ALAN WILSON
ATTORNEY GENERAL

April 26, 2017

The Honorable Wendell G. Gilliard, Member
South Carolina House of Representatives, District No. 111
328-A Blatt Building
Columbia, SC 29201

Dear Representative Gilliard,

Attorney General Alan Wilson has referred your letter dated February 2, 2017 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Question (as quoted from your letter):
"Do counties and municipalities need direct legislative authorization pursuant to a state-wide act to engage in inclusionary zoning or does the Home Rule Act apply, thereby allowing the appropriate local governing bodies to establish incentivized inclusionary zoning requirements, practices, and procedures within their jurisdictions?"

Law/Analysis:

As you may be aware, it is this Office's understanding that there is currently legislation pending regarding inclusionary zoning. See 2017 S.C. S.B. No. 346. This opinion will not specifically address the bill unless we are asked to do so at a later time. By way of background, this Office has previously opined regarding Home Rule that:

> The purpose behind 'Home Rule' was simply to remove the Legislature from interference in the day-to-day local affairs of local governments." See Op. S.C. Atty. Gen., February 22, 2013 (2013 WL 861300). In Glasscock v. Sumter County, 361 S.C. 483, 604 S.E.2d 718, 722 (Ct. App. 2004), the South Carolina Court of Appeals explained the reason for Home Rule:
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> > [t]hat local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state's now firmly rooted constitutional principle of "home rule." By the ratification of Article VIII of our state constitution in 1973, substantial responsibility for city and county affairs devolved from the General Assembly to the individual local governments. "[I]mplicit in Article VIII is the realization that different local governments have different problems that require different solutions. *Hospitality Ass'n of South Carolina v. County of Charleston*, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995); *see also Knight v. Salisbury*, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974) (opining that

> the constitutional amendment providing for home rule was "prompted by the feeling that Columbia should not be the seat of county government, and that the General Assembly should devote its full attention to problems at the state level").

Op. S.C. Att'y Gen., 2014 WL 4953184, at *3 (S.C.A.G. Sept. 23, 2014). Regarding Home Rule and zoning for a county, this Office has previously that:

> [I]f the ordinance is in the form of a zoning or planning ordinance, the Council must enact it, according to the 'home rule' legislation (§ 4-9-30(9), CODE OF LAWS OF SOUTH CAROLINA, 1976 as amended), pursuant to the provisions of Act No. 487 of 1967. That Act requires zoning and planning to be done as part of a comprehensive and long-range program. See, §§ 6-7-510 et seq., CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. Therefore, the Council cannot prohibit or regulate such an activity by means of a zoning ordinance unless it does so pursuant to a comprehensive and long-range planning program.

Op. S.C. Att'y Gen., 1980 WL 120734, at *1 (S.C.A.G. June 23, 1980). This Office also opined concerning questions of Home Rule and zoning in a 1975 opinion where we stated that:

> Your letter concerning the effect of the Home Rule legislation (Act No. 283 of 1975) on municipal and county planning and zoning activities was referred to me by Mr. McLeod. I think all of your questions are best answered by simply identifying the few provisions of this Act which are applicable to planning and zoning. As far as the counties are concerned, the Home Rule legislation empowers them 'to provide for land use and promulgate regulations pursuant thereto, subject to the provisions of Act No. 487 of 1967[']' [Section 14-3103(9)]. Since Act No. 487 serves to expand the earlier 'County Planning Act' (see Section 14-351), there should be no basic change in county planning and zoning—the only restriction on land use being the one cited. County planning activities would be conducted at the discretion of the local governing authority.
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> In regard to the municipalities, two observations are in order: first, under the Home Rule legislation, the powers of the municipality are broadly stated (see Section 47-32) and it is further provided that they should liberally be construed (Section 47-30). Secondly, Chapter 7 of Title 47 is repealed by the Home Rule Act (see Section 5 of Act No. 283 of 1975). Accordingly, municipalities would be able to conduct planning and zoning activities under the broad general provisions of the Zoning and City Planning Act (Section 47-1001 through 1141).

