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

March 10, 1987

The Honorable Sam Applegate
Senator, District No. 43
Suite 613, Gressette Building
Columbia, South Carolina 29202

Dear Senator Applegate:

By your letter of January 21, 1987, you have asked that this Office opine as to the constitutionality of S.43, which proposes to amend Section 4-9-10 of the Code of Laws of South Carolina (1976). While this bill is similar to previous legislation which, this Office felt, was constitutionally infirm, S.43 in its present form seems to have overcome the constitutional difficulties noted with respect to the earlier legislation. See Ops. Atty. Gen. dated June 16, 1986 and February 4, 1986.

If the bill should be adopted by the General Assembly, it must be remembered that 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 portion of the proposed amendment to Section 4-9-10 of the Code which is being questioned would add

subsection (g) as follows:

> All counties which elect members of their governing body at large from the county, but require members to be residents of districts, and which counties comprise part of or comprise a Standard Metropolitan Statistical Area (SMSA) in accordance with the latest official United States census, shall apportion the residency requirement districts as to population and must be re-apportioned 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 may not exceed ten percent. Those counties which had at-large voting with residency requir-ments prior to 1980 as outlined above which have not reapportioned in accordance with the 1980 decennial census are to do so by July 1, 1988.

In assessing the constitutionality of this proposed legislation, the legislative findings are helpful. Section 1 of S.43 provides:

> For purposes of this act, the General Assembly finds that Standard Metropolitan Statistical Areas (SMSA) have a high concentration of urban or suburban communities and reflect continued urban and suburban development with fundamentally antiquated, previously-drawn residency districts for county council elections based on population and geopolitical concerns.

In reviewing S.43, it appears to be a bill general in form. It could be applicable to any of several counties, depending upon the form of government in operation in a given county: Charleston, Berkeley, Dorchester (comprising the Charleston MSA); Lexington, Richland (comprising the Columbia MSA); Florence (comprising the Florence MSA); Anderson (comprising the Anderson MSA); Greenville, Spartanburg (comprising the Greenville-Spartanburg MSA); Aiken, as part of the Augusta, Georgia MSA; and York, as part of the Charlotte-Gastonia, North Carolina, MSA. It

appears, however, that only Charleston County may have the particular form of government contemplated by S.43. The question then arises as to a possible conflict with Article III, Section 34 (IX) 1/, if S.43 is general in form but actually special in substance and application.

In the opinion of June 16, 1986, it was stated that "[t]o uphold [ ] an act in 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.'" The legislation under consideration in that opinion contained no legislative findings or other means of discerning why one or two counties should be singled out for special treatment. However, S.43 contains specific findings for the county or counties which may be affected by the bill. While not conclusive, legislative findings are given "great weight" in considering whether the classification made by the General Assembly is rational. Doran v. Robertson, 203 S.C. 434, 27 S.E.2d 714 (1943); Ruggles v. Padgett, 240 S.C. 494, 126 S.E.2d 553 (1962); Townsend v. Richland County, supra; Op. Atty. Gen. dated September 26, 1984. Thus, the legislative findings would be accorded great weight by a court considering the constitutionality of S.43.

Other factors to be considered in determining whether S.43 may conflict with Article III, Section 34 (IX) include: whether the bill would meet the exigencies of a particular case, Townsend v. Richland County, supra; whether the bill promotes the evil sought to be prevented by Article III, Section 34, Timmons v. South Carolina Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970); whether peculiar conditions requiring special treatment may exist, Shillito v. City of Spartanburg, 214 S.C. 11, 51 S.E. 2d 95 (1948); and as noted above, whether the General Assembly has found a rational reason to justify treating some counties differently from others.

1/ Article III, Section 34 (IX), provides that "[i]n all other cases, where a general law can be made applicable, no special law shall be enacted ... ."

Considering these factors, it may be seen that the General Assembly has made specific findings as to treatment of counties within SMSAs and their needs in light of continued urban development. The bill does not appear to be an attempt at evading a general law but instead could be viewed by a court considering the matter as special treatment for a peculiar set of circumstances which may not be afforded relief any other way. For instance, smaller counties not a part of an SMSA which have the same form of government and residency requirements may not have experienced the population development as larger counties have. Further, those counties whose council members are elected by defined single-member districts are already required, by Section 4-9-90 of the Code, to reapportion council membership districts following adoption of each decennial census. A court could easily find that, based on the above, S.43 may be the only way to construct a remedy for the special set of circumstances existing in a large county in which council members are elected at large but have residential district requirements, but which districts have no requirement of reapportionment following each decennial census to reflect population growth.

In conclusion, it is the opinion of this Office that S.43 would most probably pass constitutional muster if challenged. As stated above, only a court can finally rule on the issue of constitutionality; in stating our opinion, we have attempted to view the problem as we believe a court faced with the issue would.

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

Robert D. Cook
Executive Assistant for Opinions