ALAN WILSON
ATTORNEY GENERAL

July 14, 2025

The Honorable Jackie R. Terribile, Member
South Carolina House of Representatives
304-A Blatt Building
Columbia, SC 29201

Dear Representative Terribile:

You have asked "whether the York County legislative body - the York County Council - can pass a resolution ordering the York County Manager or Manager of the York County Planning and Development to revoke or stay permits where the Board of Zoning Appeals Reversed the county zoning administrator?"

Your question relates to the establishment of Silfab Solar in Fort Mill. We understand that two lawsuits are currently pending in circuit court regarding the application of York County's zoning provisions to the Silfab's use of the property in question. It is our longstanding policy not to issue a formal opinion where it could possibly affect the ongoing litigation. As we have previously opined, "[d]ue to the pending litigation . . . this Office is unable to undertake an opinion on any matter which may be pending before a court or administrative body for resolution. This Office has a long-standing policy of declining to undertake an opinion in such circumstances to avoid even the appearance of usurping the court's prerogative to decide matters before it." Op. S.C. Att'y Gen., 1995 WL 803724 (August 7, 1995). Thus, the pendency of these two lawsuits where the issue of the County's zoning of the property in question is pending before the Court, precludes our issuance of a formal opinion in this instance.

However, we can provide research to you regarding the issue in question. Thus, in order to provide assistance to you, we have researched your question. The following is the product of our research. We suggest that this research be shared with attorneys for York County and others for whatever assistance it may provide.

First, we note that the attorney for Silfab is on record concluding that York County Council possesses no authority to revoke the permits in question. As we understand it, York County Council agrees with this position. In a letter dated May 15, 2025, Brandon Gaskins advised the York County Attorney that "a cease-and-desist order is not an available remedy and that County Council lacks the authority to unilaterally stop Silfab's work."

Second, there is considerable case law in South Carolina regarding whether estoppel or justifiable reliance or the existence of a vested right precludes a county or municipal council from taking action to delay or revoke building permits based upon the exercise of its police power. These decisions depend, of course, largely upon the facts. Different results are reached, given the specific facts. Generally speaking, however, South Carolina case law recognizes that the exercise of the police power – to protect the health and safety of the citizenry – cannot be hampered by a business' reliance upon and receipt of permits. Moreover, the existence of a vested right to a nonconforming use depends upon whether the use was in existence at the time the zoning ordinance was adopted. Our Court has concluded that the police power is, however, usually paramount, provided it has a sound and reasonable basis. As the Court explained in Whitfield v. Seabrook, 259 S.C. 66, 73 190 S.E.2d 743, 746 (1972),

> [t]he authority of Charleston County Council to enact a zoning ordinance restricting the use of privately owned property is founded in the police power. Bob Jones University v. City of Greenville, 243 S.C. 351, 133 S.E.2d 843 and Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527. The doctrine of estoppel [reliance] cannot be applied to deprive the Charleston County Council of the due exercise of its police power.

In Whitfield, the South Carolina Supreme Court found that

> [t]he appellant knew when he received the building permit and when he, thereafter, on August 6, 1971, made a down payment of the purchase price for the lots that such were restricted to single family residential use under the existing zoning ordinance. He also knew that the only way to avoid the application of such restriction to the property was that construction of the apartment project had to be commenced by August 15, 1971. The difficulty in which appellant finds himself was one of his own deliberate choice.
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> The court found facts to justify the conclusion that the appellant did not in good faith and without notice in making expenditures and incurring obligations in connection with this project. We concur with the conclusion of the court below that the appellant has no vested right to construct the proposed apartment project on the Joye Avenue property.

259 S.C. at 72, 190 S.E.2d at 746. In short, Whitfield held that, based upon the facts, that the Charleston County Council was not hampered by the landowner's receipt of a building permit or his investments in the exercise of the police power. The landowner had no vested right, which could not be taken away in the proper exercise of the protection of health and safety.

And, in Daniels v. City of Goose Creek, 314 S.C. 494, 497-98, 431 S.E.2d 256, 258 (Ct. App. 1993), the Court of Appeals summarized the law thusly:

> [a] landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare. DeStefano v. City of Charleston, 304 S.C. 250, 403 S.E.2d 648 (1991);

> F.B.R. Investors v. County of Charleston, 303 S.C. 524, 402 S.E.2d 189 (Ct. App. 1991); Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 349 S.e.2d 891 (Ct. App. 1986). However, a contemplated use of property by a landowner on the date a zoning ordinance becomes effective precluding such use is not protected as a nonconforming use. F.B.R. Investors; Friarsgate, Inc.

