ALAN WILSON
ATTORNEY GENERAL

March 28, 2017

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Dear Ms. McCormac:

Attorney General Alan Wilson has referred your letter dated November 2, 2016 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Questions (as quoted from your letter)**:**
"1. Other states have legislatively provided for public percent for art programs applicable to public facilities. In 1981, the South Carolina Budget and Control Board passed a resolution encouraging state agencies and institutions to set aside up to 0.5% of their total budgets for new construction and renovation projects for the purchase or commission of art. May a municipality rely on this 1981 resolution as authority to create a public percent for art program for municipal facilities? Are there any restrictions, limits, or procedures applicable to such a program?

2. A federal lawsuit filed in the United States District Court for the Northern District of California has challenged the City of Oakland's private percent for art program, wherein private developments must use 0.5% of residential and 1% of nonresidential development costs for public art, with an option of onsite installation or of making an in-lieu contribution to Oakland's existing public art account. Under the ordinance, Oakland will not issue a building permit until a developer has complied with the percent for art requirement. The lawsuit alleges that requiring private developers to fund public art is a "taking" of property without compensation forbidden by the Fifth Amendment. Further, the plaintiff, a building industry association, argues that because art is always a form of expression, forcing private developers to install or finance public art is forcing them to engage in government-sponsored speech in violation of the First Amendment.

May a South Carolina municipality implement a private percent for art as part of its building permit program?

If so, would the percent for art imposed be subject to the impact fee nexus analysis discussed in Koontz v. St. John River Water Management District, 133 S.Ct. 2586 (2013)?

Or may a municipality merely use its existing authority to regulate land use and impose aesthetic conditions to require private developers to install and/or fund public art? See, Ehrlich v Culver City, 911 P.2d 429 (S.Ct. Cal. 1996).

3. Finally, if a municipality may impose a percent for art on building permits, may it impose a different percentage based on size/cost of the building project and/or the nature of the building project (e.g., residential v. industrial v. commercial, or single-family v. multifamily)?"

Law/Analysis:

"1. Other states have legislatively provided for public percent for art programs applicable to public facilities. In 1981, the South Carolina Budget and Control Board passed a resolution encouraging state agencies and institutions to set aside up to 0.5% of their total budgets for new construction and renovation projects for the purchase or commission of art. May a municipality rely on this 1981 resolution as authority to create a public percent for art program for municipal facilities? Are there any restrictions, limits, or procedures applicable to such a program?"

As you are likely aware, the General Assembly abolished the South Carolina Budget and Control Board pursuant to Act 121 of 2014. See S.C. Act No. 121 of 2014; Op. S.C. Att'y Gen., 2014 WL 5796033 (S.C.A.G. October 27, 2014). Generally, we do not recommend relying on a statutory-dissolved agency's resolution for authority to implement a program. Furthermore, this Office has previously opined regarding a municipality's powers that:

> In examining a municipality's authority, we keep in mind that "[a] municipal corporation is a creature of statute and has only the powers expressly granted it, those which are necessarily or fairly implied in or incident to the express powers, or those powers essential to the accomplishment of its purpose." Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 131, 459 S.E.2d 876, 880 (Ct. App. 1995). Furthermore, article VIII, section 9 of the South Carolina Constitution (1976) states: "The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law...." The Legislature afforded municipalities numerous powers with its enactment of section 5-7-30 of the South Carolina Code (2004). This section provides:
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> > Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it....
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> S.C. Code Ann. § 5-7-30.

Op. S.C. Att'y Gen., 2006 WL 2382454, at *1 (S.C.A.G. July 19, 2006). Thus, a municipality's powers are limited to those statutorily-granted and implied for the completion therein. Any such program would have to be implemented pursuant to a municipality's express or implied statutory authority.

