ALAN WILSON
ATTORNEY GENERAL

September 26, 2017

The Honorable Alan D. Clemmons, Member
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 29211

Dear Representative Clemmons:

Attorney General Alan Wilson has referred your letter dated July 13, 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.

Issue (as quoted from your letter)**:**

I write you to request an opinion on whether Department of Transportation projects and borrow pits for these projects are subject to local zoning ordinances. I have located a 1989 opinion (attached) that suggests that local planning commissions and county councils are not authorized to veto plans submitted by the Department of Highways and Public Transportation, now the Department of Transportation; however, it is not clear if these projects are subject to the local zoning laws. Thank you for taking the time to assist me with this matter.

Law/Analysis:

Pursuant your request and this Office's statutory duty to advise the General Assembly (S.C. Code Ann. § 1-7-90), we advise the following:

I. Affirmation of the September 7, 1989 Opinion

As you mention in your letter, this Office issued a legal opinion in 1989 to the legal counsel for the Horry County Planning Commission regarding whether the South Carolina Department of Highways and Public Transportation had to first submit its plans to the county's planning commission for approval. See Op. S.C. Att'y Gen., 1989 WL 508592 (S.C.A.G. September 7, 1989). In that opinion this Office concluded that:

> [N]o statute expressly authorizes a county planning commission or a county council to veto plans which may be submitted to it by the State of South Carolina, through its Department of Highways and Public Transportation, which may be submitted to it by the State of South Carolina, through its Department of Highways and Public Transportation, when that agency is contemplating the construction of a multi-jurisdictional highway. Section 6-7-830(a) of the Code, relative to zoning, would not be applicable in this instance. Sections 57-5-820 et seq., relative to

> municipal approval of street work to be performed therein, would not be applicable to a county. Article VIII, Section 14(6) of the State Constitution would most probably mandate that the statutes relative to construction of state highways or the exercise of eminent domain to carry out the governmental function of constructing a highway not be set aside in favor of statutes such as Section 6-7-570 of the Code. Notwithstanding these conclusions, the Department of Highways and Public Transportation certainly is not precluded from working with local planning commissions to keep the public informed and seeking local input when projects are contemplated which would be constructed in that jurisdiction. Clearly, the local planning commission is also free to provide its input and make its views known to the Highway Department.

Op. S.C. Att'y Gen., 1989 WL 508592 (S.C.A.G. September 7, 1989) (emphasis added). Thus, this Office concluded that the Department of Transportation[1] did not have to submit its plans for a "multijurisdictional highway" to a local planning commission for approval in spite of § 6-7-830 ("All agencies, departments and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State shall be subject to the zoning ordinances thereof.") and § 6-7-710 ("For the purposes of guiding development...the governing authorities of municipalities an counties may ... regulate the location, height, bulk, number of stories, and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density and distribution of the populations, and the uses of buildings, structures....").[2] Id. As a general rule, this Office recognizes a long-standing tradition that it will not overrule a prior opinion by this Office unless it is clearly erroneous or a change occurred in the applicable law. See, e.g., Ops. S.C. Atty. Gen., 2013 WL 6516330 (November 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). Thus, in the absence of a change in the law or clear error, we will maintain the same opinion. While it appears some of the code sections mentioned in the 1989 opinion have changed, this Office still stands by the conclusions reached in the opinion.

South Carolina Act No. 355 of 1994 repealed South Carolina Code § 6-7-830 and became effective in 1999. However, the General Assembly passed § 6-29-770 in 1994. See 1994 S.C. Acts No. 355 § 1. § 6-29-770 states that:

> (A) Agencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances.
> (B) A county or agency, department or subdivision of it that uses any real property, as owner or tenant, within the limits of any municipality in this State is subject to the zoning ordinances of the municipality.
> (C) A municipality or agency, department or subdivision of it, that uses any real property, as owner or tenant, within the limits of any county in this State but not within the limits of the municipality is subject to the zoning ordinances of the county.
> ...

[1] Formerly known as the Department of Highways and Public Transportation.
[2] Please note § 6-7-710 required, as mentioned in the 1989 opinion, that regulations be implemented in accordance with the comprehensive plan for the area. Op. S.C. Att'y Gen., 1989 WL 508592 (S.C.A.G. Sept. 7, 1989).

> (H) The governing body of a county or municipality whose zoning ordinances are violated by the provisions of this section may apply to a court of competent jurisdiction for injunctive and such other relief as the court may consider proper.

S.C. Code Ann. § 6-29-770 (1976 Code, as amended). Thus, despite the repeal of § 6-7-830 ("All agencies, departments and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State shall be subject to the zoning ordinances thereof."), our 1994 opinion would still be consistent today even with the passing of § 6-29-770, which is similar in form to its predecessor. Op. S.C. Att'y Gen., 1989 WL 508592 (S.C.A.G. September 7, 1989).

II. Zoning: To Police or Not to Police

State law requires that zoning ordinances "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." S.C. Code Ann. § 6-29-710. Consistent with the 1989 opinion by the Office you address in your question, this Office also opined in 1992 regarding § 6-7-830. See Op. S.C. Att'y Gen., 1992 WL 682775 (S.C.A.G. February 13, 1992). In the 1992 opinion this Office stated that:

> Generally speaking, statutes granting zoning powers to counties and municipalities are usually upheld as valid or constitutional. 101A C.J.S., § 8. The power of the legislature to adopt such enabling legislation is usually derived from a constitutional provision or the police power of the state; in South Carolina it is the latter. Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965). With respect to such an exercise of police power, the following has been stated:
>
> Broadly speaking, planning and zoning laws or regulations are based on, or constitute an application or exercise of, the police power to enact laws for the safety, health, morals, convenience, comfort, prosperity, or general welfare of the people, and they have been said to be authorized only such power. In other words, zoning laws and regulations find, or must find, their justification in some aspect of the police power asserted for the public welfare or in the public interest, or must be justified by the fact that they have some tendency to promote the public health, morals or welfare. As otherwise expressed, they must have a direct, substantial, or reasonable relation to the above enumerated subjects, or to the police power.
>
> 101 C.J.S., § 9. Thus, the proposed enactment would be required to have some direct, substantial, or reasonable relation to the police power to be valid.

