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The State of South Carolina

Office of the Attorney General

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February 3, 1989

James M. Herring, Esquire
Town Attorney
Town of Hilton Head Island
Post Office Drawer 5909
Hilton Head Island, South Carolina 29938

Dear Mr. Herring:

As attorney for the Town of Hilton Head Island, you have advised that a traffic safety amendment to the Town's land management ordinance is proposed to be added by the process of initiative and referendum. The essence of the proposed amendment is that if the level of traffic congestion at any point in the Town reaches a certain level, then the issuance of all subsequent building permits will be halted until plans can be implemented to restore traffic flow to a more acceptable level. You have asked for the opinion of this Office as to the constitutionality of the proposed amendment, the denial of use of an individual's property by governmental action being your predominant concern. A recent decision by the United States Supreme Court does make it likely that the ordinance may be constitutionally infirm and could subject the Town to liability depending on an individual factual basis as suggested by the decision to be discussed more fully below. 1/

1/ It is the policy of this Office not to address liability (actual or potential) of public officials or governmental entities by an opinion. Thus, a discussion of the Town's liability or damages which might be imposed is not contained herein. Actual liability or the determination of damages would necessarily remain with a court deciding such issues.

Background

The South Carolina Department of Highways and Public Transportation has adopted a "level of service" measurement for the state's various types of roadways. These standards have been incorporated into the Town's Code in Article VIII of Title 16. The proposed ordinance, if adopted, would become effective when level "D" is reached. The standard for level "D" in urban and suburban arterial traffic is described as:

> Beginning to tax capabilities of street section. Approaching unstable flow. Service volumes approach 90 percent of capacity. Average overall speeds down to 15 mph. Delays at intersections may become extensive with some cars waiting two or more cycles. Peak-hour factor approximately 0.90; load factor of 0.7.

From an information sheet dated August 1, 1988, it appears that proponents of the traffic safety amendment wish to "temporarily defer" the issuance of all building permits at the "first signs of overcrowding--not after the fact. Otherwise, traffic from new development will only lead to more severe congestion until road improvements are in place."

From the same information sheet, the following question is raised: "IS THE [TRAFFIC SAFETY AMENDMENT'S] TEMPORARY DEFERRAL OF BUILDING PERMITS LEGALLY DEFENSIBLE?" The answer in part states: "Since no laws or cases to the contrary have been brought forth by the Town or other interested parties, the proper authority for this judgement [sic] lies with the courts--not with lawyers' or laymen's opinions." While certain legal authority may well make the constitutionality of the proposed ordinance questionable as applied, the final determination will necessarily be made by the courts, as noted in footnote 1.

Proposed Ordinance

The body of the proposed ordinance, including the recitals, consists of the following:

> WHEREAS, the Comprehensive Plan for the Town of Hilton Head Island was adopted by the Planning Commission on December 9, 1985, and

WHEREAS, the growth management policies contained in the Comprehensive Plan, as amended, are based upon "carrying capacity", defined as the abilities of natural and man-made systems to absorb growth or development without unacceptable degradation, "capacity standards" related to health, safety and welfare, and the Town's determination "to maintain all capacity standards above their minimum levels", and

WHEREAS, the stated purposes of Part B of Title 16, Article VII of the Municipal Code of the Town of Hilton Head Island as amended are in part, "to avoid unacceptable and unsafe congestion in the island highways", "to provide a (traffic) level of service not lower than 'D'", and to "guide the rate of growth through the issuance or deferment of building permits", and

WHEREAS, if lower then traffic Level of Service D occurs, then avoidance of greater traffic congestion associated with continued growth while remedies are identified, planned and implemented, is consistent with and is needed to carry out the above policies and purposes,

NOW, THEREFORE, BE IT ORDERED AND ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA, AND IT HEREBY IS ORDAINED BY THE AUTHORITY OF SAID TOWN COUNCIL:

Section 1. Amendment. That the Municipal Code of the Town of Hilton Head Island, South Carolina, be amended by adding

Section 16-7-718 as follows:

Section 16-7-718

Section 16-7-700 of this Ordinance establishes traffic Level of Service D, as defined and referenced in this Article VII, as the minimum

> acceptable level of traffic flow based on protection of the health, safety and welfare of the citizens of this Town.
>
> If traffic measurements taken as prescribed in this Article VII demonstrate a level of service lower than "D" at any location, then the issuance of all subsequent building permits shall be deferred until physical implementation of plans to restore Level of Service D or higher at that location is begun, financed, and scheduled for completion before the next such prescribed traffic measurement.

