

ALAN WILSON  
ATTORNEY GENERAL

June 25, 2020

The Honorable Mike Burns, Member  
South Carolina House of Representatives  
326-B Blatt Building  
Columbia, SC 29201

Dear Representative Burns:

You have requested an opinion regarding the Heritage Act. Your letter states:

[a]s questions have once again surfaced regarding the Heritage Act and its applicability statewide, I ask that your office opine on the constitutionality of the Act, with the understanding that the Act contains multiple provisions and sections.

The short answer is the Heritage Act is constitutional. The General Assembly possesses paramount authority over public property, public places or public areas of the State and its political subdivisions, and thus may protect monuments and memorials dedicated to past wars or to honor its citizens as it deems appropriate. As Judge Addy has stated, “[c]learly the General Assembly possess the power to regulate monuments and memorials which are owned by the State or its political subdivisions.” Waller et al. v. State, 2015-CP-24-00514 (May 18, 2018), (vacated as moot November 14, 2018). If a particular monument or memorial is encompassed within the Heritage Act’s protections – a fact-specific inquiry – there can be no removal or alteration thereof without the Legislature’s consent through an act of the General Assembly, as explained more fully below. Of course, the General Assembly is free to amend or repeal the Heritage Act should it so desire, and may do so as it would any other legislation – by majority of each house.

#### Law/Analysis

The Heritage Act was enacted in 2000 pursuant to Act No. 292, §§ 3 and 4. The pertinent portions of the Act are as follows:

SECTION 3. (A) No Revolutionary War, War of 1812, Mexican War, War Between the States, Spanish–American War, World War I, World War II, Korean War, Vietnam War, Persian Gulf War, Native American, or African–American History monuments or memorials erected on public property of the State or any of its political subdivisions may be relocated, removed, disturbed, or altered. No street,

bridge, structure, park, preserve, reserve, or other public area of the State or any of its political subdivisions dedicated in memory of or named for any historic figure or historic event may be renamed or rededicated. No person may prevent the public body responsible for the monument or memorial from taking proper measures and exercising proper means for the protection, preservation, and care of these monuments, memorials, or nameplates.

(B) The provisions of this section may only be amended or repealed upon passage of an act which has received a two-thirds vote on the third reading of the bill in each branch of the General Assembly.

#### **Severability clause**

SECTION 4. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words thereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

In addition, Act No. 292 of 2000 contains Section 6, codified at Section 10-11-315 which makes it “unlawful for a person to willfully and maliciously deface, vandalize, damage, or destroy or attempt to deface, vandalize, damage or destroy any monument, plaque, flag support, memorial, fence, or structure located on the capitol grounds and a person convicted of violations of this section shall be punished pursuant to the provisions of Section 10-11-360.” The title of the Act expresses the legislative purpose, which is to “provide for the protection of memorials, monuments, streets, parks, and any other public areas.” In short, the Act sought, in essence, to “freeze” monuments as of the date of the Act’s passage, meaning additional monuments could be added for protection, but existing ones, together with new ones, could not be removed or altered where the Act is applicable, except by legislative approval.

It is well recognized that “[e]very legislative act must be presumed constitutional and should be declared unconstitutional only when its invalidity is manifest beyond a reasonable doubt. . . . ‘[T]he Constitution of the State is a restraint of power, and the Legislature may enact any law not prohibited thereby.’” Nichols v. South Carolina Research Authority, 290 S.C. 415, 424, 351 S.E.2d 155, 160 (1986). In addition, we have consistently advised that a statute “must continue to be enforced unless set aside by a court or repealed by the General Assembly.” Op. S.C. Att’y Gen., 2017 WL 4464415 (September 26, 2017). “This office, in its Opinion, may only comment upon potential constitutional issues which we see as possibly arising in a judicial proceeding.” Id.

