



HENRY McMASTER
ATTORNEY GENERAL

March 6, 2006

Toni Connor-Rooks, City Administrator
City of Folly Beach
Post Office Box 48
Folly Beach, South Carolina 29439

Dear Ms. Connor-Rooks:

We received your letter requesting an opinion of this Office on behalf of the Folly Beach City Council concerning the legality of a petition submitted to the City of Folly Beach proposing an ordinance for public referendum. In your letter, you state:

At present height regulation for all structures in the City of Folly Beach is found under the City of Folly Beach Zoning Ordinance. The petition that is being circulated is seeking to remove height regulation from zoning and place it under Fire Prevention and Protection.

In addition, you enclosed a copy of the petition. The petition provides its purpose is to propose "the following 'Building Height Limit Ordinance' for public referendum." The ordinance itself is as follows:

I. The maximum height of all occupiable structures in the city of Folly Beach shall be fifty feet (50') above the elevation of the centerline of the nearest public street as of the date of this ordinance. This ordinance shall not be construed to relax more restrictive provisions found elsewhere in the Folly Beach Code of Ordinances. For the purpose of this ordinance, occupiable structures shall include all artificial structures except chimneys, flues, flagpoles, antennae, lighthouses, and public utility towers.

II. The purpose of the building height limit is to preempt the threat of fire, to preserve the heritage of Folly Beach, and to retain the environmental benefits of the existing tree canopy:

....

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The ordinance continues on to explain these purposes in detail.

Your concern lies in your “understanding that a Supreme Court decision I’on v. Mt. Pleasant stated that zoning could not be done by referendum, that it is a complex issue, and is left in the hands of the governing body.” Thus, you request an opinion of this Office concerning the legality of the ordinance contained in the petition.

Because only a court may find an ordinance invalid, our opinion is limited to giving guidance based on our belief of how a court may view the proposed ordinance. After our review of the petition in question and the relevant law, we believe the ordinance, although proposed as a fire prevention and protection ordinance, is a zoning ordinance. As such, we presume a court would find the submission of such an ordinance by initiative and referendum in contravention with the South Carolina Supreme Court’s holding in I’on v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E. 2d 716 (2000).

Law/Analysis

“A municipal ordinance is a legislative enactment and is presumed to be constitutional.” Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999). The unconstitutionality of an ordinance must be proven beyond a reasonable doubt. Peoples Program for Endangered Species v. Sexton, 323 S.C. 526, 532, 476 S.E.2d 477, 481 (1996).

[W]hile this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state statutes. Thus, we have recognized that an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction.

Op. S.C. Atty. Gen., January 3, 2003. Although we may not speak definitively to the validity of the proposed ordinance, we will attempt to provide guidance as how we believe a court would address this issue.

Section 5-17-10 of the South Carolina Code (2004), allowing electors of a municipality to propose ordinance, provides:

The electors of a municipality may propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes. Any initiated ordinance may be submitted to the council by a petition signed by qualified electors of the municipality equal in number to at least fifteen percent of the registered voters at the last regular municipal election and certified by the municipal election

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commission as being in accordance with the provisions of this section.

Furthermore, section 5-17-30 of the South Carolina Code (2004) provides for a referendum if the council fails to pass the proposed ordinance.

If the council shall fail to pass an ordinance proposed by initiative petition or shall pass it in a form substantially different from that set forth in the petition therefor or if the council fail to repeal an ordinance for which a petition has been presented, the adoption or repeal of the ordinance concerned shall be submitted to the electors not less than thirty days nor more than one year from the date the council takes its final vote thereon. The council may, in its discretion, and if no regular election is to be held within such period, provide for a special election.

S.C. Code Ann. § 5-17-30.

The South Carolina Supreme Court in Iron v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E. 2d 716 (2000), addressed the issue of whether a piece of property may be reclassified from Planned Development zoning to R-1 (residential) zoning by voter initiative and referendum. The Court found the provisions contained in Title 5 of the South Carolina Code, as cited above, which allow the initiative and referendum process, conflict with provisions in Title 6 of the South Carolina Code pertaining to zoning ordinances. Id. at 412, 526 S.E.2d at 719. In addition, the Court found to allow zoning by initiative and referendum potentially could “nullify zoning and land use rules developed after extensive debate among a variety of interested persons.” Id. Thus, the Court concluded “zoning provisions may not be enacted by initiative and referendum process contained in Sections 5-17-10 and -30.” Id. at 417, 526 S.E.2d at 721.

The petition in question refers to the proposed ordinance as a “Building Height Limit Ordinance” and proposes such ordinance pursuant to “Title 5 Chapter 17 of the South Carolina Code of Laws” as “an amendment to Chapter 90 of the Folly Beach Code of Ordinances.” Chapter 90 of the Folly Beach Code of Ordinances pertains to fire prevention and protection. Chapter 154 of the Folly Beach Code of Ordinances pertains to zoning. Thus, as your letter indicates, the petitioners appear to propose the ordinance as a fire prevention and protection ordinance, rather than a zoning ordinance. However, in our opinion, the proposed ordinance is a zoning ordinance, and the petitioners cannot circumvent the holding of Iron by proposing the ordinance as something other than zoning.

