



ALAN WILSON
ATTORNEY GENERAL

September 16, 2014

The Honorable James E. Smith, Jr.
House District 72
P.O. Box 11867
Columbia, SC 29211

Dear Rep. Smith:

By your letter received on January 23, 2014 you ask whether a proposed amendment, as contained in pending legislation, H. 3925 in particular, can retroactively amend a savings clause from a prior act, specifically Act 198 of 2012, “to eliminate the Savings Clause included in the original version of Act 198 without violation of the State Constitution?” Our response follows.

I. Law

A. Act 198 of 2012 and the Pollution Control Act

As noted in your letter, Act 198 of 2012 amended portions of the Pollution Control Act (“PCA”) including Section 48-1-250 of the South Carolina Code.¹ 2012 S.C. Acts No. 198. As a result of this amendment, Section 48-1-250, a statute previously interpreted by our Supreme Court as providing a “private cause of action” for PCA violations in Georgetown County League of Women Voters v. Smith Land Co., Inc., 393 S.C. 350, 354, 713 S.E.2d 287, 289-90 (2011), was modified to provide that “[n]o private cause of action is created by or exists pursuant to this chapter.” S.C. Code Ann. § 48-1-250 (2013 Supp.).

B. The Savings Clause Contained in Section Six of Act 198

In addition to amending Section 48-1-250 of the Code, Section Six of Act 198 included a Savings Clause² which, by its terms, saved “pending actions” and “any federal project for which

¹ Prior to its 2012 amendment, Section 48-1-250 stated that “[c]auses of action resulting from the violation of the prohibitions contained in this chapter inure to and are for the benefit of any person or persons damaged as the result of any such violation.” S.C. Code Ann. § 48-1-250 (2008).

² Specifically, Act 198’s Savings Clause provided:

a final Environmental Impact Statement has been issued, but no . . . record of decision has been issued.” 2012 S.C. Acts No. 198, § 6. The Savings Clause further explained that, following the enactment of the new provisions, those laws which were repealed would remain in full force “for the purpose of sustaining” pending actions and enforcing related “rights, duties, penalties, forfeitures and liabilities.” See 2012 S.C. Acts No. 198 § 6 (“After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws or other provisions contained in this act.”). In other words, the Savings Clause contained in Section Six of Act 198, consistent with the purpose of a savings clause in general, operated so as to preserve pending actions and allow for the enforcement of related rights and liabilities. See *State v. Brown*, 402 S.C. 119, 127, 740 S.E.2d 493, 496-97 (2013) (“A savings clause is a restriction in a repealing act, intended to save rights, pending proceedings, penalties, etc. from the annihilation which would result from an unrestricted repeal.”).

C. The Proposed Legislation Related to Act 198’s Savings Clause

As of this date, H. 3925, which is currently pending in the Senate, seeks to amend Section Six of Act 198.³ See S.C. House Bill No. 3925, Legis. Title (characterizing the purpose of

The repeal or amendment by this act or any law or any other provision contained in this act, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, liabilities, or rights and does not amend or repeal any provisions of the South Carolina Pollution Control Act for any federal project for which a final Environmental Impact Statement has been issued but no subsequent record of decision has been issued as of the date of this enactment and for any such project, the Pollution Control Act remains in full force and effect as it existed prior to the passage of this act. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws or other provisions contained in this act.

2012 S.C. Acts No. 198, § 6.

³ The proposed amendments to Act 198, Section Six state as follows:

The repeal or amendment by this act of any law or any other provision contained in this act, whether temporary or permanent or civil or criminal, does not affect pending actions, ~~rights, duties, liabilities, or rights~~ and does not amend or repeal any provisions of the South Carolina Pollution Control Act for any federal project for which a final Environmental Impact Statement has been issued but no subsequent record of decision has been issued as of ~~the date of this~~

Section Four of H. 3925 as “amending” Section Six of Act 198 of 2012 “so as to provide that the savings clause of Act 198 of 2012 applies only to cases filed before June 6, 2012, and to any federal project for which a final environmental impact statement was issued prior to June 6, 2012, but no record of decision was issued prior to June 6, 2012.”). With this in mind, we now return to your question, whether the Savings Clause from Act 198 can be retroactively amended “to eliminate the Savings Clause included in the original version of Act 198 without violation of the State Constitution.” We believe that it can.

II. Analysis

For purposes of this analysis we will assume the legislative intent behind H. 3925 is to repeal or eliminate the Savings Clause included in the original version of Act 198 and will therefore focus our analysis on the question of whether a savings clause can be retroactively repealed by the Legislature without violating the State Constitution. Because, as discussed below, Act 198’s Savings Clause, like any savings clause, exists only as a matter of legislative grace, we believe the retroactive repeal of such a clause would not, under circumstances such as these, violate the State Constitution.

