ALAN WILSON
ATTORNEY GENERAL

July 14, 2020

Richard B. Ness, Esquire
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Attorneys at Law
P.O. Box 909
Bamberg, SC 29003

Dear Mr. Ness:

You seek our opinion regarding ". . . [w]hether or not Bamberg County, by and through its County Council, can dictate the removal of a statue placed in 1911 by the Daughters of the Confederacy." By way of background, you provide the following information as stated in your letter:

> . . . [i]t is my understanding that in 1911 the Francis Marion Bamberg Chapter, United Daughters of the Confederacy erected a statue that is approximately 35 feet tall with an Italian-carved, marble figure of a Confederate private at parade rest on top.
>
> The exact, original location of this statue is unknown because the Bamberg County Courthouse was relocated in 1950 approximately 100 yards to its present location. The statue, as I understand it, was relocated to the Courthouse grounds. I am uncertain whether the statue was on the Courthouse grounds originally.
>
> I am aware of your Attorney General's Opinion that came out last week regarding the South Carolina Heritage Act. However, the question in this case is different because the ownership of the statue cannot be confirmed. In 2003, Rivers Bridge Sons of Confederate Veterans Camp 842 Commander Ed Moody claimed the SCV and United Daughters of the Confederacy are the "custodians" of the monument.
>
> Without question the statue is currently on the Bamberg County Courthouse grounds, which is located at Bamberg's town center, adjacent to U. S. Highway 301. Several Councilmembers have requested a Resolution be passed to relocate the statue.
>
> Our question here is whether or not Bamberg County Council, on its own, can remove the statue from the Bamberg County Courthouse grounds. I believe the Daughters of the Confederacy will need to be notified and advised of such a change,

> if change in fact occurs. However, I would request your opinion whether or not the Bamberg County Council, on its own, can have the statue removed.
>
> Additionally, I am also enclosing a copy of an opinion letter prepared for Bamberg County by Attorney Adam Artigliere regarding this matter.

The opinion letter which you attached from Mr. Artigliere states that "[i]f the above analyses regarding the Monument find that the Monument is a Civil War monument on public property, in order to move forward with an attempt to remove or relocate the Monument, Bamberg County would need to request that the General Assembly allow Bamberg County to remove or relocate the Monument." Further, the opinion letter states that "[t]here is the additional, corollary question as to whether such actions to amend the Monument and Memorial Section for specific requests or to otherwise authorize the removal of a particular monument would be valid in that it may be considered special legislation."

Law/Analysis

As you indicate, our recent opinion is instructive with respect to your question. In that opinion, we concluded that a court would likely find that the two-thirds requirement imposed by the Heritage Act upon future General Assemblies to amend the act or allow the removal or a modification of a particular monument or memorial is likely unconstitutional. In that opinion, we concluded:

> Accordingly, notwithstanding the two-thirds requirement, monuments or memorials protected by the Heritage Act cannot be moved or altered without legislative approval. The Legislature sought to "freeze" monuments as of date of passage of the Act, contemplating that new monuments after the Act's passage would also be protected, but existing monuments, together with new ones, would be preserved. If a particular monument or memorial is encompassed within the Act's protections - a fact specific inquiry - there can be no removal or alteration of it except by the Legislature. At the very minimum, a majority of each house is required to alter or move a monument, and, in our opinion, such is constitutional, valid and binding. Of course, the General Assembly is free to amend or repeal the Heritage Act if it so desires and may do so just as any other Act.[ ]

Op. S.C. Att'y Gen., 2020 WL 3619620 (June 25, 2020).

The conclusion reached in the attached opinion of Mr. Artigliere to your letter that the Heritage Act likely applies to the Bamberg Monument in question and that the only recourse that Bamberg County possesses is to seek relief from the General Assembly certainly seems the likely outcome. We recognize the dilemma in which that places a political subdivision such as Bamberg County; however, that is the law and the rule of law must prevail. Accordingly, inasmuch as the applicability of the Heritage Act is, in each instance, a fact-specific question, we cannot address your question beyond saying that Bamberg County cannot "on its own" move or

modify the monument in question, but must seek relief from a court and/or the General Assembly.

