August 14, 2007

The Honorable Glenn F. McConnell
President Pro Tempore, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

We received your request for an opinion concerning the governance of the Charleston County Parks and Recreation Commission and the Charleston County Board of Elections and Voter Registration. In your letter, you provided the following information:

> In 2002, the General Assembly passed Act 410, which devolved the authority for appointments and recommendations unless specifically carved out in the Act from the Charleston County Delegation to the governing body of Charleston County. Specifically, the Act required that as of January 1, 2003 that the appointment of members of the Charleston County Parks, Recreation and Tourist Commission was transferred from the delegation to the County Council. In 2003, the General Assembly passed Act 127, which abolished the Charleston County Board of Voter Registration and the Charleston County Election Commission and devolved the duties of both onto the newly created Board of Elections and Voter Registration of Charleston County.

In your letter, you reference several South Carolina Supreme Court decisions addressing the unconstitutionality of various acts affecting local governments. In particular, you reference the Court's recent decision in Davis v. Richland County Council, 372 S.C. 497, 642 S.E.2d 740 (2007). Based on these cases, you ask

> whether the legislation devolving the appointment of the Charleston County Parks, Recreation and Tourist Commission to the Charleston County Council and the abolition of Charleston County Board of Voter Registration and the Charleston County Election Commission would likely be considered unconstitutional legislation. Also would

> the prior versions of these agencies as they existed prior to the legislative changes be reinstated if they were unconstitutional?

Law/Analysis

Article VIII, section 7 of the South Carolina Constitution (1976) was enacted as part of the Home Rule amendments to the South Carolina Constitution. This provision prohibits the General Assembly from enacting laws for a specific county or municipality and states as follows:

> The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. 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 (emphasis added). Section 1 of article VIII of the South Carolina Constitution (1976) further provides:

> The powers possessed by all counties, cities, towns, and other political subdivisions at the effective date of this Constitution shall continue until changed in a manner provided by law.

Our Supreme Court interpreted these provisions as meaning "existing political subdivisions should continue to function as authorized by law on March 7, 1973, when Article VIII was ratified, until the General Assembly acted to fulfill Section 7." Hamm v. Cromer, 305 S.C. 305, 408 S.E.2d 227 (1991).

As you mentioned in your letter, our Supreme Court issued several opinions applying article VIII to hold enactments of the General Assembly pertaining to local governments unconstitutional. In particular, you mention the Court's decision in Hamm v. Cromer, 305 S.C. 305, 408 S.E.2d 227 (1991). In that case, the Court considered the constitutionality of an act amending previous acts governing the Newberry County Water and Sewer Authority. Id. The act removed appointment authority for members of the authority's governing body from the legislative delegation and vested this authority in the Newberry County Council. Id. The Court determined:

> Because Act No. 784 amended prior special legislation which created the Authority, the prohibition of Section 7 of Article VIII applies. The enactment of Act No. 784 is exactly the type of special legislation which is prohibited by Sections 1 and 7 of Article VIII of

> the South Carolina Constitution as it was not intended that after the ratification of the constitutional amendment, the General Assembly could repeatedly inject itself into local affairs.

Id. at 308, 408 S.E.2d at 228-29.

Furthermore, the Court addressed the argument raised by the appellants that the act is immune from the general prohibition on special legislation because it is transitional or remedial. Rejecting both arguments and relying on its decision in Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976), the Court found the ability of the General Assembly to enact transitional legislation to be temporary and extending "only so far as necessary to place Article VIII fully into operation" and "once a legally constituted government has become functional, the Duncan exception ends, thereby precluding any further special legislation." Id. at 308, 408 S.E.2d at 229. After examining the act, the Court determined it "in no way relates to the operative machinery necessary to implement a new form of government under Article VIII and thus, cannot be considered transitional legislation." Id. Moreover, the Court found "the local form of government, a public service district, which was organized long before the ratification of Article VIII, has remained in continuous and successful operation since that time and thus, Act No. 784 cannot be considered remedial in legislation." Id. Accordingly, the Court concluded the act in question is impermissible special legislation and is therefore, unconstitutional. Id. at 229, 408 S.E.2d at 309.

