ALAN WILSON
ATTORNEY GENERAL

April 11, 2011

The Honorable Phil P. Leventis
Senator, District No. 35
PO Box 142
Columbia, SC 29202

Dear Senator Leventis:

We received your letter requesting an opinion of this Office concerning S.497 which amends S.C. Code § 48-39-130. You asked the following questions:

1. Would the currently proposed language or the proposed amendment language to S.497 violate the prohibition on special legislation?

2. If the currently proposed and proposed amendment language for S.497 does not violate the prohibition on special legislation, what other coastal waters does the bill apply to? Specifically, please provide an opinion on how the currently proposed and proposed amendment language would apply to man-made and essential access canals as [DeBordieu Beach], Edisto Island, Folly Beach, Isle of Palms, Sullivan's Island, and the canals off of Arlington Drive in West Ashley in Charleston.

3. Under the State and Federal equal protection law and precedent, do the distinctions in the currently proposed and proposed amendment language limit the effect of this bill to Cherry Grove? What specific provisions of the bill would prevent other similarly situated canal dredging projects from falling under the waiver of State certification provisions?

Law/Analysis

S.C. Code § 48-39-130 governs the permits required to utilize critical areas. S.C. Code § 48-39-130(D) explains that it is not necessary to apply for a permit for the listed activities in that subsection. S.497 would add an appropriately numbered item to the end of subsection (D) to read as follows:

> Maintenance dredging by counties or municipalities of manmade recreational use canals conveyed before 1970 to the State for that purpose if the maintenance dredging is authorized by a permit from the United States Army Corps of Engineers pursuant to the

> Federal Clean Water Act, as amended, or the Rivers and Harbors Act of 1899. All other department administered certifications for such dredging are deemed waived.

S.497 (119th Session, 2011-2012).

The request letter informed us that the proposed language that will be offered as an amendment to S.497 reads:

> Maintenance dredging in existing navigational canal community developments by counties or municipalities of manmade, predominantly armored, recreational use canals and essential access canals conveyed to the State or dedicated to the public for that purpose between 1965 and the effective date of the Act if the maintenance dredging is authorized by a permit from the U.S. Army Corps of Engineers pursuant to the Federal Clean Water Act, as amended, or the Rivers and Harbors Act of 1899. All other department administered certifications for such dredging are deemed waived.

H.3587 (119th Session, 2011-2012). You also mentioned in the request letter that the intent of the bill is to specifically apply to a set of canals in a portion of Cherry Grove Beach.

Question 1

No, it is the opinion of this Office that such proposed language or the proposed amendment language to S.497 would not violate the prohibition on special legislation, but would be found constitutional.

The South Carolina Constitution, Article III, § 34 explains that special laws are prohibited. Specifically, "where a general law can be made applicable, no special law shall be enacted . . ." S.C. Const. Art. III, § 34, XI. Additionally, the S.C. Constitution explains that "[t]he 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 Medical Society of South Carolina v. MUSC, our Supreme Court reversed the Trial Court's decision and held that the statute at issue was constitutional:

> The trial judge held Act No. 390 was special legislation in violation of article III, § 34(IX), which provides in pertinent part that "where a general law can be made applicable, no special law shall be enacted."
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> We will **not declare a statute unconstitutional as a special law unless its repugnance to the Constitution is clear beyond a reasonable doubt.** Horry County v. Horry County

Higher Educ. Comm'n, 306 S.C. 416, 412 S.E.2d 421 (1991). The purpose of the prohibition on special legislation is to make uniform where possible the statutory laws of this State in order to avoid duplicative or conflicting laws on the same subject. Duke Power, *supra.* We have repeatedly acknowledged, however, that there are cases where a special law will best meet the exigencies of a particular situation.

A **special law is not unconstitutional where there is "a substantial distinction having reference to the subject matter of the proposed legislation,** between the objects or places embraced in such legislation and the objects and places excluded." Horry County, 306 S.C. at 419, 412 S.E.2d at 423; Duke Power Co. v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 90, 326 S.E.2d 395, 400-401 (1985); Shillito v. City of Spartanburg, 214 S.C. 11, 20, 51 S.E.2d 95, 98 (1948). The **General Assembly must have a logical basis and sound reason for resorting to special legislation**. Horry County, *supra;* Gillespie v. Pickens County, 197 S.C. 217, 14 S.E.2d 900 (1941). This Court will not overrule the legislature's judgment that a special law is necessary unless there has been a clear and palpable abuse of legislative discretion. Sirrine v. State, 132 S.C. 241, 128 S.E. 172 (1925), *overruled on other grounds,* McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

In South Carolina Pub. Serv. Auth. v. Citizens and Southern Nat'l Bank, 300 S.C. 142, 386 S.E.2d 775 (1989), we **upheld special legislation relating only to the Santee Cooper** electric utility allowing it to change its fiscal year to the calendar year. We noted that Santee Cooper was unique since it was the only State agency involved in the production, sale, and distribution of electricity, and that the Act in question was enacted to address a special condition facing this unique agency. 300 S.C. at 161, 386 S.E.2d at 786. Accordingly, we concluded the Act before us was not prohibited special legislation.

In another special legislation case, Duke Power, *supra,* we **upheld an Act allowing voters to approve a referendum granting the Greenwood County Power Commission approval to sell its electric utility to Duke**. Duke challenged the Act on the ground of special legislation. We noted the Greenwood County Power Commission had no power to sell its facility without legislative authorization, and the proposed transaction was unique. Accordingly, the challenged Act was not prohibited special legislation. 284 S.C. at 92-93, 326 S.E.2d at 402.

