

5-761 February



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 12, 1996

The Honorable C. Tyrone Courtney
Senator, District No. 13
Post Office Box 142
Columbia, South Carolina 29202

RE: Informal Opinion

Dear Senator Courtney:

By your letter of October 3, 1995, to Attorney General Condon, you sought an opinion as to the status of the Town of Reidville. You have been approached by several members of the community of Reidville, in western Spartanburg County, who are interested in reviving the Town of Reidville as an incorporated or chartered town and holding elections to fill all the vacant town offices.

Because it is not in the province of this Office to make factual determinations, this Office accepts as true, for purposes of this opinion, the facts which you have presented with your request letter. Following a summary of the relevant facts, the applicable law will be discussed.

Facts

The Town of Reidville was incorporated by an act of the General Assembly dated December 19, 1887. The act was to take effect immediately upon its passage and was to "continue in force for thirty years from the date of its passage, and until the final adjournment of the General Assembly next thereafter." Section 3 of the act. The Town of Reidville was to be governed by statutory provisions applicable to towns of less than one thousand inhabitants.

An election was held on February 12, 1918, to determine whether the Town of Reidville would surrender the present charter and be issued a new charter according to Article I, Chapter XLVIII, Volume 1, Code of 1912. The vote was unanimous; the old charter was surrendered; and a new charter was issued on February 15, 1918. According to the law in existence at that time, the charter or certificate of incorporation would continue in existence for thirty years. See §2913, Civil Code of 1912. Thus, the charter would have expired on February 15, 1948.

Section 2913 and its successor statutes were amended by Act No. 576 of 1946, so that the thirty-year limitation on the existence of municipal charters was removed. (Since no time limitation was thereafter specified, I would be of the opinion that such charter or incorporation would be perpetual, unless steps should be taken to surrender, cancel, forfeit, or otherwise give up the charter.¹)

You have advised that the current population approaches two hundred inhabitants; that while no exact figures or records can be found, the people of the area are confident that the population has not dropped below one hundred inhabitants this century; and that apparently steps have never been taken to have the charter revoked, forfeited, surrendered, or cancelled.

Applicable Law

As to surrender or forfeiture of the charter of a municipal corporation, 56 Am.Jur.2d Municipal Corporations, etc. §91 provides in part:

When the legislature has decreed that a certain community shall constitute a municipal corporation, such corporation continues in existence until the legislature otherwise orders. It consequently follows that dissolution will not result from a nonuser of corporate powers, mere failure to function, or from a failure to organize and elect officers. Even where it is provided by statute that upon its default in certain particulars the charter of a municipal corporation shall be forfeited, such forfeiture cannot be enforced or taken advantage of in any legal proceeding, collaterally or incidentally; it must be declared in a direct way. The state alone can enforce such forfeiture, since it alone has the right to waive or enforce it, and even the forfeiture should be enforced by legislative enactment rather than by quo warranto or other judicial proceeding. ... [Emphasis added.]

¹See also the discussion as to §5-1-10 and predecessor statutes, infra.

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Judicial decisions have emphasized that relative to surrender or forfeiture of municipal charters, public policy "is against the forfeiture of the charter of a municipal corporation if it can be sustained within the law and a presumption will be indulged in its behalf... ." Chadwick v. Town of Hammondville, 120 So.2d 899, 902 (Ala. 1960). Further, "[p]ublic policy opposes forfeiture of the charter of municipal corporations, if the same can be sustained within the law and presumptions that obtain in that behalf [.]" State ex rel. Kinney v. Town of Steppville, 232 Ala. 407, 168 So. 433, 435 (1936). Finally, "once a town has been incorporated and has not been dissolved in the manner prescribed by law, any subsequent attempt to reincorporate the town is void." Baber v. City of Rosser, 770 S.W.2d 629, 630 (Tex. Ct. App.-Dallas 1989).

A proviso in Act No. 576 of 1946, referenced above, stated:

PROVIDED that, whenever it shall appear that a town of less than 1000 inhabitants has decreased in population since its incorporation to less than 100 inhabitants, then the charter of such town shall thereby become forfeited; and secondly, that whenever a majority of the registered electors of any town of less than 1000 inhabitants shall file with the intendant or wardens of such town a petition asking for an election on the question of surrendering the charter of such town, such intendant or wardens shall order an election to determine the question, at which all qualified voters of such town be permitted to vote, and if two-thirds of those voting shall vote in favor of the surrendering of such charter, that the intendant or wardens shall certify the result to the Secretary of State, who shall immediately thereupon cancel the charter theretofore issued to such town.

This proviso was codified as §47-107 in the 1952 Code of Laws. In 1971 this Code section was amended so that a charter might be automatically revoked if the number of inhabitants of a municipality should drop below fifty.

In Act No. 929, 1968 Acts and Joint Resolutions, was the following in section 1 relative to the procedure for incorporation of municipalities:

Whenever the Secretary of State shall determine that a previously incorporated municipality is neither performing municipal services nor collecting taxes or other revenues and holding regular elections as prescribed

for active municipalities in Sections 65-740² and 65-1256³, he shall cancel the charter of such municipality.

