ALAN WILSON
ATTORNEY GENERAL

April 15, 2011

The Honorable Yancey McGill
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator McGill:

We received your letter requesting that we reconsider an opinion issued by this Office in 1983 concerning the South Lynches Fire District in Florence and Williamsburg counties.

Law/Analysis

In 1983, this Office issued an opinion addressing the validity of a proposed bill creating the South Lynches Fire District (the "District"). Op. S.C. Atty. Gen., June 16, 1983. We responded as follows:

> The bill is special legislation that would create a fire district in parts of two counties. Under the Home Rule Act, county councils have been expressly empowered to provide for fire protection in their respective counties. § 4-9-30(5), Code of Laws of South Carolina, 1976 (1982 Cum. Supp.). Article VIII, § 7 of the South Carolina Constitution prohibits a special law for 'a specific county which relates to those powers, duties, functions, and responsibilities which, under the mandated systems of government, are set aside for counties.' Kleckley v. Pulliam, 265 S.C. 177, 183, 217 S.E.2d 217, 220 (1975). Since fire protection is one of the powers, duties, functions, and responsibilities set aside for counties under the Home Rule Act, § 4-9-30(5), supra, it follows that this bill is most probably unconstitutional. See Cooper River Park and Playground Comm. v. City of N. Charleston, 273 S.C. 639, 642, 259 S.E.2d 107, 109 (1979).

> The constitutionality of the bill is not saved by virtue of the fact that it relates to more than one county. Although the Supreme Court upheld a special act for a multicounty airport district in Kleckley v. Pulliam, 265 S.C. 177, 217 S.E.2d 217 (1975), the rationale for that decision was that the subject of the special act 'extend[ed] beyond the purely local concern.' Supra at 186, 217 S.E.2d at 221. It was not feasible for the counties included within the airport district to perform this function themselves using only the powers given them by general law. Kleckley v. Pulliam, supra at 189, 217 S.E.2d at 223. Here, however, it is apparent that H-2836 deals solely with the local concern of fire protection within the proposed district. The two counties involved could create a similar taxing district by agreement if such were deemed necessary. Art. VIII, § 13, South Carolina Constitution. Since this is a matter committed to the counties under the Home Rule Act, it follows that H-2836 would most probably be unconstitutional.

Id.

The Legislature adopted proposed legislation considered in our 1983 opinion by act 149 of 1983. 1983 S.C. Acts 416. You are now asking us to reconsider our 1983 opinion and determine whether the Legislature legally created the District. We must we begin our analysis with the understanding that "all statutes are presumed constitutional and, if possible, will be construed to render them valid." State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). Moreover, only a court, not this Office, has jurisdiction to declare a statute unconstitutional. Op. S.C. Atty. Gen., February 24, 2010.

In our 1983 opinion, we relied on Kleckley v. Pulliam, 265 S.C. 177, 217 S.E.2d 217 (1975). In that case, the Supreme Court considered whether legislation allowing an airport commission created prior to home rule to issue bonds violated article VIII section 7 of the South Carolina Constitution. Id. Article VIII section 7 of the South Carolina Constitution contains a provision stating that "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 (2009). The Court noted that "[t]he mandate by its express terms relates only to 'counties' and does not relate to legislation dealing with the 'powers, duties, functions, and the responsibilities' which are not 'of counties'." Kleckley, 265 S.C. at 183, 217 S.E.2d at 220. Furthermore, the Court found:

> The prohibition against laws for a specific county cannot be given an interpretation which might result if the words were taken by

> themselves and out of context. The prohibition was not intended to create an area in which no laws can be enacted. Rather, the prohibition only means that no law may be passed relating to a specific county which relates to those powers, duties, functions and responsibilities, which under the mandated systems of government, are set aside for counties.

Id.

The Court set forth the following test to determine whether or not an act violates this portion of article VIII section 7: "whether the Act here relates to the powers, duties, functions and responsibilities, which belong Peculiarly to counties." Id. at 184, 217 S.E.2d at 220. Accordingly, the Court determine that

> [t]he record here clearly establishes that the function of this airport is not peculiar to a single county or counties. To a large segment of the population of this State, the maintenance of the airport is as important as the existence of an interstate highway. It, therefore, follows that since the governmental purpose under the Act establishing the District is not one peculiar to a county, the power of the General Assembly to legislate for this purpose continues, despite Article VIII, Section 7.

A year after it decided Kleckley, in Torgerson v. Craver. 267 S.C. 558, 230 S.E.2d 228 (1976), the Supreme Court considered whether or not the Legislature could amend another airport district's enabling legislation to allow it to issue bonds. The Court noted that in Kleckley

> it was absolutely impossible for either the governing body of Richland County or the governing body of Lexington County to provide for the bond issue. There was involved a matter with which only the General Assembly could deal. The bond legislation was not for a specific county; it was for a region.

Id. at 563, 230 S.E.2d at 230. However, in Torgerson, the airport district was located entirely within Charleston County and "involves problems which can be solved by the local governing body of Charleston County." Id. Furthermore, the Court stated:

> The fact that a Charleston County Airport serves travelers from other counties does not change its local status. It would hardly be argued that a Charleston County Hospital, a Charleston County

> Library, a Charleston County Museum, or a Charleston County Zoo, is not a local county function merely because it served the needs of citizens from other counties.
>
> In summary, we hold that act bearing Ratification No. R-297 of the 1975 Acts of the General Assembly is violative of Article VIII, s 7, of our Constitution, because it is legislation for a specific county.

Id. at 564, 230 S.E.2d at 230.