Section 2. Severability. If this ordinance and/or this amendment is held to be inapplicable to any person, group of persons, property, kind of property, circumstance or set of circumstances, such holding shall not affect the applicability thereof to any other persons, property or circumstances. 2/

2/ Questions concerning the enforceability and the constitutionality of the severability clause have also been raised. These are not addressed in great detail since the proposed amendment itself is felt to be potentially constitutionally suspect.

> Section 3. Effective Date. This ordinance shall become effective upon its adoption by the Town Council of the Town of Hilton Head Island, South Carolina.

Presumption of Constitutionality

In considering the constitutionality of a legislative enactment, it is presumed that the act is constitutional in all respects; this presumption also applies to ordinances. Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (S.C. Ct. App. 1987), cert. dism'd 296 S.C. 72, 370 S.E.2d 714 (1987). 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 a legislative enactment unconstitutional or to make the necessary finding of fact prior to finding a legislative enactment unconstitutional. As noted above, however, we do identify a constitutional weakness in the proposed amendment to the land management ordinance.

Zoning Laws Generally

There is no doubt that the General Assembly has authorized municipalities to enact ordinances relative to land use, under the police powers granted to municipalities. See Sections 5-7-30 (police power generally), 5-23-10 et seq. (zoning and planning), and 6-7-710 et seq. (zoning by political subdivisions, including municipalities). In particular, Section 6-7-710 provides in relevant part that

> For the purposes of guiding development in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities...may, in accordance with the conditions and procedures specified in this chapter, regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied,...the density and distribution of population,.... The regulations shall be

> made in accordance with the comprehensive plan for the jurisdiction as described in this chapter and shall be designed to lessen congestion in the streets; ...to promote the public health and the general welfare,...to prevent the overcrowding of land; to avoid undue concentration of population;...[and] to facilitate the adequate provision of transportation.... Such regulations shall be made with reasonable consideration, among other things, of the character of each area...and with a view to promoting desirable living conditions..., conserving the value of land and buildings, and encouraging the most appropriate use of land and buildings and structures. 3/

While Section 6-7-710 delegates to municipalities the regulatory powers over buildings and structures, to lessen congestion in the streets, promote public health and general welfare, control the density and distribution of population, and facilitate the adequate provision of transportation, we are not aware of any statutory provision which specifically permits a municipality to impose a moratorium on the issuance of building permits, or in other words, to prohibit building.

Zoning ordinances have been strictly construed by the courts of this State. See, for example, such cases as Holler v. Ellisor, 259 S.C. 283, 191 S.E.2d 509 (1970); Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976); Bostic v. City of West Columbia, 268 S.C. 386, 234 S.E.2d 224 (1977). As noted in Holler v. Ellisor,

> "Zoning enactments, regulations, and restrictions may not override state law and policy. They must be within the general limitations on the exercise of municipal powers, and they are subject to, and must be within, the limitations and restrictions prescribed by the enabling act authorizing them, or imposed by other legislation.

3/ Section 6-7-710 was amended in 1988 by Act No. 590 of the General Assembly. The amendments are not relevant to the issues being considered herein.

> "Such enactments and regulations must rest primarily on the enabling act authorizing them and they must not go beyond the power delegated thereby. In order to be valid, they must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power, ***."