Op. S.C. Att'y Gen., 1975 WL 29306, at *1 (S.C.A.G. Dec. 3, 1975). Moreover, the adoption of a zoning ordinance is a legislative function. Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480, 489, 536 S.E.2d 892, 897 (Ct. App. 2000) (citing City of Myrtle Beach v. Juel P. Corp., 337 S.C. 157, 522 S.E.2d 153 (Ct.App.1999)).

Notwithstanding Home Rule and this Office's opinions thereof, we believe a court will determine both a county and a municipality must have express or implied authority to pass legislation which utilizes the sovereign powers of the State. S.C. Const. art. VIII, §§ 14, 17; Williams v. Town of Hilton Head,

Island, S.C., 311 S.C. 417, 429 S.E.2d 802 (1993); Op. S.C. Att'y Gen., 2014 WL 4953188 (S.C.A.G. September 22, 2014).[1] Traditionally, the sovereign powers of the State include the power to tax, the power of eminent domain and policing power. Op. S.C. Att'y Gen., 2015 WL 1093150 (S.C.A.G. February 27, 2015) (citing State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61(1980)). The South Carolina General Assembly has clearly authorized local governments (which includes county and municipal planning commissions) to enact zoning ordinances to promote "public health, safety, morals, convenience, order, appearance, prosperity, and general welfare." S.C. Code § 6-29-710. Moreover, the governing board of a county has specific statutory authority to "provide for land use and promulgate regulations pursuant thereto subject to the provisions of Chapter 7 of Title 6." S.C. Code § 4-9-30(9).[2]

The South Carolina Supreme Court has stated that the authority to enact zoning restrictions on real property is a part of the policing powers of a municipality and a county. See Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965); Bob Jones University, Inc. v. City of Greenville, 243 S.C. 351, 133 S.E.2d 843 (1963); Owens v. Smith, 216 S.C. 382, 58 S.E.2d 332 (1950); James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955); Whitfield v. Seabrook, 259 S.C. 66, 190 S.E.2d 743 (1972). Additionally, South Carolina Code Section 6-29-950 criminalizes the violation of a zoning ordinance as a misdemeanor, which is clearly under the policing powers of the State. S.C. Code § 6-29-950.[3] Section 6-29-1140 also classifies the failure to properly file and record a plat or plan without approval of the local governing authority as a misdemeanor. S.C. Code § 6-29-1140. This Office has previously opined that a local government's zoning ordinance is implemented pursuant to its police powers. See, e.g., Op. S.C. Att'y Gen., 2010 WL 3505050 (S.C.A.G. August 4, 2010). This Office also previously opined regarding zoning laws in this State that:

> There is no doubt that the General Assembly has authorized municipalities to enact ordinances relative to land use, under the police powers granted to municipalities. See Sections 5-7-30 (police power generally), 5-23-10 et seq. (zoning and planning), and 6-7-710 et seq. (zoning by political subdivisions, including municipalities). ...
> Zoning ordinances have been strictly construed by the courts of this State. See, for example, such cases as Holler v. Ellisor, 259 S.C. 283, 191 S.E.2d 509 (1970); Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976); Bostic v. City of West Columbia, 268 S.C. 386, 234 S.E.2d 224 (1977). As noted in Holler v. Ellisor,
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> > Zoning enactments, regulations, and restrictions may not override state law and policy. They must be within the general limitations on the exercise of municipal powers, and they are subject to, and must be within, the limitations and restrictions prescribed by the enabling act authorizing them, or imposed by other legislation.
> > Such enactments and regulations must rest primarily on the enabling act authorizing them and they must not go beyond the power delegated

[1] Op. S.C. Att'y Gen., 2014 WL 4953188 (S.C.A.G. September 22, 2014), opined that Home Rule only applies where the State has delegated authority to local governments, not in areas where statewide uniformity is required.
[2] Please read the full statute for any exceptions or exclusions.
[3] See also S.C. Code §§ 6-29-780, 6-29-810, 6-29-870, 6-29-910 (a board of zoning appeals and a board of architectural review both enforce zoning ordinances and are both authorized to hold a private party in contempt and subject the private party to legal penalty by a circuit court judge).

