ALAN WILSON
ATTORNEY GENERAL

July 17, 2018

The Hon. Alan Clemmons
South Carolina House of Representatives
PO Box 11867
Columbia, SC 29211

Dear Rep. Clemmons:

We received your hand-delivered request this morning bearing today's date and seeking an opinion on certain questions related the jurisdiction of the Commission on Minority Affairs to consider application for recognition which was pending upon the effective date of Act 163. The Solicitor General has exercised his discretion to expedite the issuance of this opinion in light of the scheduled meeting of the Commission and the general public interest. This opinion sets out our Office's understanding of your question and our response.

Issue (as quoted from your letter):

> This past session the General Assembly enacted Act 163 that mandates the Commission on Minority Affairs cease the State Recognition process for Native American groups. The law was enacted on May 1st and subsequently signed by Governor McMaster on May 3rd.
>
> I would like to seek an opinion from your office on whether or not the Commission has jurisdiction to consider an application for recognition that was pending prior to the enactment of this law.
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> The Commission is scheduled to meet on July 27th and because of this, I respectively ask that you expedite an opinion on this matter.

Law/Analysis:

It is the opinion of this Office that a court would conclude that Act 163 prohibits the recognition of new Native American Indian Groups even if the application was pending prior to the effective date of that Act. We do not reach the particular legal question of whether Act 163 is jurisdictional in nature because the unambiguous mandate of the Act and other applicable law resolve this question for all practical purposes such that any pending applications for recognition of a proposed Native American Indian Group must be denied.

Act 163 of the 2017-2018 legislative session (hereinafter the "Act") was passed on May 1, 2018 and became effective two days later on May 3. Act No. 163, 2018 S.C. Acts ___.[1] With the exception of the title, the text of the Act reads in full:

> Whereas, Chapter 139 of the South Carolina Code of Regulations provides for recognition of Native American Indian Groups; and
>
> Whereas, under the definition of "Native American Indian Group" found in Chapter 139, a group "means a number of individuals assembled together, which have different characteristics, interests, and behaviors that do not denote a separate ethnic and cultural heritage today, as they once did. The group is composed of both Native American Indians and other ethnic races. They are not all related to one another by blood. A tribal council and governmental authority unique to Native American Indians govern them"; and
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> Whereas, while the number of entities that may be recognized as Native American Indian Tribes is finite, recognition of Native American Indian Groups is unlimited; and
>
> Whereas, by continuing to recognize Native American Indian Groups, all of which are entitled membership on the Advisory Committee of the Commission for Minority Affairs, the number of Group members could easily outnumber and outvote the number of Tribe members on the Advisory Committee. Now, therefore,
>
> Be it enacted by the General Assembly of the State of South Carolina:
>
> **Native American Indian Groups, existing recognition, prospective repeal of regulations regarding recognition**
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> SECTION 1. Chapter 31, Title 1 of the 1976 Code is amended by adding:
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> "Section 1-31-60. (A) Notwithstanding any other provision of law, upon and after the effective date of this statute:
>
> (1) any Native American Indian Group that on the effective date of this section has been recognized by the Commission for Minority Affairs through its regulatory process remains and continues to be:
>
> (a) recognized as a Native American Indian Group; and

[1] Available at http://www.scstatehouse.gov/sess122_2017-2018/bills/3177.htm.

(b) eligible to exercise the privileges and obligations authorized by that designation;

(2) the Commission for Minority Affairs must:

(a) eliminate the eligibility for any additional Native American Indian Groups to receive official recognized status in the State; and

(b) cease to recognize any additional entities as Native American Indian Groups; and

(3) any regulations providing for recognition as a Native American Indian Group are repealed.

(B) The Commission for Minority Affairs must revise any regulations to:

(a) eliminate any recognition procedure as a Native American Indian Group; and

(b) provide for the privileges and obligations a Native American Indian Group that continues to be recognized is authorized to exercise."

Time effective

SECTION 2. This act takes effect upon approval by the Governor.

Act No. 163, 2018 S.C. Acts ___ (codified at S.C. Code Ann. § 1-31-60 (Supp. 2018)).

Because this Act has not yet been examined by any reported opinion of a South Carolina court, a court faced with this question would rely upon the rules of statutory construction to give effect to the intention of the Legislature in codifying the various statutes set out above. As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). Also, where a state agency is tasked with enforcing a state law, that agency's interpretation of the law being enforced receives

substantial deference. *See Logan v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986). As our Office has opined previously:

> [O]ur Court of Appeals has stated, "agencies charged with enforcing statutes . . . receive deference from the courts as to their interpretations of those laws." *State v. Sweat*, 379 S.C. 367, 385, 665 S.E.2d 645, 655 (Ct. App. 2008). Our Supreme Court has recognized this fundamental principle of deference to an administrative agency interpretation in *Logan v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986), when it concluded that "construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Particularly will the courts defer to the agency's interpretation of a statute where, as here, "the agency's construction lies within its area of expertise." *Op. S.C. Atty. Gen.*, January 5, 2011 (2011 WL 380157). . . . For all these reasons, therefore, "[i]t is this Office's longstanding policy . . . to defer to the [interpretation of] the administrative agency charged with the regulation [of] . . . the subject matter." *Op. S.C. Atty. Gen.*, August 9, 2013 (2013WL 4497164).

