ALAN WILSON
ATTORNEY GENERAL

June 2, 2017

The Honorable Steven W. Long, Member
The Honorable Josiah Magnuson, Member
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 29211

Dear Representative Long and Representative Magnuson:

Attorney General Alan Wilson has referred your letter dated March 28, 2017 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

Please be advised that we have been contacted by the Inman Community Volunteer Fire Department related to the procedure set forth in S.C. Code § 6-11-10 et seq. As evidenced by the enclosed letter from May 3, 2016, your office opined that "a court will likely rule consistent with the rulings in Graham v. Creel, 289 S.C. 165, 345 S.E.2d 717 (1986) and Berry v. Weeks, 279 S.C. 543, 309 S.E.2d 744 (1983), finding that where Home Rule legislation does not specifically overrule South Carolina Code § 6-11-10 et seq., it does not implicitly repeal it." Assuming that South Carolina Code Ann. § 6-11-10 et seq. was not implicitly repealed by the Home Rule Act, we hereby request an Attorney General's opinion with regard to the following question:

> *Is the process delineated in South Carolina Code Ann. § 6-11-10 et seq. violative of the South Carolina Constitution?*

It appears that the first step in the process outlined in South Carolina Code Ann. § 6-11-10 et seq. is the filing of a written petition with the applicable clerk of the court. South Carolina Code Ann. § 6-11-20, which sets forth the requirements for the written petition, reads as follows:

> *Before any such district is formed there shall be filed with the clerk of the court of the county in which such district is proposed to be located a written petition signed by a majority of the resident landowners in the proposed district or by the owners of more than half the land and acreage which will be affected by or assessed for the expense of the proposed improvements, as shown by the tax assessment rolls. The petition shall be accompanied by a plat showing the limits of the proposed district. When such proposed district is situated in two or more counties such petition shall be filed with the clerk of the court of each county wherein the district is to be located.*

(Emphasis added). We appreciate the opinion of your office in this matter.

Law/Analysis:

1. The Constitutionality of S.C. Code § 6-11-10 and § 6-11-20

Regarding the constitutionality of a statue, this Office has consistently maintained that the law must continue to be followed until a court declares it to be unconstitutional. This Office has previously stated that:

> [A]ny statute enacted by the General Assembly carries with it a heavy presumption of constitutionality. As we have often stated, any act of the General Assembly is presumed valid unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. State ex. rel. Thompson v. Seieler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its constitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townshend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939).
> Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute "must continue to be followed until a court declares otherwise."

Ops. S.C. Att'y Gen., 2015 WL 836507 (S.C.A.G. Feb. 18, 2015); 2006 WL 269605 (January 12, 2006) (citing Ops. S.C. Att'y Gen., 2005 WL 1383357 (May 2, 2005); 1997 WL 419880 (June 11, 1997)). Moreover, this Office has previously opined that:

> If a court concludes that the Legislature would have passed the statute "independent of that which conflicts with the constitution," and such statute is capable of being executed consistent with the legislative intent "sans that portion found to be unconstitutional," the Court will sever the statute. *Sloan v. Wilkins, supra* [362 S.C. 430, 608 S.E.2d 579 (2005)]. However, if the unconstitutional provision is deemed an integral part of enactment, the entire statute will fall. *Cruz, supra* [*Daniel v. Cruz*, 268 S.C. 11, 231 S.E.2d 293 (1977)].

Op. S.C. Att'y Gen., 2005 WL 1383357 (S.C.A.G. May 2, 2005); see also American Petroleum Institute v. S.C. Dep't of Revenue, 382 S.C. 572, 677 S.E.2d 16 (2009) (The court cannot sever a statute in violation of the one subject rule of the Constitution.), abrogating Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005); Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 736 S.E.2d 651, (2012) (The court will sever the unconstitutional part of a statute as long as the severed portion is complete and the court believes the General Assembly would have passed it by itself.).

