ALAN WILSON
ATTORNEY GENERAL

March 10, 2020

Mr. Fred W. Castles III, PE
Executive Director
Chester Metropolitan District
P.O. Box 550
Chester, SC 29706

Dear Mr. Castles:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> I serve as the Executive Director of the Chester Metropolitan District (the "District"). I am writing you on behalf of the District to request an opinion regarding an Act of the South Carolina General Assembly and its impact upon the composition of the Chester Metropolitan District Commission, the governing body of the District (the "Commission").
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> The District is a special purpose district duly organized and validly created pursuant to the Constitution of the State of South Carolina, 1895, as amended (the "Constitution"), and the laws of South Carolina, specifically being created by Act No. 379 of the Acts and Joint Resolutions of the General Assembly of the State of South Carolina of 1959, as amended by Act No. 478 of 1963, Act No. 479 of 1963, Act No. 1187 of 1964, Act No. 1233 of 1966, Act No. 691 of 1967, Act No. 1486 of 1968, Act No. 1488 of 1968, Act No. 637 of 1969, Act No. 719 of 1971 and Act No. 368 of 1975 (collectively, the "Enabling Legislation").
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> Initially, the Commission was composed of three members. However, Act No. 1187 of 1964 amended the composition of the Commission to nine members, and Act No. 719 of 1971 ("Act 719") further amended the composition of the Commission providing that the nine members would be appointed in the following manner:
>
> > [t]hree members shall be appointed by the Chester City Council, two members shall be appointed by the Great Falls City Council, one member shall be appointed by the Town Council of Fort Lawn, one member shall be appointed by the Town Council of Richburg, and two members shall be appointed by the Governor, upon the

> recommendation of a majority of the legislative delegation representing Chester County.

(emphasis added). The Enabling Legislation was further amended by Act No. 368 of 1975 ("Act 368"), such act being the basis of this request for opinion. Act 368, in amending Act 719, provided that the Governor would make appointments "upon the recommendation of a majority of the Chester County Board of Directors"[1] instead of the legislative delegation representing Chester County.

Act 368 creates a potential conflict for the District in that it is subject to a challenge as being unconstitutional special legislation. Article VIII, Section 7 of the Constitution prohibits the General Assembly from enacting legislation after March 7, 1973 that affects a specific county. Additionally, the Supreme Court of South Carolina has struck down special legislation similar to Act 368. ... Recognizing the Constitutional defects of Act 368, the Chester County Council has been unwilling to make any appointment recommendations to the Governor. As such, two of the Commission's nine positions have not been filled.

The District seeks to resolve this manner in order to enjoy the benefit of leadership from nine Commission members, and also to settle the confusion regarding the open Commission seats. As such, the District is seeking the opinion of your office [to] determine whether it is permissible for the Chester County Council to initiate its recommendation authority to the Governor under Act 368?

[] Since Act 368 has not been declared by the courts to be unconstitutional or invalid, we believe it is legally prudent for the District (and the Chester County Council) to operate under the provisions of Act 368 until any such appropriate judicial declaration to the contrary. We further believe that in the event Act 368 were to ever be deemed unconstitutional or invalid, the actions of Commission members would be valid and binding on all parties regardless of the constitutionality of Act 368 and the provisions of Act 719 (as the most recent prior act concerning the composition of the Commission that is not constitutionally defective special legislation) would then be controlling.

Law/Analysis

As described in the request letter, Act 368 of 1975 presents a potential conflict with the South Carolina Constitution's provisions prohibiting special legislation. See S.C. Const. art. VIII, §§ 1, 7. However, while this Office may comment on perceived constitutional conflicts, we may not declare legislation void. This Office's March 29, 2005 opinion explained that lawfully enacted legislation carries a presumption of constitutionality:

[1] Upon information and belief, the "Chester County Board of Directors" is the Chester County Council, which is the governing body of Chester County, South Carolina.

> [O]ur Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are expressly enumerated. Accordingly, any act of the General Assembly must be presumed valid and constitutional. A statute will not be considered void unless its unconstitutionally is clear beyond a reasonable doubt. Every doubt regarding an act of the General Assembly must be resolved favorably to the statute's constitutional validity. ... Put another way, a statute "must continue to be followed until a court declares otherwise."

