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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 2, 2005

The Honorable William C. Mescher
Senator, District No. 44
303 Gressette Building
Columbia, South Carolina 29202

Dear Senator Mescher:

You have sought an opinion regarding the recent legislation enacted by the General Assembly legalizing the practice of tattooing. By way of background, you state the following:

> [l]ast session the General Assembly legalized the practice of tattooing in South Carolina by means of the statute referenced above. [S.C. Code Ann. Section 44-34-10 *et seq*].
>
> Following numerous discussions with various government jurisdictions – Counties, Cities, Towns, etc-it was my understanding that they would be satisfied if language were placed in the Legislation assuring them that they could – through zoning – control the number and location of Tattoo businesses. This zoning would, obviously, require the body to pass an ordinance regarding the allowed locations.
>
> Further, it was my understanding, the governing body could not refuse to issue a business license but could require the business to be located wherever the governing body so wished within their jurisdiction.
>
> Based on that understanding the following language was placed in the Bill. "To obtain a license, the tattoo facility must ... provide the department (DHEC) a certified copy of an ordinance passed by the local governing body where the business will be located which authorizes the tattooing of persons within its jurisdiction."
>
> As the enclosed newspaper article indicates, some municipalities are essentially negating the Tattoo-legalizing action of the General Assembly by refusing to pass an Ordinance setting out the area zoned for tattoo operations. It was not the intent of the General Assembly to have local governing entities – through their planned and deliberate inaction – continue considering the practice of tattooing an illegal act in South Carolina.

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Request Letter

> I [respectfully] ... request your opinion as to whether the poorly worded "Ordinance" language allows municipalities to thumb their noses at the General Assembly by continuing to view tattooing as illegal by refusing to pass an ordinance obviously and specifically required by the referenced Statute.

Background of New Tattooing Statute

In 2004, the General Assembly enacted Act No. 250 of 2004, now codified at § 44-34-10 *et seq.* as

> AN ACT TO AMEND TITLE 44, CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 34, SO AS TO PROVIDE FOR THE STANDARDS, REQUIREMENTS, AND PROCEDURES FOR TATTOOING CERTAIN PERSONS UNDER CERTAIN CONDITIONS AT CERTAIN LOCATIONS; AND TO AMEND SECTION 16-17-700, RELATING TO TATTOOING, SO AS TO PROVIDE THAT IT IS UNLAWFUL TO TATTOO ANOTHER PERSON UNLESS THE TATTOO ARTIST MEETS THE REQUIREMENTS OF CHAPTER 34 OF TITLE 44.

Prior to the enactment of Act No. 250 of 2004, tattooing was a criminal offense in South Carolina. Our Supreme Court upheld the proscription against tattooing contained in § 16-17-700 against a First Amendment challenge in *State v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002). There, the Court concluded that the criminal prohibition of tattooing was a valid exercise of the State's police power to protect the health and safety of its citizens. In *White*, the Court found that the act of tattooing was not constitutionally protected as "speech," concluding that

> Appellant has not made any showing that the *process* of tattooing is communicative enough to automatically fall within First Amendment protection. Burning of the flag, despite its potential safety risks, was protected because it conveyed an obvious political message [*Texas v. Johnson*, 491 U.S. 397 (1989, citing *Spence v. Washington*, 418 U.S. 405 (1974)] .... Unlike burning the flag, the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections and outweigh the risk to public safety ....
>
> In [*United States v. O'Brien,* 391 U.S. 367 (1968)], the Supreme Court made it clear the First Amendment does not protect all expressive conduct, even if intended to communicate. As discussed, application of the Supreme Court's test to determine what conduct is protected requires some line drawing. Based upon the record before us, we find that the act of tattooing falls on the unprotected side of the line.

> Appellant has not met his burden to show why tattooing, an invasive procedure, with inherent health risks, would fall within the First Amendment.

348 S.C. at 538-539. Thus, the Court concluded that the "Appellant, in this case, has not met [the] threshold burden: he has not rebutted the presumption of validity by showing the statute is arbitrary and unreasonable, with no relation to a legitimate governmental interest." *Id.* at 539-540.

