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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

February 12, 2001

Creighton B. Coleman
Member, House of Representatives
120 Washington Street
P.O. Box 1006
Winnsboro, South Carolina 29180

RE: Informal Opinion

Dear Representative Coleman:

By your letter of February 5, 2001, you have requested an opinion of this Office concerning South Carolina Code of Laws Section 50-25-1210 et seq., which provide for noise control requirements on Lake Wateree. You have asked for an opinion on the constitutionality of these provisions.

At the outset, in considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While 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.

Section 50-25-1210 establishes boating restrictions for motorboats operating on Lake Wateree, which is bounded by multiple counties in South Carolina. The statute specifies how the motorboats shall exhaust, depending on the propulsion machinery, and provides for criminal penalties for violations of the provisions. Similar statutes are in place, in Chapter 25 of Title 50, for other specific bodies of water in this State.

In an informal opinion of this Office, dated August 14, 2000 and enclosed for your review, we concluded that Section 50-25-1210 would likely withstand a constitutional challenge based on equal protection grounds. The statute neither deprives a person of ordinary intelligence of the

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opportunity to know what is prohibited, nor allows law enforcement to apply the provisions in an arbitrary and discriminatory manner. We incorporate by reference the reasoning put forth in the opinion of August 14, 2000 to address the equal protection arguments.

We also believe the statute's presumption of constitutionality would be upheld if challenged on the basis of the State Constitution. Article III, § 34, Subparagraph IX prohibits the General Assembly from enacting special laws where a general law can be made applicable. See, for example, Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996) (striking legislation which allowed for county referenda to determine legality of video poker machines). As the South Carolina Supreme Court also points out in Martin, "Article III, § 34, prohibits special legislation where the effect is to have different criminal laws in different counties." Martin at 274, citing State v. Hammond, 66 S.C. 219, 44 S.E. 797 (1903).

Although Martin and Hammond are relevant to the issue of special legislation, neither case is exactly on point in this instance. Hammond, decided in 1903, involved a statute making it illegal to dam a stream in only certain counties. Looking to the purpose of the statute, to prevent the obstructed flow of water and the damage of runoff to surrounding lands, the Court said "Why should running streams in Lancaster be so obstructed with impunity, while it is a crime to do a similar act in York or Chester?" Hammond, 44 S.E.2d at 800. Although at first blush, Hammond appears to be determinative, other provisions of law are applicable when questioning the constitutionality of Section 50-25-1210. This statute, like others in Chapter 25 of Title 50, addresses the unique circumstances involving the operation of motorboats on South Carolina's waters.

In an informal opinion of this Office dated June 28, 1990, we examined the constitutionality of a similar provision of the Code of Laws. Act No. 751, 1990 Acts and Joint Resolutions, established boating restrictions on Lakes William C. Bowen and H. Taylor Blalock in Spartanburg County. In that opinion, it was noted that many of the matters involving operation of motorboats in South Carolina are within the jurisdiction of what is now the Department of Natural Resources. See Op. Atty. Gen. June 28, 1990. Section 50-21-30 allows local laws to be enacted in limited form, but as we said in the earlier opinion "If unique conditions exist on these two lakes which cannot be adequately addressed by an ordinance identical to state law, the appropriate political subdivision lacks authorization to go beyond state law to deal with the problem." We also stated:

... Article III, Section 34(IX) prohibits the adoption of a special law where a general law may be made applicable. As stated in Shillito v. City of Spartanburg, 214 S.C. 11, 51 S.E.2d 95 (1948), however,

The language of the Constitution which prohibits a special law where a general law can be made applicable, plainly implies that there are or may be cases where a special Act will best meet the exigencies of a particular case, and in no wise be promotive of those evils which result from a general and indiscriminate resort to local and

special legislation. There must, however, be 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. The marks of distinction upon which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.

214 S.C. at 20. While the act in question contains no legislative findings, there may well be "marks of distinction" about these two lakes of the Spartanburg Water System which would require a special set of laws to control activities thereon. For example, waterskiing is regulated in part by Section 50-21-810 et seq.; the lakes in question may be of such unique characteristics that these general laws are not sufficient. Because these "marks of distinction" may well have been taken into account by the General Assembly in adoption of this act, this Office is of the opinion that the presumption of constitutionality should prevail in this instance. Ascertainment of these facts would be outside the scope of an opinion of this Office.

Op. Atty. Gen. June 28, 1990.

Thus, although the Constitution prohibits a special law where a general law can be made applicable, there are instances when a specialized law of the General Assembly is the only appropriate means of enacting the legislation. As we noted in the opinion of June 28, 1990, laws involving the operation of motorboats on the waters of the state are somewhat reserved to the authority of the State. Local governments have little discretion in enacting ordinances to address any unique circumstances surrounding the individual lakes. Similarly, these unique circumstances, or "marks of distinction," prevent a general law from being made applicable to the entire state. As distinct from Hammond which involved only the damming of streams, the physical surroundings of a particular lake could have a direct impact on the level of noise restrictions for the public enjoyment of the lake. Certain conditions may exist on Lake Wateree that require noise abatement provisions that would not be necessary on other lakes of the state. Such circumstances would require a specialized law of the General Assembly.

For all of the foregoing, it is the opinion of this Office that the statute in question could very likely pass constitutional muster if challenged in court. Of course, unless and until a court declares otherwise, this statute, like any other legislative enactment, is entitled to the presumption of constitutionality.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

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With kind regards, I remain

Very truly yours,

A handwritten signature in cursive script, appearing to read "Susannah R. Cole".

Susannah Cole
Assistant Attorney General