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The State of South Carolina

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The Honorable Joe Wilson
Senator, District No. 23
606 Gressette Building
Columbia, South Carolina 29202

Dear Senator Wilson:

You had requested the opinion of this Office as to the constitutionality of Senate bill 284, particularly as to the retroactive clause. This bill, if adopted, would add § 5-3-276 to the South Carolina Code of Laws; section 1 provides:

> When a municipality annexes territory in a county, the following entities have standing to bring a civil action challenging the validity of the annexation:
>
> (1) a municipality located in whole or in part in the county in which the annexation has occurred;
>
> (2) the county in which the annexation has occurred; and
>
> (3) a special purpose or public service district located in whole or in part in the county in which the annexation has occurred.
>
> The standing given by this section is in addition to any other standing allowed by law to challenge annexations.

Then, section 2 of the bill contains provisions which would make the law retroactive:

> This act takes effect on the first day of the second month following approval by the Governor and applies with

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> respect to annexations after September 30, 1989. For an annexation occurring after September 30, 1989, and before the effective date of this act, the date of the annexation for purposes of the time within which challenges must be brought is deemed to be the effective date of this act.

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. For reasons following, it is our opinion that potential constitutional difficulties exist with respect to S.284, so that this bill may well be unconstitutional.

By way of background, it is helpful to review the municipal annexation process. Municipal boundaries may be altered by various mechanisms found in Chapter 3 of Title 5, South Carolina Code of Laws. Several of the statutory procedures therein have been found to be unconstitutional, by decisions in Fairway Ford Co. v. Timmons, 281 SC. 57, 314 S.E.2d 322 (1984); The Harbison Group v. Town of Irmo, C.A. No. 3:90-284-16 (D.S.C. 1990), which relied on Muller v. Curran, 889 F.2d 54 (4th Cir. 1989); and Hayward v. Clay, 573 F.2d 187 (4th Cir. 1978). Section 5-3-300 et seq. provides a method of annexation permitting twenty-five percent of the resident freeholders to initiate an annexation election in the area in which resident electors, by majority vote, approve the election. Because a popular vote may be blocked by property owners, this procedure would likely be invalidated under Muller if challenged in court. The special provisions allowing annexation of property owned by governmental entities, churches, and the like, and the seventy-five percent or one hundred percent petition methods are still viable, as being free from constitutional challenge; specifically, the statutes are S.C. Code Ann. §§ 5-1-150; 5-3-100 through 5-3-140; 5-3-250; and 5-3-260. Challenges to annexations are currently made pursuant to § 5-3-270. The bill under consideration would provide an additional means of challenging annexations into a municipality.

The retroactive nature of S.284, particularly as it relates to the potential for impairment of contracts,[1] is troublesome. Retrospective legislation which affects property rights or vested interests in property has been declared invalid. Muldrow v. Caldwell, 173 S.C. 243, 175 S.E. 501 (1934); First Presbyterian Church of York v. York Depository, 203

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[1] Art. I, § 4 of the State Constitution and art. I, § 10 of the United States Constitution prohibit the adoption of laws impairing contracts.

S.C. 410, 27 S.E.2d 573 (1943). The proposed legislation would allow the specified political subdivisions to challenge any completed annexation in the county in which it occurred, after September 30, 1989, effectively placing in jeopardy every annexation after that date without limitation. Annexations which have been completed give property owners vested property rights to receive municipal services and result in contracts for services which could be impaired by application of the legislation if adopted. Had financing of residential and/or commercial property been extended on the assurance of availability of municipal services, for example, it is possible that contractual obligations, notes, mortgages, insurance contracts, and similar loan instruments could be impaired. Leases with tenants of residential and commercial property could also be affected. The proposed legislation given no protection to the potentially impaired interests of property owners and accords such owners no due process, also guaranteed by the constitutions if they are to be deprived of property interests.[2]

In addition to potentially impairing contracts and denying due process to the property owner(s) at whose behest the annexation has been accomplished, an equal protection[3] issue may also arise. Section 5-3-270 presently provides a means for challenging annexations and establishes certain time limits by which certain actions must be taken by "the person interested." The proposed legislation seems to contain no such limitations for the specified political subdivisions or at least creates exceptions to § 5-3-270 for the specified political subdivisions. There may well be others who, for some reason unknown to the undersigned, may have an interest in challenging an annexation but could not meet the timetable in § 5-3-270; such parties could easily be similarly situated to the specified political subdivisions but have not been accorded equal protection. No rational basis is identified for singling out the specified political subdivisions for special treatment.