Op. S.C. Att'y Gen., 1992 WL 682775 (S.C.A.G. February 13, 1992). Our State Supreme Court stated regarding zoning as a policing power in the Rush case that:

> The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is founded in the police power. The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts, and they will not be interfered with in the exercise of

> their police power to accomplish desired end unless there is plain violation of the constitutional rights of citizens. There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the city council of a municipality have acted after considering all of the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority.

Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 530–31 (1965).

In a 2017 opinion this Office opined 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) ....
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> 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:
>
> > 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 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, * * *.
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> 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.

Op. S.C. Att'y Gen., 2017 WL 1955651 (S.C.A.G. April 26, 2017) (quoting Op. S.C. Att'y Gen., 1989 WL 508499, at *3-4 (S.C.A.G. February 3, 1989)).[3]

III. The South Carolina Department of Transportation ("SCDOT")

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

According to our State law, the South Carolina Department of Transportation shall have the following duties and powers:

> (1) lay out, build, and maintain public highways and bridges, including **the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges;**
> (2) acquire such lands, road building materials, and rights-of-way as may be needed for roads and bridges by **purchase, gift, or condemnation;**
> (3) cause the state highways to be marked with appropriate directions for travel and regulate the travel and traffic along such highways, subject to the laws of the State;
> (4) number or renumber state highways;
> (5) initiate and conduct such programs and pilot projects to further research and development efforts, and to promote training of personnel in the fields of planning, construction, maintenance, and operation of the state highway system;
> (6) cooperate with the federal government in the construction of federal-aid highways in the development of improved mass transit service, facilities, equipment, techniques, and methods and in planning and research in connection therewith; and seek and receive such federal aid and assistance as may from time to time become available except for funds designated by statute to be administered by the Chief Executive Officer of the State;
> (7) instruct, assist, and cooperate with the agencies, departments, and bodies politic and legally constituted agencies of the State in street, highway, traffic, and mass transit matters when requested to do so, and, if requested by such government authorities, supervise or furnish engineering supervision for the construction and improvement of roads and bridges, provided such duties do not impair the attention to be given the highways in the state highway system;
> (8) promulgate such rules and regulations in accordance with the Administrative Procedures Act for the administration and enforcement of the powers delegated to the department by law, which shall have the full force and effect of law;
> (9) grant churches the right to cross over, under, along, and upon any public roads or highways and rights-of-way related thereto;
> (10) enter into such contracts as may be necessary for the proper discharge of its functions and duties and may sue and be sued thereon;
> (11) erect such signs as requested by a local governing body, if the department deems the signs necessary for public safety and welfare, including "Deaf Child" signs and "Crime Watch Area" signs; and
> (12) do all other things required or provided by law.

S.C. Code Ann. § 57-3-110 (1976 Code, as amended) (emphasis added). Moreover, the Department of Transportation "may add to the state highway primary system any sections or connections which, in the judgment of the department may be necessary in the proper development of the federal-aid primary

highway system or the state highway primary system." S.C. Code Ann. § 57-5-60. Furthermore, SCDOT has authority to condemn from a municipality or county any road that it deems "necessary for the interconnectivity of the state highway system." S.C. Code Ann. § 57-5-70. The law states that:

> ... If the department determines that a road in the county or municipal road system is necessary for the interconnectivity of the state highway system, and the municipality or county does not consent to the transfer, the department may initiate a condemnation action to acquire the road, or a portion of it, and the county or municipality is not required to make any further improvements to it.

S.C. Code Ann. § 57-5-70. Also, the Department of Transportation is tasked by law with the construction and maintenance of the state highway system in that:

> The state highway system shall consist of a statewide system of connecting highways that shall be constructed to the Department of Transportation's standards and that shall be maintained by the department in a safe and serviceable condition as state highways. The department may utilize funding sources including, but not limited to, the State Non-Federal Aid Highway Fund and the State Highway Fund as established by Section 57-11-20 in carrying out the provisions of this section. The complete state highway system shall mean the system of state highways as now constituted, consisting of the roads, streets, and highways designated as state highways or designated for construction or maintenance by the department pursuant to law, together with the roads, streets, and highways added to the state highway system by the Commission of the Department of Transportation, and the roads, streets, and highways that may be added to the system pursuant to law. Roads and highways in the state highway system are classified into three classifications:
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> (1) interstate system of highways;
> (2) state highway primary system; and
> (3) state highway secondary system.

S.C. Code Ann. § 57-5-10.

IV. Home Rule versus State Sovereignty

This Office also opined in 1988 regarding zoning ordinances that an essential function of government would be permitted in any area of a town regardless of a zoning classification. See Op. S.C. Att'y Gen., 1998 WL 383548 (S.C.A.G. August 29, 1988). The opinion quoted the Nebraska Supreme Court where it states:

> Other jurisdictions generally grant to municipalities exemption from zoning ordinances in varying degrees, depending upon the theory of exemption adopted in that jurisdiction. The discussion at 82 Am.Jur.2d Zoning and Planning ss 149, 150, 151, 152, and 153 (1976), indicates such exemptions may be based upon express exemption contained in the zoning ordinance, or pursuant to the constriction of the zoning regulations themselves; also by the express language in a supervening

> statute suspending the applicability of the zoning regulation, and by reason of immunity of the sovereign from suit, or where the use of the property in question was in furtherance of a governmental, rather than a proprietary, function. In s 152 at 636-37, eminent domain is discussed: "The view has gained some ascendancy that zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the power of eminent domain. The courts supporting this view have, at least tacitly, reasoned that the power of eminent domain is superior to the zoning power, and that a political subdivision with mere zoning authority should not be permitted to prevent or place limitations upon a public use of property in the furtherance of which a governmental entity has been clothed with condemnation power by the state legislature."
> This court has adopted the eminent domain theory of exemption in Seward County Board of Commissioners v. City of Seward, supra at 270, 242 N.W.2d at 852: "The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations."