In an opinion of this Office, dated September 7, 1989, addressing an issue related to the jurisdiction of a local planning commission, we cited the definition of zoning as provided in American Jurisprudence. “[Z]oning is ‘the division of a municipality or other local community into districts, and the regulation of buildings and structures according to their construction and the nature

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and extent of their use, or the regulation of land according to its nature and uses.” Op. S.C. Atty. Gen., September 7, 1989. The enactment of an ordinance contained in the petition limiting the height of certain structures presumably is a “regulation of buildings and structures according to their construction,” and thus, is encompassed in the definition of zoning.

Chapter 154 of Title XV of the Folly Beach Code of Ordinances, entitled “Zoning,” contains numerous sections pertaining to height limitations for each type of zoning district and a provision for exceptions to these limitations. The existence of height limitations in the zoning chapter indicates these regulations are a part of the overall zoning plan for the City of Folly Beach. To enact additional, and possibly conflicting, height limitation under the fire protection ordinances would, in our opinion, pose a risk nullification of carefully developed zoning systems or master plans. Thus, the enactment of such an ordinance creates the same problem the Court sought to address in I'on.

In addition, your letter indicates the petitioners are seeking to remove the height regulations from the zoning regulations and place it under the fire prevention and protection regulations. We did not find an indication in the petition that the petitioners seek to remove the height restrictions from the zoning provisions of the Code of Ordinances. However, if such is the case, just as seeking to enact a zoning ordinance by initiative and referendum is prohibited by I'on, we presume seeking to remove a zoning ordinance by initiative and referendum is also prohibited under I'on. Additionally, assuming the petitioners simply wish to add a provision to the fire prevention and protection regulations, we find such action is similarly prohibited. Presently, the zoning ordinances contain height restrictions. Thus, we believe the enactment of the same type, but possibly conflicting, ordinance under a different provision of its Code of Ordinances has the effect of amending the zoning ordinances. Accordingly, we deem such action is prohibited under I'on.

We also find it pertinent to address the petitioners' purposes of the height limitations in the proposed ordinance. The petitioners cite three reasons for the ordinance, one is the Folly Beach Fire Department's lack of equipment to effectively fight fires above fifty feet, and the other two are “to preserve the heritage of Folly Beach, and to retain the environmental benefits of the existing tree canopy.” In addressing the last two purposes, preserving the heritage of Folly Beach and protecting the tree canopy are unrelated to the fire regulation and protection and in our view, are more appropriately addressed in a zoning ordinance. In addressing the first purpose, we acknowledge the direct relationship between this purpose and fire prevention and protection. However, we find such purpose comports with the purposes of zoning as well.

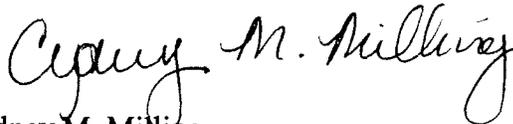
In Byrd v. City of North Augusta, 261 S.C. 591, 594, 201 S.E.2d 744, 746 (1974), our Supreme Court stated; “A zoning ordinance is legal or valid only when it is reasonable.” Courts have long held zoning ordinances imposing height restrictions as an exercise of a municipality's police powers to protect the general welfare of its citizens. 101A C.J.S. Zoning and Land Planning § 51 (2005). Section 6-29-710 of the South Carolina Code (2004) poses restrictions on the purposes for which local governments may enact zoning ordinances. Among the applicable purposes is “to secure safety from fire, flood, and other dangers.” S.C. Code Ann. § 6-29-710(A)(7). Thus, in our view, the Legislature contemplated the use of zoning, and presumably height restrictions in particular, as

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a fire protection mechanism. Accordingly, even though the petitioners proclaim fire prevention and protection as one of the purpose for the proposed ordinance, we do not find this purpose takes the ordinance out of the realm of zoning.

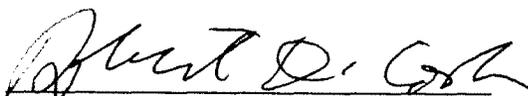
In conclusion, although the petition submitted to the City of Folly Beach for the Building Height Limit Ordinance provides for an amendment to the City's fire prevention and protection ordinances, we believe a court would consider it to be a petition for a zoning ordinance. Thus, if a court found the proposed ordinance to be a zoning ordinance, it likely would find the ordinance violates the prohibition against the enactment of zoning ordinances by initiative and referendum as set forth by the South Carolina Supreme Court in P'on. However, we note, if the Folly Beach City Council finds such action desirable, it may on its own initiative consider amending the zoning ordinances to provide for a maximum height limitation. We note, however, if the Folly Beach City Council wishes to enact such an amendment, it must comply with the requirements set forth in both Titles 5 and 6 of the South Carolina Code.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General