ALAN WILSON
ATTORNEY GENERAL

January 14, 2019

The Honorable Marvin Pendarvis, Esquire
S.C. House of Representatives
328-A Blatt Building
Columbia, SC 29201

Dear Representative Pendarvis:

This Office received your letter dated December 4, 2018 requesting a legal opinion. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter, noting the first question was answered in a separate legal opinion dated January 4, 2018):

"2) In 2017, Representative Wendell G[illiard] requested an opinion as to whether municipalities needed legislative authorization to engage in Inclusionary Zoning. Your office responded to his request on April 26, 2017. In that opinion, you declined to opine on whether Senate Bill 346 which was pending before the General Assembly at that time, was constitutional. I am asking for an opinion on whether S.346 or H.4162, which were introduced last session, would pass constitutional muster under South Carolina law."

Law/Analysis:

I. Advice to the General Assembly

As you are aware, the General Assembly has given the Attorney General the task of advising the General Assembly as follows:

> The Attorney General shall, when required by either branch of the General Assembly, attend during their sessions and give his aid and advice in the arrangement and preparation of legislative documents and business; and he shall give his opinion upon questions of law submitted to him by either branch thereof, or by the Governor.

S.C. Code Ann. § 1-7-90. This Office has opined before, as we again do so today, that "[r]egarding the constitutionality of a statute, this Office has consistently maintained that the law must continue to be followed until a court declares it to be unconstitutional." Op. S.C. Att'y Gen., 2017 WL 2601032, at *1–2 (S.C.A.G. June 2, 2017). This Office has previously opined that:

> [A]ny statute enacted by the General Assembly carries with it a heavy

> presumption of constitutionality. As we have often stated, any act of the General Assembly is presumed valid unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. State ex. rel. Thompson v. Seieler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its constitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townshend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute "must continue to be followed until a court declares otherwise."

Op. S.C. Att'y Gen., 2017 WL 2601032, at *1–2 (S.C.A.G. June 2, 2017) (citing 2015 WL 836507 (S.C.A.G. Feb. 18, 2015); 2006 WL 269605 (January 12, 2006); 2005 WL 1383357 (May 2, 2005); 1997 WL 419880 (June 11, 1997)). Thus, per your request, we will comment on possible constitutional defects we perceive in S.346 and H.4162.

II. Affirmation of a Prior Opinion in the Absence of Clear Error or Law to the Contrary

Your question references our April 26, 2017 opinion on Inclusionary Zoning where we concluded, among other things, as follows:

> 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.
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> 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). 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). 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).

Op. S.C. Att'y Gen., 2017 WL 1955651 (S.C.A.G. April 26, 2017) (footnotes omitted). It is the long standing policy of this Office that our opinions, including the April 26, 2017 opinion, continue to be the opinion of this Office unless there is shown to contain clear error or there has been a change in the law. Id.; see, e.g., Ops. S.C. Att'y Gen., 2017 WL 1528200 (S.C.A.G. Apr. 13, 2017); 2017 WL 1290050 (S.C.A.G. March 24, 2017); 2013 WL 6516330 (S.C.A.G. November 25, 2013); 2013 WL 3762706 (S.C.A.G. July 1, 2013); 2009 WL 959641 (S.C.A.G. March 4, 2009); 2006 WL 2849807 (S.C.A.G. September 29, 2006); 2005 WL 2250210 (S.C.A.G. September 8. 2005); 1986 WL 289899 (S.C.A.G. October 3, 1986); 1984 WL 249796 (S.C.A.G. April 9, 1984). South Carolina Code Ann. § 6-1-310 states that "[a] local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General Assembly." Thus, we continue to believe a court will determine that a municipality needs specific statutory authority to implement zoning ordinances that are separate from the policing powers of the State especially in light of the prohibition against new taxes by a local government pursuant to South Carolina Code Ann. § 6-1-310.

