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September 1, 1988

The Honorable Joyce C. Hearn
Member, House of Representatives
1300 Berkeley Road
Columbia, South Carolina 29205

Dear Representative Hearn:

By your letter of August 1, 1988, you have asked for the opinion of this Office as to the retroactive enforceability of Richland County's swimming pool ordinance. In particular, you wish to know whether the ordinance, as adopted, may be retroactively enforced to require fencing of swimming pools, to include pools constructed before adoption of the ordinance. You also wish to know whether Richland County Council may now adopt a new ordinance or amend the existing ordinance to require fencing or enclosure of all pools in the county.

Section 6-9-60 of the Code of Laws of South Carolina (1987 Cum. Supp.) authorizes counties and municipalities to "adopt by reference only the latest editions of ... nationally known codes for regulation of construction within their respective jurisdictions." Among the listed codes is the Standard Swimming Pool Code. We are advised that the Swimming Pool Code was first adopted by Richland County Ordinance No. 529-79 on April 18, 1979; the 1979 edition was adopted. The Swimming Pool Code at that time, and at all times since, contained enclosure requirements.

The Richland County Swimming Pool Code is found in Section 6-167 et seq. of the Richland County Code. Section 6-168 provides:

The design, construction, installation,
repair or alteration of swimming pools shall
conform to the 1985 edition of the Standard

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Swimming Pool Code, as published by the
Southern Building Code Congress International,
Inc.

Enclosure Requirements

The Standard Swimming Pool Code, in Section 315 of the 1974 and 1979 editions, provided the following, according to a memorandum of the Richland County Attorney dated July 20, 1988:

All swimming pool installations must be completed. The pool shall be completely filled with water and in operation before final inspection. For the safety of others, the pool shall be completely enclosed with an approved wall, fence or other substantial enclosure not less than five feet in height before final inspection.

The 1982 edition was amended to read, according to the above-cited memorandum:

All swimming pool installations must be completed. The pool shall be completely filled with water and in operation before final inspection. All swimming pools shall be completely enclosed by a fence at least four (4) feet (1.2m) in height or a screen enclosure. Openings in the fence shall not permit the passage of a sphere six (6) inches (152 mm) in diameter. The fence or screen enclosure shall be equipped with self-closing and self-latching gates.

Section 315 of the 1985 edition provides:

All swimming pools shall be completely enclosed by a fence at least 4 ft in height or a screen enclosure. Openings in the fence shall not permit the passage of a 6 in diameter sphere. The fence or screen enclosure shall be equipped with self-closing and self-latching gates.

Section 6-169 of the Richland County Code adds certain additional requirements to be complied with. This section continues: 1/

This section supersedes the height specification for the wall, fence, or other substantial structure, for pool enclosure as specified in section 315 of the code adopted by this article:

- (1) A licensed swimming pool contractor shall be responsible for securing a permit from the county building official for the installation of all in-ground swimming pools.
- (2) In the event an approved wall, fence, or other substantial structure to completely enclose the proposed pool is not in existence at the time an application is made for the permit to install a pool, the licensed pool contractor will be responsible for specifying the type wall, fence, or other substantial structure pool enclosure to be constructed on the reverse side of the permit application.
- (3) All approved pool enclosures for a single-family residence must be a wall, fence, or other substantial structure not less than four (4) feet in height. It shall be the responsibility of the property owner to have the enclosure installed prior to the final inspection and further, to ensure that said structure remains in place as long as the swimming pool exists.

1/ For purposes of this opinion, it is assumed that this modification has been submitted for approval of the South Carolina Building Code Council, as required by Section 6-9-60 of the Code, if such approval be necessary.

- (4) Aboveground pool installation may be assembled and installed by a nonlicensed person, provided that a permit is secured first and all other requirements of this article and the Standard Swimming Pool Code are complied with.

Scope of Swimming Pool Code/Ordinance

Section 101.2 of the Standard Swimming Pool Code, 1985 edition, sets forth the scope of its administration or applicability:

The provisions of this Code apply to the protection of the public health, safety and welfare by prescribing minimum standards for the design, construction or installation, repair or alterations of swimming pools, public or private, and equipment related thereto; requiring a permit and inspection therefor; providing the administration and enforcement of the standards set forth herein.

Nowhere in the 1985 edition is any indication as to the effective date of the regulations, relative to retroactive enforcement.

Section 6-168 of the Richland County Code, supra, notes the adoption of the Standard Swimming Pool Code for the "design, construction, installation, repair or alteration of swimming pools." Section 6-167 establishes the purpose in similar language: "The purpose of this article [Article IX. Swimming Pool Code] is to provide for regulating the installation and alteration of swimming pools, public or private." Nowhere in the information provided to this Office does a date of enforcement, relative to retroactivity, appear. It is our understanding that, prior to adoption of the first ordinance adopting the Standard Swimming Pool Code in 1979, there were no other county requirements for fencing or enclosing swimming pools by action of Richland County Council.

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Effective Date of Ordinance

The general rule as to the effective date of a legislative enactment is that such enactment is effective as of the date of enactment, unless a different time is specified in the enactment or a separate statutory or constitutional provision. 2 Sutherland Statutory Construction §33.06. The same rule has been applied to municipal ordinances. 62 C.J.S. Municipal Corporations §443b; 56 Am. Jur. 2d Municipal Corporations, etc. §351. Because, as noted above, no date for enforcement of the ordinance was specified by Richland County Council, the effective date will be the date of passage of the original ordinance, or April 18, 1979.

