

## The State of South Carolina



## Office of the Attorney General

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September 7, 1989

Edgar Dyer, Esquire  
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Horry County Planning Commission  
118 Citadel Drive  
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Dear Mr. Dyer:

You had asked for the opinion of this Office concerning the jurisdiction of local planning commissions. In particular, you had questioned whether the South Carolina Department of Highways and Public Transportation (SCDHPT) must submit its plans and chosen routes for a multi-jurisdictional highway proposed to be constructed in or through a county, to that county's planning commission and ultimately to county council for approval. You cited to Sections 6-7-830 and 6-7-710 of the Code of Laws of South Carolina to support your thought that such would be required. For the reasons following, it is the opinion of this Office that the South Carolina Department of Highways and Public Transportation is not required to so act.

SCDHPT Statutes

By Section 57-3-10, Code of Laws of South Carolina (1976 & 1988 Cum. Supp.), the South Carolina Department of Highways and Public Transportation is established as an administrative agency of the State of South Carolina whose functions and purposes are to be

the systematic planning, construction, maintenance and operation of the state highway system, ...the coordination of all state and federal programs relating to public transportation among the departments, agencies and other bodies politic and legally constituted agencies of this State... .

The general powers and duties of the SCDHPT are enumerated in Section 57-3-610 of the Code and include the following:

(1) Lay out, build and maintain public highways and bridges;

(2) Acquire such lands and road building materials and rights of way as may be needed for roads and bridges by purchase, gift or condemnation;

. . . .

(5) Cooperate with the federal government in the construction of federal-aid highways... ; and seek and receive such federal aid and assistance as may from time to time become available... ;

(6) Instruct, assist and cooperate with the agencies, departments and bodies politic and legally constituted agencies of the State in street, highway, traffic and public transportation matters when requested to do so... [.]

These enumerated powers and duties are consistent with the general notion that the laying out of highways is an important governmental function. In 39 Am. Jur. 2d Highways, Streets, and Bridges 32 it is stated:

Originally, and as one of the attributes of sovereignty, the laying out of highways and streets for the use of the public interest in the lawmaking power of the state, under its police power... .

The laying out and establishing of roads or highways is one of the most important and onerous duties of the government. ... Generally speaking, whenever the necessities or convenience of the public require a road or highway for the purpose of trade or travel, it is the duty of the government to provide one, and if necessary, to take private property for that purpose, upon making just compensation. ...

The state highway system is prescribed in Section 57-5-10 et seq. of the Code. In particular, Section 57-5-10 provides that "[t]he State highway system shall consist of a State-wide system of connecting highways which shall be constructed by the State Highway Department... ." The system is to consist of the interstate highway system, the State highway primary system, and the State highway secondary system. Statutes pertaining to rights of way, construction, turnpike projects, and so forth follow the statutes prescribing the state highway system. In none of these statutes is a provision requiring the State of South Carolina, through the SCDHPT, to

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submit its plans to, or otherwise obtain approval from, a county council or other county entity.

### Zoning and Planning

A county is authorized by Section 6-7-310 et seq. of the Code to create a planning commission, which would be authorized to adopt a comprehensive plan for the county. Specifically, Section 6-7-340(2)(c) would give a planning commission the power to prepare and recommend for adoption by county council

[a]n official map and appropriate revision thereof showing the exact location of existing or proposed public street, highway and utility rights-of-way and public building sites, together with regulations to control the erection of buildings or other structures or changes in land use within such rights-of-way, building sites or upon spaces within its political jurisdiction or a specified portion thereof... .

In addition, a county is empowered to adopt zoning regulations by Section 6-7-710 of the Code, which provides:

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 and counties 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 sizes of yards, courts, and other open spaces, the density and distribution of populations, and the uses of buildings, structures, and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches to them, water supply, sanitation, protection against floods, public activities, and other purposes. The regulations must be made in accordance with the comprehensive plan for the jurisdiction as described in this chapter and must be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to protect scenic areas; to include provisions for landscaping and protection and regulation of trees in consideration of their value from an environmental, agricultural, aesthetic, scenic, or preservation

standpoint,... ; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. ... These regulations must be made with reasonable consideration, among other things, of the character of each area and its peculiar suitability for particular uses, and with a view to promoting desirable living conditions and the sustained stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of land and buildings, and encouraging the most appropriate use of land and buildings and structures.

In those political subdivisions that have adopted zoning ordinances, the following portion of Section 6-7-830(a) of the Code is appropriate: "All agencies, departments and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State shall be subject to the zoning ordinances thereof." This statute specifically mentions zoning but not planning ordinances.

