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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 15, 1999

Neil Rashley, General Counsel
Office of the Secretary of State
1205 Pendleton Street, Suite 525
Columbia, South Carolina 29201

RE: Informal Opinion

Dear Mr. Rashley:

Your opinion request has been forwarded to me for reply. You have enclosed a copy of a decision of the United States District Court in the case of William H. Murray, J. Neil Lewis, John Corcoran, and Robert L. Miller, Plaintiffs, v. Robert Kaple, Franklin McCray, J.W. Kramer, and Waccamaw Neck Civic Association, Defendants, C.A. No. 2:99-2523-23. This action involved a municipal incorporation effort for a proposed area within Georgetown County known as the Waccamaw Neck. Plaintiffs alleged that Section 5-1-40 of South Carolina's municipal incorporation statutes was unconstitutional. This attack was based on Plaintiffs' belief the petition requiring the signatures of fifteen percent (15%) of the freeholders residing within the proposed area of incorporation was violative of the guarantee of Equal Protection of the Fourteenth Amendment of the United States Constitution. By order dated September 24, 1999, the Honorable Patrick Michael Duffy declared the incorporation procedures prescribed under S.C. Code Ann. § 5-1-40 violate the Equal Protection Clause of the United States Constitution and permanently enjoined the defendants in the case from employing the statutory procedure, conducting the proposed election, and from participating in any conduct in preparation of the election.

In light of Judge Duffy's ruling, you have asked for this Office's guidance on several questions so that the Office of the Secretary of State may determine how to perform its ministerial duties provided by the municipal incorporation statutes. Your questions are as follows:

*Respectfully,
Charlie Condon*

1. What is the impact of Judge Duffy's ruling on any pending incorporations in our office?
2. What is the impact of Judge Duffy's ruling on any incorporations that are proposed to our office before the statutes are amended?
3. What is the impact of Judge Duffy's ruling on the Pawleys Island incorporation election that was struck down? In particular, are the commissioner's appointments and the petition that were made under the statutes still valid? Can the commissioners still operate under the guise of the statute in gathering support for incorporation?
4. What is the impact of Judge Duffy's ruling on any municipalities that were previously incorporated before the ruling?

It is my understanding that the time for appeal in this case has not yet expired. This Office is not authorized to issue opinions on matters pending in the courts. Therefore, while I will attempt to provide you with as much guidance as possible, my answers must be tempered by this limitation. In addition, since this matter may be appealed, it is possible that the Court of Appeals may view this matter differently than the District Court. This must also be kept in mind when answering your questions.

QUESTIONS 1 & 2

With Judge Duffy's decision in mind, you have asked for guidance on how the Office of the Secretary of State should perform its statutory duties under the municipal incorporation statute regarding incorporations pending in your office and incorporations proposed prior to legislative amendment of the statute. The municipal incorporation statute sets forth the ministerial duties of the Office of the Secretary of State. Before issuing a corporate certificate to a proposed municipality, the Secretary of State must make certain determinations as provided by the statute. S.C. Code Ann. § 5-1-30. A petition setting forth the corporate limits and number of inhabitants of the affected area, and signed by fifty (50) qualified electors and fifteen percent (15%) of the freeholders residing within the proposed area must be filed with the Secretary of State. S.C. Code Ann. § 5-1-40. After receipt of such a petition, the Secretary of State shall then issue to three or more persons residing in the area of such proposed municipality, a commission empowering them to (a) hold an election not less than twenty days nor more than ninety days after the issuance of the commission, and (b) appoint three managers of election who shall conduct such election. S.C. Code Ann. § 5-1-50. Following the election, the commissioners shall certify the results

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of such election under oath to the Secretary of State, and if the result is in favor of incorporation, the Secretary of State shall issue a certificate of incorporation of such municipality. S.C. Code Ann. § 5-1-70.

In performance of their duties, public officials are governed by the existing law, including statutes, constitutional provisions, and judicial construction placed thereon by the courts, and their oath to obey the constitution does not impose a duty or obligation to determine whether a statute is constitutional before they obey it. 67 C.J.S. Officers § 201 (1978). Accordingly, officers must obey a law found on the statute books until, in a proper proceeding, the courts have passed on its constitutionality. Id.

The Office of the Secretary of State appears to have two potential courses of action regarding pending and future incorporations. Of course, the Office of the Secretary of State must make the final decision as to which of these methods to follow. A United States District Court concluded that Section 5-1-40 is unconstitutional and enjoined the named defendants from moving forward with the election process. The Court's decision is still subject to appeal and the statute may also be subject to potential challenges in other courts. While this Office cannot predict whether another court may reach a conclusion different from the one reached by Judge Duffy, in light of the Fourth Circuit and South Carolina cases cited in the Order, it appears very likely that Judge Duffy's decision will be upheld.

As previously stated, officers must obey a statute until the courts have passed on its constitutionality. Thus, Judge Duffy's ruling would appear to provide a basis for the Office of the Secretary of State to decline to exercise its statutory duties regarding pending and future incorporations. If the Office of the Secretary of State chooses this option, it would appear that it would be shielded from liability insofar as its actions would not violate a clearly established constitutional right. See Harlow v. Fitzgerald, 457 U.S. 800 (1982); O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945). On the other hand, since this case may still be appealed and other courts are free to interpret the statute differently, it would be possible for the Office of the Secretary of State to continue to perform the ministerial duties provided by the statute pending final resolution of this matter or statutory amendment. Of course, those attempting to proceed under Section 5-1-40 must recognize that a United States District Court has found the statute to be unconstitutional and a substantial likelihood exists that their actions would meet the same fate of those attempted by the defendants in the Waccamaw Neck case.

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QUESTION 3

This question is more appropriately addressed to Judge Duffy by the parties involved in this case. By his Order, the judge "permanently enjoins the defendants from employing the statutory procedure, conducting the proposed election, and from participating in any conducting in preparation thereof." We must defer to Judge Duffy in determining how broadly this statement and his order as a whole should be interpreted.

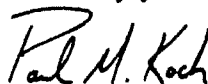
QUESTION 4

Judge Duffy concluded Section 5-1-40 violated the Equal Protection Clause of the United States Constitution and permanently enjoined the defendants from moving forward under the statute. The effect of his decision on already existing municipalities was never addressed by Judge Duffy. Thus, we must conclude that the Order was not meant to call into question the status of these municipalities. These municipalities would have to be evaluated by the courts on a case-by-case basis.

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 questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With best personal regards, I am

Sincerely yours,



Paul M. Koch
Assistant Attorney General