February 22, 2007

The Honorable Richard E. Chalk
Member, House of Representatives
404-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Chalk:

We received your request for an opinion of this Office as to the legality of a proposed joint resolution. You enclosed a copy of the resolution "changing the date for a sales and use tax referendum held during the 2006 General Election from no later than November 30, 2006 to December 10, 2006." Furthermore, you add: "It is my understanding that this resolution only applies to Beaufort County."

Law/Analysis

The proposed joint resolution provides as follows:

> SECTION 1. Notwithstanding the date provided in Section 6 of Act 93 of 1999, for any referendum conducted in the 2006 General Election pursuant to Section 6, if the result was certified to the appropriate governing body and to the Department of Revenue by December 10, 2006, then the certification requirements of Section 6 are satisfied. For any tax approved by referendum, conducted pursuant to Section 6 of Act 93 of 1999, in the 2006 General Election, the tax is imposed effective May 1, 2007.
>
> SECTION 2. This joint resolution takes effect upon approval by the Governor, and applies to all referendums conducted in the 2006 General Election.

Section 6 of Act 93 of 1999 is codified as section 4-37-30(A)(4) and (15). Section 4-37-30(A)(4) appears to be the section impacted by the proposed joint resolution. This provision reads as follows:

> (4) All qualified electors desiring to vote in favor of imposing the tax for a particular purpose shall vote "yes" and all qualified electors

> opposed to levying the tax for a particular purpose shall vote "no". If a majority of the votes cast are in favor of imposing the tax for one or more of the specified purposes, then the tax is imposed as provided in this section; otherwise, the tax is not imposed. The election commission shall conduct the referendum pursuant to the election laws of this State, mutatis mutandis, and shall certify the result no later than November thirtieth after the date of the referendum to the appropriate governing body and to the Department of Revenue. Included in the certification must be the maximum cost of the project or projects or facilities to be funded in whole or in part from proceeds of the tax, the maximum time specified for the imposition of the tax, and the principal amount of bonds to be supported by the tax receiving a favorable vote. Expenses of the referendum must be paid by the jurisdiction conducting the referendum. If the tax is approved in the referendum, the tax is imposed effective the first day of May following the date of the referendum. If the certification is not made timely to the Department of Revenue, the imposition is postponed for twelve months.

(emphasis added).

In comparing the joint resolution with section 4-37-30(A)(4), the joint resolution changes the date by which the election commission must certify the results of the referendum from November thirtieth to December tenth only for those referendums decided in the 2006 general election. After 2006, the required certification date again is November thirtieth. It is your understanding that the Legislature changed the certification date in 2006 to accommodate Beaufort County. Thus, one could raise the issue of whether the joint resolution is special legislation prohibited under articles III and VIII of the South Carolina Constitution.

Before considering the constitutionality of the joint resolution, we must bear in mind that statutes enacted by the Legislature are presumed constitutional. "A court will declare a statute unconstitutional if its repugnance to the Constitution is clear and beyond reasonable doubt." Southeastern Home Bldg. & Refurbishing, Inc. v. Platt, 283 S.C. 602, 603, 325 S.E.2d 328, 329 (1985). In addition, only a court, not this Office, may deem a statute unconstitutional. Op. S.C. Atty. Gen., July 19, 2006. Therefore, should the Legislature choose to enact this joint resolution, it would remain in full force and effect unless and until a court rules otherwise.

Article III, section 34 of the South Carolina Constitution (1976) prohibits the enactment of special legislation concerning eight specified purposes and includes the following provision:

> IX. In all other cases, where a general law can be made applicable, no special law shall be enacted: Provided, That the General

> Assembly may enact local or special laws fixing the amount and manner of compensation to be paid to the County Officers of the several counties of the State, and may provide that the fees collected by any such officer, or officers, shall be paid into the treasury of the respective counties.

According to our Supreme Court in Martin v. Condon, 324 S.C. 183, 185, 478 S.E.2d 272, 273 (1996): "In determining whether an act of the legislature is unconstitutional special legislation, this Court will examine the practical operation of the act as well as its form." (citations omitted).

> The fact that legislation is expressed in general terms is not controlling. A law general in form, but special in its operation, violates a constitutional inhibition of special legislation as much as one special in form. The question must be decided not by the letter, but by the spirit and practical operation of the act.

Elliott v. Sligh, 233 S.C. 161, 165, 103 S.E.2d 923, 926 (1958). However, our courts also recognized "[t]he fact that the proviso ultimately affected only one person or one locale does not make it special legislation." Kalk v. Thornton, 269 S.C. 521, 526, 238 S.E.2d 210, 212 (1977).

With regard to the certification of a sales and use tax referendum, we do not doubt that general law may be made applicable because the Legislature addressed this issue via general law when it enacted section 4-37-30(A)(4). Thus, we find article III, section 34(IX) applicable to ensure no special law is created in this regard.