Id., 259 S.C. at 287, quoting from 101 C.J.S. Zoning §17. It is clear that zoning ordinances repugnant to general law will be found to be void, Bostic v. City of West Columbia, supra, though a rebuttable presumption of validity attaches to the ordinance (or amendment) as adopted.

A review of Chapter 7 of Title 6, Code of Laws of South Carolina, does not reveal a grant of power to municipalities or counties to completely restrict or freeze development in the respective political subdivisions. Thus, there is some concern that the traffic safety amendment may well exceed the statutory grant of authority to municipalities to enact planning and zoning ordinances, and the amendment could well be voided by a court considering the issue.

A similar situation existed in Board of Supervisors of Fairfax County v. Horne, 215 S.E. 2d 453 (Va. 1975). In that case, the county of supervisors imposed an interim development ordinance, effectively a moratorium for a specified time period on filing site plans and preliminary subdivision plans, due to an "emergency" existing caused by "unprecedented and rapid growth" in the county. The ordinance was challenged when county zoning officials rejected the filing of site plans or preliminary subdivision plats due solely to the interim development ordinance. It was argued that the ordinance was authorized as a valid exercise of police power, or by express grant or necessary implication of the state's zoning laws. Citing general law that municipal corporations, and counties by extension, have only those powers expressly granted and those powers necessarily implied therefrom, 4/ the court held that the ordinance could not have been adopted under the exercise of police power. The court stated that the enabling zoning legislation made no provision for temporarily suspending, "under exigent circumstances," the filing of site plans or preliminary subdivision plats. Id. at 458. The court stated that

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4/ This rule of law is recognized in South Carolina. Williams v. Wylie, 217 S.C. 247, 60 S.E.2d 586 (1950); Marshall v. Rose, 213 S.C. 428, 49 S.E.2d 720 (1948).

> the General Assembly of Virginia has undertaken to achieve in the enabling legislation a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights. We believe that it is peculiarly a function of the General Assembly to determine, subject to constitutional restraints, what revisions in the statutes may be required to maintain the appropriate balance between these important but frequently conflicting interests.

Id. The court also concluded that there was no express or implied authority to adopt an ordinance imposing the moratorium as described.

Applying this Virginia case to the situation at hand, we likewise identify no provision in state law which would authorize a moratorium on the issuance of building permits as contemplated by the traffic safety amendment. A court considering the issue could easily find a basis to hold the amendment to have been adopted without statutory authorization, either express or necessarily implied.

Constitutional Concerns

In addition to statutory constraints, Town Council must also be aware of constitutional constraints in adopting any ordinance. With respect to the traffic safety amendment, relevant considerations include Article I, Section 13 of the Constitution of the State of South Carolina and the Fifth Amendment to the United States Constitution, both of which prohibit the sovereign from taking private lands without just compensation therefor. 5/ Article I, Section 13 provides in relevant part that "[e]xcept as otherwise provided in this Constitution, private property shall not be taken for ... public use without just compensation being first made therefor." The Fifth Amendment provides in the last clause, "nor shall private property be taken for public use, without just compensation."

The traffic safety amendment on its face does not appear to involve a taking of private property for public use, for which the Town would be required to compensate property owners. However, in the evolution of the law of eminent domain, it has become clear that an actual physical taking of one's property is not required before the principle of just compensation must be applied. The proposed amendment thus raises grave concerns that must be addressed.

5/ The Fifth Amendment is made applicable of the various states through operation of the Fourteenth Amendment.

The concept of eminent domain to be considered is called "inverse condemnation" and in appropriate cases can create liability for compensation from the condemning political subdivision. The concept is described in Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940), in construing what is now Article I, Section 13 of the State Constitution:

> [A]n actual physical taking of property is not necessary to entitle its owner to compensation. A man's property may be taken, within the meaning of this provision, although his title and possession remain undisturbed. To deprive him of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a "taking" as though the property itself were actually appropriated.
>
> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself. It must be conceded that the substantial value of property lies in its use. ... If the right of use be denied, the value of the property is annihilated, and ownership is rendered a barren right.

