of the opinion that a variance, such as one allowing a property owner to exceed area, height, and other dimensional restrictions, are not a use variances, section 6-29-800(A)(2)(d)(i) does not allow governing bodies to preclude by ordinance the grant of these type of variances. Therefore, we do not believe the Edisto Beach Town Council ("Town Council") has the authority under section 6-29-800(A)(2)(d)(i) to prohibit the Board of Zoning Appeals from granting a variance from a height limitation.

Next, you inquire as to the proper method for apportioning indebtedness upon the annexation of property from one county to another. As you mentioned in your letter, the requirement that debt be apportioned upon annexation originates from article VII, section 7 of the South Carolina Constitution (1976). This provision governs alterations of county lines and allows the Legislature to make such alterations upon the satisfaction of certain conditions including: "That the proper portion of the existing County indebtedness of the section so transferred [from one county to another] shall be assumed by the County to which the territory is transferred." S.C. Const. art. VII, § 7. In chapter 5 of title 4, the Legislature provides procedures for changing the boundaries of a county. However, the Legislature did not describe the method by which the county transferring property shall apportion debt to the acquiring county. In addition, we do not find any case law providing guidance as to how apportionment shall be conducted under article VII, section 7.

In our research, we only found one case that may provide insight into the apportionment of debt. The case, State v. McMillan, 52 S.C. 60, 29 S.E. 540 (1898), involved an apportionment under article VII, section 6 of the South Carolina Constitution requiring the apportionment of indebtedness upon the formation of a new county, rather than article VII, section 7 pertaining to the alteration of county lines. In that case, the legislation establishing the new county called for the Governor to appoint a commission to divide and apportion between the old and new counties the indebtedness of the old county. Id. at 66-67, 29 S.E. at 543. The plaintiffs in the case sought a writ of mandamus ordering the commission to apportion the debt. Id. While the method of apportionment was not in dispute as the commissioners agreed to apportion the debt based on the taxable property retained by the old counties, the Court relied the fact that the commissioners had discretion in choosing a method of apportionment in its determination that the commissioners' duties were not ministerial and therefore, not subject to a writ of mandamus. In examining the commissioners' duties, the Court stated:

> The first step which it was necessary for the commission to take, and the first step which was taken, was to determine the basis upon which the required apportionment should be made, inasmuch as neither the statute nor the constitution prescribed any basis upon which the required apportionment be made, further than it must be just, and that one of the elements to be considered was the indebtedness of the old

> county existing at the time of the formation of the new county, but what other elements were to be considered was necessarily to be determined by the judgment of the commission; for, suppose it was ascertained that the indebtedness of Abbeville was any given sum,-say, twenty thousand dollars,-it was very manifest that no just apportionment of that amount between the two counties could be made without taking into calculation some other element; for, with such data only, the only possible apportionment that could be made would be to divide the sum equally between the two counties; and this the legislature certainly did not intend, for, if, they had so intended, it would have been very easy to say so, and, besides, such an apportionment-an equal division-would be sure to work injustice, very probably the grossest injustice, which would be an open violation of the constitution. Some other element must, therefore, necessarily enter into the calculation. As suggested in the argument of counsel for respondents, there were, at least, three other elements which might have entered into the calculation: (1) The population of the respective counties; (2) the area of each of said counties; (3) the value of the taxable property in the two counties, respectively. One of these three elements, or some other not suggested, had to be selected by the commission; and, as the referee finds, they agreed unanimously upon the third. In this it is clear that the commission necessarily had to exercise their own judgment; for the law imposing upon them the duty of making a just apportionment failed to prescribe how such duty should be performed, for, while declaring what would be one of the elements necessary to be considered in making the calculation, to wit, the amount of the indebtedness of old Abbeville county existing at the time the new county went into operation, it did not provide what should be another element necessary to be taken into the calculation, and hence that was left to the judgment of the commission. It is clear, therefore, that the duty imposed upon the commission was not such a plain, ministerial duty as can be enforced by mandamus, but that such duty necessarily involved the exercise of judgment or discretion. For this reason the petition must be dismissed.

Id. at 70-71, 29 S.E. at 544-45.