III. Examination of Senate Bill S. 346 & House Bill H. 4162 of Session 122 for Constitutional Defects

A. S. 346 & H. 4162 Creating a New Tax for Affordable Housing

Senate Bill S. 346 and House Bill H. 4162 both create "tax adjustments", waivers of charges or fees, and offer the option to pay a fee in lieu of providing affordable units. S.C. S. 346, 122nd Session (2017-2018); S.C. H. 4162, 122nd Session (2017-2018). As quoted above, South Carolina Code Ann. § 6-1-310 states that "[a] local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General Assembly." Thus, they both would invoke the taxing power of the State and could be classified as specific authority for a "new tax" after December 31, 1996. Id.; S.C. Code Ann. § 6-1-310. South Carolina Code Ann. §§ 6-29-340, 6-29-710 ("... zoning ordinances must be made ... to facilitate ... affordable housing ..."), 6-29-1120, and 6-29-1130 were all passed in 1994 by Act No. 355, which were passed before 1997 Act No. 138 § 7 prohibiting local governments from levying a new tax after December 31, 1996. Thus, we believe a court will conclude that § 6-1-310 would apply to South Carolina Code Ann. §§ 6-29-340, 6-29-710, 6-29-1120, and 6-29-1130. 1994 S.C. Act No. 355 § 1. Additionally, South Carolina Code Ann. § 6-31-30 regarding development agreement with developers was passed in 1993, but was not amended after the passage of Act No. 138 of 1997 prohibiting a new tax after December 31, 1996. 1993 S.C. Act No. 150 § 1; 1997 S.C. Act No. 138 § 7. However, the General Assembly amended §§ 6-29-510, 6-29-720, 6-29-1110, 6-29-1130 in 2007, after passing § 6-1-310 in 1997 ("[a] local governing body may not impose a new tax after December 31, 1996, unless specifically authorized by the General Assembly." S. C. Code Ann. § 6-1-310 (1997 S.C. Act No. 138, § 7)). The

2007 Act specifically addressed the affordability of housing, currently codified at South Carolina Code Ann. § 6-29-510, when it stated that:

> ...
> (6) a housing element which considers location, types, age, and condition of housing, owner and renter occupancy, and affordability of housing. This element includes an analysis to ascertain nonessential housing regulatory requirements, as defined in this chapter, that add to the cost of developing affordable housing but are not necessary to protect the public health, safety, or welfare and an analysis of market-based incentives that may be made available to encourage development of affordable housing, which incentives may include density bonuses, design flexibility, and streamlined permitting processes; ...

S.C. Code Ann. § 6-29-510 (1994 Act No. 355, § 1; 2007 Act No. 31, § 2, eff May 23, 2007) (emphasis added). The Act specifically addresses affordable housing and authorizes "market-based incentives" that may "include density bonuses, design flexibility, and streamlined permitting processes." Id. Again these "incentives" may be "market-based" but do not authorize taxing authority. Id.; see also S.C. Code Ann. § 6-29-720(C)(7) ("[t]he governing authority also may provide that traditional neighborhood design and affordable housing ... must be permitted within the priority investment zone."). These incentives are clearly within the policing authority of the State, which is consistent with zoning as a policing power of the State. Op. S.C. Att'y Gen., 2017 WL 1955651 (S.C.A.G. April 26, 2017). Quoting from our April 26, 2017 opinion regarding Inclusionary Zoning, we stated that:

> 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 Ann. § 6-29-950.

Op. S.C. Att'y Gen., 2017 WL 1955651 (S.C.A.G. April 26, 2017). If the General Assembly intended to grant taxing authority regarding "affordable housing" or what we understand would be included within "Inclusionary Zoning," it could have and would have made such a clarification when it was specifically addressing affordable housing and "market-based incentives." 2007 South Carolina Laws Act 31 (S.B. 266); see, e.g., S.C. Code Ann. § 31-22-50 (affordable housing as part of a Community Land Trust controls "where inconsistent with the provisions of another law" as passed in 2012). Thus, if the bills create a new tax or new taxing authority for a local government, they should clearly state that within the bill. Furthermore, effective in 2007, real property's value for ad valorem taxes cannot exceed its fair market value. S.C. Const. art. X, § 6. Thus, ad valorem taxes on real property for affordable housing (or an exemption thereof) may not exceed the fair market value of the property. Id.

B. S. 346 & H. 4162 of Session 122 Charging Fees for Affordable Housing

We explained in our April 26, 2017 opinion regarding Inclusionary Zoning and building permit fees as follows:

> 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. State law also specifies regarding fees that:
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> > 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.
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> S.C. Code Ann. § 5-25-470. 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).

Op. S.C. Att'y Gen., 2017 WL 1955651, at *6 (S.C.A.G. April 26, 2017) (footnotes omitted). Quoting from the 2014 opinion referenced above, this Office has previously concluded regarding statewide uniformity that:

> The South Carolina Constitution provides that the General Assembly is responsible for passing uniform legislation regarding the classifications, ratios and assessment of the property tax. See S.C. Const. Art. X, § 1 (1895); S.C. Const. Art X, § 2 (1895); S.C. Const. Art. X, § 6 (1895). This is expressly and exclusively regulated through South Carolina constitutional, statutory and regulatory law as the subject matter of such regulation, uniform classification of real property for purposes of assessing the property tax, is a subject matter requiring statewide uniformity. As a result, local legislation within this sphere is both expressly and impliedly preempted under state law. See S.C. Const. Art. X, §§ 1-2; S.C Const. Art. X, § 6;

> S.C. Code Ann. § 12-43-220; S.C. Code Ann. § 12-43-230; S.C. Code Ann. § 12-43-232; 27 S.C. Code Ann. Regs. § 117-1780.1-3; City of Charleston v. County of Charleston, 363 S.C. at 530, 611 S.E.2d at 922; Martin, 324 S.C. at —, 478 S.E.2d at 274.