The opinion you attached to your letter suggests that a court may well conclude that the Heritage Act constitutes special legislation. Mr. Artigliere states that "the General Assembly must have a logical basis and sound reason for resorting to special legislation." In his opinion, "an individual bill adopted by the General Assembly under its strict standards, may be held to be unconstitutional special legislation." Of course, that conclusion would be a matter for the courts to reach. As we stated in our June 25, 2020 opinion, the Heritage Act "'must continue to be enforced unless set aside by a court or repealed by the General Assembly.... This office, in its opinion may only comment upon potential constitutional issues, which we see as possibly arising in a judicial proceeding.'"

The issue of whether the Act constitutes special legislation is a difficult one, as there are a number of decisions reaching various conclusions. However, we note that our Supreme Court has not hesitated recently to declare various statutes to constitute unconstitutional special legislation. See e.g. Davis v. Richland County Council, 372 S.C. 497, 642 S.E.2d 740 (2007) [Richland County Recreational Commission]; Kizer v. Clark, 360 S.C. 86, 600 S.E.2d 529 (2004) [James Island Incorporation]; see also Cooper River Park & Playground Comm'n v. City of N. Charleston, 273 S.C. 639, 259 S.E.2d 107 (1979) [Home Rule]. Indeed, in Bd. of Trustees for Fairfield County School Bd. v. State, 395 S.C. 276, 718 S.E.2d 210 (2011), a case referenced in our June 25th opinion, we note that Justice Beatty, in concurrence, concluded that the Act in question constituted special legislation. We do not address the issue of special legislation here, however, as it would be up to a court to do so because such an inquiry requires a factual determination which is beyond the scope of an opinion of this office.[1]

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[1] We note, however, our discussion of special legislation in Op. S.C. Att'y Gen., 2014 WL 1398593 (March 12. 2014), and the cases cited therein. See Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996). In Martin, the Court invalidated a "local option law" relating to video poker, which would allow a county to "opt out" of a statewide law making video poker legal in South Carolina. The result was that the Legislature had created a mechanism in which only special laws could, in essence, amend a statewide criminal law. Whether Martin and the cases referenced therein would be applicable to the Heritage Act would be a matter for a court to determine. See also Op. S.C. Att'y Gen., 1983 WL 181686 (November 23, 1983) [Section 4-9-80 may be unconstitutional "if it were challenged in court" because it requires a law for a specific county to dissolve a special purpose district.].

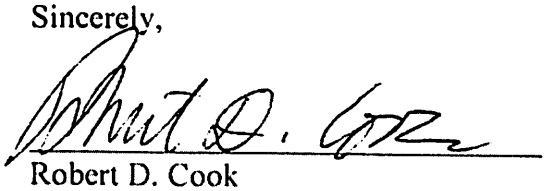
As the Supreme Court stated in Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 28, (736 S.E.2d 651, 657 (2012), "[w]e conclude a 'rational basis' test is applicable or a determination of whether [and an act] . . . constitutes special legislation or violates the Equal Protection Clause." Again, assessment of relevant facts is necessary to make a determination of these constitutional issues which only a court may undertake. See Op. S.C. Att'y Gen., 1989 WL 508520 (April 25, 1989) ["Obviously, the specific facts and circumstances involved would impact on a judicial analysis of an equal protection challenge. . . ."].

Conclusion

We are unable to address in any given instance whether or not the Heritage Act is applicable to a monument or memorial because such an inquiry is a fact-specific determination, beyond the scope of an opinion of this Office. First, it would be impractical for this Office to serve as judge and jury as to the applicability of the Heritage Act for the hundreds of monuments and memorials in South Carolina. Second, when the Heritage Act was enacted by the General Assembly, it could have empowered this Office or another executive branch agency with the legal authority to make dispositive fact determinations for monuments and memorials, but the General Assembly instead chose to reserve that authority solely unto itself. Third, even if we were to attempt to make fact determinations as to whether the protections of the Act apply to a particular monument or memorial, such determination would not be legally binding. Thus, any question about the applicability of the Act to a particular monument must necessarily be resolved by a court before proceeding to the Legislature for an act authorizing the removal of that monument.

Accordingly, in response to your specific question, Bamberg County should not "on its own" move, modify, or relocate the monument in question without first seeking relief from a court to determine with finality the applicability of the Heritage Act to that monument, and/or the General Assembly to obtain permission to modify or relocate the monument.

Sincerely,



Robert D. Cook
Solicitor General