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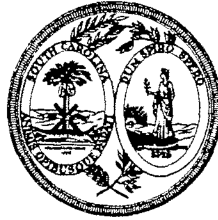

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 11, 1997

The Honorable Thomas M. Dantzler
Member, House of Representatives
208 Middleton Drive
Goose Creek, South Carolina 29445

Re: Informal Opinion

Dear Representative Dantzler:

This Office has received your recent opinion request. You have asked whether a 1955 sub-division covenant is controlling over a 1997 city zoning ordinance.

The South Carolina Supreme Court has concluded that "[w]hen restrictive covenants and zoning ordinances are in conflict, the more restrictive of the two prevails." Inabinet v. Booe, 262 S.C. 81, 202 S.E.2d 463 (1974); Byrd v. City of North Augusta, 261 S.C. 591, 201 S.E.2d 744 (1974). A zoning law cannot constitutionally relieve land within the district covered by it from lawful restrictions affecting its use, imposed by covenants. Talbot v. Myrtle Beach Board of Adjustments, 222 S.C. 165, 72 S.E.2d 66 (1952).

In Byrd, the Byrds instituted an action in which they asked, among other things, that the Court declare a 1971 City of North Augusta zoning ordinance unconstitutional and invalid insofar as it applied to and attempted to rezone real estate in a subdivision in a manner contrary to the restrictive covenants imposed upon the property prior to annexation into the City. The facts of the case were that in April of 1951, restrictive covenants affecting certain property were recorded. The covenants reserved 10 acres of land in the subdivision for commercial or residential purposes. In November of 1951, the subdivision was annexed into the City of North Augusta and subsequent thereto, the 10 acre tract reserved for commercial or residential use was zoned by the City for commercial use. In October of 1961, the Byrds designated 4.5 of the 10 acres for a shopping center. In 1971, the City rezoned the 4.5 acres so as to limit it to residential use.

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Request Letter,

On appeal, the Byrds contended (A) that the restrictive covenants take precedence over the zoning ordinance and (B) that the zoning ordinance was unconstitutional because it was arbitrary and unreasonable. The Court agreed with the City on the first issue. The Court ruled that when restrictive covenants and zoning ordinances are in conflict, the more restrictive of the two prevails. Since the zoning ordinance of 1971 was the more restrictive, the Court held that the zoning ordinance, and not the restrictive covenants, was controlling. However, the lower court's decision that the zoning ordinance was arbitrary and unreasonable was upheld by the Supreme Court.

One other factor that must be considered is whether the conditions of a subdivision have changed so as to defeat the purpose of restrictive covenants. There is no hard and fast rule as to when these changes defeat the purpose of restrictive covenants. However, it can be safely asserted that the changes must be so radical as to practically destroy the essential objectives and purposes of the agreement. Inabinet v. Booe, supra.

This Office does not have the authority to make factual determinations in a legal opinion. Op. Atty. Gen. dated September 12, 1996. Consequently, I am not in a position to specifically determine whether the 1955 covenants are controlling over the 1997 zoning ordinance. However, the courts of this state have held that "when restrictive covenants and zoning ordinances are in conflict, the more restrictive of the two prevails." Therefore, in my opinion, a determination in this matter would be more appropriately made by the city attorney based on the case law and the specific language of the covenants and zoning ordinance.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch
Assistant Attorney General