Witzel v. Vill. of Brainard, 208 Neb. 231, 233–34, 302 N.W.2d 723, 725 (1981) (emphasis added). This Office recently opined on the issue of Home Rule and concluded in one opinion that:

> [T]he 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.
> ... 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, 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). 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).

Op. S.C. Att'y Gen., 2017 WL 1955651 (S.C.A.G. April 26, 2017) (emphasis added). Regarding Constitutional rights, the Court has stated that:

> It has never been denied that the Legislature may pass laws of a salutary nature under the general police power and that a like power may be delegated to municipalities, but even the legislative acts and, equally so, the municipal ordinances must not go counter to constitutional provisions. The mere statement in the preamble of an ordinance that it is passed under the police power does not give a municipality carte blanche to pass an unreasonable ordinance or one opposed to the Constitution or laws of the state. Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984.

Henderson v. City of Greenwood, 172 S.C. 16, 172 S.E. 689, 691 (1934).

Additionally, the remedy for a violation of Local Government Comprehensive Planning Enabling Act of 1994 is:

> The governing authorities of municipalities and counties may provide for the enforcement of any ordinance adopted pursuant to the provisions of this chapter by means of:
>
> 1) withholding of building permit; [and/or]
> 2) withholding of a zoning permit; [and/or]
> 3) the issuance of stop orders against any work undertaken by an entity not having a proper building or zoning permit, or both.
>
> It is unlawful to construct, reconstruct, alter, demolish, change the use of or occupy any land, building, or other structure without first obtaining the appropriate permit or permit approval. No permit may be issued or approved unless the requirements of this chapter or any ordinance adopted pursuant to it are complied with. It is unlawful for other officials to issue any permit for the use of any land, building, or structure, or the construction, conversion, demolition, enlargement, movement, or structural alteration of a building or structure without the approval of the zoning administrator. A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor. In case a building, structure or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection,

> construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land. Each day the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use continues is considered a separate offense.

S.C. Code Ann. § 6-29-950(A) (emphasis added). Please note none of the remedies mention a road or eminent domain, while the punishment is criminal. Id. Thus, we believe it would be an absurd interpretation that the Local Government Comprehensive Planning Enabling Act of 1994 would overrule all constitutional and statutory rights of the State regarding the construction and alteration of roads and highways, including those delegated to the Department of Transportation. See, e.g., S.C. Code Ann. §§ 57-5-70; 57-3-110. Certainly, the State can condemn even publicly owned land by a county or municipality even without the municipality's permission. It would be absurd to argue that the State must first get permission from the local zoning board to condemn the municipality's land. Our State Supreme Court has advised regarding conflict in the interpretation of statutes that could lead to an absurd result that:

> When two statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute. *Higgins v. State,* 307 S.C. 446, 415 S.E.2d 799 (1992); *Hair v. State,* 305 S.C. 77, 406 S.E.2d 332 (1991). However, such repeal by implication is not favored and will not be applied if there is any other reasonable construction of the statute. *State v. Webb,* 301 S.C. 66, 389 S.E.2d 664 (1990); *State v. Bodiford,* 282 S.C. 378, 318 S.E.2d 567 (1984).
> The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Gilstrap v. South Carolina Budget and Control Board,* 310 S.C. 210, 423 S.E.2d 101 (1992). This Court must avoid construing a statute so as to lead to an absurd result. *State v. Allen,* 314 S.C. 539, 431 S.E.2d 563 (1993).

Stone v. State (City of Orangeburg), 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994). This Offices believe a court will determine where § 6-29-770 conflicts with a more-specific statute such as §§ 57-5-70 and 57-3-110, the more specific statute will prevail. This Office quoted the Court of Appeals when it stated that:

> We find the Department [of Transportation] is exempt from complying with the ZLDR because the ZLDR attempts to limit the Department's exclusive authority to construct and maintain a uniform state highway system. *See* S.C. Const. art. VIII. § 14. (stating municipalities have no authority to set aside "the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity"); *Town of Hilton Head Island v. Coal. of Expressway Opponents*, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992) ("The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity."); *Brashier v. S.C. Dep't of Transp.*, 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997) ("When construing [a]rticle VIII, section 14, this [c]ourt has consistently held a subject requiring statewide uniformity is effectively withdrawn from the field of local concern."). We note that allowing municipalities to control state highway design and maintenance could lead to varied safety standards across the state and jeopardize the safety of the traveling public.

County of Charleston v. S.C. Dep't of Transportation, 803 S.E.2d 316 (S.C. Ct. App. 2017) (emphasis added). Furthermore, § 6-29-770 directly conflicts with another statute that authorizes the South Carolina Department of Transportation to relocate an outdoor advertising sign affecting a state highway project "[n]otwithstanding a county or municipal zoning plan, ordinance, or resolution, outdoor advertising signs conforming to Section 57-25-110, et seq., ... pursuant to the federal uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601, et seq.)." S.C. Code Ann. § 57-25-190(E). Moreover, compliance with § 6-29-770 could also result in conflict with regulations promulgated and approved by the U.S. Secretary of Transportation. S.C. Code Ann. § 57-25-185[4]; 23 U.S.C. § 131(o). Thus, based on all the above, it is indisputable that powers granted to local governments in Home Rule are still subject to the State and Federal government where they conflict.