Following the Court's decision in *White* upholding the State's general prohibition against all tattooing in South Carolina, the General Assembly enacted Act No. 250 of 2004 which modified the prohibition by authorizing the regulation of tattooing. Pursuant thereto, tattooing is lawful if one obtains a license from the Department of Health and Environmental Control (DHEC), the agency deemed by the legislation as regulating tattooing in South Carolina. Section 44-34-20(B) sets forth the various criteria for licensure as follows:

> (B) Prior to performing tattooing procedures, a tattoo facility must apply for and obtain a license issued by the department that shall be effective for a specified time period following the date of issue as determined by the department. To obtain a license, the tattoo facility must:
>
> (1) obtain a copy of the department's standards and commit on the application to meet those standards;
>
> (2) provide the department with its business address and the address at which the licensee would perform any activity regulated by this chapter;
>
> (3) provide to the department a certificate of each tattoo artist's initial certification of successful completion of courses in bloodborne pathogens and tattoo infection control as approved by the department and a current American Red Cross First Aid Certificate and an adult Cardiopulmonary Resuscitation (CPR) Certification obtained from the American Red Cross or the American Heart Association;
>
> (4) remit to the department an initial and subsequently an annual license renewal fee of an amount set by the department;
>
> (5) *provide to the department a certified copy of an ordinance passed by the local governing body where the business will be located which authorizes the tattooing of persons within its jurisdiction*;
>
> (6) be in substantial compliance with department standards as determined by an initial license inspection conducted by the department. (emphasis added).

The Act also requires DHEC to "establish by regulation sterilization, sanitation, and safety standards for persons engaged in the business of tattooing." § 44-34-20(A). *See also*, § 44-34-70(A) ["The department must promulgate regulations as required by § 44-34-20 and such other regulations as may be necessary but which do not conflict with the provisions of this chapter."] Other various regulatory requirements are enunciated in the Act. DHEC is empowered to "revoke, suspend, or refuse to issue or renew a license pursuant to this chapter ...." § 44-34-80.

The Act also amends § 16-17-700 which had previously made criminal all tattooing in South Carolina. As amended, § 16-17-700 provides:

> [i]t is unlawful for a person to tattoo any part of the body of another person unless the tattoo artist meets the requirements of Chapter 34 of Title 44. However, it is not unlawful for a licensed physician or surgeon to tattoo part of the body of a person of any age if in the physician's or surgeon's medical opinion it is necessary or appropriate; and it is not unlawful for a physician to delegate tattooing procedures to an employee in accordance with Section 40-47-60, subject to the regulations of the State Board of Medical Examiners.
>
> A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined up to two thousand five hundred dollars or imprisoned not more than one year, or both.

Law / Analysis

In construing the new tattooing statute, several principles of statutory construction are pertinent. First and foremost, is the cardinal rule of statutory interpretation, which is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999), cert. denied as improvidently granted, *State v. Hudson*, 346 S.E. 139, 551 S.E.2d 253 (2001). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Hay v. S.C. Tax Comm.*, 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). Further, as our Supreme Court stated in *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942), "it is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words."

Further, full effect must be given each part of a statute, and in the absence of ambiguity, words must not be added or taken therefrom. *Home Bldg. and Loan Assn. v. City of Sptg.*, 185 S.C. 313, 194 S.E.2d 139 (1939). Any interpretation which would render the statute as mere surplusage is to be avoided. *Bruner v. Smith,* 188 S.C. 75, 198 S.E. 184 (1938).

Moreover, it should be noted that our Supreme Court has consistently recognized that a constitutional interpretation is to be preferred over an unconstitutional one. As the Court stated in *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196, 525 S.E.2d 872, 883 (2000), "[a] possible constitutional construction must prevail over an unconstitutional interpretation." (Citing *Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331 (1977). See also, *State v. Peak*, 353 S.C. 499, 579 S.E.2d 297, 300 (2003) [statute must be read to avoid conflict with Art. V, § 24 of the South Carolina Constitution which "vests sole discretion to prosecute criminal matters in the hands of the Attorney General."].

