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June 14, 1991

Burnet R. Maybank, Esquire
General Counsel
Office of the Secretary of State
Post Office Box 11350
Columbia, South Carolina 29211

Dear Mr. Maybank:

By your letter of May 28, 1991, you have inquired as to our opinion on the constitutionality of S.C. Code Ann. §§ 5-1-40 and 5-1-50, as to certain procedures required to be followed to incorporate a municipality. If we feel that the statutes are unconstitutional, you have then asked for practical guidance on actions to be taken if the Secretary of State should receive a petition for incorporation of a municipality.

At the outset, we advise that, in considering the constitutionality of an act of the General Assembly, such act is presumed to be constitutional in all respects. Moreover, such 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 5-1-40 requires that citizens of a proposed municipality file a petition with the Secretary of State, setting forth the proposed corporate limits and number of inhabitants therein. The petition must be signed by fifty (50) qualified electors and fifteen (15%) percent of the freeholders residing within the proposed municipality.

Upon receipt of the petition required by § 5-1-40, then § 5-1-50 requires the Secretary of State to issue a commission authorizing an incorporation election to be held as stated, with notice as provided therein. All registered electors residing in the area proposed to be incorporated then vote on the question of incorporation, name of the municipality, form of government, and the other various questions. While freeholders do participate in the petition process, the actual election involves only the registered electors of the proposed municipality.

You have questioned the constitutionality of §§ 5-1-40 and 5-1-50 due to recent decisions concerning similar statutes holding annexation and incorporation statutes to be violative of equal protection due to freeholder involvement. See, respectively, The Harbison Group v. Town of Irmo et al., C.A. No. 3:90-284-16 (D.S.C. 1990), and Muller v. Curran, 889 F.2d 54 (4th Cir. 1989). By an order entered April 13, 1990 in The Harbison Group case, the Honorable Karen Henderson held §§ 5-3-20 and 5-3-30 through 5-3-80 to violate the equal protection clause of the Fourteenth Amendment, U.S. Constitution, because the procedures required therein would permit owners of property in the area to be annexed to block an election among the registered voters, impermissibly restricting the franchise to property owners.

Annexation under the challenged statutes would be a three-step process: (1) a majority of those owning land in the area to be annexed would submit an annexation petition to the city or town council; (2) Council would certify to the county election commission that the petition contained the requisite number of signatures; and (3) separate but concurrent elections would be held, with the voters of the annexing city or town and the voters of the area to be annexed both voting on the question of annexation. If a majority of voters in both elections favor annexation, then the territory becomes annexed to the city or town.

The court was aware of no compelling state interest and determined that the above statutes violated equal protection by permitting property owners to determine (or, in the alternative, block) whether an annexation election could take place. Further, those statutes were not severable from the remaining statutes relative to annexation. The court's decision did not mention or construe §§ 5-1-40 and 5-1-50, however.

Of major consideration in The Harbison Group was Muller v. Curran, supra, which held unconstitutional a Maryland statute relative to incorporation of municipalities. The Maryland statute required a three-step process to incorporate a municipality: (1) a petition to be submitted to county council, signed by at least 20

percent of the registered voters of the area proposed to be incorporated, plus signatures of owners of at least 25 percent of the assessed value of property in the area proposed to be incorporated; (2) decision made by county council, in its sole discretion, to call for an incorporation election; and (3) election, in which all registered voters in the proposed municipality can vote. The Fourth Circuit stated:

> The challenged Maryland procedure permits a popular vote to be blocked by property owners. That is so because the county council cannot schedule such a vote unless a given percentage of the property owners authorize it. That in and by itself offends equal protection principles unless a compelling state interest is present. No such interest has been shown in this case.

Id., 889 F.2d at 57.

While the Secretary of State in South Carolina does not appear to have the discretion to call the incorporation election as the county council in Maryland did, still a given percentage of the property owners must participate in the petition process before the petition may be presented to the Secretary of State. Under the reasoning of the cases cited above and the precedents and reasoning cited within those cases, it is possible that a court faced with the issue could declare § 5-1-40 to be violative of equal protection. If § 5-1-50 should not be deemed severable, it too might not pass constitutional muster.

As to severability, the court in Townsend v. Richland County, supra, stated that

> where a part of a statute is unconstitutional, if such part is so connected with the other parts as they mutually depend upon each other as conditions and considerations for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the Legislature would not have passed the residue independently of that which is void, the whole Act is void. On the other hand, where a part of the statute is unconstitutional, and that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of

> such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution, then the Courts will reject that which is void and enforce the remainder.

Id., 190 S.C. at 280-81 (cites omitted). In the instant case, both statutes are part of a comprehensive statutory scheme to effect municipal incorporation. It is difficult to believe that the legislature would have adopted § 5-1-50 without adopting § 5-1-40, since § 5-1-50 is triggered only by the actions taken under § 5-1-40. Thus, a court would likely conclude that the provisions are not severable.

Because we have concluded that a court faced with the issue could conclude that §§ 5-1-40 and 5-1-50 are constitutionally infirm, you have asked for practical guidance should the Secretary of State receive a petition for incorporation of a municipality. Generally, a public officer may not decline to enforce statutes such as these unless and until the courts have declared such enactments invalid. 67 C.J.S. Officers § 201; 16 Am.Jur.2d Constitutional Law § 199; 63 Am.Jur.2d Public Officers and Employees § 276. Moreover, the Secretary of State is required by his oath to carry out the duties of his office, and such would not enable him to forbid the execution of any law which has not yet been determined to be unconstitutional. Cf., Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); Op. Atty. Gen. dated April 7, 1983. Thus, due to the presumption of constitutionality and the duty of the Secretary of State to execute his statutory duties such as those under § 5-1-50, it is our opinion that the statutes should be followed unless and until a court declares otherwise or until such statutes are amended by the General Assembly.

With kindest regards, I am

Sincerely,

Patricia D Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

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