Regarding the latter part of your first question, we believe a court will find the program would have to comply with all other aspects of the law such as providing due process and equal protection. Regarding due process of law this Office has previously stated that:

> Both substantive due process and procedural due process requirements are recognized within the protection of the fifth and fourteenth amendments of the United State Constitution. See, e.g., Hamilton v. Bd. of Trustees of Oconee County School Dist., 282 S.C. 519, 319 S.E. 2d 717 (Ct. App. 1984) (Upon analysis of the fifth and fourteenth amendments of the United States Constitution, substantive due process means state action which deprives a person of life, liberty, or property must have a rational basis; the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary.); Beckman v. Harris, 756 F.2d 1032 (4th Cir.), cert. denied, 474 U.S. 903 (1985) (To be entitled to the procedural safeguards, i.e., notice and opportunity to be heard, encompassed by the due process clause of the fourteenth amendment, the complaining party must suffer from the deprivation of a liberty or property interest.).

Op. S.C. Att'y Gen., 1989 WL 508527, at *4 (S.C.A.G. Apr. 19, 1989). Regarding equal protection of the laws, this Office has previously opined that "'[a]n ordinance conferring upon officials unrestricted discretion in the granting or refusal of building permits is a denial both of equal protection and due process of law.' 106 N.E.2d at 624." Op. S.C. Att'y Gen., 2003 WL 22862787, at *4 (S.C.A.G. Nov. 13, 2003). Certainly a municipality would have to comply within the limits of our State and federal Constitution and laws, including preserving rights such as due process and equal protection.

2. May a South Carolina municipality implement a private percent for art as part of its building permit program?

It is this Office's understanding that the case you reference in your question is pending. See Building Industry Association v. City of Oakland, 2015 WL 4550229 (N.D.Cal.) No. 3:15-cv-03392-L.B. (July 23, 2015). As we stated above, a municipality is a creature of statute and only has those powers expressly granted and inherently implied to complete its purpose. Op. S.C. Att'y Gen., 2006 WL 2382454, at *1 (S.C.A.G. July 19, 2006) (citing Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 131, 459 S.E.2d 876, 880 (Ct. App. 1995). This Office has previously opined regarding municipalities that:

> As it relates to municipalities, the Constitution charges the Legislature with providing for the "structure and organization, powers, duties, functions, and responsibilities of the Municipalities ..." S.C. Const, art. VIII, § 9 (1895). These provisions are codified in Chapters 7, 9, 11, and 13 of Title 5 of the South Carolina Code.
> See e.g., S.C. Code Ann. § 5-7-10 (2004) ("The provisions of this chapter provide for the structure, organization, powers, duties, functions and responsibilities of municipalities under all forms of municipal government provided for in Chapters 9, 11 and 13 unless otherwise specifically provided for in those chapters."). Therefore, when we are asked to determine a council's authority to undertake an action, we must first ascertain the alleged statutory authority tied to such an action.

Op. S.C. Att'y Gen., 2016 WL 2607250, at *1 (S.C.A.G. Apr. 20, 2016). It is this State's public policy "to maintain reasonable standards of construction in buildings and other structures in the State consistent with the public health, safety, and welfare of its citizens." S.C. Code Ann. § 6-9-5. Regarding construction, State law specifies that:

> A) All municipalities, as defined by Section 5-1-20, and counties in this State shall enforce building, energy, electrical, plumbing, mechanical, gas, and fire codes, referred to as building codes in this chapter, relating to the construction, livability, sanitation, erection, energy efficiency, installation of equipment, alteration, repair, occupancy, classification, or removal of structures located within their jurisdictions and promulgate regulations to implement their enforcement. The municipality or county shall enforce only the national building and safety codes provided in this chapter.