As one of the requirements for licensure, a tattoo facility must, pursuant to § 44-34-20(B)(5), "provide to the department a certified copy of an ordinance passed by the local governing body where the business will be located which *authorizes the tattooing of persons within its jurisdiction.*" (emphasis added). The word "authorize" typically means "[t]o grant authority or power to" or "to give permission for; sanction." The *American Heritage College Dictionary* (3d ed.). The term "first" means "[p]receding all others ...." *Colgate-Palmolive PEET Co. v. U.S.*, 130 F.2d 913, 914 (3d Cir. 1942). Although, if viewed in isolation, it is conceivable that the words of § 44-34-20(B)(5) might be construed to relate only to zoning or location of tattoo facilities, such an interpretation by a court is unlikely when the entire subsection is construed as a whole. To read § 44-34-20(B)(5) as involving a zoning provision would be superfluous because there would be no reason to provide a copy of a zoning ordinance to DHEC "[t]o obtain a license." Moreover, the word "authorize" must be given its plain and ordinary meaning. Thus, we believe it is clearly the better reading of this provision, when construed as a whole, that the General Assembly intended as a requirement for obtaining licensure as a tattoo facility that the local governing body where the business will be located must "first" authorize such tattooing by ordinance. In other words, we read § 44-34-20(B)(5) as a form of "local option" method of approval of tattoo facilities in a particular jurisdiction. In order to obtain a license to operate a tattoo facility in a particular jurisdiction, that jurisdiction must first express *by ordinance* that tattoo facilities are "authorized" for licensure there. Thus, we agree with the Municipal Association's interpretation of § 44-34-20(B)(5) that failure of a local governmental body to enact an ordinance "authorizing" tattoo facilities in a locality means that no such facilities may be licensed in that jurisdiction.

Constitutional Issue

While your letter does not specifically ask this question, we note that § 44-34-20(B)(5) may create constitutional problems pursuant to the South Carolina Constitution. A similar constitutional question was discussed at length in our Supreme Court's decision in *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996). In *Martin*, the Court held that S.C. Code Ann. §§ 12-21-2806-2808 of the Video Games Machines Act violated Art. III, § 34 of the South Carolina Constitution [special law where a general law could be made applicable]. Section 12-21-2806 provided for a referendum vote on a county-by-county basis to determine the legality of non-machine cash payouts from video

games machines. As a result of the statutory referenda, such payments were made illegal in twelve of the forty-six counties in South Carolina.

Martin found these statutes to be unconstitutional because "the effect of the local option laws is to treat the same conduct differently in each county and the result is unconstitutional special legislation." The Court explained its reasoning as follows:

> [g]aming and betting are activities subject to statewide criminal laws. Under S.C. Code Ann. § 16-19-40 (1985), gaming or betting is unlawful. It is punishable by thirty days' imprisonment or a fine of $100; further, under the same section, keeping a place used for such a purpose is punishable by a one-year term of imprisonment or fine of $2,000. Under S.C. Code Ann. § 16-19-60 (Supp.1995), however, coin-operated nonpayout machines with a free play feature are exempted from § 16-19-40. Under this exemption, non-machine cash payouts are legal. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991).
>
> The local option law before us in this case, § 12-21-2806, allows the counties to opt out of the exemption provided in § 16-19-60 for these non-machine cash payouts. In the counties that voted for the elimination of this exemption, the effect is to criminalize conduct that remains legal elsewhere under State law....

Id. at 273-274. In denying petitioners' request for a rehearing, the Court wrote:

> [w]e take this opportunity to emphasize once again that our ruling in this case is a narrow one. *Where there is no relevant statewide criminal law*, local government may regulate conduct consistent with its constitutional and statutory authority. Moreover, we reject the contention that we have somehow limited the power of the General Assembly to delegate police power to local government. It is completely within the General Assembly 's discretion to repeal a statewide criminal law in favor of allowing local government to regulate the conduct in question.

Id. at 279. (emphasis added)

The *Martin* Court also devoted much discussion to the power of counties and municipalities to regulate conduct beyond that touched by state law, stating that

> [a]rticle VIII, § 14(5), of our constitution requires statewide uniformity of general law provisions regarding "criminal laws and the penalties and sanctions for the transgression thereof." Accordingly, local governments may not criminalize conduct that is legal under a statewide criminal law. *Connor v. Town of Hilton Head Island*, 314 S.C. 251, 442 S.E.2d 608 (1994) (municipality cannot criminalize nude dancing

> where relevant State law does not); see also *City of North Charleston v. Harper*, 306 S.C. 153, 410 S.E.2d 569 (1991) (local government cannot impose different penalties for possession of marijuana than those established under State law). Here, the effect of § 12-21-2806 is to criminalize in twelve counties conduct that is legal under a State criminal law. This effect conflicts with the constitutional requirement of uniformity in the area of State criminal laws and thus violates article III, § 34, as unconstitutional special legislation.