Op. S.C. Att'y Gen., 2005 WL 774141, at 1 (March 29, 2005) (citations omitted). In light of this presumption of constitutionality, we advise that Act 368 be followed unless and until a court declares it unconstitutional. See 1988 S.C. Op. Att'y Gen. 202 (1988). The Commission may prefer to file a declaratory judgment action to seek a judicial determination. See Davis v. Richland Cnty. Council, 372 S.C. 497, 642 S.E.2d 740 (2007); Pickens Cnty. v. Pickens Cnty. Water & Sewer Auth., 312 S.C. 218, 439 S.E.2d 840 (1994); Hamm v. Cromer, 305 S.C. 305, 408 S.E.2d 227 (1991); Horry Cnty. v. Cooke, 275 S.C. 19, 267 S.E.2d 82 (1980); Cooper River Park & Playground Comm'n v. City of N. Charleston, 273 S.C. 639, 259 S.E.2d 107 (1979).

This Office has also advised that individuals appointed as office holders would be considered valid officers until a court declares otherwise.

> 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. 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."

1988 S.C. Op. Att'y Gen. 202, at 3 (1988) (citations omitted). Therefore, a court would likely consider the actions taken by the Commission valid and enforceable even if Act 368 is ultimately held unconstitutional.

Finally, a court may well find Act 368 meets the transitional or "one-shot" legislation exception to the prohibition on special legislation. As described in the request letter, the District was created by the General Assembly in 1959 and several subsequent legislative acts amended its boundaries and governing board's composition. 1959 Act. No. 379. The acts at issue are Act No. 719 of 1971 ("Act 719"), which states in relevant part that "two members [of the Commission] shall be appointed by the Governor, upon the recommendation of a majority of the legislative delegation representing Chester County", and Act No. 368 of 1975 ("Act 368"), which

amended the recommendation authority for the same two appointments to the "Chester County Board of Directors." Article VIII of the South Carolina Constitution, the home-rule amendment, was approved by the people of South Carolina in November of 1972 and ratified by General Assembly in March of 1973. Section 7 states, "No laws for a specific county shall be enacted ..." S.C. Const. art. VIII, § 7. The South Carolina Supreme Court has clarified that this prohibition is applicable to special purpose district developed prior to Article VIII's ratification.[2] Therefore, the issue raised by the request letter is whether Act 368 violates this prohibition against special legislation because it was enacted after home-rule and it relates to a special purpose district in a single county.

In Duncan v. York Cnty., supra, the South Carolina Supreme Court addressed the reasons for ratifying the home rule amendment and the subsequent legislative actions to fully implement it.

> [T]he complexion of the legislative delegation has changed such that there is no longer a county-oriented legislative delegation elected by the voters of an entire county and answerable to the people thereof, as was the case prior to 1967.
>
> The demise of the delegation as it formerly existed, and the inconvenience of persons having to go to the State House and to the State Legislature in Columbia to seek laws of purely local nature, brought about a clamor for what is commonly referred to as 'home rule.'
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> It is in this setting that the committee, which proposed a revised constitution, made its recommendations, resulting in the approval of New Article VIII by the people in November 1972, and its ratification by the General Assembly in March of 1973.

267 S.C. at 335, 228 S.E.2d at 95. The Court found that the amendment contemplated further action by the General Assembly may be required to more completely establish how home rule would operate. 267 S.C. at 343, 228 S.E.2d at 99 ("There is imposed upon the General Assembly, at least by implication, the duty of providing for an orderly transition of power from the old system to the new."). The Duncan Court held that an act which called for a referendum

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[2] Cooper River Park & Playground Comm'n v. City of N. Charleston, 273 S.C. 639, 259 S.E.2d 107 (1979)

> Section 7 is not only applicable to special legislation creating a district, but also to special legislation dealing with districts created prior to the ratification of new Article VIII or the amendment of prior special legislation. Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976). Thus, these provisions of Article VIII have divested the General Assembly of authority to deal by special act with special purpose districts performing functions now delegated to counties under "Home Rule."

