

June 20, 2007

The Honorable Danny Verdin  
Member, South Carolina Senate  
Post Office Box 272  
Laurens, South Carolina 29360

The Honorable Kevin L. Bryant  
Member, South Carolina Senate  
104-A North Avenue  
Anderson, South Carolina 29625

Dear Senators Verdin and Bryant:

We received your letter requesting an opinion “regarding the limits on the ability of a local municipality to use condemnation authority to acquire private property for redevelopment.” In your letter, you state:

We are aware of a local municipality that approved using its condemnation authority to acquire an unimproved, privately-owned tract that is centrally located, but without any structure or significant vegetation. The land is vacant in every sense of the word, but is desirable for economic development purposes due to its size and location. No public use of the tract is anticipated at this time by the municipality. Instead, the municipality intends to transfer the tract to a private developer for private development purposes.

Based on this information, you voice your concerns that the municipality’s condemnation of such property runs afoul of article 13(A) of the South Carolina Constitution. In addition, you interpret the constitutional amendments recently ratified by the General Assembly as eliminating “the power of local municipalities to condemn by eminent domain private property for slum and blight clearance.” You recognize article I, section 13(B) of the South Carolina Constitution allows the General Assembly to “provide certain permissible circumstances for slum and blight clearance . . .” However, you note you are “not aware of any such enabling legislation at this time.” Moreover, you are of the opinion that “[e]ven if the General Assembly had made such provision by law, we are unclear how a completely vacant lot constitutes a ‘danger to the safety and health of the community by lack of ventilation, light, and sanitary facilities, dilapidation, or deleterious land use.’”

### **Law/Analysis**

In section 5-7-50 of the South Carolina Code (2004), the General Assembly provides municipalities with the power of eminent domain. However, article I, section 13 of the South Carolina Constitution limits a municipality's ability to take private property. As you mention in your letter, this provision was recently amended in the 2006 general election and ratified by the General Assembly in 2007. As amended, article I, section 13 provides:

(A) Except 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. Private 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.

(B) For the limited purpose of the remedy of blight, the General Assembly may provide by law that private property constituting a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors may be condemned by eminent domain without the consent of the owner and put to a public use or private use if just compensation is first made for the property.

As part of the amendment to this provision, the second line of subsection (A) was added presumably to clarify that public use is required regardless of the purpose or benefit of condemning property and even if such purpose is economic development. Based on this provision, you are correct in your assessment that "municipalities cannot condemn by eminent domain any private property unless condemnation is for public use."

Although the term "public use" is not defined in the Constitution, we note several South Carolina court opinions interpreting this term with regard to condemnations. Because article I, section 13 deals with the power of eminent domain, courts generally adhered to a strict interpretation of this provision. Karesh v. City Council of City of Charleston, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978). Furthermore, as the Supreme Court noted in Georgia Department of Transportation v. Jasper County, 355 S.C. 631, 638, 586 S.E.2d 853, 856 (2003) "is well-settled that the power of eminent domain cannot be used to accomplish a project simply because it will benefit the public." Furthermore, the Court described the public use requirement as follows:

The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and

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the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it.

Id. at 638, 586 S.E.2d at 856-57 (quoting Edens v. City of Columbia, 228 S.C. 563, 573, 91 S.E.2d 280, 283 (1956)).

In that case, the Court considered whether the Jasper County could condemn land owned by the Georgia Department of Transportation in order for Jasper County to lease the land to a private corporation, which intended to construct a maritime terminal on the land. Id. The Court stated: “The involuntary taking of an individual’s property by the government is not justified unless the property is taken for public use—a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property.” Id. at 638, 586 S.E.2d at 857. Emphasizing “it is the lease arrangement in the context of a condemnation that defeats its validity,” the Court ultimately concluded a condemnation for such purposes does not meet the public use requirement as mandated by article I, section 13. Id. at 639, 586 S.E.2d at 857.

In an earlier opinion, the Supreme Court came to a similar conclusion. Karesh, 271 S.C. at 339, 247 S.E.2d at 342. The Court analyzed whether the City of Charleston could condemn property in order to lease it to a private corporation for purposes of constructing and operating a parking facility and convention center. Id. The Court considered the fact that the convention center and the parking garage would contain retail shops. Id. at 343, 247 S.E.2d at 344. Based on this fact, the Court stated: “We cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other private shopkeepers.” Id. at 343, 247 S.E.2d at 345. Accordingly, the Court determined the proposed use of the land did not meet the constitutional requirement that the condemnation serve a public use because “[t]he guarantee that the public will enjoy the use of the facilities, so necessary to the public use concept, is absent.” Id. at 343-44, 247 S.E.2d at 345.

Considering these court decisions, we gather in order to satisfy the public use requirement, the municipality must demonstrate, not that members of the public simply benefit from the condemnation of the property, but that the public will physically use condemned property. In your letter, you mentioned the municipality seeking to condemn the property in question plans to transfer the property to a private developer for private development purposes. “What constitutes a public use is ultimately a judicial question.” Karesh, 271 S.C. at 342, 247 S.E.2d at 344. Thus, this Office does not have the authority to determine whether the use proposed constitutes a valid public use. However, based on the information provided to us on the use in question, we gather a private development would provide little opportunity for the type of public use described by our courts. Based on this fact and the fact that the property is to be sold to a private developer, as well as, upon

the case law referenced above, we are doubtful as to whether use of the condemned property satisfies the public use requirement.