> thereby. In order to be valid, they must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power, * * *.

Id., 259 S.C. at 287, quoting from 101 C.J.S. Zoning § 17. It is clear that zoning ordinances repugnant to general law will be found to be void, Bostic v. City of West Columbia, supra, though a rebuttable presumption of validity attaches to the ordinance (or amendment) as adopted.

A review of Chapter 7 of Title 6, Code of Laws of South Carolina, does not reveal a grant of power to municipalities or counties to completely restrict or freeze development in the respective political subdivisions.

Op. S.C. Att'y Gen., 1989 WL 508499, at *3–4 (S.C.A.G. Feb. 3, 1989).[4] The South Carolina Code of Laws states regarding local planning that:

> (A) Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable:
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> (1) to provide for adequate light, air, and open space;
> (2) to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;
> (3) to facilitate the creation of a convenient, attractive, and harmonious community;
> (4) to protect and preserve scenic, historic, or ecologically sensitive areas;
> (5) to regulate 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 thereto, water supply, sanitation, protection against floods, public activities, and other purposes;
> (6) to facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements. "Other public requirements" which the local governing body intends to address by a particular ordinance or action must be specified in the preamble or some other part of the ordinance or action;
> (7) to secure safety from fire, flood, and other dangers; and
> (8) to further the public welfare in any other regard specified by a local governing body.

[4] Section 6-7-710 has been repealed.

S.C. Code Ann. § 6-29-710 (emphasis added). The General Assembly granted local planning commissions specific statutory authority to "prepare and recommend for adoption to the appropriate governing authority or authorities as a means for implementing the plan and programs in its area: (a) zoning ordinances to include zoning district maps and appropriate revisions thereof, as provided in this chapter." S.C. Code § 6-29-340(B)(2)(a). For instance, the General Assembly has granted local planning commissions (which includes county and municipal planning commissions) the "power and duty" to implement a "landscaping ordinance setting forth required planting, tree preservation, and other aesthetic considerations for land and structures." S.C. Code §§ 6-29-340; 6-29-720(A)(6). South Carolina Code § 6-29-510 authorizes "incentives to encourage development of affordable housing, which incentives may include density bonuses, design flexibility, and streamlined permitted processes." S.C. Code § 6-29-510(D)(6) (emphasis added). Please note none of these "incentives" involve the taxing or other powers of the State, but those "incentives" would fall under the policing powers of the State. Id. Moreover, South Carolina Code Section 6-31-30 authorizes local governments to enter into development agreements with developers as long as the agreement is approved the same way as an ordinance and as long as the tract is at least twenty-five (25) acres. S.C. Code §§ 6-31-30; 6-31-40. The South Carolina General Assembly authorizes local planning commissions to make recommendations to the local governing authority zoning ordinances and requires a local comprehensive plan to include "a housing element which considers location, types, age, and condition of housing, owner and renter occupancy, and affordability of housing." S.C. Code § 6-29-510(D)(6). While the General Assembly authorizes the regulation of density and population in addition to authorizing incentives such as density bonuses, we believe a court will determine the General Assembly granted these powers pursuant to the policing powers of the State. As you are aware, local governments may not criminalize conduct that is legal under a statewide criminal law, as the State's criminal laws must be uniform. Martin v. Condon, 324 S.C. 183, 188, 478 S.E.2d 272, 274 (1996) (citing Connor v. Town of Hilton Head Island, 314 S.C. 251, 254, 442 S.E.2d 608, 609 (1994); City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991); S.C. Const. art. III, § 34).

