

August 16, 2007

The Honorable William F. Cotty
Member, House of Representatives
8807 C Two Notch Road
Columbia, South Carolina 29223

Dear Representative Cotty:

We received your request for advice on several issues concerning municipal incorporations. Specifically, you make the following inquiries:

1. From where did the 7 mile radius rule evolve and how is it practically applied?
2. If a group wanted to incorporate a new city or town, does an existing municipality have to act on the entire area being considered or can it stop the process by declaring an interest in only a portion of the new area being considered.
3. Does newly annexed territory have to be contiguous to existing territory? Or can an existing municipality express interest in disconnected areas that don't abut to the existing city or town but are within the radius area?
4. Is there a lower limit on a new town's size in: area, value or population, and if so what are the specifics or minimums involved?
5. Could a group of properties and citizens incorporate an area more than 7 miles from existing municipalities, and then annex into the protected area closer to the other existing towns or cities? Does current law favor one municipality over another on some basis, or does the first to petition that meets the general qualifications to be annexed decided to which town an area will or can join?

Law/Analysis

Section 5-1-30 of the South Carolina Code (Supp. 2006) sets forth the prerequisites for municipal incorporation. This provision states as follows:

(A) Before issuing a corporate certificate to a proposed municipality, the Secretary of State shall determine based on the filing submitted and the recommendation of the Joint Legislative Committee on Municipal Incorporation whether the proposed municipality meets the following requirements:

(1) the area seeking to be incorporated has a population density of at least three hundred persons a square mile according to the latest official United States Census, except as provided in subsections (B) through (E);

(2) no part of the area is within five miles of the boundary of an active incorporated municipality, except as provided in subsections (B) through (E);

(3) the area seeking to be incorporated has filed a service feasibility study that has been reviewed by the Joint Legislative Committee on Municipal Incorporation and approved by the Secretary of State;

(4) the area proposed to be incorporated is contiguous as defined and as described in this item. "Contiguous" means adjacent properties that share a continuous border. If a publicly-owned property intervenes between two areas proposed to be incorporated together, which but for the intervening publicly-owned property would be adjacent and share a continuous border, the intervening publicly-owned property does not destroy contiguity;

(5) the area seeking to be incorporated has filed a proposal for providing either directly or indirectly a substantially similar level of law enforcement services to the area's existing law enforcement coverage prior to seeking incorporation; and

(6) the area seeking to be incorporated has filed a proposal demonstrating that at least three of the following services, either directly or by contract, will be provided to the

incorporated area no later than the first day of the third fiscal year following the effective date of incorporation:

- (a) fire protection at a minimum service level required in regulations promulgated by the South Carolina Fire Marshal;
- (b) solid waste collection and disposal;
- (c) water supply, water distribution, or both;
- (d) wastewater collection and treatment;
- (e) storm water collection and disposal;
- (f) enforcement of building, housing, plumbing, and electrical codes;
- (g) planning and zoning;
- (h) recreational facilities and programs; or
- (I) street lighting.

(B)(1) When an area seeking incorporation has petitioned pursuant to Chapter 17 the nearest incorporated municipality to be annexed to the municipality, and has been refused annexation by the municipality for six months, or when the population of the area seeking incorporation exceeds seven thousand persons, then the provision of the five-mile limitation of this section does not apply to the area.

(2) For purposes of item (1) of this subsection, a refusal to annex the area by the municipality includes a statement from the municipality that the area does not meet the statutory requirements for annexation.

(C) The five-mile limit does not apply when the boundaries of the area seeking incorporation are within five miles of the boundaries of two different incorporated municipalities in two separate counties other than the county within which the area seeking incorporation lies, and when the boundaries of the proposed municipality are more than five miles from the boundaries of the nearest incorporated

municipality that lies within the same county within which the proposed municipality lies, and when the land area of the territory seeking incorporation exceeds one-fourth of the land area of the nearest incorporated municipality.

(D) The population requirements do not apply to areas bordering on and being within two miles of the Atlantic Ocean and to all sea islands bounded on at least one side by the Atlantic Ocean, both of which have a minimum of one hundred fifty dwelling units and at least an average of one dwelling unit for each three acres of land within the area and for which petitions for incorporation contain the signatures of at least fifteen percent of the qualified electors of the respective areas seeking incorporation.

(E) The five-mile limit does not apply to counties with a population according to the latest official United States Census of less than fifty-one thousand.

S.C. Code Ann. § 5-1-30.