Op. S.C. Att'y Gen., 2014 WL 4953188, at *7 (S.C.A.G. Sept. 22, 2014). Both bills authorize developers the opportunity to pay fees in lieu of affordable housing and waivers for fees. S.C. S. 346, 122nd Session (2017-2018); S.C. H. 4162, 122nd Session (2017-2018) ("shall provide developers the option to pay a 'fee in lieu", in an amount determined by the municipality or county, rather than to include affordable units within their overall development..."). Nevertheless, fees must be based on the actual cost of the service. S.C. Code Ann. § 6-1-330; Op. S.C. Att'y Gen., 2017 WL 1290051 (S.C.A.G. March 28, 2017). "The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid." S.C. Code Ann. § 6-1-330. Any other fee without a benefit may be considered a tax and should be labeled according to what it actually is. Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984) (citing Celanese Corp v. Strange, 272 S.C. 399, 252 S.E.2d 137 (1979)); S.C. Code Ann. § 6-1-310. We also caution against using a "fee" as "slush fund" for a local government. See Azar v. City of Columbia, 414 S.C. 307, 317, 778 S.E.2d 315, 320 (2015) ("[A]bsent the legislatively sanctioned process and progression that permit the expenditure of user fees as 'surplus revenues,' the law requires some nexus between the City's provision of water and sewer services and the underlying purpose of each expenditure or transfer of water and sewer funds. Simply put, the statutes do not allow these revenues to be treated as a slush fund.").

C. S. 346 & H. 4162 of Session 122 as Deed Restrictions or Restrictive Covenants

Again we quote as follows from our prior opinion regarding zoning and restrictions recorded:

> 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.
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> *7 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 pursuant to either specific or implied statutory authority to do so. 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.

Op. S.C. Att'y Gen., 2017 WL 1955651, at *6–7 (S.C.A.G. Apr. 26, 2017) (footnote omitted). Both bills authorize a county or municipality to "require recorded deed restrictions or restrictive covenants to ensure the affordable units within a development remain affordable for a period of time to be determined by the municipality or county." S.C. S. 346, 122nd Session (2017-2018); S.C. H. 4162, 122nd Session (2017-2018). However, we recognize restrictive covenants and deed restrictions are acknowledged by the South Carolina Code of Laws. See, e.g., S.C. Code Ann. § 31-23-40 ("affordability covenant incorporated within or otherwise made a part of the deed"); S.C. Code Ann. § 12-37-225 ("[f]or properties that have deed restrictions in effect that promote or provide for low income housing, the income approach must be the method of valuation to be used."). While the bills certainly authorize a county or municipality to require contractual covenants and deed restrictions, we believe a court may determine that this is not the proper way to enforce or legislate a policing power. S.C. S. 346, 122nd Session (2017-2018); S.C. H. 4162, 122nd Session (2017-2018).

Conclusion:

The April 26, 2017 opinion continues to be the opinion of this Office unless there is shown to us clear error or a change in the law. Op. S.C. Att'y Gen., 2017 WL 1955651 (S.C.A.G. April 26, 2017); see, e.g., Op. S.C. Att'y Gen., 2017 WL 1528200 (S.C.A.G. Apr. 13, 2017) ("Traditionally, this Office does not overrule a prior opinion unless there has been a change in the law or where there is clear error"). Thus, we believe a court will determine that a municipality needs specific statutory authority to implement zoning ordinances that are separate from the policing powers of the State especially in light of the prohibition against new taxes by a local government pursuant to South Carolina Code Ann. § 6-1-310. Per your request to review Senate Bill S.346 and House Bill H. 4162 of Session 122 (2017-2018) for constitutional issues, this Office believes a court will find that where the bills create new taxes or new taxing authority for a local government, they should clearly state that within the bill as to avoid conflict with South Carolina Code Ann. § 6-1-310; ad valorem taxes on real property for affordable housing (or an exemption thereof) may not exceed the fair market value of the property (S.C. Const. art. X, § 6); fees are limited to their actual costs and should not be used as a "slush fund" (Azar v. City of Columbia, 414 S.C. 307, 317, 778 S.E.2d 315, 320 (2015); S.C. Code Ann. § 6-1-330); fees without a benefit are a tax (Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984) (citing Celanese Corp v. Strange, 272 S.C. 399, 252 S.E.2d 137 (1979)); and we do not believe is it generally proper to enforce the policing power of the State or local government via deed restrictions or restrictive covenants (noting there are exceptions). Nevertheless, 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 authority in the subject area, but we can address other authority or additional questions in a follow-up 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 related issues, please let us know.

Sincerely,

Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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