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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

August 2, 2005

Robert M. Stewart, Chief
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Dear Chief Stewart:

You have requested an opinion "concerning whether the State Law Enforcement Division (SLED) should issue emergency regulations to carry out its new regulatory responsibilities under S.318, which became Act 77 of 2005." By way of background, you state the following:

> Act 77 implemented procedures for municipal incorporation in South Carolina. These procedures include a requirement that areas seeking to be incorporated provide information showing they comply with minimum law enforcement service standards as promulgated in regulations issued by SLED. Currently, no regulations specify minimum law enforcement standards for municipalities.
>
> The provisions of Act 77 took effect July 1, 2005, and provided that the new Joint Legislative Committee for Municipal Incorporation could be appointed prior to that date. I am advised this was done to ensure no delay in the processing of incorporation petitions. If SLED does not promulgate emergency regulations, the new Joint Legislative Committee and the Secretary of State's Office, which have the responsibility of determining if areas proposing to incorporate meet the statutory requirements, could refuse to process petitions for incorporation until SLED's regulations are in effect which would have the ultimate effect of placing a moratorium against incorporation until such time as regulations are passed.
>
> Thereby a situation could exist somewhere in the State in unincorporated areas where, through no fault of the Sheriff, there is a lack of needed law enforcement personnel and equipment due to insufficient funding or other reasons. These areas wold not be able to incorporate in an effort to provide such services thus imperiling the safety and welfare of citizens and their property. Therefore this agency requests advice form your office as to whether this situation constitutes grounds for emergency regulations under Section 1-23-130(A) of the SC Code of Laws as amended.

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It is our opinion that a court would likely conclude that SLED's promulgation of emergency regulations in this situation would be reasonable and thus would be upheld.

Law / Analysis

Act No. 77 of 2005 is general in form and authorizes municipal incorporation throughout the State. According to the Act's title, the legislation is designed to "... Establish a Joint Legislative Committee on Municipal Incorporation to Review the Filing of an Area Seeking Incorporation and to Recommend to the Secretary of State whether the Minimum Service Standards for Municipal Incorporation Are Met ...." The Act sets forth specific findings of the General Assembly, which reflect the legislative intent in enacting the statute. Such findings may be quoted as follows:

> [W]hereas, municipal boundaries are limited only by the state's statutory law requirements; and
>
> Whereas, some municipalities already extend across county lines; and
>
> Whereas, if a publicly-owned property, such as a road or waterway, is within the exclusive territory of a single municipality, that municipality could extend its boundaries across the State, preventing areas that otherwise meet the statutory requirements for municipal incorporation from attaining local self-governance; and
>
> Whereas, the General Assembly finds and declares that publicly-owned property is for the benefit of all the citizens of the State and not to be used as the exclusive territory of any one municipal ....

The Act also seeks to define the terms "publicly-owned property" and "contiguous" for purposes of municipal incorporation, to provide for the Joint Legislative Committee on Municipal Incorporation's composition and to set forth certain requirements that a proposed municipality must meet in order to be incorporated. As indicated, the Committee's purpose is to make recommendations to the Secretary of State as to whether the requirements for incorporation have been met by a particular prospective municipality. The legislation requires that no part of the area to be incorporated may be within five miles "of an active incorporated municipality" except in certain circumstances. Among the exceptions to the five-mile limit is that the population of the area seeking incorporation exceeds seven thousand persons, a reduction from previous minimum requirements of population. The five-mile limit also does not apply to more rural counties with a population of fifty-one thousand.

Act No. 77 became law without the signature of the Governor on May 25 of 2005. Committee members could be appointed immediately, as soon as the legislation became law. However, as you indicate, the Act was made effective on July 1, 2005. Section 5-1-24 further

provides that "after June 30, 2005," citizens of the area seeking municipal incorporation shall "file for application .... ." Thus, the General Assembly mandated that the implementation of the Act was to begin no later than July 1, 2005. *See*, § 5-1-30 [terms of committee members to begin July 1, 2005].

The requirement for municipal incorporation which is pertinent here is that related to the minimum level of law enforcement which must be provided to the prospective Town. In this regard, Section 5-1-30 (A) (5) states that

> [b]efore issuing a corporate certificate to a proposed municipality, the Secretary of State shall determine based on the filing submitted and the recommendation of the Joint Legislative Committee on Municipal Incorporation whether the proposed municipality meets the following requirements:
>
> (5) the area seeking to be incorporated has filed a proposal for providing either directly or by contract a minimum level of law enforcement services as required in regulations promulgated by the State Law Enforcement Division. If law enforcement services are by contract, the proposal must indicate which governmental entity provides the service and the estimated compensation for the service;

(emphasis added). Thus, SLED is required to "promulgate" regulations pursuant to this provision to insure that public safety is adequately protected in any new municipal incorporation in South Carolina.