Again, the Court looks to when the ordinance became effective in determining whether a nonconforming use had vested. Moreover, even then, the exercise of the police power is paramount, provided it has a sound basis in fact.

The Court in Daniels, went on to add that the Friarsgate case summarized the law as follows:

> [A] landowner has no right to insist that his property not be restricted by a zoning regulation absent a showing that he has, prior to the effective date of the regulation, established a nonconforming use. 349 S.E.2d at 893. See also Town of Vienna Council v. Kohler, 218 Va. 966, 244 S.E.2d 542 (1978), cited with approval in Friarsgate, Inc. (the zoning of land is an exercise of police power; property owners have no vested right to continuity of zoning of the general area in which they reside, and the mere purchase of land does not create a right to rely on existing zoning); F.B.R. Investors (expenditures for acquisition of the property, as well as excavations for a road and sewer, were not sufficient to establish a vested right); DeStefano (expenditures for land acquisition, the layout of a road and the installation of utilities were insufficient to establish a vested right to multifamily zoning for the main part of a parcel; there was no vested right to nonconforming uses in residual tract because no nonconforming use existed at the time the City changed its ordinance).

Daniels, 314 S.C. at 498, 431 S.E.2d at 258 Ct. App. 1993). Thus, the particular facts are controlling.

The case of Scott v. Carter, 273 S.C. 509, 257 S.E.2d 719 (1979) is particularly instructive. There, the Complaint alleged that administrative authorities of Greenville County, without just cause, delayed the issuance of a zoning certificate and building permit for an apartment complex. County authorities sought to complete a traffic survey, among other objectives. The trial judge, Judge Eppes, found "no legal basis for the intrusion by County Council into the zoning certificate and building permit process." Council had directed the County Administrator to stay the process of the traffic study. Judge Eppes concluded, however, that Petitioner "has duly applied for a zoning certificate and building permit [and] the County has had more than ample time to process same . . . [and that] the delay is to the detriment of the Petitioner without just cause and prompted largely, if not exclusively, by the unjustified intrusion of the Greenville County Council." 273 S.C. at 515-16, 257 S.E.2d at 722. Judge Eppes' ruling that the County was to cease and desist any further delay and to proceed to issue the zoning certificate and building permit was affirmed.

Judge Ness, in the Supreme Court decision, registered a strong dissent. He noted that the County Administrator, acting at the request of County Council, was directed that no permit be issued pending the outcome of the rezoning study. Further, he found that

> [t]he trial court's reliance on the fact that respondent has incurred substantial expense in preparing this project is misplaced. Such action by a property owner does not crease vested rights superior to the interest of the public in the valid exercise of the police power. Douglas v. City Council of Greenville, 92 S.C. 374, 383, 75 S.E. 687 (1912); Willis v. Town of Woodruff et al., 200 S.C. 266, 20 S.E.2d 699 (1940).

276 S.C. at 519, 257 S.E.2d at 724 (Ness, J. dissenting). Justice Ness also cited with approval Whitfield v. Seabrook, supra, discussed above. According to Justice Ness, Seabrook stood for the proposition that "any expenditures after the permit was issued were made with the knowledge of the impending zoning change and therefore could not create vested right." 273 S.C. at 520, 257 S.E.2d at 724. It is important to note that Justice Ness was of the view that the proper exercise of the county's police power was ultimately controlling.

In Lominick v. City of Aiken, 244 S.C. 32, 138 S.E.2d 305 (1964), the Court declared void Aiken Council's attempt to revoke a building permit. The Court concluded that the permit was issued in good faith by the building inspector after receiving advice from the city attorney that the permit was authorized by Aiken's zoning ordinance. According to the Court, the "City Council of Aiken based on noting more than the fact that its interpretation of the ordinance differed from the interpretation given by the City Attorney" proceeded to revoke the permit. The Court concluded that "we are aware of no authority which would give the City such power under the facts and circumstances reflected by the record." The administration of the zoning ordinance was vested in the Building Inspector subject to appeal. 244 S.C. at 41-42, 138 S.E/2d at 309.

