ALAN WILSON
ATTORNEY GENERAL

April 11, 2012

The Honorable Rick Quinn
Member, House of Representatives
323-A Blatt Building
Columbia, South Carolina 29201

Dear Representative Quinn:

You request "a legal opinion as it relates to a potential annexation in the Town of Lexington." You note that the "annexation was on the Town of Lexington's December 5, 2011 agenda" but that"[t]he Town agreed to wait" for our opinion before the annexation was approved. By way of background, you state that "the town approved to be using right of way parcels to cross Highway 378 at the I-20 intersection." According to your letter, "[t]he Town argued that [it] had [the] legal ability to use [a] previously annexed right of way to become contiguous to the property in question."

Several constituents of yours question the validity of the annexation. Apparently, the concern is "that the proposed annexation would actually cross two roads using the right of way." Thus, you seek our opinion as to this issue.

Additional Background

We are also advised by the Lexington Town Attorney, Mr. Cunningham, that "[t]he town believes contiguity is established by virtue of the fact that the current town limits are directly across the right of way of Riverchase Way ... . Riverchase Way intervenes between the current town limits and the subject property." We are further advised by the Town Attorney that the property sought to be annexed is owned by the County of Lexington. A Resolution of Lexington County Council, dated October 25, 2011, has been provided to us requesting that the Town annex the property into its corporate limits. Such Resolution provides as follows:

> *Whereas*, The County of Lexington is the owner of that certain parcel of land containing 1.43 acres bearing Lexington County Tax Map 003698-03-114, which is described on the Attached Exhibit A; and
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> *Whereas*, The Town of Lexington has represented to the County that subject property is contiguous to Tax Map 003698-02-013 and public right of way which lies within the corporate limits of the Town of Lexington;

> *Whereas*, The Town of Lexington has requested that the County consent to the annexation of the subject property;
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> *NOW THEREFORE*, based upon the above representation and request of the Town of Lexington, be it resolved that Lexington County Council, Lexington, South Carolina, consents to the annexation of the property attached hereto as Exhibit A and as shown by Tax Map No. 003698-03-114.

The Town Attorney further advises that "it is possible to walk directly from 003698-02-013 to the subject property without crossing anything but road right of way … . And, this is walking straight across, or directly across the right of way, from 003698-02-013 to the subject parcel at a 90° angle from the property line (no curving or manipulating lie – it goes straight across the right of way."

Law / Analysis

We begin our analysis by noting that this Office is unable to make a determination as to whether a particular parcel of property is or is not contiguous for purposes of annexation. As we stated in an Opinion dated January 28, 1988 (1988 WL 485221),

> [t]his office can not make factual determinations and would, therefore, be unable to say in this specific case, having not seen the petition or maps of the area, whether or not this specific area is or is not contiguous.

Thus, while we are able to advise you as to the issues of law regarding annexation, and to set forth the legal requirements of contiguity, we cannot determine contiguity itself. Such involves factual determinations which are beyond the scope of an opinion of the Attorney General, and must ultimately be determined by the courts.

Moreover, like any other ordinance of a municipality, an annexation ordinance must be presumed valid. As the court noted in *In Re Annexation of Portion of South Pymatuning Tp. To Borough of Clarksville*, 409 Pa. 324, 329, 186 A.2d 13, 15 (19622), "… we have the presumption that an ordinance having been adopted by a legislative body is presumably legal and the burden of proving illegality is upon those who aver illegality." See also, *In re Mountainville Election Dist.'s Annexation*, 304 Pa. 559, 562, 156 A.2d 162, 163-164 (1931) ["The ordinance having been adopted by council, a legislative body, is presumptively legal …."]. McQuillan, *Municipal Corporations* § 7:50 (3d ed.) ["There is a presumption that once an annexation ordinance is passed the annexed territory lies within the annexing municipality."]; Cf. *Bob Jones Univ. Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) ["A municipal zoning ordinance is presumably valid. Hence, the burden of proof is upon the party attaching the amendment to establish that the acts of the city council were arbitrary, unreasonable and unjust."].

We turn now to the legal requirements of contiguity for annexation.