Administrative Procedures Act

The promulgation of agency regulations is generally governed by South Carolina's Administrative Procedures Act which is codified at § 1-23-10 et seq.. The pertinent provision relating to your question is § 1-23-110. Before promulgating or amending regulations, the APA requires the public notice of a drafting period through publication in the State Register. Section 1-23-100 (A) (1). The agency must also "give notice of a public hearing at which the agency will receive data, views, or arguments, orally and in writing, from interest persons on proposed regulations ... if requested by twenty-five persons ... or by an association having not less than twenty-five members." Section 1-23-110 (A) (3). The notice of a public hearing must include "either the text or a synopsis of the proposed regulation," Section 1-23-110 (A) (3) (c). Other requirements for promulgation are also specified in this provision. See, Leventis v. S.C. Dept. of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000).

Section 1-23-111 further governs the regulation promulgation process, including public hearings upon the proposed regulations. Legislative approval of agency regulations is provided for in §§ 1-23-120 and -125. Moreover, Section 1-23-10 (4) defines a "regulation" as an:

> agency statement of general public applicability that implements, or prescribes law or policy or practice requirements of an agency. The term includes the amendment or repeal of a prior regulation but does not include agency procedures applicable only to agency personnel ... decisions or orders in rate making, price fixing, or licensing matters ....

We note that Act No. 77's requirement that SLED issue regulations governing the "minimum level of law enforcement services" for incorporation is mandatory. Thus, the situation here may be contrasted with that in Edisto Aquaculture Corp. v. S.C. Wildlife and Marine Resources Dept., 311 S.C. 37, 426 S.E.2d 753 (1993). There, the Court concluded that the APA promulgation process was not applicable where the Wildlife Department was given the discretion whether or not to promulgate regulations concerning the Department permit requirements. Here, inasmuch as SLED is mandated by statute to promulgate regulations, we deem the APA to be applicable.

However, § 1-23-130 provides for an exception to the general rulemaking procedure, described above, by authorizing the issuance of emergency regulations. The conditions warranting emergency regulations are specified in this Section in pertinent part as follows:

> (A) If an agency finds that an imminent peril to public health, safety, or welfare requires immediate promulgation of an emergency regulation before compliance with the procedures prescribed in this article or if a natural resources related agency finds that abnormal or unusual conditions, immediate need, or the state's best interest requires immediate promulgation of emergency regulations to protect or manage natural resources, the agency may file the regulation with the Legislative Council and a statement of the situation requiring immediate promulgation. The regulation becomes effective as of the time of filing....
>
> (C) If emergency regulations are either filed or expire while the General Assembly is in session, the emergency regulations remain in effect for ninety days only and may not be refiled; but if emergency regulations are both filed and expire during a time when the General Assembly is not in session they may be refiled for an additional ninety days.
>
> (D) Emergency regulations and the agency statement as to the need for and reasonableness of immediate promulgation must be published in the next issue of the State Register following the date of filing. The summary of the final assessment report required for refiling emergency regulations pursuant to subsection (B) must also be published in the next issue of the State Register.
>
> (E) An emergency regulation promulgated pursuant to this section may be permanently promulgated by complying with the requirements of this article.

The question which you have raised is whether SLED possesses authority pursuant to § 1-23-130 to promulgate emergency regulations as the means for immediately defining the "minimum level of law enforcement services" for the purposes of incorporation of a town pursuant to Act No. 77 of 2005. We conclude that SLED possesses such authority and that a court would likely find the promulgation of such regulations in this situation to be a reasonable exercise of SLED's authority.