V. Battle of the State's Sovereign Powers: Policing Power versus Eminent Domain Power

The Supreme Court of South Carolina has distinguished between the State's exercise of police power and the State's exercise of eminent domain. For example, in a 1970 case the South Carolina Supreme Court stated that:

> This court has previously recognized that there is a distinction between the exercise of the police power and the exercise of the power of eminent domain; that just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power. Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683; Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280. While we, apparently, have not heretofore had the precise question before us, the clear weight of authority from other jurisdictions is to the effect that the construction of a median, or other traffic control devices, is an exercise of the police power; and that where there is no other taking or damaging of the property of an abutting landowner, the landowner is not entitled to compensation for any resulting damage.
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> ...
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> While the construction of a median, with nothing more, may very well be an exercise of the police power with no resulting compensable damage to an abutting property owner, in the instant case the proposed median is only an incidental part of the overall Department plans and contemplated construction. There is no suggestion of the need for, or the contemplated construction of, a median except as an incidental part of the major relocation and construction plans of the Department. But for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes, there would have been no median and, of course, no damage to the abutting landowner. It logically follows, we think

[4] "The Department of Transportation shall promulgate regulations consistent with Section 131(o), Title 23, United States Code, or such other provisions of Title 23 as may be appropriate, to allow signs, displays, and devices on federally-aided primary routes outside of nonurban areas which (1) provide directional information about goods and services in the interest of the traveling public and (2) are such that removal would work an economic hardship in such areas. Pursuant to Section 131(o), Title 23, United States Code, the department shall submit these regulations to the United States Secretary of Transportation for approval." S.C. Code Ann. § 57-25-185.

> that any damage attributable to the planned median is an incidental result of the exercise of the power of eminent domain.

S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 365–69, 175 S.E.2d 391, 394, 396 (1970) (emphasis added). Moreover, the South Carolina Constitution states that "[t]he people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail from defect of heirs shall revert or escheat to the people." S.C. Const. art. XIV, § 3. South Carolina Jurisprudence states regarding eminent domain that:

> It has been held that eminent domain is inherent in the state; the state constitution does not create it, but only affirms the existence of the power. The power is tied to a political theory that property rights are creatures of the state:
>
> > [The] right [of eminent domain] is based upon the theory that when the state originally granted lands to individuals the grant was made under the implied condition that the state might resume dominion over the property whenever the interest of the public or the welfare of the state made it necessary. Its origin antedates constitutional provisions and legislative enactments. It is one of the unwritten laws of all civilized nations. It is justified by the fact that the right of individuals must yield to the public good, and the welfare of the state is paramount to that of the individual citizen. It is previously existing universal law that lay dormant in the state until proper legal authorities directed the occasion and the mode through which it may become operative.

18 S.C. Jur. Eminent Domain § 2 (citing Atkinson v. Carolina Power & Light Co., 239 S. C. 150, 163, 121 S. E. 2d 743, 749 (1961) (citing prior authority). Accord, Jennings v. Sawyer, 182 S. C. 427, 189 S. E. 746 (1936), overruled on other grounds by McCall v. Batson, 285 S. C. 243, 329 S. E. 2d 741 (1985)).

The South Carolina Constitution grants the General Assembly authority to "provide by law for the condemnation, through proper official channels, of all lands necessary for the proper drainage of the swamp and low lands of this State, and shall also provide for the equitable assessment of all lands so drained, for the purpose of paying the expenses of such condemnation and drainage." S.C. Const. Amendment, art. I. It also authorizes the General Assembly to "enact local or special laws concerning the laying out, opening, altering or working roads or highways, and concerning the providing for the age at which citizens shall be subject to road duty, and concerning drainage." S.C. Const. Amendment, art. II. Regarding eminent domain, the Constitution states that "[e]xcept as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property" and that "[p]rivate property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use." S.C. Const. art. I, § 13. Moreover, the Court stated in 1956 regarding eminent domain that "[t]he State may delegate to its agencies, and to municipal corporations, the right to exercise its power of eminent domain, and may by statute prescribe the manner in which, at the instance of such condemner, the 'just compensation' of the condemnee is to be ascertained." Smith v. City of Greenville, 229 S.C. 252, 260–61, 92 S.E.2d 639, 643–44 (1956) (quoting Paris Mountain Water Co. v. City of Greenville, 110 S.C. 36, 96 S.E. 545 (1918)).

As you are likely aware, condemnation proceedings are governed by the South Carolina Eminent Domain Procedure Act found in § 28-2-10 et seq. as the "exclusive procedure whereby condemnation may be taken in this State." S.C. Code Ann. § 28-2-60. One section of the Eminent Domain Procedure Act states that:

> Any condemnor may institute an action under this chapter for the acquisition of an interest in any real property necessary for any public purpose. The provisions of this act constitute the exclusive procedure whereby condemnation may be undertaken in this State.

S.C. Code Ann. § 28-2-210. Please also note that the Act sets the date of the filing of the Condemnation Notice as the date to be used for the valuation of the property. S.C. Code Ann. § 28-2-440. Counties have the authority of eminent domain for county purposes except "where the land concerned is devoted to a public use." S.C. Code Ann. § 4-9-30(4). Regarding zoning ordinances versus eminent domain, the South Carolina Supreme Court has ruled that:

> The authority of a municipality to enact a zoning ordinance restricting the use of privately owned property is founded not in eminent domain, but in the police power. Owen v. Smith, 216 S.C. 382, 58 S.E.2d 332. One is not entitled to compensation for the restriction of use, or for deprivation, of his property as the result of the proper exercise of the police power. 29 C.J.S., Eminent Domain, § 6, p. 784; Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735.

