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May 24, 1991

The Honorable Thomas C. Alexander
Chairman, Labor, Commerce and
Industry Committee
407 Blatt Building
Columbia, South Carolina 29211

Dear Representative Alexander:

By your letter of May 15, 1991, enclosing H.3547 and a proposed amendment thereto, you have asked whether there would be grounds for a court to declare the bill if enacted, with or without the amendment, unconstitutional or in conflict with existing case law. The bill relates to final subdivision plan roadways superseding roadways on previously recorded plats or deeds; the proposed amendment would limit the application of the bill to Lexington County only.

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 bill would add § 4-27-185 to the South Carolina Code of Laws and would provide the following:

> Upon recordation of a final subdivision plan that has been approved pursuant to Section 4-27-180(3), the streets, alleys, or roads contained in the plan replace and supersede previous streets, alleys, or roads contained in a previously recorded plat or deed concerning that

> property unless the streets, alleys, or roads are incorporated into and are a part of the final subdivision plan.

The proposed amendment would add at the end of § 4-27-185: "This section applies to subdivisions in Lexington County only."

If the bill were enacted with the proposed amendment limiting applicability to Lexington County, such enactment would likely be violative of several constitutional provisions. Article III, § 34 (IX) and (X), of the State Constitution would require that whenever a general law can be made applicable, a special law not be adopted; furthermore, general laws are to be uniform in their operation (though a special provision may be contained in a general law). Moreover, Article VIII, § 7 prohibits the adoption of a law for a specific county; with the proposed amendment, H.3547 would be a law for a specific county. In that respect, H.3547 likely would be contrary to the judicial decisions interpreting Article VIII, § 7, such as Cooper River Parks and Playground Commission v. City of 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); Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974).

Nothwithstanding the problems identified if H.3547 were to be adopted with the proposed amendment, H.3547 without the amendment might be subject to constitutional challenge as violative of due process as applied (rather than violative on its face). For one example, the following from 25 Am.Jur.2d Easements and Licenses § 26 is illustrative:

> Generally, where property sold is described in the conveyance with reference to a plat or map on which streets, alleys, parks, and other open areas are shown, an easement therein is created in favor of the grantee. Such an easement is deemed a part of the property to which the grantee is entitled and of which he cannot be divested except by due process of law. It exists entirely independent of the fact of dedication to a public use. It is not rendered nugatory by the fact that the map or plat is not properly made or recorded for purposes of dedication; nor is it destroyed by the mere failure of the public authorities to accept the streets or ways or by an abandonment of them. [Emphasis added.]

As to a particular parcel of property, deprivation of certain property rights without due process could become an issue.

Other problems not immediately apparent from the face of the bill could arise in its application. For instance, a deed might refer to a map, plat, sketch, or such document then in existence (and perhaps annexed to the deed) on which roads may be identified as boundaries of a parcel of property. As noted in 23 Am.Jur.2d Deeds § 62,

> It is not necessary to the validity of a description in a deed by reference to a map or plat that the map or plat referred to be registered. Nor is the validity of the description destroyed because the recorded map of reference should not have been accepted by the recorder.

Confusion might arise as to exactly what property has been conveyed, when a subdivision plan or plat is subsequently accepted and recorded, since it would not be necessary that the plat referred to in a deed be recorded. The same problem could arise in terms of mortgaging property. See 55 Am.Jur.2d Mortgages §§ 129 et seq. (relating to conflicts in description of mortgaged property). Difficulty in conducting title searches or in obtaining title insurance could arise on a case by case basis, as might the necessity of bringing an action to quiet title in some cases. These are policy considerations which, in some cases, could create a constitutional problem of deprivation of property without due process of law; such a determination would depend upon the facts of a given case and is beyond the scope of an opinion of this Office.

One other problem as to proposed § 4-27-185 may be noted. A county is authorized, by § 4-9-30(9), "to provide for land use and promulgate regulations pursuant thereto subject to the provisions of Chapter 7 of Title 6[.]" As stated in an opinion of our Office dated January 6, 1978, "The County Planning Act, Id. § 4-27-10, et seq., seems to be superseded by § 6-7-10 et seq., in that the Home Rule Act requires counties to follow the latter procedure. Id. § 4-9-30(9)." Further, in an opinion dated December 3, 1975, it was noted that Act No. 487 (§ 6-7-10 et seq.) "serves to expand the earlier 'County Planning Act ....'" If H.3547 should be adopted, consideration might be given to codifying it in Chapter 7 of Title 6 (see § 6-7-1010 et seq. as to subdivision regulations).

Based on the foregoing, we advise that H.3547 could be constitutionally infirm as applied, rather than on its face, if it should be adopted without the proposed amendment; if adopted with the proposed amendment, H.3547 would be an act for a specific county and would most probably be declared unconstitutional if a court were to decide the issue, in our opinion. Of course, this Office has no authority to declare an act of the General Assembly invalid or unconstitutional; only a court would have such authority.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook

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