



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

September 28, 1995

The Honorable Lucille S. Whipper  
Member, House of Representatives  
Post Office Box 268  
Mt. Pleasant, South Carolina 29465

RE: Informal Opinion

Dear Representative Whipper:

As you were advised, Deputy Attorney General Treva Ashworth has referred your annexation question to the Opinion Section for further study. Your question was how an annexation can proceed if sufficient numbers of the owners of property cannot be located to sign an annexation petition. I understand that the problem is that in many instances the property sought to be annexed is rental property or time-share ownership where several persons own a portion of the property.

You may already be aware that a number of the municipal annexation statutes have been declared unconstitutional in various judicial proceedings. Sections 5-3-160 to 5-3-230, S.C. Code Ann., inclusive, were declared to be unconstitutional in Fairway Ford, Inc. v. Timmons, 281 S.C. 57, 314 S.E.2d 322 (1984). Later, §§5-3-20, 5-3-50, 5-3-60, 5-3-70, and 5-3-80 were declared to be unconstitutional by the Honorable Karen LeCraft Henderson in The Harbison Group v. Town of Irmo, et al., C.A. No. 3:90-284-16, in the United States District Court, by Order filed April 13, 1990. Basically, the procedures of the method of annexation examined in The Harbison Group would require that a majority of those owning land in the area sought to be annexed submit to the governing body of the municipality (city or town council) a petition seeking annexation, §5-3-20; then, the council must certify to the county election commissioners that the petition has been signed by the requisite number of property owners, §5-3-50; finally, separate elections on annexation are held on the same date among the registered voters of both the annexing

The Honorable Lucille S. Whipper  
Page 2  
September 28, 1995

municipality and the area seeking annexation, with favorable results in both, §5-3-80; upon favorable results, the area is annexed.<sup>1</sup>

The annexation statutes which have been found to be unconstitutional are generally viewed as violative of the Fourteenth Amendment to the United States Constitution, on the basis of equal protection. Because the preliminary petition requirement permits owners of property in the area to be annexed to block an election among the registered voters, the right to vote is impermissibly restricted. No compelling state interest has yet been shown, as to the South Carolina statutes, that would permit the right to vote to be so restricted.

Of the methods of municipal annexation which have not as yet been challenged, the only ones which would appear to be available in the circumstances which you have described would be §5-3-150 and §5-3-300. The difficulty with the method provided in §5-3-300 is that such method is initiated upon the filing with the municipal council a petition signed by twenty-five percent or more of the freeholders who are residents within the area proposed to be annexed; the council certifies to the county election commission that the requisite number of freeholders have signed the petition; an election is held among the registered electors of the area seeking annexation; and so forth,<sup>2</sup> such procedure being substantially similar to the procedure found unconstitutional in The Harbison Group. Should §5-3-300 be challenged in court, I am of the opinion that it would fail to pass constitutional muster.<sup>3</sup>

That being the case, the method of annexation most likely to pass constitutional muster and to be applicable to the annexation which is being sought would be that under §5-3-150, which provides as follows:

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<sup>1</sup>Such annexation would not actually be effective until preclearance is received from the United States Department of Justice under the Voting Rights Act of 1965, as amended.

<sup>2</sup>See, in addition, §5-3-300(E)(4) for circumstances in which an election might be ordered among the registered voters in the municipality to which the annexation is sought.

<sup>3</sup>Of course, every legislative enactment is entitled to the presumption of constitutionality. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While the Office of the Attorney General may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

(1) 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. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed to the city or town, the annexation is complete and the election provided in Sections 5-3-50 through 5-3-270 is not required. No member of the governing body who owns property or stock in a corporation owning property in the area proposed to be annexed is eligible to vote on the ordinance. 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; (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.

....

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, any area or property which is contiguous to a city or town may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area to be annexed to the municipality, the annexation is complete and the election provided for in Sections 5-3-50 through 5-3-80 is not required. No member of the governing body who owns property or stock in a corporation owning property in the area proposed to be annexed is eligible to vote on

The Honorable Lucille S. Whipper  
Page 4  
September 28, 1995

such ordinance. This method of annexation is in addition to any other methods authorized by law.<sup>4</sup>

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I am not aware of any method of municipal annexation presently existing which would permit annexation to be considered by a municipal governing body when proposed by petition of other than freeholders (i. e., merely residents of the area seeking annexation). I am of the opinion that a legislative act would be necessary to allow an annexation petition to go forward with signatures of electors rather than freeholders. I am further of the opinion that should annexation proceed based on the petition of electors rather than freeholders, a challenge to the annexation could easily be mounted since the statutory methods for annexation would not have been followed. I would also advise that I agree with Ms. Ashworth's statement in her letter dated September 20, 1995, that there is no clear-cut answer to the question of how an annexation can proceed if sufficient numbers of the owners of property cannot be located to sign an annexation petition.<sup>5</sup>

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 questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that the foregoing has satisfactorily responded to your inquiry and that you will advise if clarification or additional assistance should be necessary.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Senior Assistant Attorney General

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<sup>4</sup>This Code section was amended by Act No. 45, 1995 Acts and Joint Resolutions; however, the amendment is to subsection 5, concerning multi-county industrial parks, and is not relevant to this discussion.

<sup>5</sup>I am assuming that the tax rolls of the county have been checked; if that has not been done, owners might be identified from the tax rolls. It could conceivably be necessary to "quiet title" to some parcels of property to determine the true owners of some parcels.