Regarding inclusionary zoning, if you were to remove the name of an inclusionary zoning bill and to read only the content of such a bill, it appears what a bill often is doing is implementing one of two things (or a combination thereof) - a fee or a tax- with a waiver or discount of the fee or tax if a certain number of privately-built and owned residences are offered to certain classes of people based on their income.[5] This Office believes a court will find such implementation of penalties would be beyond the policing powers of the State. See also Holler v. Ellisor, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) ("Zoning enactments, regulations, and restrictions may not override state law and policy. They must be within the general limitations on the exercise of municipal powers, and they are subject to, and must be within, the limitations and restrictions prescribed by the enabling act authorizing them, or imposed by other legislation." (quoting 101 C.J.S. *Zoning* § 17, p. 713)); Bostic v. City of West Cola., 268 S.C. 386, 390, 234 S.E.2d 224, 226 (1977) ("Zoning Ordinance is void to the extent that it is repugnant to the general law."). Thus, it is clear that a county or municipality's zoning or other regulatory authority must yield to a state law of general applicability. This Office has previously advised that a bill titled as a fire prevention and protection but really was creating a zoning ordinance by referendum would be found unconstitutional. See Op. S.C. Att'y Gen., 2006 WL 703685 (S.C.A.G. March 6, 2006). This Office answered a similar legal question in 2012 regarding local government interference of forestry by means of zoning ordinances. See Op. S.C. Att'y Gen., 2012 WL 2364243 (S.C.A.G. June 12, 2012). In that opinion we concluded that local governments such as counties and municipalities could not use zoning to

[5] Though we are speaking generally and have not been asked to review a particular bill.

overrule the General Assembly's protection of the forestry industry. Id. Please also note our State's Supreme Court has previously ruled that zoning could not be enacted by a voter referendum. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

1. Inclusionary Zoning as a "New Tax."

Whereas an inclusionary zoning bill may authorize a local government to set a sales or rental price for the housing, offer a "fee" in-lieu of compliance, or offer a tax discount, we believe a court could interpret such action as either the equivalent of a "new tax" or a new fee being implemented. Any such implementation of a new tax would require an act by the General Assembly pursuant to South Carolina Code § 6-1-300(3). Regarding taxes, the South Carolina Constitution grants the General Assembly authority to "vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including special purpose districts, public service districts, and school districts ...." S.C. Const. art. X, § 6. As the South Carolina Supreme Court stated in Watson v. City of Orangeburg, 229 S.C. 367, 375, 93 S.E.2d 20, 24 (1956), "[t]he power of taxation being an attribute of sovereignty vested in the legislature subject to constitutional restrictions, taxes can be assessed and collected only under statutory authority." The General Assembly has specifically prohibited any new tax by a local governing body. S.C. Code § 6-1-310. A local governing body includes both counties and municipalities as prohibited from levying a new tax. Id.; S.C. Code § 6-1-300(3). A "new tax" is defined as a "a tax that the local governing body had not enacted as of December 31, 1996." S.C. Code § 6-1-300(4). "Specifically authorized by the General Assembly" is defined as an "express grant of power: (a) in a prior act; (b) by this act; or (c) in a future act." S.C. Code § 6-1-300(7). Consistent with this opinion, the General Assembly has specifically excluded federal or state income tax credits for "low income housing" in addition to excluding deed restrictions regarding low income housing in consideration of real property valuations. See S.C. Code § 12-37-225. Moreover, this Office has previously opined that State statutory and Constitutional laws preempt a local government's legislation regarding taxation. See Op. S.C. Att'y Gen., 2014 WL 4953188 (S.C.A.G. September 22, 2014). Thus, any inclusionary zoning legislation at the local government level which conflicts with State law would be preempted by the State law, including legislation regarding taxation and fees. Id.; S.C. Const. Art. X, § 1 (1895); S.C. Const. Art X, § 2 (1895); S.C. Const. Art. X, § 6 (1895); S.C. Code § 12-37-225.