Prior to the 2006 amendments to the South Carolina Constitution, the Constitution contained article XIV, section 5 (1976). This provision allowed the General Assembly to give municipalities in certain counties the authority to condemn property in order to carry out slum clearance and redevelopment work in slum and blighted areas. S.C. Const. art. XIV § 5. This provision also allowed municipalities to sell or dispose of such property to private enterprise for private uses or to public bodies for public uses. *Id.* As you noted in your letter, the 2006 amendments to the Constitution repealed this provision. However, the amendments added subsection (B) to article I, section 13 of the South Carolina Constitution. This provision allows the General Assembly to adopt legislation allowing for condemnation of private property for public or private use for the limited purpose of remedying blight. However, as you suggest, this provision is more restrictive than article XIV, section 5 in that it requires the property constitute “a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of the factors . . . .” Thus, while we do not believe the Constitution completely eliminated municipalities’ ability to condemn private property for slum and blight clearance, such authority appears to be more restrictive in light of the constitutional amendments.

Subsection (B) requires the General Assembly to provide a law allowing for these types of condemnations. In your letter, you stated you are unaware of any legislation allowing municipalities to condemn private property for private or public use to remedy blight. Based on our research, we believe you are correct in that the General Assembly has not taken action to enact legislation providing municipalities with such authority since the adoption and ratification of the amendments to the Constitution. However, section 5-7-50 of the South Carolina Code (2004), enacted long before the recent amendments to the Constitution, provides:

[A]ny incorporated municipality, or any housing or redevelopment authority now existing or hereafter established to function, may undertake and carry out slum clearance and redevelopment work in areas which are predominately slum or blighted, the preparation of such areas for reuse, and the sale or other disposition of such areas to private enterprise or to public bodies for public uses and to that end the General Assembly delegates to any incorporated municipality, or such authorities, the right to exercise the power of eminent domain as to any property essential to the plan of slum clearance and redevelopment.

The General Assembly’s authority to enact this portion of section 5-7-50 presumably arose from the now repealed article XIV, section 5 of the South Carolina Constitution. Thus, we must consider the validity of this portion of the statute in light of the repeal of article XIV, section 5 and

the enactment of article I, section 13(B). Courts in many jurisdictions recognize that “a statute in force when a constitutional amendment is adopted ordinarily is not affected by it and continues in force subsequent to the adoption and effective date of the amendment, especially where the amendment is merely a reaffirmation or ratification of an existing statute, unless the amendment contains some provision which expressly abrogates pre-existing rights, or unless the new constitution or the new amendment is clearly and irreconcilably in conflict with the statute.” 16 Am. Jur. 2d Constitutional Law § 48 (citations omitted). Furthermore, the General Assembly is presumed to have knowledge of prior legislation when it ratified the Constitutional amendments. Arnold v. Association of Citadel Men, 337 S.C. 265, 273, 523 S.E.2d 757, 761 (1999) (“There is a basic presumption the General Assembly has knowledge of previous legislation when later statutes are passed on a related subject.”). However, the General Assembly took no action to repeal or amend section 5-7-50 in light of the amendments to the Constitution. Accordingly, we presume the General Assembly intended for the portion of section 5-7-50 pertaining to a municipality’s authority to condemn property for the purpose of remedying blight to remain valid and in effect.

However, as we previously noted, article I, section 13(B) imposes restrictions upon the circumstances in which a municipality may exercise its authority to condemn property for the purpose of remedying blight. This provision specifies the General Assembly may allow condemnation for this purpose if the property constitutes “a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors . . . .” This specification is not mentioned in section 5-7-50. But, because the Constitution mandates it, we read it into the requirements municipalities must consider in exercising their powers of eminent domain to remedy blight. See, State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) (construing a statute consistent with the Constitution); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 196, 525 S.E.2d 872, 883 (2000) (stating “[a] possible constitutional construction of a statute must prevail over an unconstitutional interpretation” and finding a State statute consistent with the Constitution). Therefore, while a municipality may have authority under section 5-7-50 to condemn property for slum clearance and redevelopment in areas that are slum or blighted, its exercise of this authority may be unconstitutional if the property does constitute “a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors . . . .” S.C. Const. art. I, § 13(B).

Whether or not a particular area satisfies the qualifications set forth in article I, section 13(B) is a question of fact. As we stated in numerous opinions of this Office, only a court may consider and make factual determinations. Op. S.C. Atty. Gen., March 20, 2007 (“[T]his Office does not have the jurisdiction of a court to investigate and determine facts.”). Thus, we do not opine as to whether the property you describe in your letter would meet these requirements. However, as you noted we also find it unlikely that a court would find a vacant tract of land to be “a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation,

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deleterious land use . . . .” S.C. Const. art. I, § 13(B). But, a court must make the ultimate determination on this issue.

### **Conclusion**

Article I, section 13(A) prevents governmental bodies possessing the authority to condemn property through the use of eminent domain, including municipalities, from condemning property except when the condemnation is for a public use. As determined by our courts, public use requires more than just a public benefit. Those municipalities seeking to condemn property must demonstrate the property will be possessed, occupied, and enjoyed by the public. However, according to the amendments to article I, section 13, governmental bodies may exercise their power of eminent domain for private use to remedy blight presuming the General Assembly provides for such authority by law and the property constitutes “a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use . . . .” S.C. Const. art. I, § 13(B). In the case of a municipality, although enacted prior to the constitutional amendment allowing the General Assembly to authorize the use of eminent domain powers in this instance, we believe section 5-7-50 authorizes municipalities to exercise their power of eminent domain to remedy blight. Nonetheless, the property sought to be condemned by a municipality must satisfy the requirements expressed in article I, section 13 requiring the property constitute “a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use . . . .” S.C. Const. art. I, § 13(B). Whether or not a parcel of property satisfies this requirement is a determination that must be made by a court.

Very truly yours,

Henry McMaster  
Attorney General

By: Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook  
Assistant Deputy Attorney General