The joint resolution amending section 4-37-30(A)(4) appears on its face to be a general law. It does not specify that it only applies to Beaufort County. Moreover, the joint resolution specifically states it "applies to all referendums conducted in the 2006 General Election." Nonetheless, in operation, the joint resolution only impacts those counties who held a sales and use tax referendum as part of their 2006 general election and who certified the referendum results by December 10, 2006, but not by the November 30, 2006 deadline provided in section 4-37-30(A)(4). We do not have knowledge of what counties held a referendum in the 2006 general election and moreover, when their election commissions certified the results. However if the joint resolution only impacts Beaufort County, while it is general in form, it appears to operate as special legislation in violation of article III, section 34(IX) of the Constitution.

Nonetheless, article III, section 34 contains another provision, which states: "The General Assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operations: Provided, That nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." S.C. Const. art. III, § 34(X).

In several cases, our Supreme Court attempted to clarify what constitutes a special provision in a general law, which is permitted under article III, and special legislation, which is prohibited under article III. See Brown v. Moseley, 222 S.C. 1, 71 S.E.2d 591 (1952); Gillespie v. Pickens County, 197 S.C. 217, 14 S.E.2d 900 (1941); Gamble v. Clarendon County, 188 S.C. 250, 198 S.E. 857 (1938). In these cases, the Court emphatically held a provision cannot be construed in a way in which the constitutional prohibition on special legislation is destroyed. Gamble, 188 S.C. at 257-58, 197 S.E. at 860. The special provision "cannot be construed so as to nullify the constitutional purpose to secure general laws having uniform operation throughout the State, except in those cases where there is some logical basis and sound reason for special legislation." Gillespie, 197 S.C. at 225-26, 14 S.E.2d at 904 (1941).

The Court in Gamble provided the following test for a special provision in a general law: "where the general law remains in force in every county and the special provisions merely make its effect different in certain counties . . . ." Gamble, 188 S.C. at 256, 197 S.E. at 860. The Court continued:

> To reconcile these apparently conflicting ideas, we must construe 'special provisions in general laws' so as not to practically nullify the purpose to uproot local or special legislation as to certain subjects and to secure general laws thereon having uniform operation throughout the state. We understand the language, 'special provisions in general laws,' to mean provisions in general laws, which, while having a limited application, must not be so inconsistent with the general scheme or purpose of the statute as to prevent substantial uniformity of operation throughout the state.

Id. at 257, 197 S.E. at 861.

As we previously stated, the Legislature enacted general law specifying referendum requirements to impose a sales tax when it enacted section 4-37-30(A)(4). Included in this general law is a requirement that the results of the referendum be certified by the election commission. We do not believe the proposed joint resolution hampers the Legislature's purpose of providing general requirements for referendums. The joint resolution changes the date of certification, but in our view does not run afoul of the Legislature's purpose in enacting general law. Furthermore we do not conclude that the joint resolution prevents substantial uniformity with regard to the approval of a sales or use tax via a referendum. Therefore, we believe the joint resolution would constitute a special provision in a general law, which per article III, section 34(X) is permissible.

Although we do not believe the joint resolution is prohibited under article III of the South Carolina Constitution, we must also consider its validity under article VIII, section 7 of the South Carolina Constitution (1976). This provision, adopted as part of the Home Rule amendments to the South Carolina Constitution, also prohibits the enactment of special legislation. Article VIII, section

7 instructs: "No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government." S.C. Const. art. VIII, § 7.

Again, the joint resolution does not specifically state it only applies to Beaufort County. Therefore, the joint resolution, on its face, does not appear to violate article VIII, section 7 of the South Carolina Constitution. However, as we determined above, based on the fact that the proposed joint resolution only applies to the 2006 General Election, it is possible that while general in form, the joint resolution is special in its operation. Thus, presuming only Beaufort County is affected by the provision, we believe a court would find the proposed joint resolution is contrary to article VIII, section 7. Furthermore, unlike article III, section 34, article VIII, section 7 does not contain a provision allowing for special provisions in general laws. Therefore, we consider the validity of the proposed joint resolution to be constitutionally suspect under article VIII, section 7 of the South Carolina Constitution.

Conclusion

Based on our analysis above, if a court finds only Beaufort County is affected by the joint resolution, it would likely find the joint resolution runs afoul of the article III, section 34 and article VIII, section 7 of the South Carolina Constitution. While we believe that the provision in article III, section 34 allowing the Legislature to enact special provisions in general laws applies to save the joint resolution from being held invalid under article III, no such provision exists under article VIII. Accordingly, a court could find this provision invalid under article VIII, section 7 of the South Carolina Constitution. However, we reiterate that only a court may make the ultimate decision as to the legality of this joint resolution, should the Legislature chose to adopt it.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General