Agency's Finding of "Emergency"

In determining whether emergency regulations are valid in a given situation, courts have recognized that an agency may not merely recite that there is "imminent peril" to health, safety or welfare. In the view of these courts, the agency must state the reasoning underlying such findings. For example, in Wagnon v. Arkansas Health Services Agency, et al., 73 Ark. App. 269, 40 S.W.2d 849 (2001), the Court recognized that the requirements for an emergency regulation mandating a finding of "imminent peril" are not "mere technicalities." In the Court's view, the notice and comment requirements in rulemaking "assures that the public and persons being regulated are given an opportunity to participate, provide information and suggest alternatives, so that the agency is educated about the impact of a proposed rule and can make a fair and mature decision." 40 S.W.2d at 852. Moreover, according to the Court, notice and comment provides "fairness to affected parties" and also gives "affected parties an opportunity to develop evidence in the record to support their objections in the record ...." Thus, "notice enhances the quality of judicial review." Id. In the Court's opinion, the reasons for departing from the notice requirements "'should be truly emergent and persuasive to a reviewing court.'" Id., at 853. In other words,

> [t]he mere parroting of the phrase "the public health, safety, or general welfare" with no specific facts [indicates] ... the total absence of justification for such action. Without detailing the necessity of the adoption of a rule on an emergency basis the danger of abuse is obvious. ... The requirement of a submitted statement fully describing the specific reasons the "public health, safety or general welfare" are in danger is a reasonable condition precedent ....

Id. See also, Premier Games, Inc. v. State, 761 So.2d 707 (La. App. 1 Cir. 2000) [declaration of emergency in rule requiring annual video game operation fees demands more than conclusory statement, but contemplates description of facts and circumstances which justify the conclusion that imminent peril exists]; In The Matter of Law Enforcement Officers Union, 643 N.Y.S.2d 301 (1995) [statement that Department of Corrections was over capacity and needed additional beds for statutorily committed individuals was insufficient to satisfy APA requirement that agency seeking emergency rule fully articulate in writing the circumstance that give rise to the adoption on an emergency basis]: Mauzy v. Gibbs, 44 Wash. App. 625, 723 P.2d 458 (1986) [emergency regulation failed to set forth sufficient specific reasons for finding the regulation merely parroted statutory language].

On the other hand, courts have noted that the reasons for following the normal rulemaking process except in "imminent peril" circumstances "must be balanced against the public's interest in expedition and finality." Wagnon, supra at 852-853. Thus, recognizing that the agency is in the best position to know whether an "emergency" exits, courts generally give considerable deference to the agency's finding of an "emergency." For example, in Hunter v. State, 865 A.2d 381 (204), the Supreme Court of Vermont, concluding that "an agency adopting an emergency rule should strive to provide as much notice and opportunity for public input" as is practicable under the circumstances, nevertheless, recognized the substantial deference which must be given the agency by the reviewing court. The Hunter Court summarized the law in this area as follows:

> [t[hus, in the context of emergency rule making, courts have held that an agency's initial decision to adopt an emergency rule is subject to an abuse of discretion standard. See, e.g., Philadelphia Citizens in Action, 669 F.2d at 886 (upholding agency's decision that standards for emergency rulemaking are met unless arbitrary, capricious or abuse of discretion); Doe v. Wilson, 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 194 (1997) ("[A] court is not necessarily bound by an agency's determination of the existence of an emergency, but the court must accord substantial deference to this agency finding, and may only overturn such an emergency finding if it constitutes an abuse of discretion by the agency."); Berrios v. Dep't of Pub. Welfare, 411 Mass. 587, 583 N.E.2d 856, 861 (1992) (holding that Department of Public Welfare decision to adopt emergency regulations eliminating certain benefits was entitled to "every presumption in its favor and is not subject to question in judicial proceedings unless palpably wrong")(internal citation omitted); Delaware Bay Waterman's Ass'n v. New Jersey Dep't of Envtl. Prot., 304 N.J.Super. 20, 697 A.2d 957, 960 (1997) (agency decision that emergency exists for rulemaking must be upheld unless arbitrary, capricious, unreasonable or not supported by substantial credible evidence in the record as a whole). Once it has invoked its emergency rulemaking authority, an agency's subsequent decision concerning the extent of notice and hearing to be provided has similarly been held to be "entitled to considerable deference by a reviewing court." Philadelphia Citizens in Action, 669 F.2d at 886 (upholding Department of Health and Human Services' decision that comment period prior to enactment of emergency regulations was "impracticable" under federal rule); see also Petry v. Block, 737 F.2d 1193, 1201-02 (D.C.Cir.1984) (In light of "extremely limited time given by Congress" for agency to adopt regulation reducing expenditures, court cannot find that agency decision to dispense with normal comment period "was unreasonable.").

This deference given by the courts to the promulgation of emergency regulations parallels South Carolina well-established law concerning judicial review of agency fact-finding. See, Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) [Supreme Court will not overturn finding of fact by administrative agency unless there is no reasonable probability that the fact could be as related by a witness upon whose testimony the finding was based]; Floyd v. City of Charleston, 287 S.C.