It is important to remember that The Heritage Act was part of a legislative compromise to remove the Confederate battle flag from atop the Statehouse Dome. As we stated in Op. S.C. Att’y Gen., 2014 WL 2757536 (June 10, 2014),

We have previously issued several opinions regarding interpretation and application of the Heritage Act. See, Op. S.C. Att’y Gen., September 7, 2012 (2012 WL 4283911); Op. S.C. Att’y Gen., December 13, 2004 (2004 WL 3058237); Op. S.C. Att’y Gen., July 18, 2001 (2001 WL 957759). In the 2004 opinion, we addressed the question of whether the City of North Augusta could, consistent with the Act, “move monuments located in the Wade Hampton Veterans Park from their current location to the center of the park.” We noted in that opinion that it is “quite clear” in the mandate of § 10-1-165 that “none of the specified monuments or memorials [in the statute] ‘... erected on public property of the State or any of its political subdivisions’ may be relocated, removed, disturbed or altered.” We quoted from the July 18, 2001 opinion construing Section 10-1-165 as follows:

“[t]he Legislature’s purpose was obviously to protect and preserve historic monuments. A principal aim of the statute is to [ensure] ... that presently existing monuments, ... and which are located on property of the State or its political subdivisions may not be relocated, disturbed, or altered.

In addition, in Op. S.C. Att’y Gen., 2012 WL 4283911 (September 7, 2012), we noted that “[t]he Heritage Act is intended to protect monuments and memorials [of historic figures] erected on public property.”

The first sentence of Section 3 of the Act is fairly clear, protecting monuments and memorials to past wars in the State’s history – from the Revolutionary War to the Persian Gulf War, as well as “Native Americans, or African-American History monuments or memorials erected on public property of the State or its political subdivisions. . . .” However, the second sentence is ambiguous, stating that “[n]o street, bridge, structure, park preserve, reserve, or other public area of the State or any of its political subdivisions dedicated in memory of or name for any public figure or historic event may be renamed or rededicated.” (emphasis added). The Act does not define “public area” and leaves open to interpretation by a court whether such phrase is limited to property held in title by the State or political subdivision, or is to be construed more broadly to include private property which is open to the public as a “public area.”

Some courts have concluded that the term “public area” does not necessarily mean only public ownership, but is broader than that. As one court has stated, “[w]hen the Legislature uses the adjective ‘public’ to describe a location, it is not necessarily implying the location under public ownership or control,” but may also include those private property areas “which are readily accessible to the public.” People v. Jiminez, 33 Cal. App. 4<sup>th</sup>, 54, 59-60 (1995). See also State v. Williams, 280 S.C. 305, 306-307, 312 S.E.2d 555 (1984) [a “public place” is “[a] place to which the general public has a right to resort. . . .”]. In Williams, the Court held that “a lobby of a hotel where rooms are rented is a ‘public place.’” Our courts have never addressed the meaning of “public area” as used in the second sentence of Section 3 of the Heritage Act, but it is

notable that the first sentence uses the words “public property” while the second sentence employs the term “public areas,” thus suggesting, at least, that the second sentence might well include private property which is “readily accessible to the public.” A court will have to interpret the statute with finality, however.

Moreover, the second sentence applies to situations involving “public areas,” which are “dedicated in memory of or named for any historic figure.” In such cases, these may not be “renamed or rededicated.” Again, the Act does not define the term “rededicated,” but common sense would dictate that it means devotion to a different purpose, particularly since the sentence also uses the term dedicated in memory of or named for any historic figure or historic event. . . .” See Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959) [Land dedicated for street purposes cannot be used for other purposes.]. Again, legislative or judicial clarification is warranted.