The distinction between planning and zoning may be critical. As stated in 82 Am. Jur. 2d Zoning and Planning 2, zoning is "the division of a municipality or other local community into districts, and the regulation of buildings and structures according to their construction and the nature and extent of their use, or the regulation of land according to its nature and uses." On the other hand, planning relates to the physical development of the community, "the systematic development of a community or an area with particular reference to the location, character, and extent of streets, squares, and parks, and to kindred mapping and charting." Id. As noted therein, planning embraces zoning, but zoning does not completely embrace zoning; zoning is subservient to planning. No statute has been located relative to planning which imposes the requirements such as those in Section 6-7-830 as to zoning; the provisions of Section 6-7-570 must be mentioned, however.

Section 6-7-570 provides the following in relevant part:

Whenever the planning commission shall have adopted a comprehensive plan, no new street,... or other public way, ... shall be constructed or authorized in the political jurisdiction of the governing authority or authorities establishing said planning commission until the location, character and extent thereof shall have been approved by the commission. In case of disapproval the commission shall communicate its reasons

extent thereof shall have been approved by the commission. In case of disapproval the commission shall communicate its reasons to the governing authority or authorities it serves, which shall have the power to overrule such disapproval by the recorded vote of not less than two thirds of its entire membership. But if authorization or financing of the proposed public way, ... within such jurisdiction does not, under the law, fall within the province of the local planning commission's governing authority or authorities, then the governmental entity having such jurisdiction shall request approval by the local planning commission. In case of the disapproval by the local planning commission, it shall communicate its reasons to its governing authority or authorities with recommended actions to be taken. Failure of the planning commission to act within sixth days from and after the date of official submission to it shall be deemed approval.

It thus appears that some involvement with the planning commission may be appropriate when a street or public way 1/ is contemplated to be constructed in a county which has a planning commission and in which a comprehensive plan has been adopted. Where a multi-county highway is to be built, clearly the authorization and financing therefor do not fall within the province of a county council; such is within the province of the SCDHPT. It is noteworthy that there is no provision for county council to override the planning commission's disapproval as for those projects which are within the province of the governing authority (county council). The planning commission merely makes recommendations to county council in those situations. This Office has opined previously that it was not free from doubt that a county planning commission could require a separate political subdivision such as a special purpose district to alter proposed water and sewer lines, see Op. Atty. Gen. dated February 17, 1981 (copy enclosed); the same conclusion would apply to the State of South Carolina.

#### Municipal Approval

At least two statutes govern the requirement of approval by a municipality of work to be undertaken by the SCDHPT within the municipality. In Section 57-5-820 is the following:

1/ "public way" can include highways. See 35A Words and Phrases, "Public way," pages 128-130.

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All work to be performed by the Department on state highways within a municipality must be with the consent and approval of the proper municipal authorities, except that work performed or to be performed on a bridge and its approaches, certified by the Department as functionally obsolete or structurally deficient, to remove, replace, or improve such bridge and its approaches shall not require prior consent and approval of a municipal authority if the bridge crosses the intracoastal waterway.

Similarly, Section 57-5-830 provides:

In every case of a proposed permanent improvement, construction, reconstruction, or alteration by the Department of any highway or highway facility within a municipality, the municipality may review and approve the plans before the work is started; except that a municipality may not have the right to review and approve plans to remove, replace, or improve a bridge and its approaches within its limits where such bridge and its approaches have been certified by the Department to be functionally obsolete or structurally deficient and if the bridge crosses the intracoastal waterway.

In statutes relative to highways, the term "municipality" has been interpreted to mean cities and towns and has not been extended to include other political subdivisions of the State. Hinnant v. South Carolina State Highway Dept., 226 S.C. 10, 83 S.E.2d 209 (1954). No similar statute exists with respect to obtaining the consent and approval of county authorities; specific mention of municipal consent and approval would imply exclusion of other political subdivisions not so named. Home Building & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938).

#### Constitutional Concerns

While your letter did not mention any relevant constitutional provisions for our consideration, there are two provisions which should be discussed. Article VIII, Section 15 of the State Constitution provides the following in part:

[N]or shall any law be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway... without first obtaining the consent of the governing body of the county... in control of the streets or public places proposed to be occupied for any such or like purpose.

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Article VIII, Section 14 of the State Constitution must also be considered:

In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside:

... (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.

These two provisions have been examined and construed together in an opinion dated June 20, 1988 (copy enclosed). This Office concluded therein that Article VIII, Section 14(6) would probably prevail over Article VIII, Section 15 in those instances in which the State of South Carolina and the SCDHPT would construct highway facilities of a multi-jurisdictional nature.

