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The State of South Carolina

Opinion No 88-70
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Office of the Attorney General

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September 19, 1988

Gary T. Pope, Esquire
Newberry County Attorney
Post Office Box 190
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Dear Mr. Pope:

By your letter of August 17, 1988, you have asked on behalf of Newberry County Council for the opinion of this Office as to whether ratified act number 732 (S. 1461) of 1988 should be followed to effect appointments of members to the Newberry County Water and Sewer Authority.

The 1988 act amends Act No. 119 of 1963 and Act No. 190 of 1969, which latter act required the appointment of seven resident electors of Newberry County by the Governor upon the recommendation of a majority of the members of the county legislative delegation, to serve on the governing body of the Authority. The new act provides:

> The authority must be composed of seven resident electors of Newberry County, one from each county council district, to be appointed by the Governor upon the recommendation of a majority of the members of the Newberry County Council. ...

Section 1, R-732, S. 1461. In Section 2 of the act, it is provided that the terms of the present members of the Newberry County Water and Sewer Authority would expire on the effective date of the act, which was June 21, 1988. On July 21, 1988, the Newberry County Administrator submitted to Governor Campbell a list of recommended persons to serve on the Newberry County Water and Sewer Authority, pursuant to the new act. A majority of the county legislative delegation endorsed the recommendations.

Procedurally, the act was ratified on June 2, 1988 by the General Assembly. The act was vetoed by the Governor that same day. The veto was overridden by the House of Representatives on June 20, 1988 and by the Senate on June 21, 1988. The Office opined that the act was most probably violative of Article VIII, Section 7 of the State Constitution, by an opinion dated June 3, 1988.

The opinion of this Office contained the following, which is of particular importance:

> 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.

We advised further that "this Office possesses no authority to declare an act of the General Assembly invalid; only a court would have such authority."

In other instances in which this Office had felt that a particular legislative act might be unconstitutional, we have advised that the act be followed unless and until a court should declare the act to be unconstitutional, thus upholding the presumption of constitutionality until that time. See Op. Atty. Gen. dated July 26, 1984 for an example. With respect to the 1988 act regarding the Newberry County Water and Sewer Authority, we would similarly advise that the act be followed unless and until a court should direct otherwise. Thus, it would be appropriate for the Governor to follow the new law in making the new appointments to the Authority.

You have also asked whether the new members would be validly serving on the Authority if the new law should be followed. You have pointed out that a majority of the Newberry County Delegation have endorsed the recommendations of the Newberry County Council and further that the prospective appointees are eligible under both the old and new laws. In our opinion, the new appointees under the new law would be valid office holders until a court declares otherwise.

These individuals would most probably be found to be de jure officers until a court found otherwise. As stated in 63A Am. Jur.2d Public Officers and Employees §580, an officer de jure is

> one who is in all respects legally appointed and qualified to exercise the office. In order to become an officer de jure, one must satisfy three requirements: (1) he must possess the legal qualifications for the office in question; (2) he must be lawfully chosen to such office; and (3) he must have qualified himself to perform the duties of such office according to the mode prescribed by law.

The only possible hindrance to these individuals being de jure officers would be the declaration to the contrary by a court. Until such time, the appointments would be considered lawful.

If these individuals were deemed de facto officers rather than de jure officers, any actions taken by these individuals with respect to the public or third parties will be considered as valid and effectual as those of a de jure officer unless or until a court should declare those acts invalid or remove the individuals from office. See, for example, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E. 2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Strob. 92 (S.C. 1848). A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

Should the 1988 act be declared unconstitutional, there is authority for the proposition that the original act (here, Act No. 119 of 1963, as last amended by Act No. 190 of 1969) would remain in effect when an amendment thereto is found to be unconstitutional. State ex rel. Thornton v. Wannamaker, 248 S.C.421, 150 S.E.2d 607 (1966). You have advised that the prospective appointees have been endorsed by a majority of the legislative delegation. That being the case, the court in such a situation would have basis to determine that the officers are validly holding office.

You have inquired as to the permissibility of the 1988 act as "one-shot" legislation for Newberry County under that doctrine enunciated in Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976). That argument was raised and dismissed in Richardson v. McCutchen, 278 S.C. 117, 292 S.E.2d 787 (1982), in construing Article VIII, Section 7 of the State Constitution.1/ There the court stated, in holding two acts of the General Assembly increasing membership on the Williamsburg County Recreation Commission unconstitutional:

> Duncan held that §1 of Article VIII allows the General Assembly to legislate to bring about an orderly transition to local home rule government, but that such authority is temporary and extends only so far as necessary to place Article VIII fully into operation. Van Fore v. Cooke, 273 S.C. 136, 255 S.E.(2d) 339 (1979), however, limited transitional legislation to a "one shot" proposition so that the General Assembly could not repeatedly inject its will into the operation of county government. And in Horry County v. Cooke, 275 S.C. 19, 267 S.E.(2d) 82 (1980), we stated that once a legally constituted government becomes functional, the Duncan exception ends, thereby precluding any further special legislation. The purpose of transitional legislation is simply to establish an initial, legal county government. ... These two acts do not relate to the operative machinery necessary to implement a new form of government under Article VIII. Instead, the Acts are an attempt by the General Assembly to immerse itself directly in the regulation of a recreation district within Williamsburg County ... .

1/ Article VIII, Section 7 provides in pertinent part that "[n]o laws for a specific county shall be enacted ... ." This constitutional prohibition was addressed in the opinion of this Office dated June 3, 1988, concerning the 1988 act.

278 S.C. at 119-120. For these reasons, this Office has repeatedly suggested or encouraged that general legislation be adopted to accomplish such acts as increasing the number of members on the governing body of a special purpose district, changing the method of selection from appointed to elected and so forth, the general law permitting a body other than a General Assembly to do such acts. See Ops. Atty. Gen. dated February 25, 1986 and April 24, 1987, for examples.

We trust that the foregoing has adequately responded to your inquiry. If you need anything further, please advise.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:sds

REVIEWED AND APPROVED BY:

Robert D. Cook

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