Relying on Hamm, the Court came to a similar conclusion in Pickens County v. Pickens County Water and Sewer Authority, 312 S.C. 218, 439 S.E.2d 840 (1994). That case involved a 1973 enactment by the General Assembly creating the Pickens County Water and Sewer Authority and repealing a prior 1971 act creating the Pickens County Water Authority. Id. The Court followed its decision in Hamm and found this legislation to be unconstitutional under article VIII, section 7. In addition, the Court addressed the impact of its findings concerning the constitutionality of the 1973 enactment on the prior 1971 enactment creating the Water Authority. The Court stated: "When an act repealing a prior act is held unconstitutional, the repealer is also invalidated absent specific legislative intent to the contrary. The prior act is revived by invalidation of the repealer." Id. at 220, 439 S.E.2d at 842. Thus, in finding the more recent act unconstitutional as special legislation, the Court found the prior act creating the Pickens County Water Authority revived. Id.

The Supreme Court recently addressed the issue of special legislation in Davis v. Richland County Council, 372 S.C. 497, 642 S.E.2d 740 (2007). The Court considered the constitutionality of an act transferring appointment authority for the Richland County Recreation Commission from the Richland County Legislative Delegation to the Richland County Council. Id. Reflecting on its prior decisions in Hamm and Pickens County, the Court found as follows:

> Much like the Act held unconstitutional in Hamm, the Act here seeks to devolve appointment authority of a local body away from the Legislative Delegation, and confer it upon the County Council.

> Accordingly, Hamm and Pickens are squarely controlling, and Act No. 207 is indeed unconstitutional.

Id. at 503, 642 S.E.2d at 743.

In light of these decisions, we address the constitutionality of the 2002 act and the 2003 act mentioned in your letter. However, we must bear in mind that "[s]tatutes are presumed to be constitutional and will not be found to violate the constitution unless their invalidity is proven beyond a reasonable doubt." Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 398, 596 S.E.2d 42, 47 (2004). Moreover, only a court, not this Office, may declare legislation unconstitutional. Op. S.C. Atty. Gen., June 22, 2007. Thus, regardless of our findings with regard to the constitutionality of these legislative acts, they remain valid and enforceable unless and until a court rules otherwise.

As you explained in your letter, in 2002, the General Assembly enacted act 410 devolving appointment authority for boards and commissions held by the Charleston County Legislative Delegation to the governing body of Charleston County. 2002 S.C. Acts 4042. This act contains a provision particular to the Charleston County Park, Recreation and Tourist Commission (the "Recreation Commission") stating authority shall be devolved on or after January 1, 2003.

The General Assembly established the Recreation Commission in 1968 and according to its enabling legislation, the Recreation Commission was composed of seven members appointed by the Governor "one upon the recommendation of the Mayor of the City of Charleston; two upon the recommendation of the County Council of Charleston County; two by a majority of the members of the Senate representing Charleston County; and two by a majority of the members of the House of Representatives representing Charleston County." 1968 S.C. Acts 2542. In 1970, the Legislature amended the original legislation to added four ex-officio members to the Recreation Commission, including the director of the Charleston County Planning Board, the director of the Charleston-Berkeley Regional Planning Commission; the Charleston County Manager, and the Superintendent for Charleston County Schools. 1970 S.C. Acts 2663. In 1985, the General Assembly again amended the Recreation Commission's enabling legislation eliminating the ex-officio positions and calling for its seven members to be appointed by the Governor upon the recommendation of the Charleston County Legislative Delegation. 1985 S.C. Acts 1869.

As we mentioned above, only a court may declare legislation unconstitutional. Nonetheless, in reviewing act 410 in light of our Supreme Court's decisions in Hamm, Pickens County, and Davis, we find this act is constitutional suspect under article VIII. In act 410, similar to the acts addressed in Hamm and Davis, the General Assembly appears "to devolve appointment authority of a local body away from the Legislative Delegation, and confer it upon [a county council]." Davis, 372 S.C. at 503, 642 S.E.2d at 743. Moreover, because this transfer of authority occurred more than thirty years after the passage of article VIII, we believe a court, like the Court in Hamm, would not find this legislation to be either transitional or remedial. Hamm, 305 S.C. at 308, 408 S.E.2d at 229.

Thus, following the Court's decisions in Hamm, Pickens County, and Davis, we believe a court is likely to hold act 410 unconstitutional as violating of article VIII of the South Carolina Constitution.

You also inquire as to whether act 127 of 2003, abolishing the Charleston County Board of Voter Registration (the "Board") and the Charleston County Election Commission (the "Election Commission") and creating the Board of Elections and Voter Registration of Charleston County, constitutes special legislation in violation of article VIII of the South Carolina Constitution. 2003 S.C. Acts 1593. We presume the Board was established pursuant to section 7-5-10 of the South Carolina Code, which calls for the appointment of a three to five member board of registration for each county by the Governor on advice and consent of the Senate. Furthermore, we presume the Election Commission was established pursuant to section 7-13-70 of the South Carolina Code instructing the Governor to appoint three to five commissioners of election upon the recommendation the senatorial delegation and at least half of the members of the House of Representatives from the respective counties. Act 127 appears to supercede these two provisions and calls for the merger of the Board and the Election Commission. 2003 S.C. Acts 1593.

In an opinion of this Office issued in 1977, we considered generally whether the General Assembly can introduce legislation merging county boards of voter registration and county election commissions on a county-by-county basis. Op. S.C. Atty. Gen., January 5, 1977. We concluded "such legislation would most probably be violative of that portion of Article VIII, section 7 of the South Carolina Constitution of 1985, as amended, which proscribes laws for a specific county." Id. Following this opinion and the principles espoused by the Court in Hamm, Pickens County, and Davis, we believe a court would likely find this piece of legislation violative of article VIII. However, as we pointed out above, only a court may hold act 127 of 2003 unconstitutional.

Given the fact that we find both act 410 of 2002 and act 127 of 2003 constitutionally suspect, we also attempt to address your question as to whether "the prior versions of these agencies as they existed prior to the legislative changes be reinstated if they were unconstitutional?" Following the Court's decision in Pickens County, a prior act may be revived if the act repealing it is rendered unconstitutional. Pickens County, 312 S.C. at 220, 439 S.E.2d at 842. Act 410 of 2002 essentially repeals that portion of the 1985 act bestowing recommendation authority for the Recreation Commission in the Legislative Delegation. Thus, if a court were to hold act 410 of 2002 unconstitutional, presumably the 1985 legislation would be revived. However, we must note that the General Assembly also adopted the 1985 legislation after the adoption of Article VIII. Thus, this legislation may be constitutionally suspect as well.

With regard to act 127 of 2003, this act amends the general law provisions contained in sections 7-5-10 and 7-13-70 of the South Carolina Code as they pertain to Charleston County. If act 127 is held to be unconstitutional by a court, not only would the portion of this act creating the Board be invalidated, but that portion abolishing the Board and the Registration Commission also would be invalid. Accordingly, the Board and Registration Commission created pursuant to title 7 of the

South Carolina Code would once again become applicable to Charleston County, and we believe their establishment would be revived.

Conclusion

Based on our analysis above, it appears that both act 410 of 2002 and act 127 of 2003 are constitutionally suspect as special legislation in violation of article VIII of the South Carolina Code. However, as we previously cautioned, only a court ultimately may determine the constitutionality of these provisions. Thus, if you are concerned as to the constitutionality of these legislative acts, we suggest bringing a declaratory judgment action to ascertain the legal status of these provisions. Unless a court rules these acts invalid, they retain the force and effect of the law and may not be ignored. However, should a court declare one or both of these acts invalid as unconstitutional, because they function to repeal prior legislation, we believe under the Court's decision in Pickens County, that the legislation repealed by these acts is revived. Accordingly, assuming the 1985 legislation is constitutional, the Legislative Delegation would resume its authority to recommend members to the Recreation Commission. In addition, the legislation establishing both the Board and the Election Commission, also would be revived.

Very truly yours,

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REVIEWED AND APPROVED BY:

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