474, 339 S.E.2d 166 (Ct. App. 1986) [same]; Bursey v. S.C. Dept. of Health and Environmental Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004) [under "substantial evidence" standard of review, the factual findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence]; Waters v. South Carolina Land Resources Conservation Commission, 321 S.C. 219, 467 S.E.2d. 913 (1996) ["substantial evidence" is evidence which, when considering records as a whole, would allow reasonable minds to reach conclusion that agency reached; possibility of drawing two inconsistent conclusions from evidence will not mean that agency's conclusion was unsupported by substantial evidence]. In all these cases, the agency is afforded considerable leeway by the judicial review process in making factual findings in administrative proceedings. We believe that this same leeway pertains with respect to SLED's promulgation of emergency regulations in this situation. Based upon the reasoning you have provided, we conclude SLED would not abuse its discretion by promulgating emergency regulations in this situation.

In the context of emergency rules and regulations promulgated by an administrative agency, court decisions elsewhere have upheld such regulations, in a variety of situations. Such regulations have been employed to reduce general assistance benefits, Melton v. Rowe, 42 Conn. Supp. 323, 619 A.2d 483 (1992); the establishment of fees for automobile safety inspections, Robinson v. Secretary of Administration, 12 Mass. App. Ct. 441, 425 N.E.2d 772 (1981); the approval of liquor price schedules for March and April, 1963, Pioneer Liquor Mart, Inc. v. Alcoholic Beverages Control Commission, 350 Mass. 1, 212 N.E.2d 549 (1965); the implementation of changes in AFDC mandated by the Omnibus Reconciliation Act, Phil. Citizens in Action v. Schweiker, 669 F.2d 877 (3d. Cir. 1982); the defining of "system practices and procedures" for nursing home operators, Empire State Assn. of Adult Homes, Inc. v. Novello, 193 Misc.2d 543, 751 N.Y.S.2d 694 (2002); the correction of an oversight when adopting new breath test regulations for purposes of DUI testing, States v. MacKenzie, 114 Wash. App. 687, 60 P.3d 607 (2002); the agency's conclusion that fire ant infestation in Mississippi had reached emergency proportions, Environmental Defense Fund v. Blum, 458 F. Supp. 650 (D.D.C. 1978); and the specification for form and expiration date for annual affirmative consent for automatic contributions to separate segregated fund under the Michigan Campaign Finance Act, Michigan State AFL-CIO v. Secretary of State, 230 Mich. App.1, 583 N.W.2d 701 (1998); and the establishment of land use and development criteria for ecological protection, Comm. of Concerned Citizens For Property Rights, 15 Va. App. 664, 426 S.E.2d 499 (1993).

In Blum, supra, the Court stated that it "is unwilling to find that the Administrator's finding of an 'emergency' in this case was arbitrary or irrational." 458 F. Supp. at 658. And in State v. MacKenzie, supra, the Court found that the agency's determination that the widespread inadmissibility of breath test results is "clearly a public safety justifying promulgation of temporary emergency regulations: and that such determination was "not arbitrary and capricious because the emergency was not artificial or fabricated." 60 P.3d at 613.

In Novello, supra, the Court noted that the "Legislature left the implementation and definition of systemic practices and procedures to the administrative agency." 751 N.Y.S.2d at 702. Despite the fact that the agency had not defined "practices and procedures" much earlier through the normal rulemaking process, the Court upheld the emergency regulations as being justified. The agency had found that widespread systemic deficiencies existed in some adult care facilities, and that such "widespread systemic deficiencies constitute a danger to the health and general welfare of the frail, disabled and functionally impaired residents of such facilities ...." Immediate adoption of the emergency regulation was thus necessary for the preservation of the public health, safety or welfare of the residents of adult care facilities. Id. Accordingly, the emergency regulation was upheld by the Court as valid.

