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# The State of South Carolina

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March 5, 1986

The Honorable Joyce C. Hearn
South Carolina House of Representatives
404C Blatt Building
Columbia, South Carolina 29211

Dear Representative Hearn:

You have requested advice as to the constitutionality of proposed §5-23-43 of the Code of Laws of South Carolina, 1976 as set forth in Section 1 of Senate Bill S.694. This bill permits subdivision regulations to provide for the dedication of land for parks and other recreational purposes or in lieu thereof, for the payment of cash contributions. You have asked whether application of this statute would constitute a denial of due process by taking property without compensation. We confine this opinion to this constitutional issue.

Similar legislation has been held valid in numerous other jurisdictions. See Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976); Associated Home Builders v. City of Walnut Creek, 94 Cal. Rptr. 630, 484 P.2d 606 (1971); Aunt Hack Ridge Estates Inc. v. Planning Commission, 160 Conn. 109, 273 A.2d 880 (1970); Frank Ansuini Inc. v. City of Cranston, 264 A.2d 910 (RI. 1970); 43 A.L.R.3d 863; but see Berg Development v. City of Missouri City, 603 S.W.2d 273 (Tex. Civ. Apt. 1980) 1/. Associated Home Builders

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1/ Berg found a city dedication and fee ordinance to be unconstitutional but the opinion did not consider any of the authority noted from other jurisdictions.

analyzed cases on the issue as follows:

> "The clear weight of authority upholds the constitutionality of [similar] statutes...
>
> The rationale of the cases affirming constitutionality indicate the dedication statutes are valid under the State's police power. They reason that the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of the subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities [citations omitted]. Such exactions have been compared to admittedly valid zoning regulations such as minimum lot size and setback requirements." 484 P.2d at 615. (Emphasis added).

Most statutes or cases appear to have required that the dedication or fee required of developers have some kind of reasonable relationship to the usage of or need for facilities to be generated by future subdivision residents, but the courts and statutes differ as to the degree of relationship that is required. The California statute addressed in Associated required that "[t]he amount and location of land... or fees... shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision." 484 P.2d at 609 and 612. In Collis, the Minnesota court construed a statute requiring the dedication of a "reasonable portion" of subdivision land or cash payments in lieu thereof to mean "that portion of land which the evidence reasonably establishes the municipality will need to acquire for the purposes stated as a result of the approval of the subdivisions" 246 N.W.2d at 26. Although, as noted by Collis, some other jurisdictions have held that the "...burden cast on the subdivider [must] be specifically and uniquely attributable to his activity..." (emphasis added), both Collis and Associated declined to follow this stricter standard. See 246 N.W.2d at 22. See also, Aunt Hack Ridge which employed a "specific and unique" standard. Apparently, the South Carolina Supreme Court has not had the occasion to address these issues in the past.

The bill in question does not expressly require that the dedication or fee have any kind of relationship to the needs or usage expected to be generated by the development. Although subdivision regulations adopted pursuant to this proposed law might

provide for such a relationship, the legislature may wish to consider clarifying this issue in the legislation.

In conclusion, authority from other jurisdictions indicates that Section 1 of S.694 is constitutional as written as to claims that it would be an unconstitutional taking of property without due process; however, to provide guidance as to the application of the statute by local governments drafting subdivision regulations, the legislature may wish to include clarifying language as to the relationship between the dedication and fee requirements and the needs or usage to be generated by the subdivision. Of course, whether this bill should be passed is a policy question which is not for this office to decide, and the comments in this letter are confined to the above legal question.

If you have any questions, please do not hesitate to contact me.

Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

JESjr/srcj

REVIEWED AND APPROVED BY:

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