James v. City of Greenville, 227 S.C. 565, 584, 88 S.E.2d 661, 670–71 (1955). In James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955), the South Carolina Supreme Court quoted Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871, 873 (1940), stating that "[w]e agree with appellant that constitutional powers can never transcend constitutional rights, and that the police power of a municipal corporation is subject to the limitation imposed by the Constitution." James v. City of Greenville, 227 S.C. 565, 579, 88 S.E.2d 661, 668 (1955) (quoting Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871, 873 (1940) (overruled by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) regarding sovereign immunity)). Under that reasoning, zoning ordinances are imposed statutorily pursuant to the policing power of a county or municipality, and as such, cannot trump other Constitutional powers of the State.

South Carolina Code § 6-29-770 is in direct conflict with the South Carolina Department of Transportation's constitutional and statutory duties. SCDOT has the "exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges; and acquire such lands, road building materials and rights-of-way as may be needed for roads and bridges by purchase, gift, or condemnation..." and may "initiate a condemnation action to acquire the road, or a portion of it," even against a county or municipality's wishes. S.C. Code Ann. §§ 57-3-110; 57-5-70. As this Office has previously stated:

> The language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). And where two statutes are in apparent conflict, they should be construed, if reasonably possible, to give force and effect to each. Stone & Clamp, General Contractors v. Holmes, 217 S.C. 203,

> 60 S.E.2d 231 (1950). This rule applies with peculiar force to statutes passed during the same legislative session, and as to such statutes, they must not be construed as inconsistent if they can reasonably be construed otherwise. State ex rel. S.C. Tax Commission v. Brown, 154 S.C. 55, 151 S.E. 218 (1930).

Op. S.C. Atty. Gen., 1988 WL 485345 (S.C.A.G. December 1, 1988). Traditionally, the rule is the more specific statute will be construed as an exception to or a qualifier of the general statute. Wilder v. S.C. Hwy. Dept., 228 S.C. 448, 90 S.E.2d 635 (1955); Wooten ex rel. Wooten v. S.C. Dept. of Transp., 333 S.C. 464.511 S.E.2d 355, 357 (1999); Spectre. LLC v. S.C. Dept. of Health & Envir. Control, 386 S.C. 357, 688 S.E.2d 844 (S.C. 2010). This Office believes in this case a court will apply this principle to find that South Carolina Code Ann. § 57-3-110 and § 57-5-70 would govern as the more specific statutes regarding SCDOT and its powers.

Moreover, a statute regarding a police power cannot override the explicit and implicit constitution and statutory power of eminent domain of the State, as delegated to the South Carolina Department of Transportation. The original references in South Carolina case law to the policing power of the State appear to reference the "British board of police." See, e.g., Brisbane v. Lestarjette, 1 Bay 113, 1 S.C.L. 113 (1790); Lloyd v. Cannon's Ex'x, 2 Des. 232, 2 S.C.eq. 232 (1804). It would be difficult to imagine a scenario where the State has eminent domain power, yet, at the same time, can be stopped with a misdemeanor criminal violation given to a municipality under the auspices of policing power. "The limit to the exercise of the *police* power is this: The regulations must have reference to the safety, comfort or welfare of society; they must be, in fact, *police regulations*, and the fees exacted must bear some relation to the expense of issuing the license and of enforcing the regulations." State v. Hayne, 4 S.C. 403, 409 (1873).

Please also note that the South Carolina Court of Appeals decided in a case this year that the Department of Transportation is exempt from a county's zoning ordinance regarding tree removal and protection. See County of Charleston v. SC Department of Transportation, 2017 WL 2960751, __ S.E.2d ___ (July 12, 2017). The Court cited Article VIII, Section 14 of the South Carolina Constitution for the basis of its decision. The Court stated that:

> In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: ... (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.
> S.C. Const. art. VIII, § 14.
>
> The legislature determined the Department has a duty to construct and maintain the state highway system in a safe and serviceable condition. S.C. Code Ann. § 57-5-10 (Supp. 2016). In addition, the Department has exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. S.C. Code Ann. § 57-3-110(1) (2006).
> ...
> We find the Department is exempt from complying with the ZLDR because the ZLDR attempts to limit the Department's exclusive authority to construct and maintain a uniform state highway system. *See* S.C. Const. art. VIII. § 14. (stating municipalities have no authority to set aside "the structure and the administration of any governmental service or function, responsibility for which rests with the

> State government or which requires statewide uniformity"); *Town of Hilton Head Island v. Coal. of Expressway Opponents*, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992) ("The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity."); *Brashier v. S.C. Dep't of Transp.*, 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997) ("When construing [a]rticle VIII, section 14, this [c]ourt has consistently held a subject requiring statewide uniformity is effectively withdrawn from the field of local concern."). We note that allowing municipalities to control state highway design and maintenance could lead to varied safety standards across the state and jeopardize the safety of the traveling public.

County of Charleston v. S.C. Dep't of Transportation, 803 S.E.2d 316 (S.C. Ct. App. 2017) (emphasis added). Quoting from the Town of Hilton Head Island case, the Supreme Court of South Carolina stated that:

> Municipalities have no authority to set aside the structure and administration of any governmental service or function, the responsibility for which rests with the state government or which requires statewide uniformity. S.C. Const. art. VIII. § 14. The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity. S.C. Code Ann. § 57-3-10 to -30 (1976 & Supp.1991). The legislature has declared that collecting tolls is an appropriate method of financing highways and appurtenant facilities. *See* S.C. Code Ann. § 12-27-1290 (Supp.1991); *see also* S.C. Code Ann. §§ 57-5-1310 to -1490 (1991). We find that the initiated ordinance is facially defective in its entirety because it sets aside the structure and administration of the statewide highway scheme by attempting to limit the authority granted to the SCDHPT to consider the collection of tolls as a method of financing the construction of state roads. When a municipality enacts an ordinance which conflicts with state law, the ordinance is invalid. *State v. Solomon,* 245 S.C. 550, 141 S.E.2d 818 (1965). An electorate has no greater power to legislate than the municipality itself. *City & County of San Francisco v. Patterson,* 202 Cal.App.3d 95, 248 Cal.Rptr. 290 (1988). An initiated ordinance which is facially defective cannot be cured by adoption by the electorate. *State ex. rel Davies v. White,* 36 Nev. 334, 136 P. 110 (1913).

