Reg. 4820

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 23, 1995

The Honorable Lewis R. Vaughn
Member, House of Representatives
534 Blatt Building
Columbia, South Carolina 29211

RE: Informal Opinion

Dear Representative Vaughn:

Your letter of February 21, 1995, to Attorney General Condon concerning the constitutionality of H.3604 has been referred to the Opinion Section for review and response. The bill would alter the zoning powers of certain counties and municipalities in the Greenville-Spartanburg area by transferring zoning functions from selected county and municipal governments to a newly created Greenville-Spartanburg Airport Environs Authority not created elsewhere in the State. Your specific question is whether the General Assembly would be in compliance with constitutional prohibitions against special legislation for local governments by passing a bill that would alter the county zoning authority of only Spartanburg and Greenville counties and the municipal zoning authority of only Greer, Lyman, and Duncan, in light of S. C. Const. art. VIII, §§ 7 and 10.

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.

A review of H.3604 shows that, if adopted, a new section will be added to S. C. Code Ann. §55-11-110 et seq. (1976, as revised 1992), concerning the Greenville-Spartanburg Airport District. Proposed §55-11-220 would create within the District an airport environs area "for purposes of assuring land uses compatible with airport operations." The geographic area of the airport environs area is specified. An airport environs area authority is created and is granted the "power to adopt, administer, and enforce zoning regulations as conferred by Article 9, Chapter 7, Title 6 on counties and municipalities and to develop and enforce building regulations" as specified in the bill. Provision is made for the possibility of conflict between provisions of the new law or regulations adopted by the authority and other regulations applicable to the same area. A grandfather clause is included within the bill.

Several constitutional provisions must be considered to respond to your inquiry. As you observe, Art. VIII, §7 prohibits the adoption of an act for a specific county by the General Assembly. Similarly, Art. VIII, §10 prohibits the General Assembly from adopting an act for a specific municipality. Here, however, the bill pertains not to a single county or municipality but to two counties and several municipalities. The Supreme Court of South Carolina has interpreted Article VIII, Section 7 in two cases which are similar in some respects to your inquiry: Kleckley v. Pulliam, 265 S.C. 177, 217 S.E.2d 217 (1975), and Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976). For the reasons following, I believe that a court faced with the issue could well decide to follow Kleckley and uphold the constitutionality of H.3604.

Kleckley dealt with an airport district (special purpose district) in two counties, the Richland-Lexington Airport District comprising the territories of Richland and Lexington counties. The act of the General Assembly examined therein was adopted in 1975 to permit the District to issue general obligation bonds. In addressing Article VIII, Section 7, the court stated:

> Read alone, this prohibition against the enactment of laws for a specific county could be given such a broad interpretation that it would prohibit the enactment of a law establishing a state park or a branch of a state college in a designated county. 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.

Kleckley, 265 S.C. at 183-184, 217 S.E.2d at 220.

The court addressed the issue of whether the operation of an airport related to the "powers, duties, functions and responsibilities, which belong peculiarly to counties." Id. (Emphasis in original.) The court concluded:

> The record here clearly establishes that the function of this airport is not peculiar to a single county or counties.... 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.

Kleckley, 265 S.C. at 185, 217 S.E.2d at 221. Moreover, the court stated:

> The important principle is that if the subject matter of the legislation is not peculiar to the political subdivision dealt with by the applicable constitutional provision, the existing plenary power of the General Assembly continues.

Kleckley, 265 S.C. at 187, 217 S.E.2d at 222.

A court following Kleckley would most probably examine the powers, duties, functions, and responsibilities of the Greenville-Spartanburg Airport District and conclude, based on Kleckley, that such are not peculiar to a county or municipality, though of course I cannot second-guess exactly what a court would do. I believe a court would uphold the bill as not violative of Article VIII, Sections 7 and 10, on the basis of Kleckley.

By way of contrast, I observe that in Torgerson v. Craver, supra, the district under consideration there was the Charleston County Airport District. The court distinguished Kleckley, noting that the District was essentially a Charleston County political subdivision, the boundaries of which were coterminous with the boundaries of Charleston County. Unlike the district in Kleckley, the mayor of Charleston and the chairman of Charleston County Council served ex officio on the District's governing body. Taxes raised by a levy on the District were for all practical purposes levied on the county. The court stated, in holding unconstitutional an act authorizing the issuance of general obligation bonds:

> Article VIII, §7, prohibits legislation by the General Assembly for a specific county. Involved here is a matter which the county governing authority can and should deal with instead of the General Assembly.
>
> Kleckley v. Pulliam [cite omitted], relied on by the respondents is of no persuasion because the facts are entirely different. In Kleckley, an

> airport district was formed by joining Richland and Lexington County. This Court held that an Act of the General Assembly authorizing a bond issue by the District was not violative of Article VIII, §7, rationalizing that 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.
>
> The matter at hand involves problems which can be solved by the local governing body of Charleston County....

