

05-5895
Lubiano



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 3, 1996

The Honorable Greg Smith
Senator, District No. 34
608 Gressette Building
Columbia, South Carolina 29202

RE: Informal Opinion

Dear Senator Smith:

By your letter of March 25, 1996, to Attorney General Condon, you have sought an opinion as to two issues relative to the Goose Creek Parks and Playground Commission.¹ Your first question is whether there is a recall procedure for the members of the Goose Creek Parks and Playground Commission. Your second question is as to the legality of automatically including newly annexed residents of Goose Creek in the Goose Creek Parks and Playground District.

Question 1

The Goose Creek Parks and Playground Commission was created by an act of the General Assembly, Act No. 1093 of 1966, as amended. The governing body is appointed pursuant to Act No. 603 of 1971, which amends section 2 of Act No. 1093 of 1966. Section 1 of the 1971 act provides as follows:

The commission shall be composed of seven members, who shall be appointed by the Governor upon the recommendation of a majority of the Legislative Delegation of Berkeley County, who shall serve for terms of

¹I observe that, by Act No. 158 of 1995, the name of the Goose Creek Parks and Playground Commission was changed to the Goose Creek Recreation Commission.

Request Letter

The Honorable Greg Smith

Page 2

May 3, 1996

four years or until their successors are appointed and qualify, Any vacancy shall be filled in the manner of the original appointment for the unexpired portion of the term only.

An examination of the acts of the General Assembly relative to the Goose Creek Parks and Playground Commission does not reveal any provisions for recall of the members of the Commission. Removal of certain officers by the Governor is provided for by S.C. Code Ann. §1-3-240 (1995 Cum. Supp.); that Code section is not applicable here, however, because members of the Commission are not among those officers specifically listed as subject to removal and because members of the Commission would not be considered county or state officers, who are subject to removal as specified in that Code section.² Moreover, there is not a general law of the State of South Carolina which provides for recall of public officials.

Based on the foregoing, I am of the opinion that there is no recall procedure in this State which would provide a means of recalling one or more of the members of the Goose Creek Parks and Playground Commission.

Question 2

Your second question concerned the automatic extension of the boundaries of the Commission or District automatically to include newly annexed residents of Goose Creek. It is helpful to analyze the acts of the General Assembly relative to the Commission to determine what the boundaries of the District have been and to determine what procedure may have been authorized to extend those boundaries.

Act No. 1093 of 1966, the enabling legislation for the Commission, provided in section 1 for the territorial jurisdiction of the Commission, to consist of:

that portion of Berkeley County generally within the following lines: On the north by Highway 45 and the Medway Road, on the east by the Seaboard Airline Railroad, on the south by Highway 29 and on the southwest and west by Goose Creek and an extension thereof.

²Members of the Goose Creek Parks and Playground Commission would be officers of a special purpose district of less than county-wide jurisdiction; they would not be considered officers of Berkeley County or of the State of South Carolina.

The Honorable Greg Smith
Page 3
May 3, 1996

Provision for appointment of commissioners to govern the District was made in section 2 of that act; a qualification of sorts was placed on the appointment process, in that "[e]ach of the seven major subdivisions within the territorial jurisdiction shall be represented on the commission." This sentence was deleted from section 2 of Act No. 1093 of 1966 by Act No. 603 of 1971; this amendment by the General Assembly could be some recognition that the boundaries had expanded by that time beyond the "seven major subdivisions" which were within the territorial jurisdiction of the Commission at the time it was created. It is observed that there was apparently no statutory means in existence at the time to extend the boundaries of a special purpose district.

Section 1 of Act No. 1093 was amended by Act No. 437 of 1973, so that the boundaries of the District were redefined:

There is hereby created a commission in Berkeley County to be known as the Goose Creek Park and Playground Commission, whose territorial jurisdiction shall consist of that portion of Berkeley County as shown on Goose Creek Park and Playground map recorded in the office of the Berkeley County Clerk of Court in Plat Book U, Page 137, and a copy of which is on file at the office of the commission.