Several opinions issued by this Office subsequent to our 1983 opinion interpret Kleckley and Torgerson as requiring the purpose of the special purpose district to be regional in nature and not just simply crossing county boundaries in order to pass constitutional muster under article VIII section 7. For instance, in a 1984 opinion considering whether the enabling legislation of a multicounty water and sewer authority could be amended, we noted "the emphasis should be on the purpose of the district and not on geography . . . ." Op. S.C. Atty. Gen., January 18, 1984.

In another 1984 opinion, we addressed the ability of the Legislature to establish a multicounty fire district. Op. S.C. Atty. Gen., November 14, 1984.

> It is certainly possible that if the Supreme Court were faced with the issue presented by your inquiry, the Court would interpret Kleckley and Article VIII, Section 7 as permitting local legislation dealing with multi-county special purpose districts without regard to the nature of the governmental services provided by the district. We think, however, that the proper interpretation of Article VIII, Section 7 would prohibit any special legislation dealing with a multi-county special purpose district which would perform a governmental function or provide a governmental service which could be done by the respective counties. See, Kleckley v. Pulliam, supra, 265 S.C. at 169, 217 S.E. 2d at 223. Thus, we believe a court could conclude that Act No. 346 of 1982, and as a result thereof Act No. 35 of 1983, would be invalid as violative of Article VIII, Section 7 of the State Constitution.

Id.

However, in 1985, we determined the Legislature could amend the enabling legislation of a multicounty fire district without violating article VIII section 7 of the South Carolina Constitution. Op. S.C. Atty. Gen., April 3, 1985. We stated:

> A court considering the issue which you have raised and following the reasoning in Kleckley would probably note the geographic area encompassed by the District as well as the powers and duties of the district's governing body specified in Section 5 of Act No. 876 of 1966. A court could reasonably conclude that the powers, duties, functions and responsibilities of the District and its governing body are not peculiar to a county, particularly since municipal fire departments and volunteer fire departments provide the same services as the District in other parts of the State. While we cannot second-guess the court, we believe there is a reasonable basis for a court to conclude that an amendatory act of the General Assembly for the Murrells Inlet—Garden City Fire District would not violate Article VIII, Section 7 of the State Constitution.

Id. Nevertheless, in this opinion and in several opinions subsequent to this one, we concluded that in determining whether or not legislation violated article VIII section 7, a court would consider whether the public service district is regional in scope and whether its "functions, powers, duties, and responsibilities are not peculiar to a county . . . ." Op. S.C. Atty. Gen., May 23, 1985. See also Op. S.C. Atty. Gen., March 23, 1995.

More recent opinions interpret the Court's decision in Kleckley more broadly based on dicta contained in Fort Hill Natural Gas Authority v. City of Easley, 310 S.C. 346, 426 S.E.2d 787 (1993). In that decision, the Supreme Court considered whether a natural gas authority had the authority to set aside profits for future construction projects. Id. The Court determined the authority's enabling legislation did not allow for such set asides. Id. However, the Court suggested the authority could seek and amendment from the Legislature to allow for them. Id. at 350, 426 S.E.2d at 789. Moreover, the Court added that "any amendment to this statute would not violate Article VIII, Section 7 of the South Carolina Constitution, as the Authority extends beyond the confines of one county." Id.

A 2005 opinion of this Office explained as follows:

> [W]hile the Court in Kleckley appeared not to have based its decision solely upon the fact that the special purpose district in that case encompassed more than one county, dicta from the Court in a subsequent decision indicates that the multi-county nature of the district is pivotal. In interpreting the powers of the Fort Hill Natural Gas Authority - created by the General Assembly in 1952 - the Court stated that "[i]f the [Fort Hill] Authority feels that [a

> portion of its enabling Act] is unwise or substantially interferes with its operation of the system, its proper recourse is to seek an amendment from the legislature." Fort Hill Natural Gas Authority v. City of Easley, 310 S.C. 346, 426 S.E.2d 787 (1993). The Fort Hill Court, citing Kleckley v. Pulliam, supra, further stated that "in that regard, we note that any amendment to this statute would not violate Article VIII, Section 7 of the South Carolina Constitution, as the Authority extends beyond the confines of one county." 426 S.E.2d at 789.
>
> Thus, based upon Kleckley and Fort Hill, we stated in an Opinion concerning the Donalds-Due West Water Authority that
>
> > [i]f the defined service area [of the Donalds-Due West Water Authority] as provided in the Authority's enabling legislation, encompasses more than one county it is my opinion that the General Assembly most likely has the power to enact specific legislation related to the Authority.... If, on the other hand, the Authority's defined service area is confined to a single county, then it is my opinion that specific legislative action related to the Authority by the General Assembly would most likely be found by a reviewing court to be unconstitutional pursuant to the prohibitions of Article VIII, Section 7 and/or Article III, Section 34. [special legislation].
>
> Op. S.C. Atty. Gen., July 31, 2003.

Op. S.C. Atty. Gen., March 29, 2005. Relying on this opinion, another 2005 opinion of this Office concluded that the enabling legislation of a multicounty water and sewer authority passed after the enactment of article VIII section 7 is constitutional. Op. S.C. Atty. Gen., November 29, 2005. Thus, these opinions reflect the current position of this Office that so long as the legislation is multicounty in nature, a court will likely uphold the legislation as constitutional under article VIII section 7.

Conclusion

Given our current interpretation of article VIII section 7, we herein overrule our 1983 opinion concerning the constitutionality of the District's enabling legislation. Because the District is located in more than one county, we believe our courts would conclude that the

District's enabling legislation is not a law for a specific county and therefore, is valid under article VIII section 7 of the South Carolina Constitution.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General