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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

January 14, 2000

Lovera A. Taylor, City Clerk
City of Inman
20 S. Main Street
Inman, South Carolina 29349

RE: Informal Opinion

Dear Ms. Taylor:

Your opinion request has been forwarded to me for reply. You have asked several questions regarding the annexation of property by a municipality.

By way of background, you have informed this Office that in April of 1997, two property owners requested city sewer service for a new strip mall they proposed to build outside the corporate limits of the City of Inman. It is City policy to require any property owner that requests city sewer service for property outside the city limits to sign an agreement for annexation before being allowed to hook on to the city sewer system. Therefore, when these two property owners requested city sewer service, they signed the agreement. When the annexation petition was circulated, however, they refused to sign the petition. Thus, their property was annexed without their signatures on the petition. In 1997, these property owners filed a lawsuit to have the annexation petition and ordinance overturned. In 1999, the circuit court declared the annexation petition and ordinance null and void.

QUESTION 1

Is the practice of requiring property owners to be annexed in order to get city sewer service permissible?

This question has been addressed in several prior opinions of this Office. For example, in an opinion dated December 22, 1986, we stated:

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 LaSalle 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.

Further, in an opinion dated May 12, 1987 (citing the December 12, 1986 opinion), we concluded:

> 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.
>
> This conclusion and the authority cited in the opinions would also be applicable to the policy of the City of Rock Hill which would require an annexation agreement to be entered into by adjacent property owners who wish to receive services provided by the City of Rock Hill.

Based on the foregoing, until a court rules otherwise, it would appear the practice of requiring adjacent property owners to agree to be annexed by a municipality in order to receive municipal services is permissible.

QUESTION 2

Is the agreement form that the City of Inman used a legal and binding contract?

This Office is not authorized to make factual determinations in a legal opinion. Op. Atty. Gen. dated February 17, 1999. As we have stated previously:

> [b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine ... factual questions ... .

This policy is particularly appropriate in contractual matters because oftentimes the facts involved are controlling. Op. Atty. Gen. dated April 3, 1989. At this point, this question would more appropriately addressed to your city attorney and we advise that you consult with him on this question.

QUESTION 3

> Can the signatures on the agreement be considered a signature for the annexation petition?

Section 5-3-150 of the South Carolina Code of Laws sets forth the method to be followed when seventy-five percent or more of the freeholders owning at least seventy-five percent of the assessed value of the property to be annexed wish to be annexed by a municipality. Subsection (1) provides in part:

> Any area or property which is contiguous to a city or town may be annexed to the city or town by filing with the municipal governing body a petition signed by seventy-five percent or more of the freeholders, as defined in Section 5-3-240 owning at least seventy-five percent of the assessed valuation of the real property in the area requesting annexation. ... This method of annexation is in addition to any other methods authorized by law; provided, that this property may not be annexed unless the following has been complied with: (1) The petition must be dated before the first signature is affixed to it and all necessary signatures must be obtained within six months from the date of the petition; (2) The petition and all signatures to it are open for public inspection at any time on demand of any resident of the municipality or area affected by the proposed annexation or by anyone owning property in the area to be annexed; (3) The petition shall state the act or code section pursuant to which the proposed annexation is to be accomplished; (4) The petition shall contain a description of the area to be annexed and there must be attached to the petition a plat of the area to be annexed; (5) Any municipality or any resident of it and any person residing in the area to be annexed or owning real property of it may institute and maintain a suit in the court of common pleas, and in that suit the person may challenge and have adjudicated any issue raised in connection with the proposed or completed annexation. (emphasis added).

The cardinal rule of statutory interpretation is to ascertain and give effect to the legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Most often, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Insurance Company, 256 S.C. 577, 183 S.E.2d 451 (1971). The words of a statute must be given their plain and ordinary meaning without resort to subtle of forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). Courts must apply the clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

The General Assembly specifies that property contiguous to a city may be annexed by filing a petition signed by seventy-five percent or more of the freeholders owning at least seventy-five percent of the assessed value of the real property in the area requesting

annexation. The property may not be annexed unless the petition is dated before the first signature is affixed to it and all necessary signatures were obtained within six months from the date of the petition; the petition and all signatures to it are open for public inspection; the petition states the act or code section pursuant to which the proposed annexation is to be accomplished; and, the petition contains a description of the area to be annexed and a plat of the area is attached.

The clear and unambiguous language of Section 5-3-150(1) requires that in order to annex contiguous property, a petition must be signed by a certain percentage of freeholders. This petition must contain particular information and the signatures must be obtained within a specified time frame. Therefore, the better reading of the statute is that signatures contained in an annexation agreement between a city and an individual may not be counted as signatures on an annexation petition, but, instead, individuals are required to sign the annexation petition itself. But see People for the Preservation and Development of Five Mile Prairie v. City of Spokane, 755 P.2d 836 (Wash.Ct.App. 1988)(signed covenant was the substantial equivalent to signatures on petition).

I note that it may be possible for the City to seek specific performance of the annexation agreement. We would advise that you consult with the city attorney on this issue.

QUESTION 4

If the property owners refuse to sign the annexation petition after signing the agreement and permitted to connect to the city sewer system, can the City terminate sewer service?

The answer to this question is based in large part on the annexation agreement and the facts surrounding the annexation agreement. Therefore, we advise that you consult with your city attorney on this question.

QUESTION 5

Is the attached form used by the Town of Clover better than the one used by the City of Inman? Should we change to a similar form?

This question is beyond the scope of a legal opinion of this Office. Thus, we recommend that you seek the advise of your city attorney on this question.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General