Thus, the majority in *Martin* emphasized throughout its opinion that the General Assembly is constitutionally impotent to "criminalize in twelve counties conduct that is legal under a state criminal law" or which would have the effect of criminalizing "conduct that remains legal elsewhere under State law." The majority's remedy was for the General Assembly to "repeal a statewide criminal law in favor of allowing local government to regulate the conduct in question."

In *Martin*, the Court relied in part upon its earlier decision in *Daniel v. Cruz*, 268 S.C. 11, 231 S.E.2d 293 (1977). The *Cruz* Court had reviewed the constitutionality under the Equal Protection Clause of a statute regulating fortunetelling, which provided as follows:

> Licenses required for itinerant fortunetellers. – It shall be unlawful for any person to follow the business of fortunetelling in any of the counties of this State, by travelling from place to place, without first obtaining from the clerk of the court of the county in which he wishes to follow his trade, a license permitting him to do so. Such license shall be issued by the clerks of court of the counties of this State to any person applying for it upon payment by the applicant of the sum of one hundred dollars. The license shall specify the name of the applicant and his former residence and shall be for a period of one year from the issuance thereof. *But this section shall not be effective in any county until the county board of commissioners of such county authorize, by resolution, the collection of such tax. Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars or imprisonment for not more than thirty days for each and every offense.*

(emphasis added). *Cruz* invalidated this statute, finding that it "operates unequally upon a class of citizens." In the *Cruz* Court's view, "... the law, as applied to the appellant, treats her in a different manner from others in the same class.... Such a classification is repugnant to the guarantee of equal protection of the laws, because there is no rational basis upon which to establish such a classification." *Id.* at 14. Further, *Cruz* concluded that the fortunetelling statute was not severable because, in order to sever the unconstitutional provision, "the obvious legislative intent would be defeated." *Id.* at 15.

Martin viewed *Cruz* as a governing precedent under Article III, § 34 even though *Cruz* "rested on equal protection grounds ... [because] the overall purpose of prohibiting special legislation ... is closely related to the equal protection guarantee." 478 S.E.2d at 274, n. 6. *See also, Thompson v. S.C. Comm. on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976); *Diamonds v. Grvlle. Co.*, 325 S.C. 154, 480 S.E.2d 718 (1997) [where state law does not make public nudity unlawful, county may not adopt ordinance deeming public nudity alone to be illegal.] Thus, *Martin*, together with *Cruz*, provides strong precedent that any statute which allows a local government to "opt out" of a statewide criminal law is constitutionally suspect.

And, most recently, in *City of North Charleston v. County of Charleston*, ___S.C. ___, ___ S.E.2d ___, 2005 WL 824496 (April 11, 2005), our Supreme Court reaffirmed *Martin*, even beyond the criminal context. With respect to a local option law which permitted counties to impose an exemption so as to limit to fifteen percent any valuation increase attributable to reassessment, the Court cited *Martin v. Condon*. In declaring the statute unconstitutional, our Supreme Court stated that "[w]here our Constitution requires statewide uniformity, a local option law is not valid."

In contrast, our Supreme Court has distinguished an ordinance which imposes an outright ban upon otherwise legal activity from an ordinance which merely "regulates the location of such businesses." *See, Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003). In *Kenwood*, the Court upheld Greenville County's ordinance regulating the location of sexually oriented businesses. The Greenville Ordinance was not adopted as a zoning ordinance but "as a stand-alone ordinance applicable to both the zoned and unzoned areas of the County." 577 S.E.2d at 430. Concluding that the ordinance need not be adopted pursuant to the Comprehensive Planning Act, and that the ordinance did not conflict with such Act, the Court stated that "this type of ordinance may be properly enacted pursuant to the County's police powers." *Id.* at 433.