Our Supreme Court has stated that "the sole requirement for annexation is contiguity." *St. Andrews Pub. Serv. Dist. v. City Council of the City of Charleston*, 349 S.C. 602,606, 564 S.E.2d 647, 649 (2002), citing *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1998) It is clear that territory sought to be incorporated or annexed must meet the requirement of contiguity. *Glaze v. Crooms*, 324 S.C. 249, 478 S.E.2d 841 (1996). The necessity for contiguity exists even in absence of a statutory mandate to that effect. *Tovey v. City of Chas.*, 237 S.C. 475, 117 S.E.2d 872 (1961). In *St Andrews, supra*, the Court emphasized that "[t]he wisdom of an annexation is a legislative, not judicial determination." *Id.*, citing *Harrell v. City of Cola.*, 216 S.C. 346, 58 S.E.2d 91 (1950); *Pinckney v. City of Bft.*, 296 S.C. 142, 370 S.E.2d 909 (Ct. App. 1988).

S.C. Code Ann. Sec. 5-3-305 defines contiguity for purposes of municipal annexations. Such provision states.

> [f]or purposes of this chapter, "contiguous" means property which is adjacent to a municipality and shares of continuous border. Contiguity is not established by a road, waterway right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous boarder, the intervening connector does not destroy contiguity.

In *Sonoco Products Co. v. South Carolina Dept. of Revenue*, 378 S.C. 385, 393, 662 S.E.2d 599, 603 (2008), our Supreme Court recognized that § 5-3-305, as well as other statutes defining contiguity, "reflect[ ] an intention by the Legislature to broadly construe and apply the term 'contiguous.' In each of the cited statutes, contiguity was not destroyed or defeated by an intervening dedicated road or public right of way." Moreover, concluded the Court,

> [o]ur state appellate decisions also appear to broadly interpret the term contiguous. See, e.g. *Kizer v. Clark*, 360 S.C.86, 90-91, 600 S.E. 2d 529, 532 (2004) (citing section 5-1-30 of the South Carolina Code and recognizing that marshlands and creeks do not defeat towns contiguity for annexation purposes); *Mosteller v. County of Lexington,* 336 S.C. 360, 364-65, 520 S.E.2d 620, 623 (1999) (explaining, in a constitutional taking of property case, the term "contiguous" and stating "'abut' means to be contiguous ... [h]owever, abut does not always mean there must be actual contact;" "property may still be deemed to abut a road when there is some intervening, natural barrier like a stream or river"); *Glaze v. Grooms*, 324 S.C. 249, 253, 478 S.E.2d 841, 844 (1996) (recognizing basic proposition that "contiguity is not destroyed by water or marshlands which separate parcels of highland," but finding town lacked requisite contiguity to incorporate where waters/wetlands it sought to use to establish contiguity had already been annexed by another municipality); *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 901 (1988) (affording "contiguous" its ordinary meaning of "touching," within context of annexation to municipal corporation pursuant to § 5-3-130 of the South Carolina Code, and finding code section only required annexed area to share a common boundary with annexing municipality; holding contiguity is not destroyed by water or marshland within either the annexing municipality's existing boundaries or those of the property to be

> annexed merely because it separates the parcels of highland involved"); *Tovey v. City of Charleston*, 237 S.C. 475, 485, 117 S.E.2d 872, 876-77 (1961) finding in municipal annexation case, presence of Ashley River did not destroy contiguity of two areas at issue); *Beaufort County v. Trask*, 349 S.C. 522, 527, 563 S.E.2d 660, 662 (Ct. App. 2002) (holding, in annexation case, that presence of state-owned river between city and property did not defeat contiguity); *St. Andrews Pub. Serv. Dist. v. City Council of the City of Charleston*, 339 S.C. 320, 324-25, 529 S.E.2d 64, 66 (Ct. App. 2000) ("To achieve contiguity, actual physical touching of the properties is not required. The Supreme Court has rejected an argument that the annexed parcels must have the additional qualifications of unity, substantial physical touching, or a common boundary. However, the Supreme Court has never held that non-adjacent properties not incidentally separated by a road, railway, or waterway are in fact contiguous.") (citation omitted), reversed by 349 S.C. 602, 605-06, 564 S.E.2d 647, 649 (2002) (reversing Court of Appeals on issue of standing, but affirming general contiguity analysis in municipal annexation case); *Pinckney v. City of Beaufort*, 296 S.C. 142, 147, 370 S.E.2d 909, 912 (Ct. App. 1988) (holding in case involving annexation of land by city, the fact that access from city to annexed area required crossing a bridge and traversing of unannexed property in the county did not preclude finding of requisite contiguity).
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> *As evidenced in the above-cited cases, our appellate courts have repeatedly found an intervening boundary that is neither a barrier nor an obstruction does not operate to destroy contiguity. Stated another way, an incidental separation between properties should not serve to negate otherwise contiguous property.*

Sonoco, 378 S.C. at 393-394, 662 S.E.2d at 603-604. (emphasis added).