Town of Hilton Head Island v. Coal. of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992). Additionally, the Court ruled in 1992 regarding SCDOT, formerly the State Highway Department that:

> The power of eminent domain is inherent in sovereignty. It is founded on the law of necessity. Paris Mountain Water Co. v. City of Greenville, 110 S.C. 36, 96 S.E. 545. It may be delegated by the State to its agencies. Smith v. City of Greenville, 229 S.C. 252, 92 S.E.2d 639. As pointed out in the Paris Mountain Water Company case, this power is more frequently committed by the State to its accredited agencies than it is exercised directly by the State.
> The Highway Department was established 'as an administrative agency of the State Government', Section 33-21 of the 1952 Code. It derives its power from the Legislature. 'It has no inherent power. Whatever power it attempts to exercise must

> be found in some Act.' Southern Railway Co. v. S.C. State Highway Department, 237 S.C. 75, 115 S.E.2d 685, 688. Among other functions vested in the Highway Department, it is empowered to build and maintain public highways and 'acquire such lands and road building materials and rights of way as may be needed for roads and bridges by purchase, gift or condemnation.' Section 33-71. It is further provided in Section 33-122: 'The State Highway Department may acquire by gift, purchase, condemnation or otherwise any lands or other real estate that may be necessary, in the judgment of the Department, for the construction, maintenance, improvement or safe operation of highways in this State or any section of a State highway * * *.' It is stated in Section 33-127: 'The State Highway Department, for the purpose of acquiring property as authorized by § 33-122, may condemn lands, rights of way and easements of railroad, railway, telegraph or other public service corporations.'

Riley v. S.C. State Highway Dep't, 238 S.C. 19, 23–24, 118 S.E.2d 809, 810–11 (1961). We believe these cases can be summarized to stand for precedent that the Department of Transportation is not subject to local zoning laws for acts taken within the scope of its authority. Thus, we believe a court will find that § 6-29-770 does not overrule the Eminent Domain Procedure Act, the State's power of eminent domain or the "structure or administration of any governmental service or function ...[requiring] statewide uniformity." S.C. Const. art. VIII, §14(6); Op. S.C. Att'y Gen., 1989 WL 508592 (S.C.A.G. September 7, 1989).

VI. The South Carolina Department of Transportation's Powers after City of Charleston v. S.C. State Ports Authority

As you are likely aware, the South Carolina Supreme Court ruled in 1992 that the South Carolina Ports Authority had to comply with local zoning ordinances, even though it is a state agency, and that § 6-9-110 is inapplicable to zoning ordinances. See City of Charleston v. S.C. State Ports Authority, 309 S.C. 118, 420 S.E.2d 497 (1992). Quoting from the case, the court states that:

> In *Charleston County School District v. Town of McClellanville,* Order dated Feb. 5, 1991, this Court wrote "[w]e clarify any earlier intimations we may have made previously on this issue and explicitly hold that we know of no law allowing a school district or other similar agency to ignore valid, local zoning requirements and therefore they may not ignore such." Under S.C.Code Ann. § 6-7-830 (Supp.1991) and *Charleston County School District, supra,* the Ports Authority must comply with local zoning ordinances; and, if the Ports Authority refuses to comply, the City may seek injunction through the Circuit Court.

City of Charleston v. S.C. State Ports Auth., 309 S.C. 118, 120–21, 420 S.E.2d 497, 499 (1992). The Court's conclusion in City of Charleston was based on § 6-7-830 ("(a) All Agencies, departments and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State shall be subject to the zoning ordinances thereof...." However, as stated above, South Carolina Act No. 355 of 1994 repealed South Carolina Code § 6-7-830 to be effective in 1999. The General Assembly passed § 6-29-770 in 1994. See 1994 S.C. Acts No. 355 § 1. It states that "(A) Agencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in

this State are subject to the zoning ordinances...." However, South Carolina Code § 28-3-20 authorizes "[a]ll state authorities, commissions, boards, or governing bodies established by the State of South Carolina... to develop waterways of the State ... have the right of eminent domain." Additionally, it should be noted that while the Supreme Court of South Carolina chose to rule regarding all State agencies, neither the State's own lawyer, the Attorney General, nor was the Department of Transportation on the case. As far as we are aware, the State's eminent domain power was not even contemplated when making this decision for the State Ports Authority. Id. The essential question becomes does eminent domain trump a zoning ordinance. We believe a court will unequivocally answer yes, as the constitutional provisions regarding eminent domain and the building of roads (expressed and implied within the Constitution) cannot be defeated legislatively by S.C. Code § 6-29-770 (regarding the policing power of zoning ordinances) or otherwise. Furthermore, there is no discussion of the Ports Authority to use the State's power of eminent domain to defeat the zoning ordinance in City of Charleston v. S.C. State Ports Authority, nor does the Supreme Court in that case even mention eminent domain and the State's constitutional and statutory powers therein within its analysis. City of Charleston v. S.C. State Ports Auth., 309 S.C. 118, 420 S.E.2d 497 (1992).

