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The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

June 20, 1988

The Honorable Sherry Martschink
Senator, District No. 44
601 Gressette Building
Columbia, South Carolina 29202

Dear Senator Martschink:

You have forwarded to this Office a copy of House bill 4073 and have asked that we examine the bill for constitutional problems. The bill would amend Sections 57-5-820 and 57-5-830 of the Code of Laws of South Carolina (1987 Cum. Supp.) to provide, basically, that if work to be performed on highways, bridges, or other highway facilities is disapproved by a municipality "located in an established urbanized area as determined by the latest official United States census," the project may proceed notwithstanding the disapproval if the project is of significance to more than one political subdivision and is found to be a part of the urban area transportation plan.

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.

Two constitutional provisions appear to be relevant to your inquiry. Article VIII, Section 15 of the State Constitution

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provides the following:

No law shall be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, telegraph, telephone or electric plant, or to erect water, sewer or gas works for public use, or to lay mains for any purpose, or to use the streets for any other such facility, without first obtaining the consent of the governing body of the municipality in control of the streets or public places proposed to be occupied for any such or like purpose; nor shall any law be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, or to erect waterworks for public use, or to lay water or sewer mains for any purpose, or to use the streets for any facility other than telephone, telegraph, gas and electric, without first obtaining the consent of the governing body of the county or the consolidated political subdivision in control of the streets or public places proposed to be occupied for any such or like purpose.

The other applicable provision is Article VIII, Section 14 of the State Constitution, providing in relevant part:

In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: ...

(6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires state-wide uniformity.

At first glance, the amendments appear to violate Article VIII, Section 15 in that the exceptions stated in proposed Sections 57-5-820 and 57-5-830 provide a mechanism for obtaining

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other approval if the approval of the municipality is withheld for certain projects. The bill's violation of this constitutional provision is not free from doubt, however, because the projects contemplated by the exception would be only those of a multi-jurisdictional nature rather than those which would affect only one municipality. In opinions issued by this Office which have previously considered Article VIII, Section 15, a project or undertaking contemplated therein would have affected only one municipality. See Ops. Atty. Gen. dated January 13, 1984; March 26, 1984; February 13, 1981.

It could be argued that Article VIII, Section 14(6) would override or supersede the provisions of Article VIII, Section 15 with respect only to multi-jurisdictional projects. See Douglas v. McLeod, 277 S.C. 76, 282 S.E.2d 604 (1981); Kramer v. County Council for Dorchester County, 277 S.C. 71, 282 S.E.2d 850 (1981). Arguably, such multi-jurisdictional projects exceed the scope of local concerns and could be said to contravene the spirit of Article VIII, Section 14(6). If House bill 4073 were adopted by the General Assembly, it would appear that the legislature has, by its plenary power, determined that such multi-jurisdictional projects were not of local concern, thus removing them from the purview of Article VIII, Section 15.

Moreover, by Section 57-3-10 of the Code, the General Assembly has established a state agency, the South Carolina Department of Highways and Public Transportation, charging that agency with, inter alia, "the systematic planning, construction, maintenance and operation of the state highway system ..., the coordination of all state and federal programs relating to public transportation ..." and so forth. As noted in 39 Am.Jur.2d Highways, Streets, and Bridges § 32:

Originally, and as one of the attributes of sovereignty, the laying out of highways and streets for the use of the public inheres in the lawmaking power of the state, under its police power. ...

The laying out and establishing of roads or highways is one of the most important and onerous duties of the government.

...

Due to the involvement of the State of South Carolina and its agency in constructing highway facilities and the multi-jurisdictional nature of certain projects for which consent by

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more than one municipality or political subdivision could conceivably required, it is possible that Article VIII, Section 14(6) would prevail over Article VIII, Section 15 to uphold the constitutionality of the bill.

As stated earlier, the constitutionality of House bill 4073 could very well depend upon which constitutional provision would be deemed prevailing. Too, the facts of a given project could turn a facially constitutional statute into a statute deemed unconstitutional as applied. We would resolve the doubt of constitutionality in favor of upholding the constitutionality. To completely resolve the question of constitutionality would require judicial determination.

With kindest regards, I am

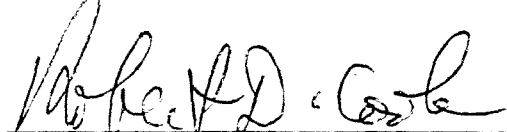
Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

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REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions