ALAN WILSON
ATTORNEY GENERAL

April 13, 2020

The Honorable Josiah Magnuson, Member
South Carolina House of Representatives
304-D Blatt Building
Columbia, SC 29201

Dear Representative Magnuson:

You seek our opinion regarding "some hypothetical legal scenarios and questions which arise relating to the South Carolina Code of Laws." Specifically, you ask a question which begins by quoting from the South Carolina Code:

> SECTION 25-1-440. Additional powers and duties of Governor during declared emergency.
>
> (a) The Governor, when an emergency has been declared, as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility:
>
> (1) issue emergency proclamations and regulations and amend or rescind them. These proclamations and regulations have the force and effect of law as long as the emergency exists;
>
> (2) declare a state of emergency for all or part of the State if he finds a disaster or a public health emergency, as defined in Section 44-4-130, has occurred, or that the threat thereof is imminent and extraordinary measures are considered necessary to cope with the existing or anticipated situation. ***A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly;***

The italicized, highlighted in bold, and underlined section above quoting 25-1-440 establishes the basis to these two questions that build from our SC Constitution which says in Article I section 7, "the power to suspend the laws shall be exercised only by the General Assembly or by its authority in particular cases expressly provided for by it."

(1) Question of any Governor's Legal Obligation/Duty to a 15 Day Law Limitation

> Therefore, the first question pertaining to 25-1-440 (highlighted section) is this: (1) Are there any other law(s) or case law from any SC Court or the SC Supreme Court that qualify(s) this provision in such manner as to allow any SC Governor legal authority to circumvent this law that requires him/her to obtain consent from the SC General Assembly to carry out a State of Emergency Declaration beyond 15 days? In other words, is this law requiring an act by any SC Governor (to get General Assembly approval to carry any emergency beyond 15 days) with no qualification (*Actus legitimi non recipient modum*)?
>
> (2) Question of Legality: Issuing Ongoing Emergency Orders without General Assembly Consent
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> As to the second question, if the South Carolina Constitution (the highest law of our state) asserts in Article IV section 1 5 that the SC "Governor shall take care that the law be faithfully executed," and this law is unqualified (25-1-440) meaning the SC Governor (faithfully being under the law himself/herself and sworn to faithfully execute it by his/her oath to the Constitution) is required to go before the SC General Assembly to obtain consent before extending any state emergency beyond the 15 day deadline, (2) what authority and legal justification exists for any executive order promulgated or enacted (written or verbally) by any Governor if such subsequent orders were to occur without proper authority from the General Assembly to give such orders? To ask this question in more succinct ways, would such orders (if made) in your legal opinion reasonably be *ab initio* null, i.e. having no legal effect and without binding force? If such a matter occurred, would not any order made without proper legal authority (orders made beyond the 15 days limit to an emergency without General Assembly Consent) constitute unjustified orders that lack authority and/or force of law and consequently be unlawful orders because any Governor doing such lacks authority to order such without General Assembly consent?

Law/Analysis

We start with the recognition that "[i]n our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision." Hampton v. Haley, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013). Moreover,

> [i]ncluded within the legislative power is the sole prerogative to make policy decisions, to exercise discretion as to what the law will be [citations]. . . . The executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." S.C. Const. art. IV, § 15. Of course, the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the legislature. . . . Thus, while non-legislative bodies may make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking is an intrusion upon the legislative power.

403 S.C. at 403-404, 743 S.E.2d at 262. Pursuant to the State's police power, the General Assembly may "enact laws for the general good of the citizens of the State even though the incidental effect of regulation would be to deprive some individual of liberty of property." Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36, 39 (1939).

As was stated in a recent opinion, Op. S.C. Att'y Gen., 2020 WL _____, (March 29, 2020), in the enactment of S.C. Code Ann. § 25-1-440, the General Assembly has delegated broad emergency power to the Governor. We noted therein that § 25-1-440 "expressly begins by stating that during a state of emergency, 'the Governor . . . as the elected Chief Executive of the State, is responsible for the safety, security and welfare of the State.'" Id. Thus, the General Assembly has made clear its intent that, during a state of emergency, as declared by the Governor, it is the Chief Executive who is in charge of managing the State's response to that emergency. The powers delegated to the Governor by the General Assembly for this purpose are indeed extensive. As our Supreme Court has noted, courts will not interfere with the enforcement of regulations designed to protect public health and safety, "unless they are unreasonable." Richards v. City of Columbia, 227 S.C. 538, 551, 88 S.E.2d 683, 689 (1955).

You correctly observed that § 25-1-440(a)(2) provides that "[a] declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly." Your question relates to the meaning of this sentence as intended by the General Assembly. In attempting to determine the purpose of the Legislature's declaration that a "declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly," we must look to the principles of statutory construction. In construing a statutory enactment, we have previously stated:

> [f]irst and foremost, is the cardinal rule that the legislative purpose must prevail. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 577 S.E.2d 202 (2003); State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable and fair interpretation, consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). Any statute must be interpreted with common sense to avoid unreasonable consequences. United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1950). A sensible construction, rather than one which leads to irrational results is always warranted. Sloan Const. Co., Inc. v. Southern Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008); see also State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778, 782 (1964) ["In seeking the intention of the legislation, we must presume that it intended by its action to accomplish something, and not to do a futile thing."].

Op. S.C. Att'y Gen., 2012 WL 4711423 (September 24, 2012). Moreover, as our Supreme Court recognized in Inabinet v. Royal Exchange of London, 165 S.C. 33, 36, 162 S.E.2d 598, 600 (1932), "[a] statute remedial in nature should be liberally construed in order to accomplish the

object sought." We apply the foregoing principles, together with the General Assembly's stated overarching intent in § 25-1-440: that the Governor as the elected Chief Executive of the State is, during a declared state of emergency, "responsible for the safety, security and welfare of the State." As we read the statute in that light, the fifteen day limit attaches literally to "a declared state of emergency." Nothing in the statute, however, prohibits the Governor, at the end of a fifteen day period, from the declaration of a "new" emergency. In short, by providing that the fifteen day limit describes "a declared state of emergency," and by not specifying that a declared "state of emergency" must be the only one, the General Assembly anticipated that a particular emergency may be ongoing and must necessarily require a "new" emergency to be declared at the end of a fifteen day period, commensurate with changed circumstances or the development of new threats.

An "emergency" is defined as "'an unforeseen occurrence of combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency.'" Op. S.C. Att'y Gen. 1983 WL 14276 (December 5, 1983) (quoting Hice v. Dobson Lumber Co., 180 S.C. 259, 185 S.E. 742, 746 (1936). The current emergency stems from the COVID-19 pandemic, a fluid, evolving contagion, with each new day bringing forth new or intensifying threats to public health and safety. Particularly with the present pandemic, a declaration of emergency cannot "foresee" what will occur at the end of the fifteen day period. Thus, it is unreasonable to assume that the General Assembly intended to limit the Governor in such dire circumstances to one "declaration of emergency" only unless the General Assembly expressly "consents." A far better and more logical interpretation of "emergency" is that a particular emergency is limited to fifteen days, but that a "new emergency" may be declared at the end of the fifteen days, based upon changing circumstances or new threats as the pandemic continues. This has been done by previous Governors with respect to weather events, as we understand it.

In Worthington v. Fauver, 88 N.J. 182, 440 A.2d 1128, 1142 (1982), the New Jersey Supreme Court rejected an "overly narrow interpretation" of a similar emergency powers statute. According to the Court, the Governor's delegated emergency powers represent "an extraordinary delegation of authority by the Legislature to the Executive," and thus such emergency orders by the Governor "must not only bear a rational relationship to the goal of protecting the public, but their scope must not exceed the emergency." Id. at 1137. The Court in Fauver upheld a subsequent declaration of emergency by the Governor. In the Court's view, "in the absence of a legislative response, such properly grounded executive actions could continue to be exercised as long as the emergency posed a threat to the public." Id. at 1138.

Thus, the Court viewed the absence of legislative action as constituting an implied "consent" to the Governor's actions. Moreover, the Court expressly declined to say "how often the Governor . . . could continue to exercise these powers before [the Court] would conclude that he had exceeded his statutory authority." Id. at 1138. See also Op. S.C. Att'y Gen., 1992 WL 682838 (September 3, 1992) [nothing in the APA prohibits successive emergency regulations, based upon a new determination of emergency each time; however, the agency may not employ

such process to ". . . circumvent prescribed rulemaking requirements through the simple device of promulgating a series of emergency regulations."].

Each type of emergency is, of course, different. However, we note that the intensity, deadliness, and constantly changing nature of this pandemic is probably like no other "emergency" in our history. Thus, we believe a court would likely give considerable deference to the Governor's actions here. Certainly, any declaration of a "new" emergency at the end of a fifteen day period would be presumed valid and within the exercise of the Governor's statutory powers.

As our Supreme Court noted long ago, "[i]n all judicial inquiry with respect to health laws and regulations, every intendment is to be allowed in favor of the validity of the statute and the lawfulness of the measures taken under it." Kirk v. Wyman, 83 S.C. 372, 65 S.E. 387, 390 (1909). In that light, a court will determine whether actions taken during such a health emergency constituting interference with personal liberty or property [were] reasonably necessary for the public health, and second, if the means used and the extent of the interference were reasonably necessary for the accomplishment of the purpose to be attained." Id.

Conclusion

The General Assembly has delegated broad emergency powers to the Governor, pursuant to § 25-1-440 to manage the State's response to a declared emergency. S.C. Code Ann. § 25-1-440 (2007). Section 25-1-440 expressly limits "a declaration of emergency" by the Governor to fifteen days unless there is "consent by the General Assembly." § 25-1-440(A). We must read this language in light of the overarching legislative purpose that the Governor is "responsible for the safety, security and welfare of the State" during the emergency. See id. Thus, while the fifteen day limit applies to "a declared state of emergency," nothing in the statute prohibits the Governor from declaring in the wake of a constantly changing and evolving pandemic, a "new emergency" based upon the new facts and circumstances at the end of a fifteen day period. If the Legislature had intended that the Governor was limited to one fifteen day declaration of emergency, and one only, it could have easily said so. Previous Governors have interpreted the statute as we understand it, and the New Jersey Supreme Court in Worthington v. Fauver appears to have upheld a similar interpretation. Worthington v. Fauver, 88 N.J. 182, 440 A.2d 1128, 1142 (1982). A pandemic certainly is not expected to end before the expiration of the fifteen days; the Governor must, therefore, base his decision to declare a new emergency upon new circumstances and intensifying threats.

We stress herein that the ultimate police power resides in the hands of the General Assembly. In that vein, the Legislature has delegated enormous authority to the Governor pursuant to § 25-1-440. In Fauver, the New Jersey Supreme Court, in upholding the Governor's exercise of emergency powers, concluded that, in the absence of legislative action in response to the Governor's exercise of emergency powers, "such properly grounded executive actions could continue to be exercised as long as the emergency posed a threat to the public." In other words,

the Court deemed the absence of legislative action to be a form of consent by the Legislature. Also, the New Jersey Supreme Court declined to say when the Governor's exercise of power through a new declaration of an emergency required the conclusion that the Governor "had exceeded his statutory authority." Of course, such a conclusion would be a matter for the courts, based upon the facts and circumstances then existing.

In our judgment, our constitutional requirement of separation of powers, with powers dispersed among three branches of government, , provides adequate safeguards for the exercise of emergency powers delegated by the General Assembly to the Governor. See S.C. Const. art. I, § 8. A court will presume any declaration of emergency, whether original or new, and the powers exercised thereunder, to be valid and within the Governor's statutory powers. Kirk v. Wyman, supra. However, we are reminded that the General Assembly retains the ultimate police power to choose at some point expressly to consent or not consent to the Governor's actions.

Accordingly, we conclude that § 25-1-440 permits the Governor to declare a "new" emergency at the end of the fifteen day period, based upon new facts and circumstances and new threats perceived at that time. The new threats posed by a pandemic, such as we now face, cannot be anticipated at the beginning of the crisis. Thus, the Governor may need to declare a new emergency based upon those new threats and we believe the governing statute provides the flexibility to do so, with the caveat that the Legislature retains the ultimate police power.

Sincerely,

Robert D. Cook
Solicitor General