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February 23, 2022

Honorable Alan Wilson
Robert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Dear Attorney General Wilson:

The City of Charleston writes to respond to your letter of February 17, 2022, regarding the City's removal of a highway marker from the Charleston Charter School for Math and Science. Your letter concludes that the removal of the marker violates the South Carolina Heritage Act. We disagree. As set forth below, this action did not violate the Heritage Act (or any other law) based on a plain reading of that statute and a 2021 decision by the South Carolina Supreme Court.

## BACKGROUND

The marker was erected on what is now the campus of the Charleston Charter School for Math and Science in 1947. According to reports from the Post and Courier during that time, the City of Charleston donated the highway marker, and it was erected by the United Daughters of the Confederacy. The school is located on the corner of King and Grove Street and across the street from the now world-famous Rodney Scott's Barbecue.

On July 21, 2020, the Charleston Charter School of Math and Science's principal wrote the City of Charleston to inquire about the "possible removal of a highway marker in front of our gym." She explained that the marker "has been a pain point for our scholars, staff and community members for many years." She relayed that the marker had ivy growing over it until someone in the community came to cut the ivy and leave flowers in front of it, giving rise to concern within the school community. In light of these concerns, she requested that the marker be "relocated swiftly so no harm comes to our school building."

On August 4, 2020, the principal again wrote the City because she had "not heard back from anyone about the marker on the corner of King and Grove by the gym on the River's Campus where Charleston Charter School for Math and Science is located." Mayor Tecklenburg responded on August 5, 2020 and indicated the Director of Traffic and Transportation would follow up.

On October 8, 2020, the principal again wrote the Mayor, including other interested parties such as Mr. Rodney Scott, owner of Rodney Scott's BBQ, because "he has folks coming from around the world to stop by." She explained that the issue "has yet to be resolved and is causing further posts on Facebook. We have tried to have it removed but we are unclear who to make the request to. . . . This marker does not represent our community. Perhaps something honoring those students who first integrated the Rivers campus would be far more appropriate." City officials such as Councilman Jason Sakran and the City's Culture and History Subcommittee at that point engaged for some time on the issue. On February 16, 2021, Mayor Tecklenburg received further correspondence from Charleston County School District requesting removal of the marker from the Charleston Charter School for Math and Science. After a full review of the Heritage Act and circumstances giving rise to the numerous requests for the marker's removal, the City relocated the marker to gated, safe storage owned by the City on July 20, 2021.

## LEGAL ANALYSIS

The plain language of The Heritage Act makes clear the marker at issue is not subject to protection from removal. South Carolina Code Section 10-1-165, provides for the "Protection of certain monuments and memorials" as follows:

> (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.

S.C. Code Ann. § 10-1-165.

The statute contains two separate prohibitions, neither of which applies in this case. The first sentence applies to monuments or memorials for the "principal wars in which South Carolinians participated on behalf of the United States as of the year 2000." *Pinckney v. Peeler*, 434 S.C. 272, 294, 862 S.E.2d 906, 918 (2021). The first sentence prohibits the relocation, removal, disturbance, or alteration of monuments or memorials for those "listed wars." *See id.* at 295, 862 S.E.2d at 918. The marker is named for Robert E. Lee. **Robert E. Lee is not a war –**

**certainly not one of the named wars.** Nor was he a South Carolinian. It is true he was involved in several wars, most notably the Civil War, but that does not mean that anything bearing his name is a "war memorial."

The second sentence applies to streets, bridges, structures, parks, preserves, reserves, or other public areas named for or dedicated in memory of any historic figure or historic event. Specifically, the second sentence prohibits renaming or rededication of any such street, bridge, structure, park, preserve, reserve, or other public area. While this sentence may cover Lee as a "historic figure," this sentence does not apply to the marker because it prohibits "renaming or rededicating." Moving the marker from school grounds doesn't change the name of the highway – the City's action involved neither a renaming nor a rededication.

Although we are aware that some may urge that the words "war memorial" be interpreted broadly and expanded to include a memorial named for or referring to a person who is typically associated with that war, that is plainly not what the statute says. The South Carolina Supreme Court has held many times that the laws of the General Assembly mean what they say and are not to be expanded by interpretation when the words are plain, as here:

> 'The legislature's intent should be ascertained primarily from the plain language of the statute.' 'If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation, and the court has no right to look for or impose another meaning.' 'Words used in a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the operation of the statute.'

*Richland Cty. Sch. Dist. Two v. S.C. Dep't of Educ.*, 335 S.C. 491, 496, 517 S.E.2d 444, 447 (Ct. App. 1999) (internal citations omitted).

That is especially true here, where the second sentence explicitly covers something named after a "historic figure." The General Assembly knew how to specify something named after a person – it did just that in the first sentence. If the General Assembly had meant such things to be covered under the first sentence, it could have and would have done so:

> "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that "to express or include one thing implies the exclusion of another, or of the alternative. . . .When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning."

