



ALAN WILSON
ATTORNEY GENERAL

April 13, 2011

Kim Thomas, Chairman
Jasper County Planning Commission
Post Office Box 1659
Ridgeland, South Carolina 29936

Dear Ms. Thomas:

We understand from your letter that you desire an opinion of this Office on behalf of the Jasper County Planning Commission (the "Commission"). To help in answering your request, you provided the following background information:

Some time ago, the Jasper County Director of Planning and Building Services (Director) issued his opinion to the property owner of a parcel of land in the County that was subject to a legal non-conforming use, that the legal non-conforming status of the use of the property was soon to be lost because of a provision of our ordinance that states that if a legal non-conforming use ceases for a period of one year then the legal status of that non-conforming use is lost (unless an extension is granted by the Commission). This property was being used as a wood waste combustion incinerator. It is our understanding that DHEC has ordered the use to cease because of a violation by the owner of emission standards administered by the Agency. The Director has written a letter on December 8th, 2010 to advise the property owner's engineer that the legal non-conforming status would be lost effective January 20th, 2011 if the incinerator was not restarted prior to that date. In response, the property owner made application with the Planning Commission for an extension of the twelve month period for cessation of use which is allowable under the Zoning Ordinance of Jasper County. Soon after, the property owner filed an appeal of the decision of the Director with the

Jasper County Board of Zoning Appeal with a different opinion of what constitutes "cessation" of a nonconforming use.

The Director has now advised the Planning Commission that it cannot take up the request for an extension until the Board of Zoning Appeals issues its decision. The basis for his conclusion is Code of Laws of South Carolina § 6-29-800(C) and Jasper County Zoning Ordinance § 3-5.4 which is similar. The County Attorney concurs with this interpretation.

You state the Commission would like to address the extension immediately. Therefore, it requests an opinion as to whether or not the statute and zoning ordinance "stays consideration of the extension request pending before the Planning Commission prior to a decision of the appeal pending before the Board of Zoning Appeals."

Law/Analysis

Section 6-29-800 of the South Carolina Code (Supp. 2010) states the powers and authority given to zoning boards of appeals.

(A) The board of appeals has the following powers:

(1) to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance;

(2) to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:

(a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;

(b) these conditions do not generally apply to other property in the vicinity;

(c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and

(d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

(i) The board may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.

A local governing body by ordinance may permit or preclude the granting of a variance for a use of land, a building, or a structure that is prohibited in a given district, and if it does permit a variance, the governing body may require the affirmative vote of two-thirds of the local adjustment board members present and voting. Notwithstanding any other provision of this section, the local governing body may overrule the decision of the local board of adjustment concerning a use variance.

(ii) In granting a variance, the board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the

board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety, or general welfare;

(3) to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance; and

(4) to remand a matter to an administrative official, upon motion by a party or the board's own motion, if the board determines the record is insufficient for review. A party's motion for remand may be denied if the board determines that the record is sufficient for review. The board must set a rehearing on the remanded matter without further public notice for a time certain within sixty days unless otherwise agreed to by the parties. The board must maintain a list of persons who express an interest in being informed when the remanded matter is set for rehearing, and notice of the rehearing must be mailed to these persons prior to the rehearing.

S.C. Code Ann. § 6-29-800(A). Subsection (C) of this provision states as follows:

(C) An appeal stays all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In that case, proceedings may not be stayed other than by a restraining order which may be granted by the board or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown.

S.C. Code Ann. § 6-129-800(C).

In addition to section 6-29-800(C), you also provided us with the following language, similar to that provided in section 6-29-800(C), from Jasper County Zoning Ordinance § 3:5.4 (the "Ordinance"):

An appeal, which requests Board action stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken, certifies to the Board, after notice of appeal shall have been filed with him, that by reason of facts stated in the certificate a stay would not be stayed other than by a restraining order, which may be granted by the Board or by a court of competent jurisdiction.

To determine whether or not section 6-29-800(C) and the Ordinance permit the Commission to address the extension question, we must interpret these provision in accordance with the rules of statutory construction.

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Blackburn v. Daufuskie Island Fire Dist., 382 S.C. 626, 629, 677 S.E.2d 606, 607 (2009). In ascertaining legislative intent, “a court should not focus on any single section or provision but should consider the language of the statute as a whole.” Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). “A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)).

Government Employees Ins. Co. v. Draine, 389 S.C. 586, 592, 698 S.E.2d 866, 896 (Ct. App. 2010).

Both section 6-29-800(C) and the Ordinance state that the appeal stays all proceedings “in furtherance of the action appealed from . . .” Thus, this language and section 6-29-800 read as a whole indicate the appeal only stays the action originally addressed by the zoning official. Therefore, we must look to the decision made by the Director to determine what matters are stayed.

If we understand the facts you presented in your letter, the Director issued an opinion on the loss of the non-conforming use status due to the fact that the incinerator was not being used. The property owner then appealed the Director’s decision to the Jasper County Board of Zoning Appeal (the “Board”). In the mean time, the property owner also sought an extension from the Commission. Under these facts, the issue under consideration by the Commission is not the “action appealed from.” First, the Commission was not involved in the Director’s decision to

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terminate the property's status due to lack of use. Second, the Director did not address whether or not the property is eligible for an extension. Third, the matter before the Board is whether or not the non-conforming use ceased, not whether or not an extension may be granted.

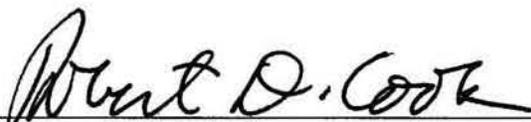
While certainly both the action pending before the Director and that pending before the Commission involve whether or not the property can retain its non-conforming use status, the decision made by the Director and appealed to the Board is different than the issue presented to the Commission. Therefore, it is our opinion that section 6-29-800(C) and the Ordinance do not preclude the property owner from seeking an extension of its non-conforming use status before the Commission.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General