Op. S.C. Att'y Gen., 2013 WL 4873939 (September 5, 2013).

1. General Effect of Act 163

Turning to the text of Act 163, we have no doubt that a court would conclude that the General Assembly unambiguously intended to halt the recognition of any new Native American Indian Groups (referred to herein as "Groups"). *See* S.C. Code Ann. § 1-31-60 (Supp. 2018). This is plainly demonstrated in the language of the legislation which mandates that the Commission "eliminate the eligibility for any additional Groups to receive official recognized status in the State" and to revise its regulation to "eliminate any recognition procedure." *Id.* Moreover, the Act also repealed "any regulations providing for recognition," and mandated that the Commission "cease to recognize any additional entities." *Id.* While the Legislature also took measures to ensure any Groups already recognized would retain recognition, we fail to see how the General Assembly could have stated any more plainly that there shall be no recognition of any additional Groups beyond those which have already been recognized. *See id.*

2. Effect of Change in Law on Pending Application

Turning to your question specifically, we understand that it asks us to opine on the impact of Act 163 on applications for recognition by a proposed Group which had been submitted prior to the passage of the Act and which were pending upon the effective date. At the outset, we note that the General Assembly plainly mandated that the Commission cease recognizing any

additional Groups "upon and after the effective date of the Act." S.C. Code Ann. § 1-31-60 (Supp. 2018). Moreover the General Assembly repealed the Commission regulations which provided for recognition. *Id.* We believe that a court would conclude that a straightforward application of the plain language set out above would result in the denial of any pending applications not yet approved as of the effective date of the Act. *See id.; cf. Op. S.C. Att'y Gen.*, 2005 WL 1983358 (July 14, 2005). To the extent that there might still be some question about this result, prior opinions of this Office support reaching that identical result even without such unambiguous statements. *See, e.g., Op. S.C. Att'y Gen.*, 1988 WL 383502 (March 2, 1988). We discuss one of those prior opinions below.

A prior opinion of this Office issued in 1988 considered the impact of a proposed legislative amendment on pending applications for certificates of need from the SCDHEC. *Op. S.C. Att'y Gen.*, 1988 WL 383502 (March 2, 1988). That opinion quoted American Jurisprudence 2d for its statement of the general rule:

> [A] change in the law pending an application for a permit or license is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the permit or license should be granted. If, however, action on the application is unreasonably delayed until after the change has become effective, or if the appropriate officer arbitrarily fails to perform a ministerial duty to issue the license promptly on an application that conforms to the law at the time of filing, the law at the time of filing of the application ordinarily controls.

51 Am.Jur.2d Licenses and Permits § 46. The opinion went on to conclude that under the proposed amendment "an application for a certificate of need . . . would follow the law as amended while the application was pending," provided that there had not been some unreasonable delay or arbitrary ministerial failure. *Op. S.C. Att'y Gen.*, 1988 WL 383502 (March 2, 1988) (emphasis added). That opinion also noted that a similar principle governed appeals as described in the 1801 US Supreme Court case of *United States v. Schooner Peggy*:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

Id. (quoting *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801)); *see also Op. S.C. Att'y Gen.*, 2011 WL 2214070 (May 17, 2011) (concluding that "[t]he General Assembly

certainly possesses authority to place a moratorium on permits issued by DHEC," but cautioning that legislation nullifying a pre-existing, properly-issued permit "may present due process implications."). In summary, our 1988 opinion concluded that where the General Assembly changes the applicable law while an administrative application is pending, that application generally must be dealt with according to the new amended law, and not according to the law as it existed when the application was submitted. *See id.*

Consistent with that rule discussed in our prior 1988 opinion, we believe that a court faced with the question presented in your letter would conclude that any applications to the Commission for recognition of a new Native American Indian Group which were still pending as of the effective date of Act 163 must be dealt with according to the provisions of Act 163. *See Op. S.C. Att'y Gen.*, 1988 WL 383502 (March 2, 1988). As discussed above, the Act patently prohibits the recognition of any new Groups, and even goes so far as to repeal the regulations which provide for such recognition. S.C. Code Ann. § 1-31-60 (Supp. 2018).

Conclusion:

Accordingly, it is the opinion of this Office that Act 163 prohibits the recognition of new Native American Indian Groups even if the application was pending before the Commission prior to the effective date of that Act. *Op. S.C. Att'y Gen.*, 1988 WL 383502 (March 2, 1988).

Nothing in this opinion should be construed so as to question the continuing recognition of Native American Indian Groups which were recognized as of the effective date of the Act, consistent with the express language of the General Assembly in Act 163. *See* S.C. Code Ann. § 1-31-60 (Supp. 2018).

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General