However, in Carolina Chloride, Inc. v. Richland Co., 394 S.C. 154, 714 S.E.2d 869 (2011), the prospective purchaser was told by the Zoning Administrator that the property in question was zoned "Heavy Industrial." The owner invested substantial amounts in the property only to learn later that the property was actually zoned "Rural." Subsequently, Carolina Chloride successfully sought rezoning of the property to "Heavy Industrial." Nevertheless, the purchaser decided not to buy the Carolina Chloride property because of confusion over the zoning. Carolina Chloride sued the County, alleging various causes of action, but it "essentially alleged the County had incorrectly advised if the legal zoning classification of its property and that it had lost a potential sale due to the zoning issue." 394 S.C. at 162, 714 S.E.2d at 872.

The Supreme Court concluded that Carolina Chloride's claim of negligence and negligent misrepresentation failed. According to the Supreme Court, "[a]lthough it is certainly unfortunate that a mistake occurred in this case, Carolina Chloride had no legal right to rely solely upon the representations of County personnel and should have consulted the official record to determine the legal zoning classification of its property." 344 S.C. at 168, 714 S.E.2d at 876.

Likewise, the Court rejected Carolina Chloride's claim for inverse condemnation ("takings"). The claim for a "regulatory taking" was based upon the letter advising that the property was zoned "Rural" instead of "Heavy Industrial" thereby reversing the "Heavy Industrial" designation", thereby causing Carolina Chloride harm. The Court summarized the law of "takings" as follows:

> Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of the property that has been effectively "taken" by the governmental entity, although not through the process of eminent domain. Kiriakides v. Sch. Dist. of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009). "An inverse condemnation may result from the government's physical appropriation of private property, of it may result from government-imposed limitations on the use of private property." Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005).
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> The second method, regulatory inverse condemnation, requires proof of two elements: 1) affirmative conduct, and 2) a taking. Id. at 657, 620 S.E.2d at 80. When the claim stems from an allegation of a temporary denial of less than all economically viable use of the property, the central inquiry is whether the delay ever became unreasonable. Id. at 660, 620 S.E.2d at 81. "Until regulatory delay becomes unreasonable, there is no taking." Id.
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> Two circumstances are important:
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> (1)The economic impact on the claimant, especially the extent to which the governmental entity has interfered with the claimant's investment-backed expectations, and (2) the character of the governmental action. Id. at 659, 620 S.E.2d at 80.
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> "To prevail in such an action, a plaintiff must prove 'an affirmative aggressive, and positive act' by the government entity that caused the alleged damage to the plaintiff's property." WRB Ltd. P'ship v. County of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006). . . .

Carolina Chloride, 394 S.C. at 169-70, 714 S.E.2d at 877.

In Hampton v. Richland Co., 292 SC 500, 357 SE 2d 463 (Ct. App. 1987), an action was brought to compel reclassification of property to "commercial" after Richland County Council had rezoned it "Office and Institutional District." The Court of Appeals upheld County Council in its rezoning. The Court found the rezoning to be reasonable, concluding that "(a) classification of property should be upheld as constitutional, absent evidence that the classification is either unnecessary or confiscatory." 292 SC at 504, 357 SE 2d at 465. According to the Court, the land value was not made "worthless" by the rezoning. The land in question was "susceptible to a reasonable and lawful use under the classification imposed."

In summary, the foregoing represents our research regarding your question. While we cannot definitively respond to your inquiry because the matter is before the court, the answer will well depend upon the facts, which we cannot address in an opinion. As we have consistently stated, such factual determinations are the province of the court. As can be seen, the various cases outlined herein turn heavily upon the facts.

Nevertheless, our courts have held consistently that zoning is a legislative function and that the question of protection of the health and safety of the citizenry is a paramount concern in any zoning decision. Whether or not a landowner is entitled to the protection of a nonconforming use, or has a vested right based upon such use, will depend upon whether such nonconforming use was already in existence at the time the property in question was zoned "in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare. Daniels v. City of Goose Creek, supra. Whether or not property has been inversely condemned or taken" by a zoning action will depend upon application of the standard set forth in Carolina Chloride, supra. The burden is on the landowner to prove damages and not all damages are compensable. Carolina Chloride, supra.