Our Supreme Court consistently recognized that the erection of monuments, markers and memorials to the gallantry of service by men and women during wartime constitutes a valuable public purpose. As was said in Powell v. Thomas, 214 S.C. 376, 382, 92 S.E.2d 782, 784 (1949),

[i]t is generally recognized that the construction of memorial buildings, monuments and other public ornaments designed merely to inspire sentiments of patriotism may properly be deemed to be public purposes for which taxes may be imposed. . . . ‘The continuity of our governmental institutions is dependent in a large measure upon the perpetuation of a patriotic impulse which is but the willingness to sacrifice all for the ideas and the ideals which form the foundations stones of our republic. It will not be gainsaid that patriotism is promoted by the erection of a memorial monument, be it granite shaft or building, symbolic of the soldiers spirit or sacrifice, conceived consummated, in recognition of his deeds of heroic daring and perpetuating in grateful remembrance of those who dedicated their lives to the service of their country. Such a monument brings visibly and effectually before the minds of the present and future generations the sacrifices of the past. It is conceded, as it indeed must be, that the erection of a building as a memorial hall, to the extent that it would serve as a stimulus to patriotism, would be a public purpose.’

See also Mims v. McNair, 252 S.C. 64, 80, 165 S.E.2d 355, 363 (1969) [“The funds to be allocated from the Tri-Centennial Celebration from the bond proceeds are to be used for historical and recreational purposes, both of which are recognized to be public purposes.”]. Thus, the General Assembly has sought in the passage of the Heritage Act to preserve and protect the State’s history in the form of monuments and markers and other structures and has mandated that these monuments, markers and other structures not be altered without the consent of the Legislature. Only the Legislature can modify the Act or its coverage.

Important also is the fact that in the passage of the Heritage Act, the General Assembly sought to preserve all monuments and markers, reflecting a diverse South Carolina history. The

Act protects monuments and markers honoring war heroes, civil rights icons, educators, scientists, governors, senators, literary figures and many other parts of South Carolina's past. While there are segments of South Carolina's history which many today may consider worth forgetting, or removing from public view, there are other portions of the State's past which everyone can take pride in as noble. Monuments extolling the heroes of World War II for example – “the Greatest Generation” – are protected by the Heritage Act, as are African-American history monuments or memorials erected on public property. History is history. It includes the very bad, but also the very best of South Carolina's many accomplishments. All of these events are in the history books and cannot be erased. As Justice Holmes well said “A page of history is worth a volume of logic.” We seek to learn from mistakes of the past, so that those mistakes will not be duplicated. But again, the Heritage Act represents a decision made by the General Assembly, one which is entitled to constitutional deference. Regardless of whether people agree or disagree with the wisdom of the General Assembly's purpose, it is up to the Legislature to alter, amend, or change the law should it so desire.

There is one constitutional issue in the Act which we point out here. We would note that Subsection (B) mandates that “[t]he provisions of this section may only be amended or repealed upon passage of an act which has received a two-thirds vote on the third reading of the bill in each branch of the General Assembly.”

In Bd. of Trustees of Fairfield County v. State, 395 S.C. 276, 278, 718 S.E.2d 210, 211 (2011), our Supreme Court addressed South Carolina's Constitution's requirement for a Bill's passage. The issue in Fairfield County was whether the Legislature had properly overridden the Governor's veto of local legislation. There, the Court stated the following:

[w]e further note the premise that, absent a constitutional provision to the contrary, the legislature acts and conducts business through majority vote. . . . [T]he people of South Carolina through their constitution have established certain areas that require a supermajority of the legislature to act.

The Court noted that the “constitutional authority to override a governor's veto is one such example.” Id. In Fairfield County, the Court held that a 33-10 vote in the House and a 1-0 vote in the Senate “fell short of the constitutional mandated two-thirds requirement.” See also Tallevast v. Kaminski, 146 S.C. 225, 143 S.E.2d 796, 799 (1928) [“The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the Act itself. . . .”]. Moreover, in Fairfield, the Supreme Court quoted Thomas M. Cooley “A Treatise on Constitutional Limitations, 169-70 (5th Ed. 1883). The Fairfield Court quoted the passage from Cooley: “[f]or the vote required in the passage of any particular law, . . . simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; in where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills two-thirds or three-fourths of a quorum will be understood, unless the terms

employed clearly indicate that this proportion of all the members, or of all those elected is intended.” Fairfield, 395 S.C. at 281-82, 78 S.E.2d at 21.

