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January 6, 1994

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

Dear Representative Kirsh:

By your letter of December 7, 1993, you have advised that in 1986 York County Council implemented zoning in the unincorporated areas of York County. "Northeast of Clover, the council certified hundreds of acres of land as agriculture conservative (AGC). In the middle of that land designated, the council certified a seven plus acre tract of land as industrial (ID). The business hired by the council to identify the use of each parcel designated in this tract is ID due to the presence of a metal building used to store some lumber inventory." Based on this verbatim statement of the facts from your letter, you have asked:

1. Should this tract have been zoned AGC with a nonconforming use since it was surrounded on all sides by AGC?

2. Does this action mean that the York County Council is certifying industrial spot zoning?

"Spot zoning" is "a process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of owners of such property and to detriment of other owners." Bob Jones University v. City of Greenville, 243 S.C. 351, 361, 133 S.E.2d 843 (1963). The court in Talbot v. Myrtle

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Beach Board of Adjustment, 222 S.C. 165, 72 S.E.2d 66 (1952), stated with respect to spot zoning generally

> that where an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare.

Talbot, 222 S.C. at 175. The court in Talbot cautioned that "[c]ourts cannot become city planners but can only correct injustices where they are clearly shown to result from the municipal [or county] action...." Id.

The court in Knowles v. City of Aiken, 305 S.C. 219, 407 S.E.2d 639 (1991) applied the two-pronged analysis discussed in Talbot: "[U]pon a finding that there [is] in fact spot zoning, the appropriate analysis is to closely scrutinize the following factors: (1) the adherence of the zoning to the City's [or county's] comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown." Knowles, 305 S.C. at 223.

From the description in your letter, it appears that the tract of land zoned ID, being completely surrounded by many acres zoned AGC, may be an example of spot zoning; however, such is ultimately a question of fact which is not within the province of this Office to determine. Assuming that a finding of spot zoning has been made, it would then be necessary to determine whether such classification is consistent with, or adheres to, the county's comprehensive plan, and whether the classification promotes the common welfare as opposed to purely private gain. Such determinations are outside the scope of an opinion of this Office but would be within the province of a court.

The assignment of zoning classifications to various tracts of land is a legislative act which will not be disturbed by a court "unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's [or county's] zoning decision, a citizen must establish that the decision was arbitrary and unreasonable." Knowles v. City of Aiken, 305 S.C. at 224. Moreover, a zoning decision will not be overturned by a court as long as such decision is "fairly debatable." Rushing v. City of Greenville, 265 S.C. 285, 288, 217 S.E.2d 797 (1975).

The court in Knowles held that even if the ordinance considered therein did constitute spot zoning, the court could not invalidate the zoning because its propriety was,

at the least, "fairly debatable" and the zoning was not so unreasonable "as to impair or destroy citizen's constitutional rights" so as to allow the court to second-guess the city's wisdom in adopting the ordinance. Knowles, 305 S.C. at 224. Applying this holding to the fact situation described in your letter, perhaps it could be argued that the tract should have been zoned AGC with a nonconforming use; to have the ID classification invalidated, however, would require a showing that the ID classification was not "fairly debatable" and that the ID classification was so unreasonable that citizen's rights have been impaired or destroyed. As with the determination that spot zoning has occurred and that it should be invalidated, the determination that the tract was improperly zoned would be within the province of the courts.

Enclosed is a copy of the Knowles decision referred to above, as it sets forth in greater detail the principles of zoning law described above. We are pleased to provide the foregoing guidance on the legal principles associated with zoning and trust you will understand our limitations on the finding of facts.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosure

REVIEWED AND APPROVED BY:

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Executive Assistant for Opinions