Moreover, this Office opined in a 1978 opinion "that Act No. 653 [of 1976] provides that all state properties are subject to county or municipal zoning ordinances," and that means "compliance, but not to require that the state obtain permits or to submit to local enforcement of these zoning ordinances." Op. S.C. Att'y Gen., 1978 WL 34766 (S.C.A.G. March 14, 1978). This Office also opined in a 1978 opinion that the College of Charleston must comply with municipal building code regulations. See Op. S.C. Att'y Gen., 1978 WL 34782 (S.C.A.G. March 20, 1978). These opinions are consistent with an interpretation that state-owned buildings would be subject to local zoning ordinances pursuant to City of Charleston v. S.C. State Ports Authority, 309 S.C. 118, 420 S.E.2d 497 (1992), but does not overrule or contradict the State's power of eminent domain and its Constitutional power of building roads and highways. In a 1979 opinion this Office quoted a 1928 case to conclude "[t]hat which the State authorizes, directs, requires, licenses, or expressly permits, a municipality is powerless to prohibit." Op. S.C. Att'y Gen., 1979 WL 43617 (S.C.A.G. September 25, 1979) (quoting Law v. County Board of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928)). Our State Supreme Court stated in Law that:

> An ordinance which is repugnant either to the Constitution or general laws is ipso facto void. Clegg v. City of Spartanburg, 132 S. C. 182, 128 S. E. 36. "All ordinances or by–laws adopted by" a municipality "contrary to the laws of the land are void." State ex rel. Fanning and Lord v. Mayor of Charleston, 12 Rich. 480. "An ordinance is the product of legislative power conferred upon the municipality. One essential to its validity is that it shall not conflict with the laws of the state." 28 Cyc. 290; Southport v. Ogden, 23 Conn. 128; Adams v. Mayor of Albany, 29 Ga. 56; Burg v. Chicago, R. I. & P. R. Co., 90 Iowa, 106, 57 N. W. 60, 48 Am. St. Rep. 419; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Trotter v. Board, etc., of St. Louis Public Schools, 9 Mo. 101; Volk v. Mayor, etc., of City of Newark, 47 N. J. Law, 117; Taintor v. Mayor and Common Council of Morristown, 33 N. J. Law, 57; Nolan v. King, 97 N. Y. 572, 49 Am. Rep. 561; Weith v. Wilmington, 68 N. C. 24; Mays v. Cincinnati, 1 Ohio St. 268; Katzenberger v. Lawo, 90 Tenn. 235, 16 S. W. 611, 13 L. R. A. 185, 25 Am. St. Rep. 681; Flood v. State, 19 Tex. App. 584; In re Snell, 58 Vt. 207, 1 A. 566. A statute will override a conflicting city ordinance, whether it precedes or follows the ordinance in point of time. In re Smith, 26 Cal. App. 116, 146 P. 82. "A state law is paramount to a conflicting city

> ordinance, where they both relate to a subject with reference to which the right to legislate is concurrent." St. Louis v. Ameln, 235 Mo. 669, 139 S. W. 429. City ordinances conflicting with state Constitution or statute are void. Mayor, etc., of City of Savannah v. Hussey, 21 Ga. 80, 68 Am. Dec. 452.

Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12, 13–14 (1928).

In Capital View Fire District v. County of Richland, the Court of Appeals of South Carolina concluded, among other things, that "[t]he doctrine of parents patriae applies only to sovereigns asserting at least quasi-sovereign interests apart from the interests of particular private citizens ... [and] [p]olitical subdivisions, such as cities and counties, however, lack the element of sovereignty that is a prerequisite to maintaining a suit under the doctrine of *parens patriae*." Capital View Fire District v. County of Richland, 297 S.C. 359, 362, 377 S.E.2d 122, 124 (Ct. App. 1989) (citing Board of County Commissioners v. Denver Board of Water Commissioners, 718 P.2d 235 (Colo.1986) (counties lack the element of sovereignty that is a prerequisite for *parens patriae* standing); United States v. City of Pittsburg, California, 661 F.2d 783 (9th Cir.1981) (only the states and the federal government may sue as *parens patriae*); cf. Board of Supervisors of Fairfax County, Virginia v. United States, 408 F.Supp. 556, 566 (E.D.Va.1976) ("Fairfax County, however, is not a sovereign, but rather a political subdivision whose powers are derivative of the sovereign State of Virginia.")). Under that same theory that political subdivisions are derivatives of the State and its sovereign powers, the Department of Transportation, who is empowered with the sovereign power of eminent domain, cannot be limited by statute or otherwise to a county's policing powers delegated from the same State.

VII. Borrow Pits

The South Carolina General Assembly specifically addressed borrow pits and the Department of Transportation's ability to condemn title to real property to acquire them when it stated that:

> The department may acquire an easement or fee simple title to real property by gift, purchase, condemnation or otherwise as may be necessary, in the judgment of the department, for the construction, maintenance, improvement or safe operation of highways in this State or any section of a state highway or for the purpose of acquiring sand, rock, clay, and other material necessary for the construction of highways, including:
>
> (a) land for drainage ditches and canals that may be needed in order to correct existing land drainage facilities impaired or interfered with by the department in connection with its road improvement work; and
> (b) property, either within or without incorporated towns, to be used for borrow pits from which to secure embankment and surfacing materials.
>
> Other property required, as determined by the department, for the construction, maintenance and safe operation of state highways may be acquired by condemnation in the manner described in this article. Provided, however, after condemnation, trial and rendition of verdict by jury there shall be no abandonment by the department without the payment of expenses incurred by the landowner

> including a reasonable fee to the attorney or attorneys representing the landowner, which fee and expenses shall be set and approved by the trial judge.