Moreover, *Kenwood* held that Greenville's ordinance did not violate Art. VIII, § 14 of the State Constitution, nor was the validity of the ordinance controlled by *Diamonds*, *supra*, referenced above. Instead, the Court concluded:

> [f]irst, Platinum Plus and Heartbreakers contend that this Court's decisions in *Diamonds v. Greenville County*, 325 S.C. 154, 480 S.E.2d 718 (1997) and *Connor v. Town of Hilton Head*, 314 S.C. 251, 442 S.E.2d 608 (1994) apply to the instant case. In both *Diamonds* and *Connor*, the Court held ordinances which were absolute bans unconstitutional; in *Diamonds*, Greenville County banned public nudity, and in *Connor*, Hilton Head banned nude dancing. The Court found in both cases that Article VIII, § 14 of the South Carolina Constitution prohibited a municipality from proscribing conduct that is not unlawful under State criminal laws governing the same subject. Because state criminal laws addressing the subject of public nudity did not prohibit all public nudity or nude dancing, the ordinances at issue criminalized conduct that was not unlawful under State law. Therefore, the Court concluded that

> Greenville County and Hilton Head had exceeded their power in enacting the ordinances.
>
> In the instant case, however, the Ordinance does not outright ban either nude dancing or sexually oriented businesses. Instead, it regulates the location of such businesses. Accordingly, *Diamonds* and *Connor* are clearly inapplicable ....

Id. at 433-434.

And, in response to the argument that the Greenville ordinance violated the First Amendment, the *Kenwood* Court likewise rejected such contention. Greenville County had increased the setback requirement from 1000 to 1500 feet in terms of location within nine enumerated types of properties, including a school, church, boundary of a residential district and property line of a lot devoted primarily to residential use. The First Amendment claim rested upon the argument that the County did not have any data to rely on for this increased distance, and thus the ordinance was not "narrowly tailored." Rejecting the First Amendment arguments of Platinum Plus and Heartbreakers, the Court concluded as follows:

> Platinum Plus and Heartbreakers' First Amendment arguments are governed by the United States Supreme Court's decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). These decisions hold that ordinances designed to regulate the secondary effects of sexually oriented businesses are content-neutral and are properly analyzed as "time, place, and manner" regulations. ... The appropriate inquiry ... therefore, is whether the Ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50, 106 S.Ct. 925; see also *Harkins* [*v. Greenville County*, 340 S.C. 606 ... at 64, 533 S.E.2d [886] at 890 (sexually oriented business regulations will be upheld if they are designed to serve the substantial governmental interest of preventing harmful secondary effects and they allow for reasonable avenues of communication").
>
> The Ordinance clearly meets the *Renton* standard. The County's interest in combating the secondary effects of sexually oriented businesses is, undoubtedly, a substantial one. *See Renton*, 475 U.S. at 50, 106 S.Ct. 925 ("A city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" (Citation omitted). Moreover, we note that in *Harkins*, the Court specifically decided that the Ordinance did not "zone the adult businesses out of existence." *Harkins*, 340 S.C. at 620-21, 533 S.E.2d at 893.

> The First Amendment requires only that whatever evidence the County relies upon is "reasonably believed to be relevant to the problem" the County is addressing. *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925 ... .
>
> Here, the County relied upon *inter alia*, several summaries of other cities' secondary effect studies as well as the *Renton* decision itself. The evidence that County Council relied upon clearly supports its rationale for the ordinance.

Id. at 434-435.

As discussed above, it appears that the legislative intent of § 44-34-20(B)(5) was not to delegate to local governments the authority simply to regulate *the location of tattoo facilities*, but to authorize counties and municipalities to impose outright bans upon such facilities locating within that particular jurisdiction by refusing to adopt ordinances authorizing such activity, or in the alternative, to authorize such facilities. Put another way, counties and municipalities are given the discretion to *authorize* tattoo facilities, separate and apart from any statewide statute, thereby, by definition, making such facilities legal and subject to licensure in some localities, but illegal in others. This being the case, and in light of decisions of the South Carolina Supreme Court such as *Cruz*, *Martin* and *Diamonds*, the delegation of such authority is constitutionally suspect pursuant to Art. VIII, § 14 and Art. III, § 34 of the South Carolina Constitution, as well as the Equal Protection Clause of the federal and state Constitutions. Depending upon whether or not a particular local government chooses to authorize the location of tattoo facilities in that jurisdiction, such activity would be subject to criminal punishment in certain parts of the State only. The foregoing Supreme Court decisions thus render this provision of the tattooing legislation constitutionally questionable.