In an opinion of September 3, 1992, this Office addressed the issue of the validity of emergency regulations promulgated by the South Carolina Residential Builder's Commission. Such regulations were promulgated in an effort to interpret the Commission's enabling statutes after repeated attempts to promulgate these as permanent regulations. There, we said that

> [t]here does not appear to be any provision of 1976 S.C. Code Ann.,1-23-10, et seq., or any reported judicial interpretation of those statutes, which would prohibit an agency from promulgating a series of emergency regulations in order to address an emergency situation which, in the agency's good faith determination, is ongoing. See: Shipley, S.C. Administrative Law, 2nd Edition, Chapter 4. Of course, the "life" of an emergency regulation is prescribed by the provisions of Section 1-23-130(a), Code. That is, the regulation would expire after ninety days if it is promulgated while the General Assembly is in session; and, may be renewed for an additional ninety days if it is promulgated while the General Assembly is not in session and the first ninety-day period of effectiveness expires while the General Assembly is not in regular session.
>
> Accordingly, this Office concludes that the emergency regulations promulgated by the Commission on June 25, 1992 are presently in effect. Those regulations, including provisions regarding registration fees, would remain in effect until on, or around, September 24, 1992. At that point, the regulations would be renewable for an additional ninety days. The regulations would then finally expire unless they were permanently promulgated by the Commission.
>
> The conclusion reached herein should not be taken to mean that an agency may blithely circumvent prescribed rulemaking requirements through the simple device of promulgating a succession of emergency regulations. The agency must make a finding of imminent peril to public health, safety or welfare and may be required to set forth the specific facts and reasons underlying its findings. 73 CJS, Public Administrative Law and Procedure, Section 103. Moreover, the agency must

> comply with all other requirements and procedures made applicable by law to the agency or its regulations. See: 1981 Op. S.C. Atty. Gen., No. 81-77.

See also, Op. S.C. Atty. Gen., March 11, 1991 ["Of course, whether the packaging and labeling of the particular wine product constitutes an imminent threat to public health, safety or welfare is a policy decision uniquely within the province of the (ABC) Commission."]; Op. S.C. Atty. Gen., Op. No. 77-353 (November 4, 1977) ["once an agency has determined that ... a situation (involving imminent peril to public health, safety or welfare) exists, the agency should publish (the) notice.... Furthermore, although the act does not detail what the notice should contain, it is the recommendation of this Office that the notice include a description of the subject and issues involved in the proposed regulation and immediate promulgation."]

We turn now to an analysis of act No. 77 of 2005. It is evident that the General Assembly anticipated immediate implementation of the Act. Section 3 of the Act states the following:

> SECTION 3. The provisions of this act take effect July 1, 2005; however, the appointment of the members of the Joint Legislative Committee on Municipal Incorporation may be made upon signature by the Governor.

The Act became law without the Governor's signature on May 25, 2005. As noted above, authority was given to appoint members of the Joint Legislative Committee as of that date. The law became effective a short time later on July 1, 2005.

Moreover, it is clear from the Act's legislative findings, as well as the Act itself, that the General Assembly intended to facilitate municipal incorporation, attempting to remove certain obstacles thereto. Those findings include the following statement:

> [w]hereas, if a publicly owned property, such as a road or waterway, is within the exclusive territory of a single municipality, that municipality could extend its boundaries across the State, preventing areas that otherwise meet the statutory requirements for municipal incorporation from attaining local self-governance ... .

(emphasis added). As noted above, the minimum population requirement was lowered from 15,000 to 7,000. The Act retains the former incorporation statute's encouragement of incorporation in more rural counties by providing that "[t]he five-mile limit does not apply to counties with a population according to the latest official United States Census of less than fifty-one thousand.

Moreover, Act No. 77 of 2005 deems police protection a major component of incorporation. While § 5-1-30(6) requires that a prospective municipality demonstrate that "at least three of the following services "[fire protection, solid waste collection and disposal, water supply, etc.] will be provided no later than the first day of the third fiscal year following incorporation, subsection (5) of the same section mandates that adequate "law enforcement services" be demonstrated prior to

incorporation. Before incorporation, the area seeking to be incorporated must show that it will provide "a minimum level of law enforcement services" as required by SLED regulations. Thus, the General Assembly clearly intended that law enforcement protection is a primary focus of any new incorporation.

The reason for this emphasis is fundamentally important. As our Supreme Court recognized in Tovey v. City of Chas., 237 S.C. 475, 117 S.E.2d 872, 874 (1961), a municipal corporation "'is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purpose of local government thereof.'" (emphasis added). The provision of adequate law enforcement services is typically an important reason – sometimes, the most important reason – justifying municipal incorporation. As you note in your letter, many times, Sheriff's offices in the more rural counties are underfunded and, through no fault of the Sheriff, lack sufficient manpower. This problem was illustrated for example, in Boling v. City of Jackson, 279 So.2d 590 (Miss. 1973), the Mississippi Supreme Court reversed the lower court's denial of incorporation to the town of Pearl, Mississippi. The Supreme Court found as important to its decision that incorporation was mandated was that, among other immediate needs of the 15,000 person community of Pearl, "[t]here are only three constables and three justices of the peace and six deputy sheriffs for the entire County of Rankin, the result being that there is no concentration of law officers in Pearl. On the average, it takes forty-five minutes to get someone from the Sheriff's office in Brandon." 279 So.2d at 592. In concluding that the community had met the requirements of incorporation, the Court concluded that