S.C. Code Ann. § 57-5-320. Moreover, in 1977, an opinion by Mr. A. Camden Lewis of this Office concluded concerning borrow pits that:

> Section 58–19–30 Code of Laws of South Carolina (1976) in paragraph 5 states that the Railway Commission shall have the power of eminent domain and may proceed in the same manner as provided by law for the State Highway Department and others. The section specifically mentions Title 57 of the Code.
>
> In Title 57 at 57–5–320 the Code provides that the Highway Department may acquire an easement or fee simple title to real property for, among other specified purposes, borrow pits.
>
> The case of Haynes v. Jones, 91 Ohio St. 197, 110 NE 469, 470 (1915) has stated that a borrow pit constitutes an appropriation of the land itself for which the state must compensate the owner. The Court here implied that a borrow pit was a taking similar to an easement or right of way for which the state retains the title and compensates the owner.
>
> CONCLUSION
> It is the opinion of this Office that the Railway Commission has the requisite statutory authority to condemn land for borrow pit purposes.

Op. S.C. Att'y Gen., 1977 WL 24574 (S.C.A.G. July 22, 1977). Thus, this Office, per its usual practice, would affirm the prior opinion unless we are presented with evidence of clear error or a change in the law. See, e.g., Ops. S.C. Atty. Gen., 2013 WL 6516330 (November 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). Additionally, the South Carolina Mining Act specifically excludes the South Carolina State Ports Authority and the Department of Transportation. See S.C. Code Ann. § 48-20-280. The law states that:

> The provisions of this chapter do not apply to those activities of the:
> ....
> (2) Department of Transportation, nor of a person acting under contract with the department, on highway rights-of-way or borrow pits maintained solely in connection with the construction, repair, and maintenance of the public road systems of the State. This exemption does not become effective until the department has adopted reclamation standards applying to those activities and the standards have been approved by the council. At the discretion of the department, the provisions of this chapter may apply to mining on federal lands.

S.C. Code Ann. § 48-20-280. Thus, it has been the consistent opinion of this Office that borrow pits may be taken by implementation of the State's eminent domain power and that such pits are considered part of a project for the Department of Transportation.

VIII. Conclusion

It is for all of the above reasons we affirm the conclusion in our September 7, 1989 opinion that "no statute expressly authorizes a county planning commission or a county council to veto plans which may be submitted to it by the State of South Carolina, through its Department of Highways and Public Transportation when that agency is contemplating the construction of a multi-jurisdictional highway" and believe a court will likely find the South Carolina Department of Transportation is not subject to zoning ordinances as long as its actions are in furtherance of the State's sovereign power of eminent domain pursuant to the South Carolina Eminent Domain Procedure Act (S.C. Code Ann. § 28-2-10 et seq.) or the Department's exclusive authority to construct and maintain a uniform state highway system,[5] noting "[t]he planning, construction, and financing of state roads is a governmental service which requires statewide uniformity."[6] S.C. Code Ann. § 28-2-210; Op. S.C. Att'y Gen., 1989 WL 508592 (S.C.A.G. September 7, 1989); S.C. Const. art. VIII, Section 14(6); S.C. Code § 57-5-70.[7] Additionally, this Office believes City of Charleston v. S.C. State Ports Authority examined § 6-7-830[8] only in regards to zoning, which is a policing power, and thus, this Office believes a court would find that the case does not analyze within its ruling the State's sovereign power of eminent domain or the requirement of statewide uniformity and accordingly would not apply to the Department of Transportation in the use of the State's sovereign power of eminent domain or a service that requires statewide uniformity. City of Charleston v. S.C. State Ports Authority, 309 S.C. 118, 420 S.E.2d 497 (1992), S.C. Code § 6-29-770; S.C. Const. art. VIII, Section 14(6); S.C. Code Ann. § 57-5-70; S.C. Code Ann. § 57-3-110. Moreover, we believe a court would find that to conclude that the Department of Transportation is subject to all zoning ordinances, a policing power of the State, including trees and shrubbery ordinances would be absurd, cause inconsistencies even in the same highways and roads across various municipalities and counties, and would directly contradict our Court of Appeal's ruling in County of Charleston v. S.C. Dep't of Transportation, 803 S.E.2d 316 (S.C. Ct. App. 2017).[9] Additionally, this Office believes a court will determine that compliance with § 6-29-770 could also result in conflict with regulations promulgated and approved by the U.S. Secretary of Transportation pursuant to S.C. Code Ann. § 57-25-185 and 23 U.S.C. § 131(o).[10] Lastly, we believe a court will determine that the Department of Transportation's borrow pits are a part of the project itself and thus would also not be subject to zoning ordinances or the South Carolina Mining Act. S.C. Code Ann. § 48-20-280; Op. S.C. Att'y Gen., 1989 WL 508592 (S.C.A.G. September 7, 1989); S.C. Code Ann. § 57-5-320. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. 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. This opinion only addresses some of the sources in the subject area, but we can address other authority or additional questions in a follow-up opinion.

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[5] S.C. Code Ann. § 57-3-110.

[6] Brashier v. S.C. Dep't of Transp., 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997). See also County of Charleston v. S.C. Dep't of Transportation, 803 S.E.2d 316 (S.C. Ct. App. 2017); Town of Hilton Head Island v. Coal. of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992).

[7] Please note that Eminent Domain pursuant to the South Carolina Eminent Domain Procedure Act is limited to "real property necessary for any public purpose." S.C. Code Ann. § 28-2-210.

[8] This statute has been repealed, as mentioned above, but is similar to § 6-29-770.

[9] Unless ruled otherwise by the South Carolina Supreme Court.

[10] See City of Myrtle Beach v. S.C. Dept. of Transportation, 2004 WL 6248372 (Ct.App. January 16, 2004) (unpublished opinion).

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 Ann. § 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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