Thus, if the Governor were to veto an alteration or change to a monument or a memorial protected by the Heritage Act, the Legislature would need, pursuant to the Constitution, a two-thirds vote of each house to override the veto. However, under the Fairfield County case, any statute which imposes a two-thirds requirement of each House upon a future General Assembly in order to amend or repeal a provision, such as the Heritage Act does, would probably not pass constitutional muster. See also League of Ed. Voters v. State, 176 Wash.2d 808, 827 (Wash. 2013) [concluding that a statute requiring a supermajority concerning taxation “substantially alters our system of government.”].

We note also that the Heritage Act contains a so-called “severability clause.” See § 4 of the Act. Such provision states:

**Severability clause**

SECTION 4. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words thereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Our Supreme Court has explained that “[t]he test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution.” Joytime Distributors an Amusement Co., Inc. v. State, 338 S.C. 634, 648, 528 S.E.2d 647, 655 (1995). In Joytime, the Court applied the severability clause to render video poker illegal in South Carolina. Likewise, in League of Ed. Voters, supra, the Court struck the two-thirds vote requirement but held the severability clause controlled to render the Act constitutional.

With respect to the Heritage Act’s two-thirds requirement, we conclude that even if a court finds the two-thirds voting requirement is invalid under Fairfield County, the Court will undoubtedly apply the severability clause in the Heritage Act renders the Act constitutional. The Heritage Act, in our view, would stand independently of the two-thirds voting requirement based upon the General Assembly’s paramount interest in protecting historic monuments, markers, and memorials, which are located on public property or in public areas of the State or its political subdivisions.

A court might, however, choose not to reach the constitutional question under the doctrine of constitutional avoidance. See State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003) [Court interpreted statute governing DHEC so as to avoid a conflict with Article V, Section 24 of the State Constitution]. It is a well-recognized principle that one General Assembly may not bind another by statute. The case of Manigault v. Springs, 199 U.S. 473 (1905), is illustrative of this rule. In Manigault, the United States Supreme Court addressed an act of the South Carolina Legislature which was passed “without the formality required by the Revised Statutes of South Carolina of 1893 in which it is declared that no bill for the granting of any privilege or immunity, or any other private purpose whatsoever, shall be introduced or entertained in either house of the general assembly except by petition, to be signed by the persons such privileges,” with a 60 day notice to all interested persons, published in the newspaper, for three weeks running.

The subsequent legislature failed to follow the statute and such defect was challenged. However, the United States Supreme Court concluded that the failure to follow the preceding statute did not render the subsequent Act invalid. The Court stated as follows:

[a]s this is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended, or disregarded by the legislature which enacted it. This law was doubtless intended as a guide to persons desiring to petition the legislature for special privileges, and it would be a good answer to any petition for the granting of such privileges that the required notice had not been given; but it is not binding upon any subsequent legislature, nor does a noncompliance with it impair or nullify the provisions of an act passed by the requirement of such notice.

199 U.S. at 497 (emphasis added). See also 82 C.J.S., Statutes, Section 11 [“Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its lawmaking power. . . .”]; 82 C.J.S. Statutes, Section 289 [“The Legislature cannot restrict or limit the right to exercise the power of legislation by prescribing modes of procedure for the amendment of statutes. . . .”].

We have referenced Manigault in numerous opinions of this Office. For example, in Op. S.C. Att’y Gen., 1986 WL 192009 (April 14, 1986), we addressed a requirement that a by-law could not be changed except by a two-thirds vote. Referencing Manigault, we advised the body was free to alter the two-thirds requirement by a majority vote if it so desired. We noted, that our Opinion of October 9, 1985, controlled in its “discussion of Manigault v. Springs [*supra*], discussing a subsequent legislature’s refusal to follow procedures adopted by an earlier legislature in this State.” See also Op. S.C. Att’y Gen., 2019 WL 5290864 (October 8, 2019) [“An act, ordinance, or rule, once the docket is not binding upon future legislative bodies, which bodies are free to amend or modify previous actions taken.” (citing Manigault)].

