

The State of South Carolina

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Opinion As S...

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December 22, 1986

The Honorable Thomas A. Limehouse  
Member, House of Representatives  
Post Office Drawer 2005  
Summerville, South Carolina 29484

Dear Representative Limehouse:

You have advised that the City of Summerville has instituted a policy of not providing fire protection services to certain property immediately contiguous to the City's limits unless the owners of the property agree to be annexed into the City. You have asked this Office about the legality of such a practice, which you mention has the effect of coercing annexation for those who wish to receive fire protection services from the City. You have enclosed a copy of this policy for our review.

Section 5-7-60 of the Code of Laws of South Carolina (1976) provides the following:

Any municipality may perform any of its functions, furnish any of its services, except services of police officers, and make charges therefor and may participate in the financing thereof in areas outside the corporate limits of such municipality by contract with any individual, corporation, state or political subdivision or agency thereof or with the United States Government or any agency thereof, ... .  
[Emphasis added.]

Use of the term "may" indicates that extra-territorial provision of services by a municipality, by contract with an individual, is within the discretion of the municipality. 2A Sutherland Statutory Construction, § 57.03; see also Op. Atty. Gen. dated September 28, 1977; McQuillin, Municipal Corporations, §§ 45.05a and 31.16; 56 Am.Jur.2d Municipal Corporations, etc. §§ 228, 568; LaSalle National Bank of Chicago v. County of DuPage, 777 F.2d 377 (7th Cir. 1986). As

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may be seen from the cited authorities, the general rule is that municipal services may be provided outside the limits of the municipality only where statutorily authorized and then only when such provision is deemed desirable to the municipality; our interpretation of Section 5-7-60 of the Code is in keeping with the general law.

The more significant question which you have raised is whether extra-territorial provision of services may be tied to requiring the property owner to consent to annexation prior to receiving services. In discussing provision of sewage services outside city limits, McQuillin states in § 31.16:

A city may lawfully refuse to provide sewage treatment services to residents of a neighboring town or impose as a condition for such services that either the town residents purchase other city services or consent to be annexed by the city.  
[Emphasis added.]

Id., citing Town of Hallie v. City of Chippewa Falls, 105 Wis. 2d 533, 314 N.W.2d 321 (1982); see also LsSalle National Bank of Chicago v. County of DuPage, supra.

Furthermore, in a recent United States Supreme Court decision, Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), a factual situation similar to that raised by your inquiry was presented to the Supreme Court. In Hallie, the City of Eau Claire refused to provide sewage treatment facilities to townships outside city limits unless each township also agreed to permit the city to provide sewage collection and transportation services by way of annexation. Employing an antitrust analysis, since violations of the Sherman Act, 15 U.S.C. § 1 et seq. were alleged, the Supreme Court upheld the policy of The City of Eau Claire, finding that the city's anticompetitive activities were protected by the state action exemption to federal antitrust laws since the anticompetitive activities were authorized, but not compelled, by the State of Wisconsin, even though the State did not actively supervise the anticompetitive conduct. Thus, in focusing on one aspect of the problem, it may be argued that the United States Supreme Court has at least impliedly, if not explicitly, approved such a scheme of requiring consent to be annexed before agreeing to provide services to persons or areas located outside city limits.

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You have also asked whether such a practice would pass muster under the Equal Protection clauses of the state and federal constitutions. In particular, you have indicated that certain areas around the boundary of the city seem to be targeted for annexation to "square off" the city's boundaries. Thus, you have suggested that certain parcels of property are more likely to be positioned so that annexation will be required if fire protection services are to be received. The test to be applied in this instance was stated in Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978):

Unless some suspect criteria, such as race, is involved, it is elementary that the equal protection provisions are satisfied if the classification bears a reasonable relationship to a legitimate state interest which the Legislature seeks to effect and the constituents of each class are treated alike under similar circumstances and conditions.

271 S.C. at 235-36. One may imagine that the reasonableness required by this test could be found in that the city's resources (water, personnel, and so forth) are limited and choices must be made as to the best utilization of those resources, consistent with the definition of the town's boundaries. In any event, we have not located any authorities which hold such a policy to be invalid; to the contrary, as noted above, existing authorities seem to uphold such a policy.

Moreover, upon consultation with the South Carolina Municipal Association, we learned that requiring consent to annexation prior to provision of services to those outside municipal boundaries is a widespread practice and becoming more so every day. You may wish to confer with Robert E. Lyon, Jr., General Counsel to the Association, for more information on this practice.

For those property owners who do not wish to annex into the City of Summerville but yet are desirous of receiving fire protection services, alternatives may be available. For example, the property owners may wish to approach Dorchester County Council to set up a tax district to provide fire protection services, as set forth under Section 4-9-30(5). Without knowing more about local political subdivisions which may provide such services in the area, we are not in a position to suggest other alternatives; however, because the provision of fire services is of such importance, the affected property owners

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would undoubtedly wish to make some inquiries to determine exactly what alternatives are available.

In conclusion, we would advise that the existing legal authorities indicate that a municipality has considerable discretion to enter into contracts to provide its services to persons residing outside the municipal limits. The United States Supreme Court has arguably approved such a practice, using an antitrust analysis. Such a practice may well meet the requirements of reasonableness necessary to be upheld under the Equal Protection clauses of the state and federal constitutions. Obviously however, only a court could determine with finality the validity of any specific policy.

One other point is in order. In providing you with the available legal authorities in this area, we are obviously not commenting upon the wisdom or advisability of the foregoing municipal policy. We fully recognize and are sympathetic with the fact that the receipt of adequate fire protection is of great importance to local residents. We are confident that this matter will be resolved at the local level to the satisfaction of all.

With kindest regards, I am

Sincerely,

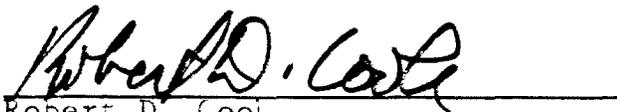


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Enclosures

REVIEWED AND APPROVED BY:



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