In this same regard, the Supreme Court's decision in *Eldridge v. S.C. Dept. of Transportation,* 384 S.C. 548, 683 S.E.2d 483 (2009) is particularly instructive. *Eldridge* involved review of the Court of Appeals decision affirming the Referee's ruling that certain "Property Between the Roads" in the City of Greenwood could not be used for on-premises identification signs. The "Property Between the Roads" was a median which runs through downtown Greenwood. The Referee had held that such an "on premises" sign was required by a Greenwood ordinance to be located on the actual property where the business is located. In the Referee's view, "the Property Between the Roads was not contiguous or adjacent to any land where businesses were located, because it is separated from any businesses by the existing roads."

The Court of Appeals affirmed, going further, and concluding that a 1996 circuit court order had found that "[a]s to that portion of the former right-of-way [of the Railroad] covered by streets, highways and sidewalks for more than 20 years ..., the title lies in the City, County, and Highway Department." Based upon this Order, according to the Court of Appeals, SCDOT, owned the portion of the property upon which the roads are situated, and thus the Property Between the Roads is physically separated from the business properties, and is not contiguous, adjacent to or adjoining such properties.

Thus, the issue before the Supreme Court was, in that Court's view, whether the Property Between the Roads was "contiguous" to the businesses. The Court concluded that, even though separated

by the roadway, such did not defeat contiguity. We quote the Supreme Court's explanation of contiguity in full:

> More recently, however, this Court acknowledged that the term "contiguous" has been broadly interpreted. *Sonoco v. SC Dep't of Revenue,* 378 S.C. 385, 662 S.E.2d 599 (2008), *citing Kizer v. Clark,* 360 S.C. 86, 90–91, 600 S.E.2d 529, 532 (2004) (recognizing that marshlands and creeks do not defeat town's contiguity for annexation purposes); *Mosteller v. County of Lexington,* 336 S.C. 360, 364–65, 520 S.E.2d 620, 623 (1999) (explaining the term "contiguous" and stating " '[a]but' means to be contiguous ... [h]owever, abut does not always mean there must be actual contact").
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> In *Sonoco,* we went further and distinguished between "contiguous" in a lay or secondary sense, versus in legal contemplation, stating, "In the legal field, it has been defined as: '[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded by or traversed by.' Black's Law Dictionary 290 (5th ed.1979)." 378 S.C. at 391, 662 S.E.2d at 602. Significantly, S.C.Code Ann. § 5–3–305 is also cited in *Sonoco;* it states, in part:
>
> > For purposes of this chapter, "contiguous" means property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.
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> In *Sonoco,* we ultimately held a taxpayer's office buildings were subject to property tax because the public road and railroad tracks did not defeat contiguity of the plant and office buildings. We find the issue presented here is squarely controlled by our opinion in *Sonoco;* we find the contiguity requirement is met here such that for purposes of the applicable ordinance, the signs may be considered "on premises."
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> Further support for this result is found in the definition of "adjacent." *Black's Law Dictionary,* 38 (5th Ed.1979) defines it adjacent as "lying near or close to; sometimes, contiguous, neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch."
>
> We find the Court of Appeals and Referee unduly restricted the definition of "on premises." Given the liberal construction afforded the definition of "contiguity" in *Sonoco,* we find the Property Between the Road's separation by the roadway does not defeat contiguity, such that the signs may be considered "on premises" for purposes of the ordinance. Accordingly, the Court of Appeals opinion is reversed, and the case is remanded to the Referee for calculation of damages.

Conclusion

As stated above, we cannot determine definitively whether or not the property in question is contiguous to the Lexington town limits which, we are advised by the Town Attorney, are directly across the road from the property subject to be annexed. Such contiguity is a question of fact, more properly addressed ultimately to the courts. However, any ordinance of annexation would be presumed valid. Moreover, based upon the authorities referenced herein, it is clear that our Supreme Court does not deem an intervening road *or roads* or an intervening right of way as rendering such property non-contiguous to municipal boundaries. In the Supreme Court's view, the concept of contiguity is "broadly interpreted" and does not require touching. While such property must not be "widely separated," it need not touch. *Eldridge, supra.* Thus, in our opinion, based upon the circumstances described, the intervention of a road or roads or rights of way would not itself render the property non-contiguous.

Sincerely,

Robert D. Cook
Deputy Attorney General

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