The Court in McMillian did not endorse or shed light on what method or methods of apportionment are acceptable. However, the Court, in this decision, indicates the method is discretionary, and so long as it does not "work an injustice," it complies with article VII, section 6. While, in this matter we are dealing with an apportionment under article VII, section 7, rather than

article VII, section 6, we believe a court would also find the method of apportionment to be discretionary so long as it is just and reasonable. Whether a particular method is just and reasonable requires an investigation and determination of factual issues. As this Office stated on numerous occasions, we are without the jurisdiction of a court to make factual determinations. Op. S.C. Atty. Gen., June 20, 2007. Thus, we cannot specify one appropriate method to be employed in apportioning indebtedness under article VII, section 7. However, we believe a court would consider various methods and evaluate their appropriateness based on whether they would create a just result.

Lastly, you inquire as to the meaning of the term "indebtedness" as used in article VII, section 7. Like you, we did not find any provisions in the South Carolina Constitution or the South Carolina Code defining this term. Accordingly, we must again employ the rules of statutory construction in order to determine the meaning of this term as used in article VII, section 7. As we stated previously, "[t]he cardinal rule of statutory construction is to determine and give effect to the intent of the legislature." Hopper v. Terry Hunt Constr., 373 S.C. 475, 481, 646 S.E.2d 162, 166 (Ct. App. 2007). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007). Furthermore, "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Generally, statutes are to be construed with reference to the whole system of law of which they form a part." Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998).

Indebtedness is generally defined as "[t]he condition or state of owing money." Black's Law Dictionary 771 (7th ed. 1999). This definition is broad and may encompass a variety of transactions creating indebtedness. However, article X, section 14 of the South Carolina Constitution (Supp. 2006) appears to limit this definition with regard to counties. This provision contains language allowing political subdivisions, which include counties, to incur bonded indebtedness. S.C. Const. art. X, § 14. This provision states: "Such political subdivisions shall have the power to incur indebtedness in the following categories and no other: (a) General obligation debt; and (b) Indebtedness payable only from a revenue-producing project or from a special source as provided in subsection (10) of this section." Id. (emphasis added). Given the fact that counties only have the authority to incur indebtedness as general obligation debt or indebtedness from a special source, we assume the indebtedness of counties that must be apportioned in accordance with article VII, section 7 consists of these two types of indebtedness. Otherwise, the incurrence of other types of indebtedness would violate article X, section 14.

In your letter, you specifically question whether items such as operating debt and lease-purchase agreements are included as indebtedness. In a 1985 opinion of this Office considering indebtedness for purposes of article X, section 13 of the South Carolina Constitution, noted "it is well accepted that obligations for the necessary and current expenses of the government do not constitute 'indebtedness' withing constitutional limitations." Op. S.C. Atty. Gen., December 9,

1985. Moreover, we do not believe operating debt would be included as indebtedness for purposes of article VII, section 7.

With regard to whether a lease-purchase agreement constitutes indebtedness, we are not aware of any opinion of this Office or an opinion of the courts addressing this question with regard to VII, section 7. However, we note several Supreme Court cases and a statute dealing with this issue in regard to constitutional debt limitations for school districts under article X, section 15 of the South Carolina Constitution. In Caddell v. Lexington County School District Number One, 296 S.C. 397, 373 S.E.2d 598 (1988), the Supreme Court considered whether a lease-purchase agreement is included in indebtedness under article X, section 15. The Court noted article X, section 15 only applies to general obligation debt, which is "'ultimately secured by taxes on the property within the political entity.'" Id. at 399, 373 S.E.2d at 599 (quoting City of Beaufort v. Griffin, 275 S.C. 603, 605, 274 S.E.2d 301, 303 (1981)). Under the lease-purchase agreement in question, the school district planned to lease buildings and land to a non-profit corporation for a term of thirty years who would finance the cost of the renovations to the buildings. Id. at 399, 373 S.E.2d at 598-99. The non-profit corporation would then lease the buildings back to the school district under a year-to-year lease. In addition, the agreement contained a provision referred to as a "non-appropriation clause" "under which the District may decline, without penalty, to renew the annual lease by failing or refusing to appropriate the necessary funds." Id. at 399, 373 S.E.2d at 599. Ultimately, the Court concluded the lease-purchase agreement did not constitute indebtedness because with the inclusion of the non-appropriations clause, the agreement did not require a pledge of the State's credit and would not create the potential for taxpayer liability. Id. at 401, 373 S.E.2d at 600.

