The State of South Carolina

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The Honorable John J. Snow, Jr.
Member, House of Representatives
Route 1, Box 192
Hemingway, South Carolina 29554

Dear Representative Snow:

You advise that you have been approached regarding the introduction of legislation to provide an exemption for agriculture from all county or municipal enacted zoning and development standard ordinances except for buildings designed for public access. 1/ You have asked to be advised of the constitutionality of statewide legislation to provide these exemptions. You have not provided any particular price of proposed legislation for our examination; thus, our comments must necessarily be general.

1/ Most probably counties and municipalities already possess this authority on an individual basis, pursuant to § 6-7-720, S.C. Code Ann. which provides in relevant part that

> the governing authority of the municipality or county may exercise the powers granted in this chapter and, for the purposes mentioned, shall create zoning districts of such number, shape and size as it may determine to be best suited to carry out the purposes of this chapter. Within such districts, the governing authority may regulate the erection, construction, reconstruction, alteration, and use of buildings and structures and the uses of land .... All such regulations shall be uniform for each class or kind of building or use throughout each district ... .

In considering the constitutionality of any act of the General Assembly, it is presumed that such act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. 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 may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional. These presumptions would attach to any legislation such as that described above which might be adopted by the General Assembly.

The original authority to zone land resides in the State itself, but such authority may be, and usually is, delegated to the political subdivisions of the State. See S.C. Code Ann. §§ 6-7-310 et seq. (planning) and 6-7-710 et seq. (zoning). Such political subdivisions do not have inherent zoning authority and thus may exercise only that authority granted by the State. 101A C.J.S. Zoning and Land Planning § 8; 82 Am.Jur.2d Zoning and Land Planning § 8; 82 Am.Jur.2d Zoning and Planning § 7. Once granted, the legislature may also revoke such powers. As stated in State ex rel. Thelen v. City of Missoula, 543 P.2d 173 (Mont. 1975), in construing a state statute permitting homes for the developmentally disabled to be built in all residential zones (thus overriding city zoning ordinances),

> [w]hile we recognize respondent city's arguments as to the desirability of maintaining local government control of zoning regulations in its city, there is no question that the power of the legislature over the city in this matter is supreme. The legislature can give the cities of this state the power to regulate through zoning commissions, and the legislature can take it away. Respondent's remedy lies not in this Court, but in the legislature. ...

543 P.2d at 176.

In that regard, several exceptions to the zoning or planning powers of counties or municipalities, or directives to counties or municipalities, have been adopted by the legislature. For examples, see: § 55-9-240 (political subdivisions are directed to zone lands surrounding public-owned

airports in conformity with certain federal aviation regulations); §§ 48-39-290 and 48-39-350 (interplay of Coastal Council and local political subdivisions concerning use of certain coastal lands); § 6-7-710 (by enacting zoning regulations respecting trees, local political subdivisions cannot regulate commercial timber operations or restrict the ability of public utilities' and electrical suppliers' maintenance of safe clearance around utility lines); § 6-7-830 (providing an exception from zoning regulation for certain homes serving mentally or physically handicapped persons and a procedure for site selection if an objection to the originally selected site is raised); and others.

Generally speaking, statutes granting zoning powers to counties and municipalities are usually upheld as valid or constitutional. 101A C.J.S., § 8. The power of the legislature to adopt such enabling legislation is usually derived from a constitutional provision or the police power of the state; in South Carolina it is the latter. Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965). With respect to such an exercise of police power, the following has been stated:

> Broadly speaking, planning and zoning laws or regulations are based on, or constitute an application or exercise of, the police power to enact laws for the safety, health, morals, convenience, comfort, prosperity, or general welfare of the people, and they have been said to be authorized only such power. In other words, zoning laws and regulations find, or must find, their justification in some aspect of the police power asserted for the public welfare or in the public interest, or must be justified by the fact that they have some tendency to promote the public health, morals or welfare. As otherwise expressed, they must have a direct, substantial, or reasonable relation to the above enumerated subjects, or to the police power.

101 C.J.S., § 9. Thus, the proposed enactment would be required to have some direct, substantial, or reasonable relation to the police power to be valid.

Depending upon the definition of the term "agriculture" proposed for the legislation, an argument conceivably could be made that such would be violative of the doctrine of

equal protection. 2/ either on its face or as applied, as there could possibly be other uses for land which are equally in need of such treatment. 3/ To avoid a potential equal protection challenge, such legislation would be required only to show a reasonable basis for disparate treatment of agricultural lands. As noted by the United States Supreme Court, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Dandridge v. Williams, 297 U.S. 471, 485, 90 S.Ct. 1153, 1161 (1970), citing McGowan v. Maryland, 366 U.S. 420, 426. Invidious discrimination rather than a certain amount of inequality would likely be required to overturn such an act as envisioned by your letter.

To avoid constitutional difficulties, it would probably be helpful to draft a preamble or other statement of legislative findings or intent, to establish the reasons for agricultural lands receiving preferential or disparate treatment. Courts will look to such findings to aid in determining, evaluating, and effectuating legislative intent if such enactment should be challenged. City of Spartanburg v. Leonard, 180 S.C. 491, 186 S.E. 395 (1936).

In conclusion, we advise that the legislation envisioned by your letter would be presumed constitutional if adopted, and only a court could actually declare it unconstitutional if challenged. The state can delegate authority to the political subdivisions to enact zoning regulations, pursuant to the police power, and the state may also remove or limit that authority. If by legislation the state should remove agricultural lands from county and municipal planning and zoning standards (except for those buildings designed for public access), the state need show only a reasonable relation to the promotion of public health, safety, convenience, comfort, prosperity, or the like to withstand a

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2/ As to constitutional guarantees of equal protection, see U.S. const. amend. XIV and art. I, § 3 of the state Constitution.

Perhaps other arguments could be made, as well, that the definition of "agriculture" as finally adopted might be overbroad or under-inclusive and thus constitutionally suspect. Such could be determined only after reviewing specific legislation.

3/ As examples, consider such industries as the textile and manufacturing industries, which, incidentally, have received legislative boosts by such mechanisms as state Constitution art. X, § 3(g) and S.C. Code Ann. § 4-29-67.

constitutional challenge on the basis of equal protection. It would be helpful for such an enactment to include a preamble or legislative findings to show legislative intent in the event the enactment should be challenged.

We trust that the foregoing general discussion has adequately responded to your inquiry. If we may assist you further or examine a particular bill, please advise.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

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