Further research into Article VIII, Section 15 bolsters that conclusion and casts doubt upon the intent of that provision to be applicable to streets or highways in the first instance. The language of the provision refers to "a street or other railway... ." The term "other" means "different or distinct from that already mentioned." Black's Law Dictionary 992 (5th Ed. 1979). Cases construing the forerunner of Article VIII, Section 15 have involved private railroads about which the General Assembly has adopted acts. See, for example, Riley v. Charleston Union Station Co., 71 S.C. 457, 51 S.E. 485 (1905); Riley v. Charleston Union Station Co., 67 S.C. 84, 45 S.E. 149 (1903). There is a separate and distinct type of railway known as a "street railway," which is a railroad constructed on the surface of a public street. See 40 Words and Phrases, "Street Railroad," page 435 et seq. <sup>2/</sup> Thus, rather than referring to streets, it is more likely that the intent of Article VIII, Section 15 is to require consent of counties prior to the construction of street railways.

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<sup>2/</sup> See also Section 58-5-10(3) of the Code as to regulations of "street railway service" and cases such as Columbia v. Pearman, 180 S.C. 296, 185 S.E. 747 (1936) and Columbia v. Tatum, 174 S.C. 366, 177 S.E. 541 (1934).

Because Article VIII, Section 15 would thus most probably not require a county governing body's consent prior to construction of a street (rather than a street railway), Article VIII, Section 14(6) would be the prevailing constitutional provision. Because the general laws requiring administration by the State or requiring statewide uniformity could not be set aside in granting power or authority to a county, it could thus be argued that statutes such as Sections 57-3-10 and 57-3-610 would override statutes such as Sections 6-7-570.

#### Other Considerations

Judicial decisions from other jurisdictions appear to conclude that when the state is exercising a governmental function in using state property, the state cannot be controlled by a local zoning ordinance, where the state entity is authorized to condemn lands by eminent domain. The procedure for condemning lands for use by the SCDHPT was found in Section 57-5-390 et seq. of the Code; these statutes have been repealed and replaced by the Eminent Domain Procedure Act, Section 28-2-10 et seq. of the Code. In State ex rel. Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952), the Supreme Court of Ohio cited the majority rule from Doan v. Cleveland Short Line Ry. Co., 92 Ohio St. 461, 112 N.E. 505:

Where an allotter adopts a plan for the improvement of his allotment whereby the use of the lots is restricted exclusively for residence purposes, such restriction cannot be construed as applying to the state or any of its agencies vested with the right of eminent domain in the use of the lots for public purposes.

107 N.E.2d at 350.

The decision in Allen was followed in Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955). Therein the court noted:

The need for new highway construction has been expressly recognized by the Federal Government and the various states... . [S]erious local resistance along the routes of construction is by no means uncommon. ... Such objections to the encroachments of new highways and their untoward incidents are, of course, understandable and are to be sympathetically heard and fairly considered by the agency charged with the high responsibility of effectuating the public objective with due regard for



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individual rights. But these rights, valuable as they are, must, in the public interest, give way to the greater good for the greater number and where the agency has, within its statutory delegation, conscientiously selected the route of the highway and the sites of its incidental facilities, it is highly proper that the courts not intrude.

118 A.2d at 664. See also Op. Atty. Gen. dated August 29, 1988 (enclosed) and cases cited therein. Thus, when the state agency has determined that the need for a highway exists and has authority to exercise the power of eminent domain to acquire land for the highway site, such an exercise of governmental function may well override a statute such as Section 6-7-830 of the Code with respect to compliance with a local zoning ordinance or Section 6-7-570 concerning planning commissions.

#### Conclusion

In consideration of the foregoing, it is the opinion of this Office that no statute expressly authorizes a county planning commission or a county council to veto plans which may be submitted to it by the State of South Carolina, through its Department of Highways and Public Transportation, when that agency is contemplating the construction of a multi-jurisdictional highway. Section 6-7-830(a) of the Code, relative to zoning, would not be applicable in this instance. Sections 57-5-820 et seq., relative to municipal approval of street work to be performed therein, would not be applicable to a county. Article VIII, Section 14(6) of the State Constitution would most probably mandate that the statutes relative to construction of state highways or the exercise of eminent domain to carry out the governmental function of constructing a highway not be set aside in favor of statutes such as Section 6-7-570 of the Code. Notwithstanding these conclusions, the Department of Highways and Public Transportation certainly is not precluded from working with local planning commissions to keep the public informed and seeking local input when projects are contemplated which would be constructed in that jurisdiction. Clearly, the local planning commission is also free to provide its input and make its views known to the Highway Department.

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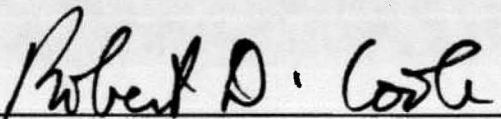
With kindest regards, I am

Sincerely,

*Patricia D. Petway*  
Patricia D. Petway  
Assistant Attorney General

PDP:nnw  
Enclosure

REVIEWED AND APPROVED BY:

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