> [t]he record shows without dispute that there is an urgent need for the incorporation of the Pearl area into a municipality so that the community can cope with the problems of police protection, garbage, fire protection, drug control, health hazards, recreation, sanitation, street improvement and zoning .... In our opinion, the law does not require that this large and growing community, beset by so many problems that could be alleviated at least in part within a reasonable time if allowed to incorporate, should be denied the right to incorporate until some indefinite time in the future when it may be annexed by the City of Jackson.

Id. at 593. (emphasis added). The problems facing Sheriffs in rural counties in South Carolina – one of the principal ones, that of being underfunded – is recognized in a study conducted by Clemson University which states that "... law enforcement coverage over large rural areas is inadequate." See, Ransom, "Planning for Development In Rural Areas: An Assessment of the Strategic Plans for South Carolina's Enterprise and Champion Communities." found at www.strom.clemson.edu/opinion/ransom/rural.html.

It is also evident that the formation and operation of a municipal police department is an important focus of the establishment of a municipality in South Carolina. We have previously stated that "[a] primary function of a municipal corporation is the preservation of public peace and order. In keeping with such is the authority of a municipality to establish a police force." Op. S.C. Atty.

Gen., Op. No. 92-67 (November 6, 1992), citing 62 C.J.S. Municipal Corporations, § 134. Section 5-7-110 authorizes a municipality to "appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties. Such officers are bestowed "all the powers and duties conferred by law upon constables, in addition to the special duties imposed upon them by the municipality." We have previously observed that § 5-7-110 gives "'broad authority'" with respect to a municipal police department." Op. S.C. Atty. Gen., April 28, 1998. In other words, the desire for adequate law enforcement services is most often an impetus, if not the driving force, behind the formation of a municipal corporation.

In addition, courts have often rejected the argument that new legislation requiring an agency to promulgate regulations must be put "on hold" until the regular rulemaking process is complete. These decisions conclude that the agency may promulgate emergency regulations to meet the requirements of rulemaking in the enabling legislation, provided that there is a finding by the agency of an "imminent peril to public health, safety or welfare," and such finding is reasonable. See, Cressey v. Foster, 694 So.2d 1016 (La. 1997) [need to provide some method of distributing child support to families on public assistance was "emergency" thus justifying emergency regulation to fill gaps left by amendment of federal statute dictating methods of distributing child support collected by state from obligors]; Pioneer Liquor Mart, 350 Mass. 1, 212 N.E.2d 549 (1965) [ABC Commission had substantial basis for giving "emergency" approval of liquor price schedules for March and April, 1963 where Commissions stated there was no time to comply with notice and public hearing requirements and agency's "finding that the public interest required promulgation of some price schedule for March and April, 1963."]; Robinson v. Secretary of Administration, 12 Mass. App. Ct. 441, 425 N.E.2d 772, 778 (1981) ["The simple reason (for emergency regulations) was that, if the regulation did not become effective immediately, the semiannual (vehicle) inspection period would have nearly passed and the Commonwealth would have lost the additional revenue irretrievably."]; Berrios v. Dept. of Public Welfare, supra [adoption of budget containing cuts to emergency assistance program created emergency that justified Department of Public Welfare's adoption and implementation of emergency regulation which eliminated certain emergency assistance benefits designed to address needs of homeless families; "(c)onsidered in this context, the emergency regulations appear to be reasonably consistent with the changes mandated by the line item."]; Doe v. Wilson, 57 Cal.App. 4th 296, 67 Cal.Reptr. 187 (1997) [state agencies may promulgate emergency regulations to conform state law to new federal law].

And, in Massachusetts Auto Body Assn. v. Commissioner of Insurance, 409 Mass. 770, 570 N.E.2d 147 (1991), the Court rejected arguments that the Commissioner of Insurance did not have sufficient reason to issue emergency regulations. In that case, the Commissioner promulgated emergency regulations to implement direct payment and repair shop referral components of the Automobile Insurance Reform Act. The Court concluded that the Commissioner possessed a sufficient basis for finding that the Legislature intended to new law to be implemented immediately, holding that

> [i]n the instant case, the commissioner deemed the emergency regulation necessary to get the direct payment system into place quickly, so that savings could be realized and consumers could benefit from lower insurance rates in 1989, as the Legislature intended .... The act's preamble declares it to be "an emergency law," the deferred operation of which "would tend to defeat its purpose" immediately to lower the cost of automobile insurance premiums.