2. Inclusionary Zoning as a Fee.

If an inclusionary zoning bill were to authorize a fee in-lieu of compliance with a housing requirement for low income households, this Office believes a court could determine such a new fee would be a building permit fee or other fee. This Office recently opined regarding fees that a building permit fee 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; Op. S.C. Att'y Gen., 2017 WL 1290051 (S.C.A.G. March 28, 2017). 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.[6] State law also specifies regarding fees that:

[6] Please note 2017 S.C. S.B. 364 is pending legislation at the time of this opinion which would amend Section 5-25-310. 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

> 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). 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. Ops. S.C. Att'y Gen., 2017 WL 1290051 (S.C.A.G. March 28, 2017); 2014 WL 3352176 (S.C.A.G. June 18, 2014); 1974 WL 21384 (S.C.A.G. November 13, 1974). Regarding fees in general, South Carolina law specifically limits revenue from a service or user fee to the actual costs for the service. S.C. Code Ann. § 6-1-330. While we acknowledge the General Assembly has granted zoning power to counties and municipalities pursuant to their policing powers, fees, taxes and incentives and modifications thereto would not be under the policing power of the State but must be pursuant to other statutory authority for taxes and fees. Op. S.C. Att'y Gen., 2014 WL 4953188 (S.C.A.G. September 22, 2014).

3. Inclusionary Zoning by Deed Restrictions.

Furthermore, deed restrictions are contractual in nature between private parties and are only enforceable by those to whom the restrictions are in favor of, whereas zoning regulations are implemented pursuant to local government's police power and represent an obligation to the community. Whiting v. Seavey, 159 Me. 61, 188 A.2d 276 (1963) (citing Chap. 74-1-3, The Law of Zoning and Planning (Rathkopf)). The Court stated in Whiting that:

> Contracts have no place in a zoning plan. Zoning, if accomplished at all, must be accomplished under the police power. It is a form of regulation for community welfare. Contracts between property owners or between a municipality and a property owner should not enter into the enforcement of zoning regulations. * * * The municipal authorities enforcing the zoning regulations have nothing whatever to do with private restrictions. Zoning regulations and private restrictions do not affect each other. * * * It is obvious that the zoning and the private restrictions are unrelated. One is based on the police power, the other on a contract. The municipality enforces the former by refusing a building permit or ousting a nonconforming use. A neighbor having privity of title enforces the latter by injunction or an action for damages. * * * Courts in trying a zoning case will ordinarily exclude evidence of private restrictions, and in trying a private restriction case will exclude evidence of the zoning. This is done on the grounds of immateriality.

Whiting v. Seavey, 159 Me. 61, 66–68, 188 A.2d 276, 279–80 (1963) (quoting In re Michener's Appeal, 382 Pa. 401, 115 A.2d 367, at 369-370). While we recognize government agencies have entered into deed restrictions and restrictive covenants with private parties, it is our understanding it was done so

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Code by ordinance." S.C. Code Ann. § 5-25-10). Please also note the law regarding counties are not discussed herein.

pursuant to either specific or implied statutory authority to do so.[7] This Office does not believe a court will find that deed restrictions regarding inclusionary zoning, which would be contractually granted by the landowner to a local government, would be enforceable through the policing power of the State delegated to local governments through zoning without express or implied statutory authorization.

Moreover, other jurisdictions have addressed the issue of inclusionary zoning. The Supreme Court of Virginia ruled that while an ordinance which "provid[es] low and moderate income housing serves a legitimate public purpose" it could not be accomplished through a zoning amendment based upon the policing power of the State. Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 237, 196 S.E.2d 600 (1973). The Court further concluded that an ordinance may not institute social-economic zoning which results in a "taking" of property without just compensation. Id.; see also Board of Supervisors of Fairfax County v. Lukinson, 214 Va. 239, 196 S.E.2d 603 (1973). While there are other cases concerning inclusionary zoning, this Office believes a South Carolina court will rule consistent with the holding in Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 196 S.E.2d 600 (1973).[8]