As mentioned by our Supreme Court in Brown, the general purpose of a savings clause is to save pending actions from “annihilation” in the face of a legislative repeal. Brown, 402 S.C. at 127, 740 S.E.2d at 496-97 (“A savings clause is a restriction in a repealing act, intended to save rights, pending proceedings, penalties, etc. from the annihilation which would result from an unrestricted repeal.”). A prior opinion from this Office agrees, explaining that a savings clause is generally understood as a clause attached to an amending or repealing act designed to preserve pending actions instituted upon a statute which would otherwise be eliminated as a result of the amendment or repeal of such a statute. Op. S.C. Atty. Gen., 1980 WL 121247 (May 28, 1980). The necessity of such a clause is premised upon the idea that “a statute in its old form is superseded by the statute in its amended form” and therefore, “[u]nless a contrary intent is clearly indicated, the amended statute is regarded as if the original statute had been repealed, and the whole statute re-enacted with the amendment.” Id. (citing Am. Jur.2d, Statutes, § 343); see also Windham v. Pace, 192 S.C. 271, 283-84, 6 S.E.2d 270 (1939). Thus, where a statute is

~~enactment June 6, 2012, and for any such project, the Pollution Control Act remains in full force and effect as it existed prior to the passage of this act. After the effective date of this act On and after June 6, 2012, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws or other provisions contained in this act.~~

repealed, a general savings clause can save “any substantive private right, liability, right of action, penalty, forfeiture, or offense which accrued under the repealed statute” and an action predicated upon the repealed statute may still be commenced and prosecuted to conclusion. Sutherland’s Stat. Constr., § 23.38 (7th ed.).

The determination of whether to include a savings clause in any given act amending or repealing a statute is of course, a legislative decision and is made entirely at the discretion of the legislature. Moreover, “[t]here is no requirement that a saving clause be couched in any specific language.” Id. Indeed, the legislature is free to decide, as a matter of policy, whether a substantive right, liability, cause of action, penalty or offense should be saved, and if so, whether such an act should apply prospectively or retroactively.⁴ In short, a savings clause exists only as a matter of legislative grace.

With these principles in mind, we believe the retroactive amendment of a savings clause is akin to a legislature’s decision of whether to include a savings clause in an initial amending or repealing act and, as a result, conclude that since a legislature can make such a decision in the first instance, it can subsequently revisit such a decision in the latter instance. Stated differently, since a legislature may, in its discretion, determine whether to save pending actions and, in the event that it does, decide exactly the type of actions to save, it stands to reason that the legislature may subsequently reevaluate its’ wisdom in doing so and modify or delete the clause as it deems fit.

Furthermore, we believe such a conclusion is consistent with a legislature’s inherent authority to amend or repeal previously enacted general legislation. For example, when, as discussed above, a legislature elects to repeal or amend a general statute, it is in effect exercising its collective wisdom and stating that the law, in its current state, must be revised or eliminated in some form or fashion. Sutherland’s Stat. Constr., § 23.38 (7th ed.). We believe the law is no different with respect to revisiting a previously enacted savings clause. In other words, since a legislature can revise or eliminate a previously enacted general statute by subsequent amendment or repeal, we believe it can also revisit a previously enacted savings clause by amendment or repeal so long as doing so is consistent with constitutional restrictions regarding *ex post facto* laws and bills of attainder. Accordingly, it is the opinion of this Office that, as a general matter of law, a legislature may retroactively repeal or amend so as to eliminate, a previously enacted savings clause, so long as the terms of the amendment do not violate constitutional restrictions regarding *ex post facto* laws and bills of attainder.

⁴ However, we note that, with respect to the question of retroactivity, “[t]he Federal Constitution forbids Congress to pass bills of attainder or *ex post facto* laws and forbids the states to pass bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts.” Ruud, The Savings Clause—Some Problems in Construction and Drafting, 33 Tex. L. Rev. at 288 (citing U.S. Const. Art. I, § 9, No. 3 and U.S. Const. Art. I, § 10, No. 1.).

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Conclusion

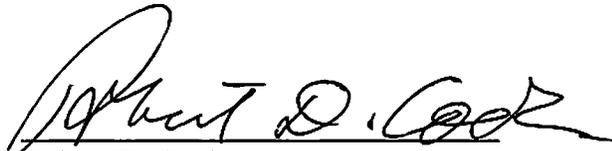
In conclusion, assuming the Legislature intended the current version of H. 3925 to repeal or eliminate the Savings Clause included in the original version of Act 198 of 2012, such an action does not violate the South Carolina Constitution in this case. Indeed, a legislature has inherent authority to revisit a prior legislative decision so long doing so does not amount to either an *ex post facto* law or a bill of attainder. Accordingly, we believe the Legislature can repeal, or amend so as to eliminate, a previously enacted savings clause in this instance, since a savings clause exists only as a matter of legislative grace.

Sincerely,



Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General