Id., 194 S.C. at 21. See also Hill v. City of Hanahan, 281 S.C. 527, 316 S.E.2d 681 (S.C. App. 1984), which quotes extensively from Gasque, supra. Thus, the law as to inverse condemnation and compensation therefor is well-settled in this State. 6/

Precedents have been set at the federal level, as well, with respect to the taking of private property and regulation of property use which may rise to the level of a taking. In an early, landmark case the United States Supreme Court noted that

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6/ Whether property is actually taken by inverse condemnation is of course a question of fact rather than a question of law.

> while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. ... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16, 43 S.Ct. 158, 160 (1922). To what extent property may be regulated without a taking occurring thus becomes an issue.

As previously stated, whether a taking has occurred depends upon the facts of a particular case. The Supreme Court has stated in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), that its standard in determining whether a particular governmental action has effected a taking includes consideration of both "the character of the action and on the nature and extent of the interference with rights in the parcel as a whole...." 438 U.S. at 130-31, 98 S.Ct. at 2662. Relevant considerations include the economic impact of the regulation on the property owner, the interference with investment-backed expectations, whether a physical "invasion" of property has occurred, or whether the alleged interference has arisen from "some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124, 98 S.Ct. at 2659. Effectuating a substantial public purpose or an unduly harsh impact upon the use of one's property were also considerations.

The Supreme Court again examined land use regulations vis a vis excessive governmental interference with individual property rights in cases such as Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) and San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 101 S. Ct. 1287, 67 L.Ed.2d 551 (1981). However, excessive regulation of property which could arise to a taking was not squarely addressed by the Supreme Court until the decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (hereinafter "Lutherglen"); this decision raises additional constitutional concerns about the traffic safety amendment.

The "Lutherglen" decision involved a temporary taking of private property by virtue of a land use regulation of the County of Los Angeles. A church owned property, upon which a camp was located, in a canyon; due to forest fires and a subsequent flash flood, the camp was destroyed. The church's right to rebuild its camp was

"temporarily" curbed due to an "interim" ordinance prohibiting any construction within the designated flood protection area. The church claimed in the ensuing lawsuit that it had been denied all use of its property and sought to recover damages upon several theories, including inverse condemnation. The Supreme Court essentially picked up where it had stopped short in the City of Tiburon and City of San Diego decisions, both supra, to examine whether the Just Compensation clause of the Fifth Amendment required a government to pay for "temporary" regulatory takings.

The Court reiterated the general principles of eminent domain previously discussed, including those principles that over-regulation may be recognized as a taking of property and that a taking may occur without formal proceedings (i.e., by inverse condemnation). The Court stated that the Just Compensation clause of the Fifth Amendment

> does not prohibit the taking of private property, but instead places a condition on the exercise of that power. ... This basic understanding of the Amendment makes it clear that it is designed not to limit the government interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.

Id., 107 S.Ct. at 2385-86. The Court continued that a temporary taking is no different from a permanent taking for which compensation is required; the Fifth Amendment requires that the government pay the property owner for the value of the use of his land during the time of the taking. It would not be a sufficient remedy to merely invalidate the ordinance. The Court held "that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Id., 107 S.Ct. at 2389.

The Court assumed, for purposes of its opinion, that the church was denied all use of its property for a considerable number of years and held that invalidating the ordinance without paying the property owner the fair value of the property during this time would be constitutionally insufficient. The case was remanded to the California courts to have determined the issue of whether all use of the property was indeed denied. A state court decision following the remand has apparently not been published, so that the final outcome is unknown.

Based on "Lutherglen" it is apparent that a court considering the constitutionality of the traffic safety amendment could determine that, in a given instance, a taking of private property has occurred, so as to require compensation from the Town to the property owner if indeed he has been deprived of all use of his property, as a temporary but total regulatory taking. 7/ Damages, if any be imposed by the Court, would be calculated as in "Lutherglen." See also Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987) (wherein damages were calculated following "Lutherglen," where a land use regulation had been adopted arbitrarily and capriciously, was confiscatory in nature, and bore no substantial relationship to a legitimate exercise of police power).