*Hodges v. Rainey*, 341 S.C. 79, 86-87, 533 S.E.2d 578, 582 (2000) (quoting Black's Law Dictionary 602 (7th ed. 1999) and *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970)).

In short, South Carolina's black letter law makes clear that the above statute does not prohibit the City of Charleston's removal of the Robert E. Lee marker. *See also City of Myrtle Beach v. Tourism Expenditure Review Comm.*, 407 S.C. 298, 304, 755 S.E.2d 425, 428 (2014) ("The wisdom or folly of the Act is not for us to judge; we must enforce the Act as written.").

To the extent the Attorney General's office relies on prior Attorney General Opinions[1] that take a looser approach to the General Assembly's language, such Opinions predate the 2021 South Carolina Supreme Court decision *Pinckney v. Peeler*, 434 S.C. 272, 862 S.E.2d 906. That case sheds negative light on those prior Opinions and is supportive of the City of Charleston's interpretation of the Heritage Act.

In *Pinckney,* our Supreme Court decided a constitutional challenge to aspects of the Heritage Act, striking down the supermajority (two-thirds) requirement, but rejecting other challenges and holding that the severability clause saved the remainder of the statute by excising that remainder from the invalid supermajority section of the law. Two aspects of the Supreme Court's decision are notable.

First, our Supreme Court made clear that the statute is to be read as it is written and specifically held: "**The things not included for protection—removal of structures such as statues that are not monuments or memorials to the listed wars**—are narrow and clearly ascertainable. We find it hard to imagine how the General Assembly could have better defined this classification." *Pinckney v. Peeler*, 434 S.C. at 294-295, 862 S.E.2d at 918 (emphasis added). There, the petitioners argued that the General Assembly was strongly committed to the super-majority requirement, and the Court agreed that one could think that the whole statute was intended to fall if the supermajority was struck down. The Court rejected this supposition, however, because "the General Assembly included a clear and effective severability clause." Thus, statutory language prevailed over attempted interpretation, and the statute's plain language makes clear that things not specified in the language of the law – such as the marker at issue here – are <u>not</u> included for protection under the Heritage Act.

Second, the Court discussed the General Assembly's intent in enacting the Heritage Act and concluded in a way just the opposite of the Attorney General's 2014 Opinion. The Court emphasized that the Act was the product of long- and hard-fought battles and that the result was compromise in which each side got something and gave something up. In the section on "Reasonableness," the Court said pro-flag legislators agreed to remove the flag "but only if those

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[1] Notably, an Opinion issued on June 10, 2014, addressed to Senators Larry Grooms and Danny Verdin, considered the Battle Flag that hangs in the Citadel's Summerall Chapel. The question addressed by the Attorney General was whether the flag is a "memorial" or a "monument." The Attorney General concluded that the flag is a "memorial" or "monument," but this was because he "construed Section 10-1-165 broadly." Moreover, his "broad" construction was based on his description of what he called the Legislature's "obvious" purpose to protect historic monuments – a purpose he perceived as expansive or even unlimited. In particular, the Attorney General plainly departed from the statute when he opined that "the Legislature *clearly* intended to protect *other* public monuments and memorials . . ." (emphasis added). At that time, of course, there had been no judicial interpretation of the Heritage Act.

memorials would be protected." At the same time, according to the Court, anti-flag legislators "agreed to protect the monuments and memorials," but only in exchange for removing the flag. As the Court said, neither side got everything it wanted.

In such a situation, a court is obligated to preserve the compromise by reading the law **exactly** as it was passed, because any "broad construction" moves the compromise line away from where the Legislature put it. Described another way, the Attorney General's opinion assumes the General Assembly's legislative intent was to go as far as it could in protecting monuments and memorials, even those that were not covered by the statutory language. By contrast, the 2021 Supreme Court opinion held that this was not the General Assembly's intent; rather, the General Assembly's intent – according to the South Carolina Supreme Court – was a combination of, and a carefully crafted compromise between, two opposing intents.

Accordingly, the Attorney General's opinions have been superseded. In light of our Supreme Court's binding opinion, the Heritage Act means only what its words specifically say. Viewed that way, a stone marked "Robert E. Lee" is not a memorial of a "listed war."

Finally, to require that the marker remain on a lawn at the Charleston Charter School for Math and Science is inconsistent with United States Supreme Court precedent. If state law forces students to be identified with a specific symbol or label, that is a form of "compelled speech," which the U.S. Supreme Court would likely hold violates the First Amendment of the U.S. Constitution. *See Janus v. ASFSCME,* 138 S. Ct. 2448, 2455 (2018).

Please note that the City of Charleston is not insensitive to the place in history of an object like the Robert E. Lee marker, and has, for instance, discussed an appropriate location or disposition for it with interested citizens and organizations.

For the above reasons, the City of Charleston stands by the decision to remove the Robert E. Lee Memorial Highway marker from the Charleston Charter School for Math and Science.

Thank you for the opportunity to share these views.

Very truly yours,

Wilbur E. Johnson
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Julia P. Copeland
Deputy Corporation Counsel

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