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The State of South Carolina

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August 1, 1994

The Honorable Herbert Kirsh
Member, House of Representatives
Box 31
Clover, South Carolina 29710

Dear Representative Kirsh:

On behalf of some constituents you have forwarded two proposed ordinances which would establish overlay zoning districts, as well as other materials relevant thereto, and have sought our opinion as to several questions. Each of your questions will be answered separately, as follows.

<u>Question 1</u>

Is there a time limit for a pending ordinance to become null and/or void?

Because the enclosed proposed ordinances are presently being considered by a county council, it is assumed that the issue involves adoption of ordinances by county councils.

No state law prescribes an outer time limit within which an ordinance must be passed or become null and/or void. A minimum time table is set forth in S.C. Code Ann. § 4-9-120: "With the exception of emergency ordinances, all ordinances shall be read at three public meetings of council on three separate days with an interval of not less than seven days between the second and third readings." It is observed that a county council is a continuing body and does not have discrete terms as does the General Assembly, and thus pending legislation (i.e., ordinances) would not become null and/or void after the passage of a set amount of time, as is the case with legislation pending when the General Assembly adjourns sine die.

REQUEST LETTER

Question 2

Is any action required to maintain the pending status?

No state law appears to prescribe a particular action to be taken by a county council to maintain the pending status of an ordinance.

Question 3

You have enclosed copies of the overlay ordinances and asked whether such would be legal as far as the county or the state would be concerned.

An ordinance, if it should be adopted, would be entitled to the same presumptions of constitutionality to which an enactment of the General Assembly would be. It would be presumed that the ordinance would be constitutional in all respects. The ordinance will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Cf., Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office advises whenever it may identify a particular constitutional infirmity, it is solely within the province of the courts of this State to actually declare an enactment or ordinance unconstitutional or unenforceable for other reasons.

In 1994, the General Assembly adopted S.687, R-395, the "South Carolina Local Government Comprehensive Planning Enabling Act of 1994." This act adds Chapter 29 to Title 6 of the South Carolina Code of Laws to update existing legislation as to planing and zoning and to repeal Chapter 27 of Title 4, Chapter 23 of Title 5, Sections 6-7-310 through 6-7-1110, and other enactments five years after the 1994 act was approved by the Governor (May 3, 1994). During the next five years, the 1994 act is cumulative and may be implemented at any time. See Section 2 of the act. Much like present § 6-7-720, new § 6-29-720(A) permits the county to "create zoning districts of such number, shape, and size as the governing authority determines to be best suited to carry out the purposes of this chapter." In subsection (C), certain zoning and planning techniques are authorized to be utilized (the statute notes that the list is not exclusive); overlay zoning is one of those techniques.

An overlay zone is one

> which imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district when

> there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries[.]

§ 6-29-720(C)(5). Thus, adoption of zoning by use of overlay zones is specifically authorized by state law.

By your enclosures, some concern was expressed that certain proposed provisions may not comply with statutes, regulations, or policies of the Department of Transportation. Our research has failed to turn up statutes or regulations which establish standards such as those referred to in the enclosures. Consultation with engineering officials might be advisable to determine whether the ordinance would be consistent with relevant highway standards. I note that in the proposed Heckle Overlay ordinance there is reference to approval by the appropriate reviewing agency as to technical changes, such as distances between driveways; the Department of Highways and Public Transportation (now Department of Transportation) is specifically named therein; standards of the Department of Transportation are referred to in both proposed ordinances.

It is always possible that challenges to any zoning ordinance could occur. The 45-page document entitled "Proposed Lake Wylie Overlay Draft" in particular is too detailed to examine in an opinion of this Office to determine that every aspect complies with state law or is constitutional, on its face or as applied. Particularly as the ordinance might be applied, a factual scenario would have to be presented as framework for the ordinance to be applied and analyzed. If there is a specific question or concern (i.e., a taking of property for which compensation should be paid), please advise and we will attempt to provide a response.

As to whether the proposed ordinances would be legal as far as the county is concerned, it is assumed that inquiry is made whether the ordinances would contradict other, presently existing, county ordinances. This Office does not have access to county ordinances of the various counties and thus cannot respond to the issue.

Question 4

With reference to grandfather clauses, your constituents wish to know if such is legal or can it be allowed. The question of amortizing the value of signs if they have to come down within a five year period has also been raised.

Present § 6-7-720 provides in relevant part:

> The [zoning] regulations may provide that land, buildings and structures and the uses thereof which are lawful at the time of

> the enactment or amendment of zoning regulations may be continued although not in conformity with such regulations or amendments, hereinafter called a nonconformity. The governing authority of any ... county may provide in the zoning ordinance or resolution for the continuance, restoration, reconstruction, extension, or substitution of nonconformities. Such governing authority may also provide for the termination of any nonconformity by specifying the period or periods in which the nonconformity shall be required to cease or brought into conformance, or by providing a formula whereby the compulsory termination of nonconformities may be so fixed as to allow for the recovery or amortization of the investment in such nonconformity.

New § 6-29-730 is virtually identical to the cited language of present § 6-7-720.

Grandfathering or amortizing would be a matter of legislative grace, as indicated by the use of the term "may," which generally connotes permissiveness, or optional or discretionary actions. State v. Wilson, 274 S.C. 352, 264 S.E.2d 414 (1980). County council could provide for grandfathering or amortization in any of the several ways specified in the above-cited statutes.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

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