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The State of South Carolina

Office of the Attorney General

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July 12, 1985

Ms. Judith S. Burk
Assistant City Attorney
City of Spartanburg
Post Office Box 2207
Greenville, South Carolina 29602

Dear Ms. Burk:

By your letter to Attorney General Medlock of June 21, 1985, you have asked for this Office's interpretation of the recent amendment to Article X, Section 3(g) of the State Constitution.

The constitutional amendment in question provides the following exemption from ad valorem taxation as to manufacturing establishments vis a vis municipalities:

> Municipal governing bodies may by ordinance exempt from ad valorem taxation for not more than five years all new manufacturing establishments located in any of the municipalities after July 1, 1985, and all additions to the existing manufacturing establishments, including additional machinery and equipment, located in any of the municipalities of this State costing fifty thousand dollars or more made after July 1, 1985. Exemptions from municipal taxation granted pursuant to this item may not result in any refund of taxes.

As to these provisions, you have inquired about the degree of flexibility which a municipality may exercise in adopting an ordinance pursuant to the provisions of the new amendment. You have particularly asked whether a municipality may exempt only certain types of manufacturing establishments; whether the

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decision to exempt may be made on an industry-by-industry basis; whether different exemptions may be established for different geographic areas within a municipality; and whether a municipality could adopt, for example, an ordinance granting a one-year exemption and several years later adopt an ordinance granting a five-year exemption.

By your letter of June 26, 1985, you have asked, additionally, whether an exemption may be revoked after adoption and further, whether an exemption may be granted to only certain manufacturing establishments which provide a certain number of jobs or represent a minimum investment.

In construing a constitutional amendment, courts have applied rules similar to those of statutory construction. Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973). It is the objective of this Office and the courts of this State to ascertain and give effect to the purposes for which a constitutional amendment is intended, as well as the will of the Legislature and the people. Holland v. Kilgo, 253 S.C. 1, 168 S.E.2d 569 (1969); McWhirter v. Bridges, 249 S.C. 613, 155 S.E.2d 897 (1967). The words in a constitutional amendment must be given their plain and ordinary meanings unless there is some reason requiring a different interpretation. Cf., Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975). Furthermore, where the language in a constitutional amendment is plain and unambiguous, such language must be applied literally. Cf., Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978). The questions raised by your letter will be addressed, considering these rules of statutory construction.

We would first advise that adoption of a tax exemption by municipalities as permitted by the constitutional amendment is discretionary. The amendment provides in part that "[m]unicipal governing bodies may by ordinance... ." The use of the term "may" is generally regarded as permissive. State v. Wilson, 274 S.C. 352, 264 S.E.2d 414 (1980). In the City Attorney's memorandum of May 24, 1985, to the Economic Development Director, the City Attorney states that each municipality has the option to grant or not grant the tax exemption. We concur with the City Attorney's conclusion.

You have asked about the scope of the exemption: whether only certain types of manufacturing establishments may be exempt, or whether exemption could be contingent upon the establishment providing a certain number of jobs or representing a minimum investment. As to exemptions which may be granted to manufacturing establishments making additions to already existing facilities, a minimum cost of fifty thousand dollars must be

incurred for the exemption to be applicable. The plain language of the amendment so requires this minimum cost. Because a statute or ordinance cannot contradict a constitutional provision, this figure must be adhered to, as to additions to already existing manufacturing establishments. Hyder v. Edwards, 269 S.C. 138, 236 S.E.2d 561 (1977).

As to deciding to grant an exemption on an industry-by-industry basis, according to the number of jobs to be filled, minimum investment other than discussed in the preceding paragraph, or on geographic location, the amendment appears to preclude such selectivity as to applicability. The amendment refers to "all new manufacturing establishments..." and "all additions to the existing manufacturing establishments ... costing fifty thousand dollars or more..." (emphasis added). The word "all" means every one, "the aggregate; the whole; totality." Jefferson Standard Life Insurance Company v. King, 165 S.C. 219, 229, 163 S.E. 653 (1932). Thus, all new manufacturing establishments and all of those establishments making additions meeting the minimum cost would be granted the exemption if a municipality opts to enact the exemption. The City Attorney, in his memorandum, states that he believes

> that the word "all" establishes a class and all members of that class must be entitled to the exemption of one to five years if the municipality decides to grant one.

