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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 9, 2000

Thomas Ray Sims, Esquire
Santee Town Attorney
Post Office Box 2016
Orangeburg, South Carolina 29116

RE: Informal Opinion

Dear Mr Sims:

As the attorney for the Town of Santee, you have requested an opinion of this Office regarding the actions of a previous mayor. By way of background, you have provided the following information: The Town of Santee recently passed a valid ordinance changing the rate for their business license tax. Upon receiving notice of the fee, several business objected on the basis of the written representations of the previous mayor, who stated that if they annexed into the city, he would grant them a business license reduction. The Town Council has not voted on this issue, nor is there a record of any discussion of the matter during the meetings.

Specifically, you now ask:

- 1) Whether the mayor may unilaterally offer business license reductions as an incentive to get businesses to annex into the Town without Town Council knowledge; and
- 2) Whether the fact that the businesses allege that they annexed into the town based on these representations would toll South Carolina Code Section 5-3-270, which states the time limit in which one may contest annexation.

The statutes primarily governing the powers of municipalities are found in Title 5. South Carolina Code of Laws Section 5-7-30 confers upon a municipality the power to "levy a business license tax on gross income." Furthermore, Section 5-7-160 provides:

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All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law. A majority of the total membership of the council shall constitute a quorum for the purpose of transacting council business.

Finally, Section 5-9-20 states that in "the mayor-council form of government there shall be a municipal council composed of a mayor and not less than four council members." Read together these statutes prohibit any one member of council from exercising a power vested in the municipality. Because the levying of the business license tax on gross income is an express power of the municipality, the municipality carries out its powers through the council, and the mayor is only one member of council, the mayor cannot act unilaterally to bind the municipality in decisions concerning the levying of the business license tax. Moreover, action by the council ratifying the mayor's representations could be problematic, as well. Although the details are not addressed by your letter, disparate application of business license tax among businesses of a municipality invariably raises equal protection concerns. See, e.g., Eli Witt Co. v. City of West Columbia, 309 S.C. 555, 425 S.E.2d 16 (1992); Thomson Newspapers Inc. v. City of Florence, 287 S.C. 305, 338 S.E.2d 324 (1985).

Your second question concerns the version of Section 5-3-270 applicable at the time of annexation, which read, in part:

When the limits of a city or town shall be ordered extended no contest thereabout shall be allowed unless the interested person shall, within sixty days after the result has been published or declared, file ... his intention to contest... nor unless, within ninety days ... an action shall be begun...

You have informed us that the annexation occurred several years ago, so the sixty and ninety day period for contest has long since passed.

Should the businesses contest the annexation because of the mayor's representations, the municipality would likely defend on the basis of Section 5-3-270. However, "[a] defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." Myrtle Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994)(citations omitted). In this instance, the conduct in question was committed by the mayor, not the defendant municipality. The Supreme Court of South Carolina has rejected equitable estoppel as a defense when arising from the actions of a public officer:

No estoppel can grow out of dealings with public officers of limited authority, and the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of ... one of its officers or

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agents....

DeStephano v. City of Charleston, 304 S.C. 250, 403 S.E.2d 648 (1991) (quoting Farrow v. City Council of Charleston, 169 S.C. 373, 168 S.E. 852, (1933)). From the foregoing authority it appears unlikely that a court would now allow a contest of annexation that occurred several years ago based on the mayor's representations before the annexation. However, courts do have the inherent power to do that which is necessary to reach a just result. See Ex parte Dibble, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983). You may wish to seek a declaratory judgement to determine the matter with finality.

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

With kind regards, I remain

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General