570 N.E.2d at 153. Moreover, in Melton v. Rowe, supra, the Connecticut Court deferred to the Commissioner of Income Maintenance and Municipality's finding that without emergency regulations, the state would lose approximately $19 million in revenue and that the general assistance program "'will be thrown into chaos'" unless "regulations are adopted to provide guidance to the municipalities administering the program." 619 A.2d at 487. The Court quoted with approval the following statement by the Court in American Federation of Government Employees v. Block, 655 F.2d 1153, 1157 (D.C. Cir. 1981):

> "[T]he absence of specific and immediate guidance from the Department in the form of new standards would have forced reliance by the Department upon antiquated guidelines, thereby creating confusion among field administrators, and caused economic harm and disruption to those northeastern processors whose inspection lines ran at various speeds. This harm would not have been limited to those within the boiler industry but would have extended in all likelihood to the consumer in the form of poultry shortages or increases in consumer prices."

Likewise, in Melton the commissioner determined that failure to adopt regulations immediately would "'delay or prohibit implementation of the changes in a timely fashion ....'" 619 A.2d at 488.

Finally, in Empire State Assn. of Adult Homes, Inc. v. Novello, supra, the Court upheld emergency regulations defining "systemic practices and procedures" with respect to nursing homes even though the agency had "failed to promulgate regulations for a period of approximately 8 years under normal" APA procedures. In Empire, the agency had become "aware of acute failures within the adult health care facility industry to remedy systemic deficiencies," as well as the failure of many facilities to comply with the governing statutes requiring the reporting of a resident's death, attempted suicides or involvement with alleged felonies. Thus, the Court looked to the "emergency" at that moment rather than the fact that there might have been or might be sufficient time to proceed under the usual rulemaking procedures. As the Court recognized,

> ... any prolonged failure by respondent to take administrative action to preserve the health, safety and welfare of patients in adult care facilities when conditions inimicable to their health, safety and welfare clearly exist does not mean that no emergency exists.

751 N.Y.S.2d at 702. Accordingly, the Court concluded:

> [t]his Court holds and determines that the respondent has clearly demonstrated: (1) that widespread systematic deficiencies exist in some adult care facilities; (2) that such widespread systematic deficiencies constitute a danger to the health and general welfare of the frail, disabled, and functionally impaired residents of such facilities; and (3) that immediate adoption of such of the new emergency regulation is necessary for the preservation of the public health, safety or general welfare of the residents of some adult care facilities. Accordingly, this Court further holds and determines that the respondent's adoption of the new emergency regulation to investigate and correct widespread systematic deficiencies in the adult care facility industry for the preservation of the public health, safety and general welfare of the frail, disabled, and functionally impaired residents of these facilities on an emergency basis does not violate the State Administrative Procedure Act.

Id.

In this instance, you have advised that "[i]f SLED does not promulgate emergency regulations, the new Joint Legislative Committee and the Secretary of State's Office, which have the responsibility of determining if areas proposing to incorporate meet the statutory requirements, could refuse to process petitions for incorporation until SLED's regulations are in effect which would have the ultimate effect of placing a moratorium against incorporation until such time as regulations are passed." Thus, you state that

> ... a situation could exist somewhere in the State in unincorporated areas where, through no fault of the Sheriff, there is a lack of needed law enforcement personnel and equipment due to insufficient funding or other reasons. These areas would not be able to incorporate in an effort to provide such services thus imperiling the safety and welfare of citizens and their property.

As noted above, such was precisely the situation in Boling v. Jackson, supra. There, the Court found that there was "... an urgent need for ... incorporation" because of inadequate law enforcement resources, among other pressing problems. While this case did not involve the promulgation of emergency regulations, it clearly demonstrates that the desire for additional law enforcement services is a strong motivation for municipal incorporation. Act No. 77 of 2005 places considerable emphasis upon insuring that a prospective municipality provides minimally adequate law enforcement services b y requiring SLED to promulgate regulations to provide for a "minimum level of law enforcement services ... ."