S.C. Code Ann. § 6-9-10(A). Moreover, a municipality and a county may contract with each other and with other governmental entities of the State to issue permits and enforce building codes. S.C. Code Ann. § 6-9-20. This Office has previously opined regarding building permits that:

> Municipalities have statutory authority to require a permit to build. See S.C. Code § 5-25-310. In regards to municipal building permit fees South Carolina Code § 5-25-480 states:
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> > Cities having a population of seventy thousand or more, according to the official United States census, may establish a schedule of fees for the inspection of new buildings and the inspection of repairs to or alterations of existing buildings, which shall not exceed two dollars for any construction, repairs or alterations costing less than two thousand dollars, and shall not exceed one dollar for each and every one thousand dollars of cost of construction, repairs or alterations costing in excess of two thousand dollars.
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> S.C. Code § [5]-25-480 (1976 Code, as amended) (emphasis added). Moreover, a municipality has general statutory authority to enact regulations and ordinances for the general benefit and welfare of its citizens. See, e.g., S.C. Code § 5-7-30; Op. S.C. Atty. Gen., 1959 WL 11442 (June 12, 1959).

Op. S.C. Att'y Gen., 2014 WL 3352176, at *3–4 (S.C.A.G. June 18, 2014).[1] State law requires that "[b]efore a building is begun the owner of the property shall apply to the inspector for a permit to build [and the] permit shall be given in writing and shall contain a provision that the building shall be constructed according to the requirements of this chapter. ... S.C. Code Ann. § 5-25-310.[2] State law also specifies regarding fees that:

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[1] Please note there are many other statutes and regulations regarding building permits and fees (e.g. S.C. Code §§ 4-25-230, 6-9-5, 6-9-30, 12-43-240, etc.). The statutes in this opinion are not intended to be inclusive but provide a few illustrations within the law.

[2] Please note 2017 S.C. S.B. 364 is pending legislation at the time of this opinion. Please also note that there are limitations on the applicability of Chapter 25 ("None of the provisions of this chapter, except §§ 5-25-20, 5-25-40, and 5-25-160 to 5-25-210, shall apply to towns of less than five thousand inhabitants, nor shall any of the provisions of this chapter, except §§ 5-25-20, 5-25-30, 5-25-40 and 5-25-160 to 5-25-210, apply to municipalities of five thousand or more inhabitants which shall have adopted the Southern Building Code by ordinance." S.C. Code Ann. § 5-25-10). Please also note the law regarding counties are not discussed herein.

> For every inspection of a new building or of an old building repaired or altered the following fees shall be charged: Two dollars for each mercantile store room, livery stable or building for manufacturing of one story, and fifty cents per room. But the inspection fee shall in no case exceed five dollars. Before issuing any building permit such fee shall be paid to the city treasurer. The building inspector shall be paid adequate compensation by the city or town for inspections made under the terms of this chapter.

S.C. Code Ann. § 5-25-470 (emphasis added).[3]

Your question asks whether a specific fee- a building permit fee- can be implemented to pay for art versus using taxpayer funds to pay for art. This Office has previously opined regarding a building permit fee that it was a fee and not a tax even though the fee was based on the cost of construction. Op. S.C. Att'y Gen., 1974 WL 21384 (S.C.A.G. November 13, 1974).[4] Concerning building permit fees, this Office previously stated that:

> In 1974 this Office opined that a church is not exempt from a building permit fee. Op. S.C. Atty. Gen., 1974 WL 21384 (November 13, 1974). In that opinion this Office concluded that even though a building permit fee increases with the cost of construction, the fee is not an ad valorem tax, which would be prohibited. In that opinion this Office stated:
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> > *"You have expressed concern over the fact that the building permit fee provided under Section 3 of the Act is progressive with the cost of construction until the fee reaches $25.00 when the cost of construction exceeds $200,000. Even though the building permit fee increases with the cost of construction, it is the opinion of this office that the building permit fee is not an ad valorem property tax. As stated at 71 Am. Jur. 2d, State and Local Taxation, Section 20: 'An ad valorem property tax is invariably based upon ownership of property and is payable regardless of whether the property is used or not.' The building permit on the other hand imposes a fee in the nature of an excise or license because more than ownership is involved. It has been held that a building permit fee is distinguishable from a tax. See St. Paul v. Dow, 37 Minn. 20, 32 N. W. 860. The case of Maine v. Grand Trunk Railway Co., 142 U. S. 217, 12 S. Ct. 121, cited at Section 25 of 71 Am. Jur. 2d, supra, appears to be directly on point. It holds that if a tax is in the nature of an excise, it does not become a property tax because it is proportioned in amount to the value of the property used in connection with the privilege or act which is taxed."*
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> Id.