In this case, **MUSC is a unique State agency because it is the only one that owns and operates an acute-care teaching hospital.** Further, the proposed transaction regarding hospital services is one unique to MUSC. Moreover, the fact that MUSC has no authority to enter the proposed transaction without legislative approval indicates such legislation is necessary. Since the legislature had a "logical reason and sound basis" for enacting a special law authorizing the proposed transaction, Act No. 390 is not unconstitutional special legislation.

Medical Society of South Carolina v. MUSC, 334 S.C. 270, 279-80, 513 S.E.2d 352, 357-58 (1999) (emphasis added).

Moreover, we note that an exception to Art. III, § 34 prohibiting "special legislation" is provided in subsection (X), which provides "[t]hat nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." In opinion No. 85-31 (April 4, 1985), we discussed Art. III, § 34 (X) as follows:

> Our court has usually upheld amendments to a general law, such as § 9–1–1530, to provide for certain exceptions. See, present § 9–1–1530 (exception for elective officials). See also, State v. Meares, 148 S.C. 118, 145 S.E. 695; State ex rel. Sellers v. Huntley, et al., 167 S.C. 476, 166 S.E. 637; Kalk v. Thornton, 269 S.C. 521, 238 S.E.2d 210 (1977). However, such provisions must be
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> > general in form. In operation [they must apply] to all areas falling within the class established and exclude [ ] none from its application who should be included.
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> 269 S.C. at 526 [Kalk v. Thornton]. And the classification itself must be rational and not arbitrary, one which is 'based upon differences which are either defined by the Constitution or are natural and intrinsic, and which suggest a reason that may rationally be held to justify the diversity of the legislation.' State ex rel. Riley v. Martin, 274 S.C. at 117. Legislative findings with respect to the need for such a classification are accorded 'great weight' by the courts. Doran v. Robertson, 203 S.C. 424, 27 S.E.2d 714 (1943).

The Kalk case, quoted in the above-referenced opinion, also noted that "[t]he fact that the proviso [or amendment] ultimately affected only one person or one locale does not make it special legislation." [referencing Timmons v. South Carolina Tercentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970).]

Similar to the statute at issue in Medical Society of South Carolina v. MUSC and Kalk, the currently proposed language or the proposed amendment language to S.497 would not violate the prohibition on special legislation. It is the opinion of this Office that, under S.C. Const. Art. III, § 34, **the proposed language or proposed amendment language for S.497 would be deemed valid and constitutional. Such proposed statutory language would not be considered "unconstitutional special legislation" because the Cherry Grove canals are unique in that they are the only ones developed by the county or municipality as opposed to a private developer.** See, 19 S.C.Jur. Constitutional Law § 98.1. Moreover, we perceive the proposed amendment would constitute a "special provision in a general law," as authorized by Art. III, § 34 (X).

Question 2

Of course, this Office cannot, in an opinion, determine facts. See, Op. S.C. Atty. Gen., December 12, 1983. However, it is our understanding that, based on the information provided, this bill would only apply to the set of canals in Cherry Grove because all others mentioned above are man-made and essential access canals developed by private developers. The **Cherry Grove Beach canals are unique because the area at issue was developed by the county or municipality**.

Question 3

Under our federal and State Constitutions, no person shall be denied the equal protection of the laws. U.S. Const. Amend. XIV, § 1; S.C. Const. Art. I, § 3 (2009). In this instance, an exemption from applying for a permit does not involve a fundamental right or a suspect class; therefore, a rational basis analysis should be used to determine whether such an exemption violates the equal protection clauses. See, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

In an opinion of this Office dated October 18, 2010 we noted that:

> Our Supreme Court explained the rational basis analysis as follows:
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> > If a classification is reasonably related to a proper legislative purpose and the members of each class are treated equally, any challenge under the equal protection clause fails. Robinson v. Richland County Council, *supra*; Medlock v. S.C. Fam. Farm Dev., 279 S.C. 316, 306 S.E.2d 605 (1983). The requirements of equal protection are satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis. Medlock, *supra*. In addition, the burden is upon those challenging the legislation to prove lack of rational basis. Ex parte Yeargin, 295 S.C. 521, 369 S.E.2d 844 (1988).
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> A legislatively created classification will not be set aside as violative of the equal protection clause unless it is plainly arbitrary and there is no reasonable hypothesis to support the classification. Samson v. Greenville Hosp. System, 295 S.C. 359, 368 S.E.2d 665 (1988); Medlock, *supra*.
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> Brown v. County of Horry, 308 S.C. 180, 186, 417 S.E.2d 565, 568-69 (1992).

Op. S.C. Atty. Gen., October 18, 2010.

As stated in prior opinions, ". . .every statute is presumed constitutional, and will not be declared unconstitutional unless its invalidity is clear beyond reasonable doubt. . . ." Ops. S.C. Atty. Gen., July 27, 2010; June 12, 2009. An opinion of this office dated November 27, 2007 indicated that ". . . legislation passed by the General Assembly is presumed constitutional. Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) ('All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.'). 'A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.' Joytime Distrib. & Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)." Op. S.C. Atty. Gen., November 27, 2007. Moreover, "[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Ops. S.C. Atty. Gen., July 27, 2010; August 19, 1997.

It is the understanding of this Office that because of the specific language used, the distinctions in the currently proposed and proposed amendment language limit the effect of this bill to Cherry Grove for all intent and purposes. The proposed legislation **would likely satisfy a rational basis analysis** because the classification bears a reasonable relation to the legislative purpose. **It is the opinion of this Office that this proposed legislation would be found constitutional by a court and that the court would likely determine such legislation does not violate the Equal Protection clause.** We are aware of no other similarly situated dredging projects to which this proposed amendment would apply.

Sincerely,

Robert D. Cook
Deputy Attorney General