273 S.C. at 642, 259 S.E.2d at 108–09.

to select a form of government for York County did not violate Article VIII, § 7 because it was necessary "to take local government out of the State House." 267 S.C. at 348, 228 S.E.2d at 101.

> There can be no doubt but that Act No. 448 is an act for a specific county. We think, however, it is constitutionally permissible as a 'One-shot' proposition, in view of s 1 of Article VIII quoted hereinabove. That section dictates that 'The powers possessed by all counties . . . at the effective date of this Constitution shall continue until changed in a manner provided by law.' This constitutional provision contemplates that legislation by the General Assembly would be required to bring about an orderly transition, but such authority is a temporary nature and extends only to the point necessary to place Article VIII fully into operation.

267 S.C. at 345, 228 S.E.2d at 100; see also Horry Cnty. v. Cooke, 275 S.C. 19, 267 S.E.2d 82 (1980) ("[S]pecific legislation necessary to bring about an orderly transition to home rule is constitutionally permissible.").

In the following decades, the Court continuously emphasized that the exception for transitional legislation has limited application; that is only to the extent "necessary to insure an 'orderly transition' of power from the old system of government to the new system of local home rule government mandated by Article VIII." Cooper River, 273 S.C. at 643, 259 S.E.2d at 109. In contrast, the Court explained that legislation that amounts to "an attempt by the General Assembly to immerse itself directly in the regulation of ... a function reserved for local county government" would not qualify for this exception. 273 S.C. at 643, 259 S.E.2d at 109.

Moreover, the Court clarified what it means for transitional legislation to constitute "one-shot." In Horry Cnty. v. Cooke, 275 S.C. 19, 267 S.E.2d 82 (1980) the Court considered the complicated process of establishing Horry County's form of government which included preclearance litigation with the federal government and multiple legislative acts over a course of years.

> The "one-shot" rationale in Duncan v. York County, supra, was actually applied to a state of facts in which not one, but two special statutes were necessary to place Article VIII fully into operation in York County. Thus by implication it is clear that by "one-shot proposition" the court was referring not merely to a single legislative enactment but rather to that process whereby the initial, home-rule county government becomes fully operational.

275 S.C. at 23–24, 267 S.E.2d at 84. The Court held that "once a legally constituted government becomes functional the Duncan case exception ends, thereby precluding any further special legislation." 275 S.C. at 24–25, 267 S.E.2d at 85.

The cases discussed above broadly outline an exception from the prohibition on special legislation for legislative acts that transition local decision making from the General Assembly to

a political subdivision until that political subdivision becomes fully functional. Act 368 appears to fall within this exception because it transitions the recommendation for two seats on the Commission from the legislative delegation representing Chester County to the county government. Further, Act 368 of 1975 predates the general law establishing Chester County under the council-supervisor form of government with single-member election districts in 1979. See 1979 Act No. 252.[3] Therefore, according to Horry Cnty. v. Cooke, the "one-shot" nature of the exception would not preclude Act 368, an earlier legislative act, as the form of government under home rule for Chester County had not been fully established.

Please note that more recent court decisions have roundly rejected attempts to transition responsibility for recommending nominees to seats on local bodies from their respective legislative delegations to local governments. In Hamm v. Cromer, 305 S.C. 305, 408 S.E.2d 227 (1991), the Court addressed similar legislation adopted in 1988 which sought to change the recommendation for seats on the governing body of the Newberry County Water and Sewer Authority governing body from the Newberry County Legislative Delegation to the Newberry County Council. The Court found the legislation unconstitutional because it did not fall within the "one-shot" exception.

> While Act No. 784 may well have been a good-faith attempt to promote home rule by placing control of the governing body of the Authority directly into the hands of the Newberry County Council rather than leaving it within those of the Newberry County Legislative Delegation, it still constitutes impermissible special legislation and is unconstitutional as it applies to Newberry County in the face of the South Carolina Constitution's prohibition against such legislation and this Court's past precedent. Cloaking Act No. 784 under the guise of being remedial or transitional legislation more than seventeen years after the ratification of Article VIII of the South Carolina Constitution and more than twenty years after the Authority has been in continuous and successful operation, does not remedy the legislature's disregard of the blatant constitutional prohibition against special legislation.