Clearly, pursuant to § 4-9-660, York County Council possesses broad authority to conduct investigations and inquiries. See Op. S.C. Att'y Gen., 1978 WL 34870 (April 24, 1970). This authority enables Council to investigate processes such as this one. As the Court concluded in Dunes W. Golf Club, LLC v. Town of Mt. Pleasant, 401 S.C. 280, 296-97, 737 S.E. 2d 601, 609-10 (2013),

> "[a] legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property." Harbit, 382 S.C. at 394, 675 S.E.2d at 782. "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action." Knowles v. City of Aiken, 305 S.C. 219, 222, 407 S.E.2d 639, 642 (1991). "In order to successfully assault a city's (or county's) zoning decision, a citizen must establish that the decision was arbitrary and unreasonable."
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> Id. at 224, 407 S.E.2d at 642. "And in the context of a zoning action involving property, it must be clear that the state's (or county's) action "has no foundation in reason and is a mere arbitrary or irritational" exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 827 (4th Cir. 1995) (quoting Nectow v. Cambridge, 277 U.S. 183, 187-88, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

While we are unable to answer your specific question regarding whether Council may revoke the permits issued – for the reasons explained above – we are able to point out that such revocation, should it occur, must be based upon a finding that such is necessary to promote the health and safety of the community. We have located several cases in which permits were revoked

and in each instance, the Court found that no reasons promoting the health, welfare and safety were found or justified the revocation.

For example, in Nuckles v. Allen, 250 S.C. 123, 131, 156 S.E.2d 633, 637-38 (1967), the South Carolina Supreme Court stated:

> [t]he conditions affecting the use of the property were the same at the time the building permit was granted to Nuckles as they were when the variance was granted by the Board to the original owners. Certainly no just cause or public necessity is shown to justify the action of the Board in rescinding the variance granted to the original owners or revoking the building permit issued to Nuckles, a subsequent purchaser.

See also Palmetto Petroleum, Inc. v. City of Mullins, 251 S.C. 24, 28-29, 159 S.E.2d 854, 856 (1968) (citing Nuckols with approval, noting that in Nuckles, there was no showing of public necessity and also concluding "there is no vested property right in a mere building permit.").

In Willis v. Town of Woodruff, 200 S.C. 266, 20 S.E.2d 699 (1942), the Court noted that the governing rule is that "'When once the proper authorities grant a permit for the erection or alteration of a structure, after applicant has made contracts and incurred liabilities thereon, he acquires a kind of property right on which he is entitled to protection; and under such circumstances it is generally held that the permit cannot be revoked without cause or in the absence of public necessity for such action.'" (quoting 43 C.J. 349).

And, in Douglas v. City Council of Greenville, 92 S.C. 374, 75 S.E. 687 (1912), petitioner was granted a building permit to operate a livery stable in Greenville. Following public outcry against location of the stable, city council adopted an ordinance prohibiting such livery stables except where such business had operated on such premises immediately preceding the date of passage of the ordinance. Based upon the ordinance, the license to operate the stable was then refused. The Court concluded that "the ordinance should be sustained as a valid and reasonable exercise of the police power." According to the Court, "when the matter is viewed from the standpoint of the public health, safety, and comfort; and it is therefore subject to municipal regulation." 75 S.E. at 689. See also Petrosky v. Zoning Hearing Bd. Of Upper Chichester Twp., Delaware Co., 402 A.2d 1385, 1388 (Pa. 1979) [listing factors to determine vested rights where a municipality has issued a building permit, among these is the "insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit."]; Restaurants of Wichita, Inc. v. City of Wichita, 527 P.2d 969, 972 (Kan. 1974) ["It is the general rule that there is no contract or vested right of property in a license or permit as against the power of the state or a municipality to revoke it for cause or in the exercise of the police power to protect the public health, safety, morals or welfare."].

Thus, based upon our research, our Supreme Court, as well as other courts, have generally required that there be a close correlation with the promotion of health and safety in the revocation of permits. As we have stated above, zoning is a legislative function to be exercised by County

Council. See Hampton v. Richland County, supra ("An ordinance rezoning a particular piece of property… is legislation, pure and simple." It is a matter for Council to determine whether health and safety is adversely affected. Should Council so determine, the landowner may have remedies for inverse condemnation or other remedies at this late stage. As noted above, we cannot say how the courts will rule in this instance. Such will be decided based upon the facts and law. This Memorandum is simply our general research regarding the question posed.

Sincerely,

Robert D. Cook
Solicitor General