Act No. 437 of 1973 was approved by the Governor, and hence effective, on July 11, 1973. While this 1973 act is entitled to the presumptions of constitutionality,³ it is most probably unconstitutional. Article VIII of the South Carolina Constitution was ratified by the General Assembly and became effective on March 7, 1973, which event predates the effective date of the 1973 act. Article VIII, Section 7 of the Constitution mandates that "[n]o laws for a specific county shall be enacted" Because the 1973 act is one solely for Berkeley County, this constitutional provision is implicated. Acts similar to the 1973 act have been struck down by the South Carolina Supreme Court as violative of this constitutional provision. See Cooper River Parks and Playground Commission v. City of

³ 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.

The Honorable Greg Smith
Page 4
May 3, 1996

North Charleston, 273 S.C. 639, 259 S.E.2d 107 (1979); Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976); Hamm v. Cromer, 305 S.C. 305, 408 S.E.2d 227 (1991); Pickens County v. Pickens County Water and Sewer Authority, ___ S.C. ___, 439 S.E.2d 840 (1994). It is very likely that a court considering the issue would find the 1973 act to be unconstitutional.

Act No. 158 of 1995 further amended section 1 of Act No. 1093 to change the name of the Commission; the provision adopted in 1973 concerning the territorial jurisdiction was left intact:

There is hereby created a commission in Berkeley County to be known as the Goose Creek Recreation Commission, whose territorial jurisdiction shall consist of that portion of Berkeley County as shown on Goose Creek Park and Playground map recorded in the office of the Berkeley County Clerk of Court in Plat Book U, Page 137, and a copy of which is on file at the office of the commission.

As with the 1973 act, the presumptions of constitutionality would attach, though for the same reasons as stated in the preceding paragraph, it is very likely that a court considering the constitutionality of the act would find the 1995 act to be unconstitutional, as well.

Until 1987, no statutory means existed to extend the boundaries of a special purpose district which was organized for recreational purposes. In 1974, S.C. Code Ann. §6-11-410 et seq. was adopted because new Article VIII precluded the General Assembly from adopting legislation for a specific county, such legislation often being for special purpose districts located only in a specific county. Section 6-11-410 et seq. contained an exemption, however, in §6-11-650, so that the procedure would not apply to special purpose districts organized for recreational purposes. In 1987, by Act No. 74, the exception as to such districts was removed. Now the procedures of §6-11-410 et seq. are available to extend the boundaries of special purpose districts organized for recreational purposes, such as the Goose Creek Park and Playground Commission has been.

Considering all of the foregoing, the question of legality of automatically extending the boundaries of the District each time the City of Goose Creek annexes property is by no means clear. The 1966 act seems to contemplate that the territorial jurisdiction will expand with annexation of property into the City. The 1973 act, which seems to place a limit on the territorial jurisdiction of the District, is most probably unconstitutional; it is entitled to the presumption of constitutionality and therefore to be followed, however, and I observe that its constitutionality has not been finally determined by a court. Arguably, the adoption of §6-11-410 et seq. as a comprehensive statutory scheme to alter

The Honorable Greg Smith

Page 5

May 3, 1996

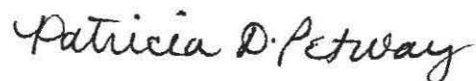
the boundaries of a special purpose district could be said to supersede the limits of the 1973 act, though the territorial jurisdiction established by the 1973 act was reiterated in the 1995 act.

Because the legality of automatically extending the boundaries of the District each time the City of Goose Creek annexes property cannot be determined by this Office with any degree of certainty, I would respectfully recommend that either a declaratory judgment be sought as to construction of the relevant acts and the current territorial jurisdiction of the District, or that Berkeley County Council be consulted toward following the procedures of §6-11-410 et seq., to have the boundaries legally be made consistent with the boundaries as they are being followed presently, in the event that a court should rule that the 1973 act was valid and entitled to be followed in the absence of using §6-11-410 et seq. to alter the boundaries of the District.

This letter is an informal opinion only. It has been written by a designated Senior 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,

A handwritten signature in cursive script that reads "Patricia D. Petway".

Patricia D. Petway
Senior Assistant Attorney General