[3] Please see footnote #2.

[4] This opinion was based on S.C. Code § 14-400.945 (1972 Code) which was a local law regarding construction permits in Lexington County.

Op. S.C. Att'y Gen., 2014 WL 3352176, at *5–6 (S.C.A.G. June 18, 2014). This Office has also previously opined regarding a building permit fee is likely a fee rather a tax when we stated that:

> While this Office does not know all the facts surrounding your building permit fee nor how the revenue is spent, it is likely a court could find that the building permit fee is a fee not a tax under the Brown [v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992)] test and using the J.K. Const., Inc. [v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 519 S.E.2d 561(1999)] analysis depending on how the revenue is spent since it is this Office's understanding the fee is uniformly imposed based on anticipated construction.

Op. S.C. Att'y Gen., 2014 WL 3352176, at *6 (S.C.A.G. June 18, 2014). Thus, this Office has consistently interpreted fees regarding building permits as fees rather than taxes.

Generally, this Office has not interpreted art as an inherent corporation function of a municipality but instead opined that the undertaking must be for a public purpose. See, e.g., Ops. S.C. Att'y Gen., 1971 WL 22767 (S.C.A.G. April 28, 1971) (opining that a county may not appropriate funds to a nonprofit corporation Arts Council, even though its purpose was cultural and educational); 1976 WL 23043 (S.C.A.G. August 17, 1976) (opining that the Dept. of Parks, Recreation & Tourism may hold an arts and crafts show pursuant to its statutory authority); 1988 WL 383509 (S.C.A.G. March 16, 1988) (opining that "as long as a public purpose is being served and a public function is being carried out by a private entity such as the Center for Performing Arts Foundation... no violation of Article X, Section 11 of the State Constitution would occur if the proposed project were included in the Bond Bill). The United States Supreme Court opined on art stating that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 589–90, 118 S. Ct. 2168, 2179–80, 141 L. Ed. 2d 500 (1998). While this Office recognizes that there are places where the General Assembly has supported the arts (see, e.g., S.C. Code Ann. § 60-15-10, -15, et seq.), your question involves the interpretation of the use of fees for a particular purpose. Regarding fees generally, the law states that:

> (A) A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. ...
> (B) The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid. ...

S.C. Code Ann. § 6-1-330 (emphasis added).

If so, would the percent for art imposed be subject to the impact fee nexus analysis discussed in Koontz v. St. John River Water Management District, 133 S.Ct. 2586 (2013)? Or may a municipality merely use its existing authority to regulate land use and impose aesthetic conditions to require private developers to install and/or fund public art? See, Ehrlich v Culver City, 911 P.2d 429 (S.Ct. Cal. 1996).

To clarify our opinion expressed above, this Office believes a court will determine that a building permit fee is a fee and as such may only be used "to finance the provision of public services ... to pay costs related to the provision of the service or program for which the fee was paid." S.C. Code Ann. § 6-1-330. Even if a court does not find this statute applies, we believe a court will reach the same conclusion

being that fees relating to building permits must be used to cover the expenses by the governmental entity pursuant to its statutory authority to impose such a fee. Any other such municipal regulation requiring the funding of public art would require specific or implicit statutory authority as part of a public purpose. As you may be aware, municipalities may not impose new taxes of any other kind "unless specifically authorized by the General Assembly." Op. S.C. Att'y Gen., 2011 WL 3918170 (S.C.A.G. August 24, 2011) (quoting S.C. Code Ann. § 6-1-310 (2004)). Moreover, the use of taxpayer money would require a public purpose. See, e.g., Op. S.C. Att'y Gen., 2003 WL 21043497 (S.C.A.G. April 2, 2003) (citing Nichols v. S.C. Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986)). If a municipality were to require developers to pay for art, it would need specific statutory authority to do so. For instance, the General Assembly has granted local planning commissions authority to require trees and landscaping by ordinance. S.C. Code § 6-29-340 (B)(2)(d). Therefore, we believe a court will determine that a municipality could not require a private party to pay directly for art without specific statutory authority.