Regarding your concern of the constitutionality of South Carolina Code Ann. § 6-11-10 and § 6-11-20, this Office has previously opined on the issue of freeholder (also known as landowner) petition requirements for a voter referendum. In one such opinion this Office concluded that where South

Carolina Code § 5-31-640 required at least twenty-five percent of the resident freeholders to petition for a referendum to be held, such a statute concerning the sale, conveyance or disposal of a sewage system violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution absent a compelling statute interest. Op. S.C. Att'y Gen., 2007 WL 419427 (S.C.A.G. January 29, 2007). Please note § 5-31-640 states that "[b]efore any election shall be held under the provisions of this article, at least twenty-five per cent of the resident freeholders of the city or town, as shown by its tax books, shall petition the city or town council that such election be ordered. S.C. Code Ann. § 5-31-640 (1976 Code, as amended). The South Carolina Supreme Court later held the act unconstitutional as violative of the Equal Protection Clause, found no compelling interest. See Sojourner v. Town of St. George, 383 S.C. 171, 679 S.E.2d 182 (2009). Additionally, the court held in Sojourner that the statute was not severable. Id. In a 1996 opinion by this Office, we opined that "neither the United States Constitution nor any other legal mandate requires that the State of South Carolina grant anyone the right to vote on annexation questions." Op. S.C. Att'y Gen., 1996 WL 679514 (S.C.A.G. October 22, 1996). The opinion also stated that "[o]nce the right to vote on an issue is established, any restrictions placed upon that right based upon property ownership is unconstitutional." Id. (citing Hayward v. Clay, 573 F.2d 187, 190 (4th Cir. 1978), cert. denied, 439 U.S. 959 (1978)).

Moreover, the United States Supreme Court has addressed landowner voting requirements. In 1981 the Supreme Court upheld a property-based voting requirement regarding a special purpose district engaged in water distribution. See Ball v. James, 451 U.S. 355, 101 S.Ct. 1811 (1981).[1] The Delaware Supreme Court explained its position by stating that:

> The defendants also contend that this case should be controlled by the recent decisions of the United States Supreme Court in Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973) and Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973). In Salyer, the Court upheld provisions of the California Water Code permitting only landowners to vote in water storage district elections and apportioning votes according to the assessed value of the land held. In Associated Enterprises, upon the basis of Salyer, the Court upheld similar provisions in the Wyoming Watershed Improvement District Act.
>
> These two cases announce an exception to the general rule of 'one man, one vote' laid down in Reynolds. The primary basis for the exception is the nature of the unit of government affected by the voting provisions. The Supreme Court held that the popular election requirements enunciated by Reynolds were not applicable to elections in a water storage district 'by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group * * *.' Salyer Land Company, 410 U.S. at 728, 93 S.Ct. at 1229.
>
> A city or incorporated town is not a governmental unit of special or limited purpose. For that reason, Salyer and Associated Enterprises are inapposite here; the exception to the 'one man, one vote' rule enunciated by them is of no benefit to the

[1] While there are many other relevant cases and statutes, this opinion only references some of them.

> City of Dover. We do not reach questions concerning the economic effect of annexation, or whether annexation affects definable groups of citizens differently.

Mayor & Council of City of Dover v. Kelley, 327 A.2d 748, 753 (Del. 1974) (citing Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973) and Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973)). Thus, the Supreme Court has distinguished between landowners voting for a special or limited government purpose versus the traditional position that voting cannot be limited to landowners.