Torgerson, 230 S.E.2d at 230. A court considering Torgerson in the context of the Greenville-Spartanburg Airport District could very well find persuasive the distinctions between the two districts, noting most especially the regional nature of the Greenville-Spartanburg Airport District. Similarly, the governing bodies of Greenville and Spartanburg counties and the municipalities involved could not easily legislate for the Greenville-Spartanburg Airport District. Such power must therefore remain with the General Assembly.

It is also observed that a political subdivision of a state has no inherent power to enact zoning regulations. "[T]he power of a local government to accomplish zoning exists only by virtue of authority delegated from the state." 83 Am.Jur.2d Zoning and Planning §4. The Supreme Court in Holler v. Ellisor, 259 S.C. 283, 191 S.E.2d 509 (1972), stated:

> Zoning enactments, regulations, and restrictions may not override state law and policy. They must be within the general limitations on the exercise of municipal powers, and they are subject to, and must be within, the limitations and restrictions prescribed by the enabling act authorizing them, or imposed by other legislation.
>
> Such enactments and regulations must rest primarily on the enabling act authorizing them and they must not go beyond the power delegated thereby. In order to be valid, they must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power, ***.

Holler, 259 S.C. at 287. With respect to zoning, one court has recognized that "[t]he legislature can give the cities ... the power to regulate through zoning commissions, and the legislature can take it away." State ex rel. Thelen v. City of Missoula, 543 P.2d 173, 176 (1975). In Sutherland Stat. Const. §75.07 (5th Ed.) the issue of "delegation by the legislature of zoning authority to municipalities, zoning commissions or zoning districts"

was discussed; the authors state that "[g]enerally, this delegation has been held not to violate constitutional prohibitions against special laws and is considered proper."

While the creation of an airport zoning district and procedure may seem unusual, apparently it is not completely unheard of. I was able to locate several judicial decisions which mentioned such zoning districts. For example, in Davis v. City of Princeton, 401 N.W.2d 391 (Minn. Ct. App. 1987) there was a reference to the Princeton Joint Airport Zoning Board. In Davis, the airport under discussion was operated jointly by the City of Princeton, the County of Mille Lacs, and the County of Sherburne. The Board therein was responsible for administering the airport zoning ordinance which had been adopted as based on that state's model airport zoning ordinance. I also found a reference to a "joint airport zoning board" in Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959), which decision cited Florida statutes concerning such boards relative to airport hazard areas. These decisions did not comment on the creation of such airport zoning boards, however.

One other constitutional consideration would be Article III, Section 34 of the South Carolina Constitution. In particular, subsection (IX) requires that "where a general law can be made applicable, no special law shall be enacted." This provision has been interpreted recently in Horry County v. Horry County Higher Education Commission, 306 S.C. 416, 412 S.E.2d 421 (1991) and in other cases. One key consideration as to whether an act is unconstitutional under Article III, Section 34 is whether there are any peculiar local circumstances which would justify special treatment for the local area in question. Put another way, as in Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133 (1946), could the General Assembly adopt a general law, uniform in operation throughout the state, which would accomplish the same result? As observed earlier, the Greenville-Spartanburg Airport District may well be in a unique situation, in that several political subdivisions are immediately adjacent to the airport and the cooperation of all would be required to accomplish the necessary zoning and resulting safety for the surrounding area and inhabitants. It may well be that no other airport or airport district in the state is so impacted that a general law could not be readily fashioned. Such is a matter for the legislature to decide, however.

I would offer one final observation. The bill refers to "Article 9, Chapter 7, Title 6" in the granting of power to adopt, administer, and enforce zoning regulations by the board of the airport environs area. The General Assembly in 1994 enacted the "South Carolina Local Government Comprehensive Planning Enabling Act of 1994" (Act No. 355 of 1994) and provided in section 2 of that act:

> Chapter 27 of Title 4, Chapter 23 of Title 5, Section 6-7-310 through Section 6-7-1110, and Act 129 of 1963 are repealed, effective five years from the date of approval of this act by the Governor. At the end of five years, all local planning programs must be in conformity with the provisions of this act. During the intervening five years, this act is cumulative and may be implemented at any time.

The act was approved by the Governor on May 3, 1994. In less than five years the reference to Article 9, Chapter 7, Title 6 will become obsolete.

In conclusion and based on the foregoing, I am of the opinion that the provisions of H.3604 could well be determined by a court to be constitutional. Certainly the bill would be entitled to the presumption of constitutionality. Only a court could actually determine that the bill or enactment would be unconstitutional.

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 kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General