Severability Clause

The severability clause of the proposed traffic safety amendment is of concern. On its face, it appears to require that each aggrieved property owner or permit applicant relitigate the issues relative to constitutionality or enforceability of either the traffic safety amendment or the land management ordinance itself. Should the severability clause be challenged in court, it would likely not withstand such challenge for several reasons. The doctrine of "stare decisis" is well-recognized in this State, providing that "where a principle of law has become settled by a series of court decisions, it should be followed in similar cases." Langley v. Boyter, 284 S.C. 162, 325 S.E.2d 550 (S.C. App. 1984). 8/ While "stare decisis" is not a rule of law, it is a matter of judicial policy, to which most, if not all, courts adhere.

In addition, the principle of collateral estoppel appears to be offended by the severability clause. The principle would preclude a defendant (i.e., the Town) from contesting one or more issues which had previously been decided against the defendant in a previous action brought by a party who is a stranger to the present action. The South Carolina Court of Appeals in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (S.C. App. 1984), stated as to the principle of "non-mutual offensive collateral estoppel":

7/ "Lutherglen" has been distinguished in cases such as Moore v. City of Costa Mesa, 678 F. Supp. 1448 (C.D.Cal. 1987). If a property owner is able to use his property for his home and business, but is merely unable to build a new and more profitable building thereon to replace an existing building, all use of the property has not been denied.

8/ This opinion was subsequently quashed by the South Carolina Supreme Court by Langley v. Boyter, 286 S.C. 85, 332 S.E.2d 100 (1985); the dicta as to the doctrine of "stare decisis" remains valid, however.

> In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question, already once decided, simply because he now faces a different plaintiff who for due process reasons could not be adversely bound by the prior judgment. The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation.

Id., 281 S.C. at 370, quoting from Hossler v. Barry, 403 A.2d at 769. See also Restatement (2d), Judgments, §29. Thus, it is quite possible that a court faced with relitigation of the same issues relative to the traffic safety amendment with the Town as defendant but with a different plaintiff would follow the principle of non-mutual offensive collateral estoppel to preclude relitigating the same issue in the absence of some compelling countervailing consideration.

For the foregoing reasons, it is very likely that a challenge to the severability clause would be successful. Once the constitutional issues as to the traffic safety amendment have been litigated, the severability clause would likely fall since it would most probably be violative of the principles of "stare decisis" and collateral estoppel. Of course, a court considering the issue would make the final decision.

Conclusion

For the reasons as stated above, it is the opinion of this Office that the traffic safety amendment to the land management ordinance of the Town of Hilton Head Island would very likely be found to be violative of the Fifth Amendment to the United States Constitution and Article I, Section 13 of the State Constitution if it is determined that enforcement of the amendment, in a given instance, deprives a property owner of all use of his property, even temporarily, in the absence of just compensation being paid for the taking. A court faced with the issue could very well determine that the traffic safety amendment was adopted outside the scope of limitations placed on municipalities, as well. Finally, the severability clause would most probably not stand up to a challenge should "stare

decisis" or collateral estoppel be raised. While this Office identifies the foregoing problems and must presume that the amendment, as any legislative enactment, would be constitutional, that presumption is nevertheless rebuttable.

This Office has taken strong stands on upholding the police power of counties and municipalities. Too, the participation of this Office as an amicus curiae in the "Lutherglen" appeal cannot be overlooked. For these reasons, the conclusions expressed in today's opinion are narrowly drawn to address only the traffic safety amendment as presented by the Town of Hilton Head Island to this Office for review. This Office does not view lightly the narrowing of the police power of a political subdivision of this State, as would be the result if a court struck down the Town's traffic safety amendment. Thus, today's opinion may be of little precedential value in other circumstances in which the police power of a municipality or county may be challenged; each situation will require evaluation on its own merits.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:sds

REVIEWED AND APPROVED BY:

Robert D. Cook

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