Presumably, S.284 if enacted would be read in pari materia with § 5-3-270, making the specified political subdivisions "interested persons," so as to challenge an annexation. It is questioned whether the proposed legislation may be unconstitutionally overbroad (in addition to being under-inclusive as observed in the preceding paragraph). As a hypothetical example, should the City of Cayce have annexed property during the time in question, such distant municipalities as Gaston or Chapin, or a special purpose district such as the Irmo Fire District, located or having jurisdiction nowhere close to the City of Cayce, have been granted standing; it is difficult to discern the interest such political

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[2] U.S. const. amend. XIV; state const. art. I, § 3. Indeed, the property owner's rights could be affected without the owner's consent, notice, hearing, or the opportunity to participate in the proceedings.

[3] U.S. const. amend. XIV; state const. art. I, § 3.

subdivisions could show the court to maintain a challenge. There is no standard or basis in S.284 upon which a challenge by a political subdivision may be based, such as ownership of property or encroachment into another municipality. (The mere interest of public officials would not be sufficient to invoke standing. See Greenville County Fair Ass'n v. Christenberry, 198 S.C. 338, 17 S.E.2d 857 (1941).)

Moreover, it is axiomatic that any litigation must be instituted by the real party in interest. S.C.R.C.P. Rule 17(a). A municipality, county, or special purpose district which is not the owner of property annexed, does not appear to be a real party in interest in an annexation suit. County of Lexington v. City of Columbia, 303 S.C. 300, 400 S.E.2d 146 (1991); Quinn v. City of Columbia, 303 S.C. 405, 401 S.E.2d 165 (1991); Richland County Recreation Dist. v. City of Columbia, 290 S.C. 93, 348 S.E.2d 363 (1986); St. Andrews Public Service Dist. v. City of Charleston, 294 S.C. 92, 362 S.E.2d 877 (1987). The overbreadth of S.284 could result in litigation without a real party in interest, bringing subject matter jurisdiction into question.

The standing which would be conferred by S.284 would be tantamount to placing municipalities, counties, and special purpose districts in parens patriae. The Supreme Court held in County of Lexington v. City of Columbia, supra, that a political subdivision of the State lacks the sovereignty to maintain a suit in that capacity, citing Capital View Fire District v. County of Richland, 297 S.C. 359, 377 S.E.2d 122 (S.C. App. 1989). The court also held that there was no issue of overriding public concern which would confer standing in either the County of Lexington or the Quinn case.

In addition, the Supreme Court held in State of South Carolina v. City of Columbia, _____ S.C. _____, 419 S.E.2d 229 (1992), that not even the State had standing to challenge the annexation of property which it did not own. The court reiterated its consistent holdings in prior cases that the challenging party must assert an infringement of its own proprietary interest or statutory rights to establish standing. The proposed legislation does not confer upon political subdivisions any propriety interests or statutory rights in annexed property of private owners. If the State itself does not have standing absent such interests, the legislature of the State cannot create such standing. The legislature cannot delegate a power not inherently held by the State or granted by the Constitution. There is no constitutional provision granting such power, and the court in State of South Carolina v. City of Columbia, supra, ruled in effect that there is no such inherent power. We have not located any authority that such power existed at common law.

To summarize, we have identified a number of potential constitutional difficulties with respect to S.284 to the extent that this bill may well be unconstitutional. We trust the foregoing discussion will be of assistance as the bill is further considered.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

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