305 S.C. at 309, 408 S.E.2d at 229. In Davis v. Richland Cnty. Council, 372 S.C. 497, 642 S.E.2d 740 (2007), the Court held Act 207 of 2005, which removed recommendation authority for seats on the Richland County Recreation Commission from the Richland County Legislative Delegation to the governing body of Richland County, unconstitutional as well.

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[3] Act 252 is titled, in relevant part, "A bill to establish single-member election districts for election of the members of the Chester County Council under the council-supervisor form of county government pursuant to Chapter 9 of Title 4 of the 1976 Code." Notably, the General Assembly included a legislative finding that it "ha[d] not previously enacted any laws relating to the method of election and terms of office for the Chester County Council pursuant to the provisions of Chapter 9 of Title 4 of the 1976 Code." 1979 Act No. 252, § 1. This finding suggests that the General Assembly was well aware of the Duncan exception and crafted this language to fall within it.

> Here, Act No. 207 takes the authority to recommend Richland County Recreation Commission members away from the Richland County Legislative Delegation, and gives that authority to the Richland County Council; it also provides that the terms of the then-current members of the commission appointed by the Richland County Legislative Delegation expire on June 30, 2005. Much like the Act held unconstitutional in Hamm, the Act here seeks to devolve appointment authority of a local body away from the Legislative Delegation, and confer it upon the County Council. Accordingly, Hamm and Pickens are squarely controlling, and Act No. 207 is indeed unconstitutional.

372 S.C. at 503, 642 S.E.2d at 743.

While Hamm and Davis raise some doubt, it is not clear a court would conclude these decisions dictate Act 368 would not qualify as transitional or one-shot legislation. Unlike the legislation at issue in those cases, Act 368 predates the implementation of the home-rule form of government for Chester County. See 1975 Act No. 283; Duncan, 267 S.C. at 343, 228 S.E.2d at 99 (discussing the alternative forms of county government). Other court decisions that address legislation adopted in the decade following home rule focused more on whether the act at issue was "transitional." See Pickens Cnty. v. Pickens Cnty. Water & Sewer Auth., 312 S.C. 218, 219, 439 S.E.2d 840, 841 (1994) (Act 757 of 1973 abolishing one special purpose district with "[t]he apparent intent ... to consolidate water and sewer services in one authority" did not constitute transitional legislation); Richardson v. McCutchen, 278 S.C. 117, 120, 292 S.E.2d 787, 788 (1982) (holding both 1975 and 1977 acts increasing the membership of the Williamsburg County Recreation Commission were "clearly not the 'transitional' legislation anticipated by Duncan."); Cooper River Park, supra (Act 418 of 1973 that transferred property owned by a special purpose district to the City of North Charleston "in no way relates to the operative machinery necessitate to implement a new form of government."). Moreover, Justice Toal's dissents in Hamm and Davis point out that the legislation at issue in both cases transferred control to the county governments and she would hold they qualified for the one-shot exception.[4]

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[4] Justice

> In my opinion, Act 784 is constitutional as one-shot legislation under Duncan v. County of York, 267 S.C. 327, 228 S.E.2d 92 (1976). I am well aware that the Duncan exception was limited to the establishment of initial county governments by Horry County v. Cooke, 275 S.C. 19, 267 S.E.2d 82 (1980); however, the county government has never had legally constituted control over the Authority. It is my view, then, that the transfer of control accomplished by Act 784 constitutes the establishment of initial county government.

Hamm, 305 S.C. at 310, 408 S.E.2d at 230 (Toal, J., dissenting); Davis, 372 S.C. at 504, 642 S.E.2d at 744 (Toal, J., dissenting) ("Because Richland County Council has never had the legal authority to appoint the members of the Commission, in my opinion, the transfer of authority under Act No. 207 constitutes the establishment of initial county government.").

Conclusion

In conclusion, while there is some doubt, a court may well find that Act 368 does not violate the constitutional prohibition on special legislation because the act transfers authority from the legislative delegation to the county government and predates the full implementation of the county's form of government established under home-rule. As is discussed more fully above, in light of the presumption of constitutionality for legislative acts, we advise that Act 368 be followed unless and until a court declares it unconstitutional.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General