The State of South Carolina

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Dear Ms. Zeigler:

You have asked for the opinion of this Office as to the constitutionality of H.2279, R-618, which act would add certain provisions to Section 4-9-10, Code of Laws of South Carolina (1976, as amended). For the reasons following, it is the opinion of this Office that certain portions of the act are of doubtful constitutionality.

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 act would amend Section 4-9-10 of the Code to authorize county councils to conduct referenda to change the method of election of county council members. In addition, a portion of section 1 of the act would add subsection (f)(4), which would permit, as a method of election

> [a]ny other method of election in existence in any county of this State as of July 1, 1986, if the county on June 25, 1975 had an at-large from the county method of

> election and has this same method of election as of July 1, 1986, and a population of at least two hundred twenty-five thousand persons.

Furthermore, section 2 of the act would add subsection (g) to Section 4-9-10, as follows:

> All counties whose population exceeds one hundred thousand or which county contains two or more municipalities with a population of at least thirty thousand each and which elect members of their governing body at large from the county, but require members to be residents of districts, shall apportion the residency requirement districts as to population and must be reapportioned as to population by the county council within a reasonable time prior to the next general election which follows the adoption by the State of each federal decennial census. The population variance between defined residency districts shall not exceed ten percent. Those counties which had at-large voting with residency requirements prior to 1980 as outlined above which have not reapportioned in accordance with the 1980 decennial census to do so by July 1, 1988. [Sic.]

Article III, Section 34(IX) of the State Constitution provides that "where a general law can be made applicable, no special law shall be enacted." The provisions of the act cited above are general in form; indeed, it would be difficult to draft the provisions in a more general form. Even though an act is general in form, however, it may be special in operation, which act would violate the prohibition of special legislation as much as an act special in form. Town of Forest Acres v. Town of Forest Lake, 226 S.C. 349, 85 S.E.2d 192 (1954). Thus, it is necessary to look at the practical application of the act.

Due to the restricted application of subsection (f)(4) to counties with a population of at least two hundred thousand meeting the other specified requirements, that portion of the act could be applicable only to Richland County. Similarly, while several counties meet the population requirement of exceeding one hundred thousand, only Charleston County meets the additional specified requirements as to method of election.

Further, only Charleston County has two municipalities of the specified population. Thus, even though the act is general in form, it is actually special in substance and application.

To uphold such an act general in form but special in application, it must be shown that the act "is based on a rational difference of situation or condition found in the counties placed in a different class." Elliott v. Sligh, 233 S.C. 161, 166, 103 S.E.2d 923 (1958). Justification could be shown to a court as to why these counties should require special treatment, though no such justification appears within the body of the act and we can identify no reason, based on the language of the act, why these provisions should be restricted to only those counties with large populations. For example, as to subsection (g), while counties with large urban populations may have experienced shifts in population which justify reapportionment, which is not presently required in those counties which have the specified method of election, there may be smaller counties using the specified method of election which have experienced population shifts on a smaller scale but for which reapportionment is equally justified. Further, as to subsection (f)(4), other counties might also desire to be able to change to any other method of election which was in existence on June 25, 1975, though such counties do not meet the population or other requirements.

The South Carolina Supreme Court has held unconstitutional a variety of statutes which were based on population but for which population had no natural or logical relation to the purpose of the act. See, for example, Elliott v. Sligh, supra; Town of Forest Acres v. Town of Forest Lake, supra; United States Fidelity & Guaranty Co. v. City of Columbia, 252 S.C. 55, 165 S.E.2d 272 (1969); State v. Ferri, 111 S.C. 219, 97 S.E. 512 (1918); State v. Hammond, 66 S.C. 219, 44 S.E. 797 (1903). But see Timmons v. South Carolina Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970). We believe that a court considering the constitutionality of the act in question would find the reasoning of these cases persuasive, providing a basis for holding these two subsections unconstitutional.

Section 3 of the act provides for separability of any provisions of the act found to be unconstitutional, thus permitting other portions of the act to stand. With the exception of the portions which would be codified as (f)(4) and (g), the other portions appear to be constitutionally firm and thus would be permitted to remain in force and effect if the other two provisions should be struck down by a court of competent jurisdiction.

In conclusion, it is the opinion of this Office that portions of the act are of doubtful constitutionality. However, if a court struck those portions as unconstitutional, the remaining portions of the act appear to pass constitutional muster and thus would be permitted to stand. As stated above, while this Office may point out constitutional difficulties, only a court may actually declare an act unconstitutional.

Sincerely,

Patricia D. Petway

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PDP/an

REVIEWED AND APPROVED BY:

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