Forfeiture, surrender or cancellation of a charter or certificate of municipal incorporation is presently addressed by §5-1-100, as follows:

Whenever it shall appear that a municipality has decreased in population since its incorporation to less than fifty inhabitants, the certificate of such municipality shall be automatically forfeited and void. Whenever a majority of the registered electors of any municipality shall file with the municipal council of such municipality a petition requesting the municipal certificate be surrendered, the council shall order an election to determine the question, at which election all qualified electors of the municipality shall be permitted to vote, and if two-thirds of those voting shall vote in favor of surrendering the certificate, the council shall certify the result to the Secretary of State, who shall thereupon cancel the certificate theretofore issued to such municipality.

If the Secretary of State shall determine that any previously incorporated municipality is neither performing municipal services nor collecting taxes or other revenues and has not held an election during the past four years, he shall cancel the certificate of such municipality.

Two previously issued opinions of this Office (copies enclosed) are helpful in interpreting these statutes. The first is Op. Att'y Gen. No. 2437, issued March 18, 1968. In relevant part former Attorney General Daniel McLeod stated:

²Section 65-740 was §12-21-1120 of the 1976 Code and read in part until an amendment in 1991:

For the purposes of calculating the proper distribution of this tax to the municipalities of the State, a list of the municipalities, certified to be active by the Municipal Association of South Carolina, shall be used, and the word "active," as used for the purpose of distributing this tax, shall mean a municipality which has a regularly elected mayor or intendant, a town council and a police officer or officers and which is collecting property or other taxes for municipal purposes.

³Section 65-1256 of the 1962 Code was codified as §12-33-40 in the 1976 Code and reads virtually identically to old §12-21-1120 as cited in footnote 2.

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I do not believe that the mere certification by the Municipal Association that a town is not active is sufficient for the Secretary of State to act in [cancellation] of charters pursuant to the provisions of Section 47-1.1 [now §5-1-1], as amended during the current session of the Legislature.

The Secretary of State is required to determine whether a town is performing municipal services, etc., and the reference to Section 65-740 and 65-1256 appears to be for definitive purposes only. Under the latter sections, the distribution of taxes involved is clearly to be based upon a list of municipalities certified to be active by the municipal association. In the new act (Section 47-1.1), the determination is to be made by the Secretary of State.

Normally, if a town is not on the list of active members as compiled by the municipal association, this would be a clear indication that its charter can be cancelled, but the determination of the fact of inactivity should then be ascertained by the Secretary of State himself. Additionally, a constitutional issue could be raised if the determination of inactivity is delegated to the agency of the municipal association. ...

Then, by Op. Att'y Gen. No. 4096, issued August 25, 1975, construing the 1971 amendment to §49-107, supra, the situation of a town whose population had fallen below 100 was examined; specifically, whether the town could be deemed to have forfeited its charter by reason of its population having been below one hundred persons prior to 1971 was addressed. In pertinent part, that opinion stated:

The operative words of Section 47-107 are "thereby" and "become." According to Webster's Third New International Dictionary, "thereby" means "by that, by that means in consequence of that" and "become" means "to come to exist or occur" or "to emerge as an entity." Taken together, the two words clearly imply that forfeiture of the charter automatically occurs, regardless of whether or not someone formally notifies the Secretary of State of the decrease in population and requests the forfeiture.

It is doubtful that this statute (now §5-1-100), and hence this previously issued opinion, would be applicable to the situation with respect to the Town of Reidville, as you have advised us that the population does not appear to have fallen below the requisite number, depending upon which version of the statute may have been in effect, so as to have the charter automatically forfeited.

Another statute which should be considered is current §5-1-10, which provides in pertinent part:

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All municipalities which have a certificate of incorporation issued by the Secretary of State ... are hereby declared to be perpetual bodies, politic and corporate and are entitled to exercise all the powers and privileges and are subject to all the limitations and liabilities provided for municipal corporations in this State. [Emphasis added.]

This statute originated as Act No. 285 of 1904:

Be it enacted by the General Assembly of the State of South Carolina, That all municipal charters heretofore or hereafter issued by the Secretary of State shall be, and are hereby, declared to be perpetual; Provided, That nothing herein contained shall be deemed or taken to prevent the General Assembly from amending or repealing said charters.

The original act was amended by Act No. 440 of 1918 to read:

Section 2986. All municipal charters heretofore or hereafter issued by the Secretary of State, and also all municipal corporations heretofore created by Acts of the General Assembly of this State, shall be, and are hereby, declared to be perpetual: Provided, That nothing contained in this section shall be deemed or taken to prevent the General Assembly from amending or repealing said charters.

These enactments would support the position that the charter or certificate of incorporation issued to the Town of Reidville would still be extant, as such would be perpetual in the absence of actions of the General Assembly or appropriate state or local actions (as in §5-1-100, for example).

Conclusion

Construing all of the foregoing statutes and indications of public policy and presumptions to be indulged in light of the facts accepted as true for purposes of this informal opinion, particularly the facts that the population of the Town of Reidville has not dropped below the statutorily indicated level and that no steps have apparently been taken by the State of South Carolina (i.e., through the General Assembly or the Secretary of State) to cancel the charter or certificate of incorporation, I am of the opinion that the charter of the Town of Reidville would have perpetual existence by virtue of the various applicable statutes. Due to the lack of judicial guidance on this issue and novelty of the question in this State, I must advise that my conclusion is not completely free from doubt,

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however; to remove that doubt, the concerned residents may wish to consider seeking a declaratory judgment in the courts of this State.

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 it satisfactorily responds 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

Enclosures