In your first question, you inquire as to the origination and rationale as to the “7 mile radius rule.” By this, we presume you refer to the portion of section 5-1-30(A)(2) prohibiting the area to be incorporated from locating within five miles of an active incorporated municipality. Although the Legislature amended and rewrote section 5-1-30 many times, it appears this requirement precedes section 5-1-30 and was part of section 47-2 of the 1975 supplement to the 1962 South Carolina Code. From our research, we gather the Legislature enacted section 47-2 of the South Carolina Code in 1975 as part of a larger piece of legislation aimed at fulfilling the Legislature’s duty under article VIII of the South Carolina Constitution to establish criteria and procedures for the incorporation of municipalities. 1975 S.C. Acts 692. Section 47-2 set forth the criteria for municipal incorporation and included a requirement that “no part of such area is within five miles of the boundary of any active incorporated municipality . . .” S.C. Code Ann. § 47-2 (Supp. 1975). As for the reason for the five-mile radius limitation, we can only speculate as to why the Legislature chose five miles rather than another measurement. However, we gather from the inclusion of this criteria that the Legislature sought to prevent the encroachment of new municipalities upon those previously established. As for the application of this requirement, we presume that once the area seeking to incorporate is established, a five-mile radius is measured around its boundaries to determine if it encroaches upon an established municipality.

Next, you ask if an existing municipality can stop the incorporation of a new municipality by claiming an interest in only a portion of the area being considered for incorporation or does the existing municipality have to claim an interest in the entire area being considered for incorporation. No provision exists within chapter 1 of title 5 of the South Carolina Code allowing an existing

municipality to object to the incorporation of a municipality because the existing municipality “claims an interest” in the area sought for incorporation. However, an existing municipality or individual with standing may object to the incorporation if the incorporating municipality fails to meet the criteria established under section 5-1-30. However, we note that section 5-1-110 of the South Carolina Code (Supp. 2006) provides a 60-day statute of limitation from the date of the issuance of the certificate of incorporation to bring an action challenging the incorporation.

You also inquire as to whether a newly annexed territory must be contiguous to an existing territory. Chapter 3 of title 5 of the South Carolina Code contains provisions pertaining to the ability of an existing municipality to extend its corporate limits and annex additional areas. The provisions in this chapter contain several methods by which annexation may be accomplished. Some of these methods allow for the annexation of certain types of property “adjacent to” the municipality, while the general method of annexation and landowner initiated annexations specifically require contiguity. S.C. Code Ann. §§ 5-3-100; 5-3-140; 5-3-300; 5-3-150 (2004). Regardless of the method or whether it specifically states contiguity is required, our Supreme Court held with regard to municipal annexations: “it seems to be generally recognized, and is so conceded in this case, that there must be contiguity even in the absence of a statutory requirement to that effect.” Tovey v. City of Charleston, 237 S.C. 475, 484, 117 S.E.2d 872, 876 (1961). Thus, to answer your question, a newly annexed territory must be contiguous to existing territory.

With regard to your question pertaining to minimums for a town’s size, we refer you to section 5-1-30(A)(1). As cited above, this provision requires a population density of “at least three hundred persons a square mile according to the latest official United States Census . . .” S.C. Code Ann. § 5-1-30(A)(1). However, subsection (D) provides an exception to this requirement for incorporating areas boarding or within two miles of the Atlantic Ocean with “a minimum of one hundred fifty dwelling units and at least an average of one dwelling unit for each three acres of land” S.C. Code Ann. § 5-1-30(D). While we are not aware of any additional area, value or population requirements for incorporation, we note subsections (B) and (E) provide exceptions to the five-mile limit for areas with certain populations and subsection (C) provides an exception to the five-mile limit for areas incorporating that satisfy a particular area requirement. S.C. Code Ann. § 5-1-30.

Lastly, you question whether a group may incorporate an area satisfying the five-mile limit and then annex area within five miles of an existing municipality. In our review of the South Carolina statutes governing annexation, we did not discover a requirement that the property to be annexed be located outside a certain radius of other municipalities. Thus, we surmise that as long as the municipality complies with the requirements of the annexation statutes, it appears that an existing municipality may annex property lying within five miles of another municipality.

Conclusion

While we are not aware of the Legislature's precise reasoning in creating the five-mile limit for municipalities seeking to incorporate, we note this requirement has been in existence since 1975 and presume it is applied in accordance with the plain wording of section 5-1-30 of the South Carolina Code. If an existing municipality desires to object to the incorporation of a new municipality, the existing municipality may object based on the incorporating municipality's failure to comply with the prerequisites to incorporation. However, we are not aware of a statute allowing an existing municipality to object simply based on its interest in the property to be incorporated unless that property includes property within five miles of the existing municipalities corporate limits. Furthermore, a newly annexed territory must be contiguous to the annexing municipality. We note no specified limit in a new municipality's area, value, or population other than the density requirement as stated in section 5-1-30(A)(1). Lastly, based upon our review of the statutes governing annexation, we find no restrictions limiting the proximity of area to be annexed to another municipality.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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