Thus, we concur with the City Attorney's conclusion.

The City Attorney also stated in his memorandum that "[t]o pick and choose under these circumstances would possibly violate the equal protection clause of the constitution." Such uniformity of taxation and exemption must be considered not only in light of the United States Constitution but also in terms of the State Constitution; see, for example, Sections 1,3, and 6 of Article X. Because a classification has been established by the amendment, all manufacturing establishments falling within that classification must be treated equally to avoid constitutional difficulties. See 16 McQuillin, Municipal Corporations, § 44.64; 84 C.J.S. Taxation § 21; McPherson v. Fisher, 143 Ore. 615, 23 P.2d 913 (1933). This Office thus concurs with the City Attorney's concern about constitutional problems if all affected manufacturing establishments are not treated equally.

The length of time for which an exemption may be granted is clearly and plainly stated as "not more than five years." In construing the phrase "not more than five," the Supreme Court of

Florida stated that such express language meant that five was the maximum, that five could not be exceeded. Wilson v. Crews, 160 Fla. 169, 34 So.2d 114 (1948). Thus, a municipality may enact an ordinance granting an exemption to be effective from one year to five years or anywhere in between. Because there is no evidence of legislative or other intent that a manufacturing establishment be granted greater than a five year exemption (unless the establishment established after July 1, 1985, makes an addition of the required cost later, for example), care must be taken by a municipality if it should adopt a one-year exemption now and a larger exemption several years hence to provide for the possibility that some manufacturing establishments may have already received some of the maximum five years of permissible tax exemptions. Situations may be imagined whereby legislative intent could be thwarted by annual amendments to a municipal ordinance to permit continued exemptions to manufacturing establishments which have received the maximum five years of permissible tax exemptions. 1/

You have asked whether an ordinance granting the exemption may be modified once adopted. The general rule is that if a legislative body has the power to adopt an act or ordinance, that body also has the power to amend or revoke the ordinance. See Boatwright v. McElmurray, 247 S.C. 199, 146 S.E.2d 716 (1966). If at a future date such modification or revocation of an ordinance granting exemptions is undertaken, you may wish to consider whether any rights have been vested under the original ordinance and provide for the protection of those rights accordingly. The general law as to revocability of tax exemptions is discussed in 84 C.J.S. Taxation § 239; generally speaking, except where an exemption is a valid contract, it may be repealed or revoked. We do not comment on whether a contract may have been created but merely mention the point for your consideration.

1/ We would add that there would be no basis within the amendment for varying the length of time for which exemptions may be granted for various portions of the manufacturing industry. For example, textile manufacturers could not be given a greater exemption than manufacturers of other products. As discussed above, equal protection problems could exist if all manufacturers were not granted an exemption for the same length of time.

In conclusion, the opinion of this Office as to the interpretation of the constitutional amendment as discussed above may be summarized as follows:

1. The municipality is permitted but is not required to adopt an ordinance pursuant to the new constitutional amendment.

2. If an ordinance is adopted, it must be applicable to all new manufacturing establishments locating in the municipality after July 1, 1985, or to all manufacturing establishments making an addition to existing facilities after July 1, 1985 which meet the cost requirement. There is no basis for granting the exemption on an industry-by-industry basis, on the number of jobs to be provided or a minimum investment (except as discussed above for additions to facilities), or on a geographic basis.

3. The exemption may not be granted for more than five years for locating or making an addition by a manufacturing establishment within the municipality.

4. An ordinance creating an exemption may be modified or revoked; however, whether certain rights may have vested and thus must be protected should be considered.

We trust that the foregoing adequately responds to your inquiries. Please advise this Office if additional information or clarification may be needed.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:djg

REVIEWED AND APPROVED BY:

Robert D. Cook

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