The Supreme Court reiterated its holding in Caddell in Redmond v. Lexington County School District Number Four, 314 S.C. 431, 445 S.E.2d 441 (1994). In that case, the plaintiffs argued the school district abused its discretion by entering into lease purchase agreement when, if the agreement were added to existing indebtedness, it would exceed the constitutional debt limitation under article X, section 15. Id. Again, finding lease-purchase agreements not to be indebtedness, the Court denied the plaintiff's claims. Id.

Subsequent to Caddell and Redmond, the Legislature amended section 11-27-110 of the South Carolina Code (Supp. 2006). Section 11-27-110(B) prevents governmental entities from entering into financing agreements that when added to the existing principal amount of bonded indebtedness exceeds the eight percent constitutional debt limitation. Section 11-27-110(A)(6) defines the term financing agreement. In 2006, the legislature amended this definition to include:

> any contract entered into after December 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or other political subdivision to a nonprofit corporation, political subdivision, or any other entity in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities. This item shall apply to any contracts entered

> into after August 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or other political subdivision to a non-profit corporation, political subdivision, or any other entity, from any source other than the issuance of general obligation indebtedness by the school district, in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities.

Accordingly, despite the Supreme Court's rulings in Caddell and Redmond, this provision appears to clarify that lease-purchase agreements financed by any source other than general obligation debt are considered indebtedness for purposes of article X of the South Carolina Constitution.

Unlike with regard to constitutional debt limitations, courts have been silent as whether lease-purchase agreements are indebtedness for purposes of article VII, section 7. Moreover, the Legislature has not acted to clarify this question. Without legislative clarification, given the Supreme Court's analysis in Caddell, it appears that the courts may take the position that lease-purchase agreements containing non-appropriations clauses are not considered indebtedness for purposes of this constitutional provision. However, in reviewing the Court's decisions in Caddell and Redmond, we note the Court considered the facts of each agreement and the provisions contained thereunder in its analysis. Thus, whether or not a particular lease-purchase agreement constitutes indebtedness will likely involve questions of fact, which are beyond the scope of an opinion of this Office. Op. S.C. Atty. Gen., June 20, 2007 ("[O]nly a court may consider and make factual determinations."). Therefore, we are not in a position to categorically determine whether lease-purchase agreements are indebtedness for purposes of article VII, section 7. Rather, this is a decision we believe must be made by a court. Moreover, this appears to be an issue which is ripe for consideration by our Legislature should it, as it did in section 11-27-110 with regard to article X, see fit to provide statutory guidance as to the meaning of the term indebtedness under article VII.

Conclusion

Based on our interpretation of section 6-29-800(A)(2)(d)(i), we are of the opinion that this provision only authorizes governing bodies to pass ordinances prohibiting boards of zoning appeals from granting use variances. Because we believe a height limitation to be an area or dimensional variance, which we find to be distinguishable from a use variance, we believe Town Council is not authorized to pass an ordinance preventing the Board of Zoning from granting variances for height limitations.

As for the proper method of apportioning indebtedness among counties pursuant to article VII, section 7 of the South Carolina Constitution, we do not find a requirement that a particular method must be employed. Rather, we are of the opinion that so long as the method used is just and reasonable, a court is likely to uphold it. However, only a court may make the decision as to whether a particular method is just and reasonable. Finally, while we find no definition for the term "indebtedness" as used in article VII, section 7 of the South Carolina Constitution, we believe this

term contemplates the types of indebtedness counties are authorized to incur pursuant to article X, section 14 of the South Carolina Constitution. Furthermore, we do not believe this term encompasses obligations for ordinary and necessary expenses. However, we are unsure as to whether it generally includes lease-purchase agreements and find that such a determination likely depends on the facts and circumstances of the agreement. Therefore, whether or not a particular lease-purchase agreement constitutes indebtedness for purposes of article VII, section 7 is best let to a court to decide.

Very truly yours,

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REVIEWED AND APPROVED BY:

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