ALAN WILSON
ATTORNEY GENERAL

March 15, 2011

The Honorable Phillip Lowe
Member, House of Representatives
507 West Cheves Street
Florence, South Carolina 29501

Dear Representative Lowe:

We understand you desire an opinion of this Office concerning the constitutionality of the Renegade Hunter Act recently passed by the Legislature. Specifically, you state your question as follows:

> Is it constitutionally permissible to have a Rogue hunting bill that applies to hunting deer with dogs in the low state or about half of South Carolina, which does not apply to the Upstate where no deer hunting with dogs is permissible. Can they enforce a bill that is not enforceable across the entire state since there is no dog hunting allowed in the Upstate?

Law/Analysis

We understand the bill you refer to in your letter is act 239 passed by the Legislature in 2010, which added section 50-11-770 to the South Carolina Code. 2010 S.C. Acts 1747. Section 50-11-770 of the South Carolina Code (Supp. 2010) provides, in pertinent part:

> (B) Notwithstanding the provisions contained in Section 50-11-760, it shall be unlawful for any person to hunt from any road, right of way, property line, boundary, or property upon which he does not have hunting rights with the aid or use of a dog when the dog has entered upon the land of another without written permission or over which the person does not have hunting rights. The provisions of this section apply whether the person in control of the dog intentionally or unintentionally releases, allows, or otherwise causes the dog to enter upon the land of another without permission of the landowner.

> (C) It is not a violation of this section if a person, with the landowner's permission, uses a single dog to recover a dead or wounded animal on the land of another and maintains sight and voice contact with the dog.
>
> (D) A dog that has entered upon the land of another without permission given to the person in control of the dog shall not be killed, maimed, or otherwise harmed simply because the dog has entered upon the land. A person who violates this subsection may be fined not more than five hundred dollars or imprisoned for not more than thirty days. The penalties for violations of this section as provided in subsection (E) do not apply to violations of this subsection.
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> (E) A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars, no part of which may be suspended, or imprisoned for not more than thirty days, or both. The court must transmit record of the conviction to the department for hunting license suspension pursuant to subsection (F).
>
> (F) In addition to any other penalties provided by law, a person convicted of a violation of this section must have his hunting privileges suspended by the department for one year from the date of his conviction. He may not have his hunting privileges reinstated by the department until after he successfully completes a hunter education class administered by the department.
>
> (G)(1) The provisions of this section do not apply to bear hunting.
>
> (2) The provisions of this section do not apply to Game Zones 1 or 2.

(emphasis added).

As emphasized above, section 50-11-770(G)(2) states that the prohibition on renegade hunting does not apply to Game Zones 1 and 2, which we understand to contain upstate counties. You question whether or not the Legislature can make section 50-11-770 applicable to all, but a stated few counties. Our Supreme Court addressed a similar question in Lee v. South Carolina Dept. of Natural Resources, 339 S.C. 463, 530 S.E.2d 112 (2000). In Lee, a group of hunters brought a declaratory action against the South Carolina Department of Natural Resources (the "DNR") claiming that a Sunday ban on big game hunting on private property in upstate counties

was unconstitutional. Id. The Court considered the constitutionality of section 50-9-510(9) of the South Carolina Code, providing for the ban, on the basis of the equal protection clause and the prohibition on special legislation. Id.

In regard to the ban's constitutionality under the equal protection clause, the Court determined that because the privilege to hunt big game is not a fundamental right or a suspect class, a rational basis level of scrutiny is appropriate. Id. at 466-67, 530 S.E.2d at 113-14. The Court stated: "The General Assembly may enact different laws in different geographical areas without violating the Equal Protection Clause, provided there is a rational basis for the distinctions" and applied the following test for passing constitutional muster under the Equal Protection Clause:

> To satisfy the Equal Protection Clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 23, 482 S.E.2d 558, 562 (1997) (citing Jenkins v. Meares, 302 S.C. 142, 394 S.E.2d 317 (1990)). A legislative enactment will be sustained against constitutional attack if there is "any reasonable hypothesis" to support it. Id. (citing Thomas v. Spartanburg Ry., Gas & Elec. Co., 100 S.C. 478, 85 S.E. 50 (1915)).

Id. at 467, 530 S.E.2d at 114. The Court also added "[w]e must give great deference to the General Assembly's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue." Id.

The Court considered the reasons presented by the DNR for the Sunday hunting ban in the upstate. Id. The reasons presented included the difficulty of enforcing the existing statewide ban on Sunday hunting on Wildlife Management Areas in upstate counties because these areas are so numerous, small, and scattered in these zones; preservation of wildlife resources in the upstate counties due to the higher frequency of hunting in these counties; and providing recreational users an opportunity to enjoy the outdoors without the risk of encountering hunters. Id. The Court determined these reasons "bear a reasonable relationship to the legislative purposes, and the Sunday ban rest on several rational bases." Id. at 470, 530 S.E.2d at 115.

The Court also considered whether or not the Sunday ban constituted special legislation in violation of article III, section 34 of the South Carolina Constitution. Id. at 470-71, 530 S.E.2d at 116. The Court determined:

> Section 34 prohibits special laws on the protection of game- except that special laws may be enacted within each game zone. Thus, Section 34 allows different regulations within the various zones. We have said as much in the rehearing order in Martin, stating that "[i]t is axiomatic that the prohibition against special laws found in article III, § 34(IX), of our constitution does not apply where another constitutional provision specifically authorizes a special law." Martin, 324 S.C. at 197, 478 S.E.2d at 279."

Accordingly, the Court found the law banning big game hunting in upstate counties on Sundays to be valid under both the Equal Protection Clause and article III, section 34. Id.

This Office, unlike a court, cannot investigate and determine factual questions. S.C. Atty. Gen., October 18, 2010. Therefore, we do not have knowledge and have no authority to conduct an investigation to determine the reason that section 50-11-770 is not applicable in Game Zones 1 and 2. However, in your letter, you mentioned that section 50-11-310 of the South Carolina Code (Supp. 2010) states "[i]n Game Zones 1 and 2, it is unlawful to pursue deer with dogs . . . ." Therefore, we presume the reason section 50-11-770 exempts Game Zones 1 and 2 from its provisions is because at least with respect to deer, hunting with dogs is prohibited. We presume a court would find that a total ban of hunting with dogs in Game Zones 1 and 2 supports a rational basis for exempting these zones from section 50-11-770.

Furthermore, as the Court in Lee explained, article III, section 34 of the South Carolina Constitution (2009) specifically states "[t]hat the General Assembly is empowered to divide the State into as many zones as may appear practicable, and to enact legislation as may appear proper for the protection of game in the several zones." Therefore, we believe that like the Court in Lee, a court would similarly find section 50-11-770 constitutionally valid.

Very truly yours,

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REVIEWED AND APPROVED BY:

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