Moreover, the tattooing legislation does not contain a severability clause. *See, Sloan v. Wilkins*, ___ S.C. ___, 608 S.E.2d 579 (2005); *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 649, 528 S.E.2d 647, 654 (1999). Further, it appears that, like the statute in *Cruz*, § 44-34-20(B)(5), a court may conclude that the criteria contained therein is essential to the Legislature's passage of the Act. If a court concludes that the Legislature would have passed the statute "independent of that which conflicts with the constitution," and such statute is capable of being executed consistent with the legislative intent "sans that portion found to be unconstitutional," the Court will sever the statute. *Sloan v. Wilkins, supra*. However, if the unconstitutional provision is deemed an integral part of enactment, the entire statute will fall. *Cruz, supra*. Based upon the importance of § 44-34-20(B)(5) to the statute's enactment, a court may well conclude that this provision of the Act *is not severable from the remainder*, thus striking down the entire statute. Of course, only a court may make such a determination.

Of course, we note that any statute enacted by the General Assembly carries with it a heavy presumption of constitutionality. As we have often stated, any act of the General Assembly is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has often

recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. *State ex rel. Thompson v. Seigler*, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. *Thomas v. Macklen*, 186 S.C. 290, 195 S.E. 539 (1937); *Townsend v. Richland Co.*, 190 S.C. 270, 2 S.E.2d 779 (1939).

Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute "must continue to be followed until a court declares otherwise." *Op. S.C. Atty. Gen.*, June 11, 1997.

Thus, only a court could determine that § 44-34-20 (B)(5) is constitutionally invalid or that it is or is not severable from the remainder of the Act if that Section were determined to be invalid. Unless and until such time as a court so determines, we read this provision as requiring the adoption of an ordinance by a local governing body authorizing tattoo facilities in such jurisdiction before a facility could receive a license to operate in that jurisdiction. In other words, we do not interpret this provision as merely authorizing a jurisdiction to determine where tattoo facilities may be located (zoning), but instead as giving a county or municipality the discretion to determine whether such facilities may operate there at all.

Conclusion

In summary, it is our opinion that § 44-34-20(B)(5) would likely be interpreted by a court as bestowing upon local governing bodies the authority to determine whether or not tattoo facilities may be licensed to operate in that jurisdiction. We do not read this provision as merely a zoning authorization, but instead as allowing localities to ban or authorize tattoo facilities as they choose.

While you did not ask this question, we are also compelled to advise that such provision is, in our opinion, constitutionally suspect as special legislation and violative of the Equal Protection Clause. Our Supreme Court has repeatedly held that a statute violates these provisions of the Constitution by empowering local jurisdictions to opt out of state criminal law regulations. As presently existing, § 16-17-700 make it unlawful to tattoo *unless* the tattoo artist "meets the requirements of Chapter 34 of Title 44." One of the requirements for such licensure is that the applicant "provide to the department a certified copy of an ordinance passed by the local governing body where the business will be located *which authorizes the tattooing of person within its jurisdiction.*" (emphasis added). While zoning is deemed an exception to the constitutional rule regarding local option, the foregoing language of the statute renders it difficult to construe the law as written in such a manner as to conclude that the provision is merely a zoning provision. Thus, as written, the statute is constitutionally suspect as permitting a locality to "opt out" of a statewide criminal law. *See, Martin v. Condon, supra.* Inasmuch as the new tattooing legislation contains no

severability clause, and it appears that § 44-34-20(B)(5) was essential to the legislation's passage, a court could well conclude that § 44-34-20(B)(5) is not severable from the remainder of the Act. If so, the entire legislation could be invalidated by a court.

However, we emphasize that the statute is presumed constitutional, and that only a court could make a determination relating to unconstitutionality or severability. Unless and until a court rules that § 44-34-20(B)(5) is constitutionally invalid, such provision must be enforced as it is written. Thus, as discussed, we read this section as a "local option" provision, thereby requiring a county or municipality to first authorize tattoo facilities to operate in that jurisdiction before any such facility may be licensed to operate there.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an