Thus, in our opinion, the General Assembly is not bound by the two-thirds provision set forth in the Heritage Act as being necessary to alter or modify a protected monument or marker

or to amend or repeal the Act as it sees fit. Even if a matter is taken to court for failure to meet the two-thirds requirement, and the case is deemed justiciable, we believe that the court will conclude that the Legislature's failure to follow this requirement does not render the Act unconstitutional in any sense. Either the court is likely to apply the severability clause, and determine that the act is constitutional using that route, or will apply Manigault, concluding that failure to meet the two-thirds requirement does not affect the constitutionality of the Act.<sup>1</sup>

### Conclusion

The Heritage Act is constitutional as a valid exercise of the General Assembly's plenary power to preserve the State's history. The Legislature possesses paramount authority over public property or public areas of the State or its political subdivisions, and thus may protect monuments or memorials dedicated to past wars, historic events, or to honor its citizens as it deems appropriate. Here, the General Assembly attempted to preserve a virtual treasure trove documenting the State's past from the early days to the present day.

The one provision in the Act which raises any constitutional concerns is the two-thirds of each house voting requirement. However, one legislature cannot bind another by statute (only by a constitutional provision is a legislature bound). Thus, under this principle of law, should the General Assembly decide to vote to amend or alter a protected monument, or even the Act itself, it may constitutionally do so by majority vote of each house, as to enact any other legislation. The two-thirds requirement would not, in other words, impair the constitutionality of the Act. Manigault, supra. Moreover, even if a case regarding the two-thirds requirement were taken to court and was justiciable, it would not be successful, in our opinion, because of the presence of the severability clause in the Act. The severability provision would likely be employed by the court to sever the two-thirds requirement thereby making a majority vote of each house sufficient to amend the Act. League of Ed. Voters, supra. Thus, the two-thirds provision would not jeopardize the Act's validity.

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

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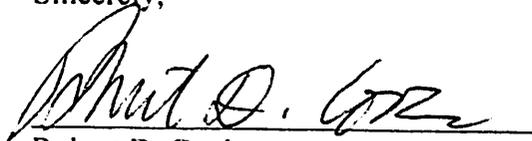
<sup>1</sup> In the Waller litigation, this Office defended the two-thirds of each house provision as valid. We argued not only that the issue was not ripe for review, but that earlier Attorney General opinions, as well as State v. Mancke, 18 S.C. 81, 85, 1882 WL 5641 at \*3 (1881 controlled). See Memorandum in Support for Motion for Summary Judgment of Defendants State, Bryant, and Wilson, pp. 14-17. Judge Addy did not reach this issue, however.

Mancke noted that it was well recognized "that one legislature cannot bind another upon subjects of substantial legislation. . . ." However, upon "a matter merely administrative in its character, . . . subsequent legislatures have confirmed by so declaring when it was their intention that an act should go into operation immediately upon its passage." While we argued to Judge Addy that the two-thirds requirement was "similarly administrative," we are not now convinced that such is the case. We now believe that imposing a two-thirds requirement upon each house to amend the Heritage Act is not "a matter merely administrative in its character," but is a "subject of substantial legislation" under Mancke, and is thus not binding upon future General Assemblies.

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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.<sup>2</sup>

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook  
Solicitor General

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<sup>2</sup> As Judge Addy indicated in Waller, private owners of monuments possess First Amendment rights to speak as they desire, without having the Act “forever freeze the speech of whatever entity owns the monument.” Waller Order, supra at 4. Moreover, there may also be First Amendment rights where the monument or memorial is located on private property. See Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 786 (1995) (Souter, J., concurring) [“(A)n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands.”]. On the other hand, “[p]ermanent monuments displayed on public property typically represent government speech.” Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 470-71 (2009). These are the kinds of fact-specific questions concerning an individual monument or memorial which are beyond the scope of an Attorney General’s opinion.