Retroactive Enforcement

A legislative act is generally deemed to be prospective in nature, unless its retroactive effect is clearly expressed within the enactment. Retroactive operation of such an enactment is not looked upon favorably by the courts. 2 Sutherland Statutory Construction §41.04; Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965); 1957-58 Op. Atty. Gen. 310; 1956-57 Op. Atty. Gen. 284. This rule has also been applied to municipal ordinances; in ambiguous cases, prospective enforcement will be favored over retroactive enforcement. 56 Am. Jur.2d Municipal Corporations, etc. §408.

The presumption that a legislative enactment is prospective in nature rather than retroactive generally prevails unless the enactment is remedial or procedural in nature. 2 Sutherland Statutory Construction §§41.04 et seq.; Oehler v. Clinton, 282 S.C. 25, 317 S.E.2d 445 (1984), citing Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45 (1980). A remedial enactment would make a change in some type of remedy, as for example, a statute of limitations. 2 Sutherland Statutory Construction §41.09; Hercules, Inc., supra. A procedural enactment would involve a change in some procedure rather than a change in substantive law. See 73 Am. Jur. 2d Statutes §354. Further, it has been stated that a legislative enactment will be deemed to operate prospectively only

where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right,

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or create a new liability in connection with a past transaction, invalidate a defense which was good when the statute was passed, or in general, render the [enactment] unconstitutional.

73 Am. Jur.2d Statutes §350.

Clearly, the ordinance would be of a substantive nature. It cannot be said to affect only procedural rights, and no remedies are affected. Thus, the presumption that the ordinance should be enforced prospectively only would be applicable. The ordinance as adopted would therefore not be enforceable as to swimming pools constructed prior to adoption of the ordinance.
2/

Amendment of the Ordinance

Because your first question has been answered negatively, the question remains whether Richland County Council may amend its ordinance or adopt a new ordinance to require enclosure of the swimming pools not affected by the 1979 or later ordinances. It appears that either approach would be permissible. Because this point is not one covered by the Standard Swimming Pool Code, such does not appear to conflict with the Code and would be additional; to be on the safe side, however, it would be advisable to consult the South Carolina Building Code Council to make certain that such a modification is not one which should be approved by the Council, or to seek the Council's approval, otherwise.

Clearly, regulation of various health and safety aspects of both public and private swimming pools have been deemed a portion of the police power of a state and its political subdivisions. See Vinson v. Howe Builders Assn. of Atlanta, 233 Ga. 948, 213 S.E.2d 890 (1975); Mason v. Mayor and Council of Borough of Hillsdale, 53 N.J. Super. 500, 147 A.2d 604 (1959); State v. Woodlands Condominium Assn., 204 N.J. Super. 85, 497 A.2d 912 (1985); Palangio v. City of Chicago, 23 Ill.2d 570, 179 N.E.2d 663 (1962). In at least one case located by this Office, a swimming pool ordinance, when adopted, applied to

2/ For comparison, see R. 61-51 of the South Carolina Department of Health and Environmental Control. Fencing requirements, found in part A(8), are applicable only to public swimming pools constructed on or after May 2, 1960, by part C1 of the Regulation. After amendment in 1983, this exception was carried forward by part B1 of R. 61-51.

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pools yet to be constructed and to pools already in existence; the latter pools' owners were given sixty (60) days in which to conform to the requirement of a fence and gate as specified by the ordinance. The court in Mason v. Mayor and Council of Borough of Hillsdale, supra, upheld the ordinance, stating that

the fact that the swimming pools existed before the ordinance cannot create a non-conforming use under zoning. There is no attempt in this ordinance to determine where swimming pools may be placed in the community, but the obvious purpose is to fence these pools and those to be constructed, to keep children from being hurt by going into the pools. There may even be some thought of protection to adjoining owners.

Mason, supra, 147 A.2d at 606.

In the context of building codes and amendments thereto, the South Carolina Supreme Court in Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955), stated that

it has been generally held that the State, in the valid exercise of its police power (or the municipality, in the exercise of the police power granted to it by the State), may require reasonable changes in buildings previously erected, in order to comply with new requirements and standards for the protection of health and safety, despite the fact that such buildings, at the time of erection, complied with the regulations then in effect.

Id., 88 S.E.2d at 689. See also Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937); Abbate Bros., Inc. v. City of Chicago, 11 Ill.2d 337, 142 N.E.2d 691 (1957); numerous cases cited in Annot., 109 A.L.R. 1117.

As stated above, there is authority for the adoption of a new ordinance or amendment of an existing ordinance to require fencing or some other enclosure (as permitted by Section 315 of the Standard Swimming Pool Code) to be put in place around swimming pools already in existence at the time of adoption of the

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1979 or later ordinance. Of course, the decision to take such action remains solely in the province of Richland County Council. As noted earlier, it would be prudent to consult with the Building Code Council to determine that such a modification is either approved or outside the jurisdiction of the Council.

Conclusions

1. The Richland County swimming pool ordinance, adopting the Standard Swimming Pool Code, is prospective in nature and should not be enforced retroactively.

2. Richland County Council may modify the existing ordinance or adopt a new ordinance to require fencing or enclosures around all swimming pools in Richland County already in existence at the time of adoption of the 1979 ordinance or a later ordinance.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:sds

REVIEWED AND APPROVED BY:

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