ALAN WILSON
ATTORNEY GENERAL

May 2, 2013

The Honorable Chip Huggins
Member, House of Representatives
323-B Blatt Building
Columbia, South Carolina 29201

Dear Representative Huggins:

Attorney General Alan Wilson has referred your letter of January 23, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: In light of the language of South Carolina Code Section 40-59-260 providing that "an owner must personally appear and sign" a building permit application, may an individual acting under a Power of Attorney authority specifying the Attorney-In-Fact's specific authorizations, properly executed and witnessed and recorded in the permitting county be an adequate substitute to the requirement that the owner "personally appear" and meet the requirements under the law?

Short Answer: It is likely a court would interpret the owner of record to have to appear in person to sign a building permit application pursuant to S.C. Code § 40-59-260 as interpreted by the individual county.

Law/Analysis:
As you state in your letter, South Carolina Code Section 40-59-260 (1976 code, as amended) says:

> (A) This chapter does not apply to an owner of residential property who improves the property or who builds or improves structures or appurtenances on the property if:
> (1) the owner does the work himself, with his own employees, or with licensed contractors or registered entities or individuals;
> (2) the structure, group of structures, or appurtenances, including the improvements, are intended for the owner's sole occupancy or occupancy by the owner's family and are not intended for sale or rent; and
> (3) the general public does not have access to this structure.
>
> (B) In an action brought under this chapter, proof of the sale or rent or the offering for sale or rent of the structure by the owner-builder within two years after completion or issuance of a certificate or occupancy is prima facie evidence that the project was undertaken for the purpose of sale or rent, unless otherwise approved by the commission, and is subject to the penalties provided in this chapter. As used in this section, "sale" or "rent" includes an arrangement by which an owner receives compensation in money, provisions, chattel, or labor from the occupancy, or the

transfer of the property or the structures on the property. This section does not exempt a person who is employed by the owner and who acts in the capacity of a builder or a specialty contractor of any kind.

(C) To qualify for exemption under this section, **an owner must personally appear and sign the building permit application**. The local permitting agency shall provide the person with a disclosure statement, provided by the department, in substantially the following form:

"Disclosure Statement[:]

State law requires residential construction to be done by licensed residential builders and specialty contractors. You have applied for a permit under an exemption to that law. The exemption allows you, as the owner of your property, to act as your own builder even though you do not have a license. You must supervise the construction yourself. You may build or improve a one-family or two-family residence. The building must be for your own use and occupancy. It may not be built for sale or rent. If you sell or rent a building you have built yourself within two years after the construction is complete, the law will presume that you built it for sale or rent, which is a violation of this exemption. You may not hire an unlicensed person as your residential builder or specialty contractor. It is your responsibility to make sure that people employed by you have licenses required by state law and by county or municipal licensing ordinances. Your construction must comply with all applicable laws, ordinances, building codes, and zoning regulations."

(D) **At the time an owner personally appears and signs the building permit application** as required by subsection (C) of this section, the local permitting agency shall provide the owner with all forms necessary to comply with subsection (E) of this section.

(E) If a residential building or structure has been constructed by an owner under the exemption provided for in this section, the owner of the residential building or structure must promptly file as a matter of public record a notice with the register of deeds, indexed under the owner's name in the grantor's index, stating that the residential building or structure was constructed by the owner as an unlicensed builder. Failure to do so revokes the statutory exemption.

(F) Nothing in this chapter may be construed to authorize an owner of a residential building or structure to hire a person or entity that is not licensed or registered in accordance with this chapter.

(emphasis added). Therefore, let us examine the meaning of the statute. The cardinal rule in statutory interpretation is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are

to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)).