2. The Severability of Any Unconstitutional Portions of Statutes

In 1977 a federal court found portions of South Carolina annexation statutes which limited the right to vote to landowners were unconstitutional but also severable from the constitutional portions of the statutes. See Hayward v. Edwards, 456 F.Supp. 1151 (D.S.C. 1977). In 1978 the Fourth Circuit Court of Appeals ruled that portions of an annexation statute requiring a majority vote by the freeholders to annex an area created in impermissible "property-based classification of voters in election of general interest, empowering those with property to override votes of those without, and thus violated [the] [E]qual [P]rotection [C]lause of the Fourteenth Amendment." Hayward v. Clay, 573 F.2d 187 (4th Cir. 1978). However, the Court ruled that the unconstitutional portions were severable from the statute. Id. The Fourth Circuit stated in that case that "once the right to vote is established, the Equal Protection Clause requires that, in matters of general interest to the community, restriction of the franchise on grounds other than age, citizenship, and residence can be tolerated only upon proof that it furthers a compelling state interest. Id. at 190 (citing Hill v. Stone, 421 U.S. at 297, 95 S.Ct. 1637). The South Carolina Supreme Court later ruled an annexation statute with eight alternate methods of election requiring a majority of freeholders to sign a petition for annexation was not severable from the one method, and thus declared the whole statute unconstitutional. See Fairway Ford Inc. v. Timmons, 281 S.C. 57, 314 S.E.2d 322 (1984). The Court used the following test to determine whether an unconstitutional portion of a statute is severable from the constitutional portion:

> The rule is that where a part of a statute is unconstitutional, if such part is so connected with the other parts as that they mutually depend upon each other as conditions and considerations for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the Legislature would not have passed the residue independently of that which is void, the whole act is void. On the other hand, where a part of the statute is unconstitutional, and that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such character as that it may fairly be presumed that the Legislature would have passed it independently of that which is in conflict with the Constitution, then the courts will reject that which is void and enforce the remainder. [] Townsend v. Richland County, 190 S.C. 270, 280–81, 2 S.E.2d 777, 781 (1939); Aiken County Board of Education v. Knotts, 274 S.C. 144, 150–51, 262 S.E.2d 14, 18 (1980) (quoting Townsend).

Fairway Ford, Inc. v. Timmons, 281 S.C. 57, 59, 314 S.E.2d 322, 324 (1984). In 1999 the United States District Court for the District of South Carolina found a statute requiring a portion of the freeholders in an area to petition to incorporate was not severable and was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See Murray v. Kaple, 66 F.Supp.2d 745 (D.S.C. 1999).

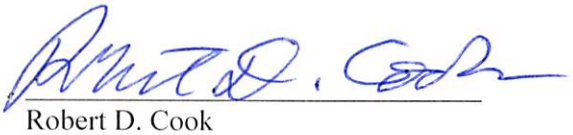
Conclusion:

This Office, like a court, presumes the constitutionality of a statute and thus begins and ends this opinion with the presumption of constitutionality for all statutes. Op. S.C. Att'y Gen., 2015 WL 836507 (S.C.A.G. Feb. 18, 2015) (citing State ex. rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956); Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townshend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939)). Thus, this Office will uphold South Carolina Code Ann. § 6-11-10 and § 6-11-20 and special purpose districts established thereby until a court declares them unconstitutional. While we believe a court may find the freeholder (also called the "landowner") requirement of § 6-11-20 unconstitutional based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, we also believe based on the Supreme Court decisions in Mayor & Council of City of Dover v. Kelley, Salyer Land Company v. Tulare Lake Basin Water Storage District, and Associated Enterprises, Inc. v. Toltec Watershed Improvement District, that a court may uphold the landowner requirement in establishing a special purpose district for a "special limited purpose" as described in those cases. See Mayor & Council of City of Dover v. Kelley, 327 A.2d 748, 753 (Del. 1974); Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973)). Thus, a court could find § 6-11-20 constitutional depending on the type and purpose of the special purpose district established by petition on a case-by-case basis. Regarding whether the landowner requirement in § 6-11-20 is severable in any way from the remaining portion of the statute or generally from the establishment of a special purpose district, a court must make that determination. Since there are over one hundred forty (140) provisions in Chapter 11 of Title 6, we are not able to address each one individually in this opinion request. If you have a specific question regarding another provision, we will address that in a follow-up opinion. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. This Opinion only addresses some of sources in the subject area, but we can address other authority or additional questions in a follow-up opinion. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General