Conclusion:

As we stated above, the South Carolina General Assembly has clearly authorized local governments (which would include county and municipal planning commissions) to enact zoning ordinances to promote "public health, safety, morals, convenience, order, appearance, prosperity, and general welfare" and must be enacted in consideration of statutory purposes. S.C. Code § 6-29-710. Moreover, the governing board of a county has specific statutory authority to "provide for land use and promulgate regulations pursuant thereto subject to the provisions of Chapter 7 of Title 6." S.C. Code § 4-9-30(9). Thus, it is this Office's opinion that a court will rule that while Home Rule grants powers from the General Assembly to local governments, a local government still must have either implicit or express authority to legislate the implementation of the sovereign powers of the State especially where Statewide uniformity is required or where the General Assembly has legislated (i.e. criminal laws, taxes, fees, eminent domain, etc.). S.C. Const. art. VIII, §§ 14, 17; Williams v. Town of Hilton Head, Island, S.C., 311 S.C. 417, 429 S.E.2d 802 (1993); Op. S.C. Att'y Gen., 2014 WL 4953188 (S.C.A.G. September 22, 2014); S.C. Code § 12-37-225.

Furthermore, where the General Assembly has delegated the consideration of affordable housing to the local governments, the only incentives the statute lists as examples are "density bonuses, design flexibility, and streamlined permitted processes," all of which we believe a court will determine fall within the policing powers of the State. S.C. Code § 6-25-510(D)(6).[9] Therefore, it is this Office's opinion that a court will find that a local governing body exceeds its authority when it adopts zoning ordinances and incentives which are not based on its policing powers and that any such action would require statutory authority from the South Carolina General Assembly. See Rush v. City of Greenville,

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[7] We note that S.C. Code § 6-31-120 specifically authorizes a developer to record a development agreement with a local government. However, the South Carolina Local Government Development Agreement Act only applies to tracks of land with twenty-five (25) or more acres. S.C. Code § 6-31-40.

[8] Some examples where a court ruled inclusionary zoning was not a taking were 2910 Georgia Avenue LLC v. District of Columbia, __ F.Supp.3d __ (Feb. 14, 2017); California Building Industry Assoc. v. City of San Jose, 61 Cal.4th 435, 351 P.3d 974 (2015).

[9] The statute reads the incentives "may include" but we interpret the examples as consistent with the policing powers of the State and believe that is what the General Assembly intended. S.C. Code § 6-25-510(D)(6).

246 S.C. 268, 143 S.E.2d 527 (1965); Bob Jones University, Inc. v. City of Greenville, 243 S.C. 351, 133 S.E.2d 843 (1963); Owens v. Smith, 216 S.C. 382, 58 S.E.2d 332 (1950); James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955); Whitfield v. Seabrook, 259 S.C. 66, 190 S.E.2d 743 (1972); Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 237, 196 S.E.2d 600 (1973); S.C. Code § 6-29-950 (the violation of a zoning ordinance is a misdemeanor). Additionally, it is this Office's opinion that a court will likely rule consistently with the court in Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 237, 196 S.E.2d 600 (1973), in that while "providing low and moderate income housing serves a legitimate public purpose" it could not be accomplished through a zoning amendment based upon the policing power of the State or else would be a taking of private property. Moreover, we also believe a court will determine that the General Assembly has prohibited a county or municipality from raising taxes or implementing a fee beyond the actual cost of a service without specific statutory authority. S.C. Code § 6-1-310; § 6-1-330; Ops. S.C. Att'y Gen., 2017 WL 1290051 (S.C.A.G. March 28, 2017); 2014 WL 4953188 (S.C.A.G. September 22, 2014).

Nonetheless, if you would like for us to look at a specific bill to give our legal opinion as to its constitutionality, we will do so. Also, as you may be aware, this Office does not usually issue a written opinion regarding a pending lawsuit unless asked to do so by the court. However, this Office is only issuing a 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:

Robert D. Cook
Solicitor General