The plain language of the statute clearly requires an owner to appear in person. If the legislature had intended for a third party to be able to appear under a power of attorney, it could have easily done so by using language such as "the owner *or his agent*." To otherwise permit a third party to appear on behalf of an owner under a power of attorney would allow an owner to circumvent the statute's express requirement that he or she appear in person. If the owner were allowed to have a third party appear in his place under a power of attorney, that conclusion would allow the owner to circumvent the plain and clear language to appear in person in the statute. S.C. Code § 40-59-260.

Historically this Office, along with the courts, usually gives deference to interpretations of applicable statutes or regulations by an administrative agency. Op. S.C. Atty. Gen., 2007 WL 1031453 (March 20, 2007) (citing Brown v. Bi-Lo., Inc., 354 S.C. 436, 581 S.E.2d 836 (2003)). Only when the plain language is so contrary to the agency's interpretation of its own regulation will a court reject an agency's interpretation of that regulation. Op. S.C. Atty. Gen., 2007 WL 1031453 (March 20, 2007) (citing Brown v. SC Dept. Health & Envir. Control, 348 S.C. 507, 560 S.E.2d 410 (2002)). "Where the administrative interpretation has been formally promulgated as an interpretative regulation or has been consistently followed, this required deference is highlighted and the administrative interpretation is entitled to great weight." Op. S.C. Atty. Gen., 1990 WL 482427 (May 1, 1990) (citing Marchant v. Hamilton, 279 S.C. 497, 309 S.E.2d 781 (1983)). Even though this question deals with a statute and not a regulation, it is this Office's understanding the county interprets it to mean an applicant must appear in person and not by a third party under a power of attorney. Therefore, the county's interpretation appears to be consistent with a plain reading of the statute. Accordingly, this Office finds no compelling reason to veer from this interpretation, nor should it veer absent compelling reason. Emerson Elec. Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986).

It is worth bringing to your attention that this Office answered a previous question concerning whether a corporation may qualify for an owner/builder exemption when building or improving a commercial building at a cost of $25,000 or less. In that opinion, this Office found even though a corporation may own property, employ agents and enter into contracts, it does not physically exist in order to appear in person and thus may not meet the requirement to "personally appear." Op. S.C. Atty. Gen., 1991 WL 528144 (January 11, 1991). Additionally, other Attorney Generals have opined on similar issues. The Iowa Attorney General's office opined that:

> Where a statute requires an affidavit to be made by a particular person his agent or attorney cannot make it. 2 C.J.S., Affidavits, sec. 6. Where a statute requires an affidavit to be made concerning matters peculiarly within the knowledge of a certain person it was held he must make the affidavit himself and one made by an agent would not be sufficient. U.S. v. Bartlett, 24 Fed. Cases 1021. Under the authorities set

> out in this opinion, we believe that the affidavit and verified statement must be made by the person claiming the credit. An application might be signed under a proper power of attorney if such authority was attached to the application, but the affidavit of an intention to occupy said dwelling house in good faith as a home for six months or more in the year for which credit is claimed must be executed by the person claiming the homestead tax credit. We do not believe some person can appear in the assessor's office with a list authorizing him to sign the application and by signing the name of the claimant to such application make a valid claim for homestead tax credit. Similar statutes are ... relating to application for an absent voter's ballot, and ... relating to refunds of gasoline tax, and we do not believe anyone would seriously argue that in those instances the legislature intended for anyone other than the voter or claimant to execute the affidavit. The information required under all of these statutes relates to facts concerning which only the person making the affidavit could have the correct knowledge... The legislature has provided for someone other than the owner making the application and verified statement in only two instances...and this is an indication the legislature did not intend any other.

Op. I.A. Atty. Gen., 1953 WL 83248 (February 6, 1953).[1]

Conclusion: Based on the forgoing reasons, it appears a court would likely construe the owner of record to appear in person to sign a building permit application pursuant to S.C. Code § 40-59-260. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

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[1] Please also note where Iowa again addressed this issue and affirmed and expanded their previous opinion in 1991. See Op. I.A. Atty. Gen., 1991 WL 495687 (September 11, 1991).