It also appears that your concerns regarding the need for minimum standards to be in place immediately because of the likelihood that communities will seek to incorporate in the near future under the new law is well founded. It has been reported that the community of Taylors voted against incorporation on July 19, 2005 under the former incorporation statute and that Joanna in Laurens County defeated incorporation two years ago. It is also reported that other communities in the

upstate are strongly considering incorporation under the Act No. 77. According to the Greenville News,

> [s]everal communities in the Upstate and elsewhere have been monitoring events in Taylors, including Powdersville, Boiling Springs and Joanna.
>
> Powdersville, in Anderson County just across the county line from Greenville, is a community of about 22,000 ... .

"Taylors Residents Reject Incorporation: Vote Could Be Bellwether for Similar Efforts," Greenville News, July 20, 2005.

Accordingly, we believe that a court would conclude that it is reasonable for SLED to anticipate efforts throughout the State to incorporate immediately under Act No. 77. Your conclusion that unless emergency regulations are quickly promulgated to set minimum standards for law enforcement services in the incorporated area, public safety could be imperiled, is reasonable as well. As discussed above, oftentimes the need for additional law enforcement provides the impetus for municipal incorporation. Sheriffs in the more rural counties of the State are often stretched far too thin. With population increases, communities thus often desire the formation of municipal police departments to help fill this need. If such incorporation cannot be accomplished until the rulemaking process is complete, these communities would go wanting for law enforcement services.

A statute must be construed with common sense to avoid unreasonable consequences. United States v. Rippetoe 178 F.2d 735 (4th Cir. 1949). Moreover, a sensible construction, rather than one which leads to irrational results, is always warranted. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Here, the General Assembly intended for the new municipal incorporation law to take effect immediately. Moreover, the Legislature sought to insure adequate law enforcement in areas desiring to incorporate. These dual legislative purposes – immediate implementation and the provision of a "minimum level of law enforcement services" – cannot be served without the promulgation of emergency regulations by SLED. Thus, it is our opinion that a court would likely conclude that SLED is acting reasonably and responsibly and in accordance with the intent of Act No. 77 of 2005 in moving immediately to protect public safety by promulgating emergency regulations.

Conclusion

Based upon the foregoing authority, it is our opinion that were SLED to conclude that emergency regulations are required to establish the "minimum level of law enforcement services" necessary for incorporation of a municipality pursuant to Act No. 77 of 2005, such would likely be upheld by a court. In our view, a court would conclude that, based upon the reasoning articulated

in your letter, SLED's conclusion that there exists "imminent peril" to public safety is reasonable, and that the promulgation of emergency regulations to meet such a danger is not an abuse of the agency's discretion.

The General Assembly intended that Act No. 77 of 2005 is to be implemented immediately. The Act is statewide in nature and would govern any prospective incorporation in the State. Moreover, the Act requires that SLED establish "minimum levels of law enforcement services" for any incorporation to occur.

SLED has determined that there may exist communities in South Carolina, particularly in rural areas where the Sheriff, due to no fault of his own, is unable as a result of a lack of funding and resources, to provide sufficient law enforcement services to meet the needs of the community. As set forth above, this concern is documented not only in case law, but in studies concerning development of rural areas in the State. In Boling v. City of Jackson, supra, the Court referred to such a need as "urgent."

Moreover, SLED's concern regarding urgency appears to be recognized in Act No. 77, as well. The Act requires that the prospective municipality must demonstrate that it will provide a "minimum level of law enforcement services," in compliance with SLED regulations, at the time it submits its request for incorporation. By contrast, the incorporating area must demonstrate that other services, such as fire, water and sewer services, will be provided to the incorporated area "no later than the first day of the third fiscal year following the effective date of incorporation ... ." Thus, the Legislature clearly intended SLED's law enforcement standards to be in place immediately. Indeed, by comparison, § 5-1-30(6) requires the Fire Marshal also to promulgate regulations, establishing fire services standards, but such standards do not have to be established nearly so soon as the law enforcement standards. (The incorporation area must simply show that at least three of the nine services listed will be provided no later than the first day of third fiscal year following the effective date of incorporation). Thus, when the regulatory requirements imposed upon SLED are compared to those same responsibilities of the Fire Marshal, SLED's need to promulgate emergency regulations is far more immediate. This is particularly true in light of documentation that a number of communities – particularly in the Upstate area – are contemplating immediate efforts to incorporate under Act No. 77 of 2005. SLED is thus simply acting to preserve and protect public safety.

Accordingly, we believe that a court would uphold the conclusion of SLED, based upon its expertise as the State's leading law enforcement agency, that without emergency regulations, public safety would be imperiled.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General