"3. Finally, if a municipality may impose a percent for art on building permits, may it impose a different percentage based on size/cost of the building project and/or the nature of the building project (e.g., residential v. industrial v. commercial, or single-family v. multifamily)?"

Traditionally, this Office, like a court, presumes a municipal ordinance is constitutional. Regarding the presumption of constitutionality of a municipal ordinance, we have previously opined that:

> Municipal ordinances are entitled to a presumption of validity. Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 554, 397 S.E.2d 662, 664 (1990) ("[A] presumption of validity attaches to all legislation . . . ."). To evaluate the validity of a particular ordinance, a court will first "ascertain whether the county or municipality that enacted the ordinance had the power to do so." Hospitality Ass'n of S.C., Inc. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116-17 (1995). Next, "if the local government had the power to enact the ordinance," a court will determine "whether the ordinance is inconsistent with the Constitution or general law of this State." Id.

Op. S.C. Att'y Gen., 2011 WL 3918170, at *1 (S.C.A.G. Aug. 24, 2011). Thus, if such an ordinance were passed, we would presume its constitutionality. Please note this Office wrote a previous opinion on whether a town could base its business license fees on gross receipts versus floor tax, and we concluded that either of the two methods to calculate fees was acceptable. See Op. S.C. Att'y Gen., 1970 WL 17020 (S.C.A.G. December 2, 1970). However, we based that opinion on S.C. Code § 47-173 and § 47-271 (1962 Code) which were repealed by the 1976 Code of Laws according to the South Carolina Statutory Tables. Id.; see also Op. S.C. Att'y Gen., 1976 WL 30666 (S.C.A.G. February 13, 1976) (opining that S.C. Code § 47-173 and § 47-271 (1962 Code) were replaced by the Home Rule Act (Act No. 283 of 1975) and that municipalities within the State are authorized by statute to levy a business license tax). The State of Tennessee's Attorney General answered a similar question in 2006 to your question and determined that pursuant to Tennessee law that building permits could add fees as a flat fee, a percentage, or by other method as long as the fee is levied "evenhandedly" and does not exceed the maximum statutory amount. Op. Tenn. Att'y Gen., 2006 WL 853268 (Tenn.A.G. February 14, 2006). While we recognize the Tennessee Attorney General opinion was advised pursuant to Tennessee law, we believe a court will agree in requiring uniformity in the implementation of a fee subject to the related costs and

expenses by the governmental entity pursuant to its statutory authority to impose the fee and compliance with any statutory limitations.

Conclusion:

It is this Office's opinion that: in general we do not recommend following a statutory-dissolved agency's resolution as authority to implement a new program as any such program would have to be implemented pursuant to a municipality's express or implied statutory authority; we believe a court will reach the conclusion that fees relating to municipal building permits must be used to cover the expenses by the governmental entity pursuant to its statutory authority to impose such a fee; any such municipal ordinance requiring a private party to pay directly for art would require specific statutory authority and a public purpose; and, we believe a court will require uniformity in the implementation of a fee subject to the related costs and expenses by the governmental entity pursuant to its statutory authority to impose the fee and compliance with any statutory limitations. As we stated above, while the South Carolina General Assembly has chosen to support the arts in various ways, we do not believe a court will find a municipality is authorized to charge a fee for art as a part of a building permit fee, nor do we believe a court will find a municipality is authorized to implement a new tax for art without specific statutory authorization. However, this Office is only issuing this legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

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