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CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 14, 1996

The Honorable Maggie W. Glover
Senator, District No. 30
613 Gressette Building
Columbia, South Carolina 29202

The Honorable Luke A. Rankin
Senator, District No. 33
508 Gressette Building
Columbia, South Carolina 29202

RE: Informal Opinion

Dear Senator Glover and Senator Rankin:

By your letter of April 11, 1996, to Attorney General Condon, you sought an opinion as to whether two bills as recently amended, S.937 and S.1211, would be violative of the Contract Clause, United States Constitution Art. I, §10, and South Carolina Constitution Art. I, §4, because they appear to retroactively impair existing contracts.

While these bills have not yet been enacted, the presumptions of constitutionality will be considered as if these bills have become law. In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such 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 this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Request Letter.

S.1211

An amendment to S.1211, dated April 8, 1996 (Doc. No. JUD1211.001), would add §5-7-65 to the South Carolina Code of Laws, to take effect upon approval by the Governor. The new section would read:

> Notwithstanding any other provision of law and applicable retroactively beginning on January 1, 1995, a municipality may not, by ordinance or otherwise, impose upon a customer receiving fire protection services from the municipality whose property is without the corporate limits of the municipality, or upon a subsequent purchaser, assignee, transferee, or other successor in interest to the property served, a requirement that the customer refrain from opposing annexation as a condition of continued receipt of fire protection services if the municipality has:
>
> (1) prior to January 1, 1995, extended fire protection services to the customer, pursuant to a contractual agreement which did not contain, prior to January 1, 1995, a clause or provision prohibiting the customer from opposing annexation if the property becomes contiguous to the municipality; or
>
> (2) prior to January 1, 1995, extended these services to the customer under any circumstances without, prior to January 1, 1995, any specific agreement with respect to annexation.

S.937

A recent amendment to S.937, dated April 8, 1996 (Doc. No. JUD0937.002), would add §5-31-1940 to the South Carolina Code of Laws, with no effective date indicated on the document. The new section would provide:

> Notwithstanding any other provision of law and applicable retroactively beginning on January 1, 1995, a municipality may not, by ordinance or otherwise, impose upon a customer receiving water or sewer services from the municipality whose property is without the corporate limits of the municipality, or upon a subsequent purchaser, assignee, transferee, or other successor in interest to the property served, a requirement that the customer refrain from opposing annexation as a condition of continued receipt of water or sewer services if the municipality has:
>
> (1) prior to January 1, 1995, extended water or sewer services to the customer, pursuant to a contractual agreement which did not contain, prior

> to January 1, 1995, a clause or provision prohibiting the customer from opposing annexation if the property becomes contiguous to the municipality; or
>
> (2) prior to January 1, 1995, extended these services to the customer under any circumstances without, prior to January 1, 1995, any specific agreement with respect to annexation.

A review of these bills indicates that the two are identical in all respects but for the fact that one deals with provision of fire protection services and the other deals with provision of water or sewer services. These bills would apply retroactively to January 1, 1995, and would provide that a municipality may not impose, as of that date, a requirement that a customer outside the corporate limits (or a subsequent owner of the property), receiving the stated municipal services, refrain from opposing annexation should the property become contiguous to the municipality if (1) the municipality prior to January 1, 1995, extended the stated services to the customer pursuant to a contract which did not contain, prior to January 1, 1995, a clause prohibiting the customer from opposing annexation, or (2) prior to January 1, 1995, the municipality extended such services without any specific agreement regarding annexation.

The effect of these bills if adopted seems to be the restoration of a customer who lives outside the corporate limits of a municipality, who receives the stated services from the municipality, to the position he or she was in as of January 1, 1995, if since that time he or she has been required to receive such services under some kind of agreement that he or she would refrain from opposing annexation should the property being served become contiguous; further, it would appear that the customer would thus not be required to annex into the municipality should the property being served become contiguous. An impact on the municipality would be that the municipality could not use forced annexation under the circumstances described above as a means of growth if such a requirement were imposed subsequent to January 1, 1995, as a condition precedent to receiving further fire protection or water or sewer services, as the case might be.

If one or both of these bills should be adopted and a municipality had adopted a policy subsequent to January 1, 1995, prohibiting a customer from refraining to oppose annexation should the property become contiguous, substantial questions could arise, in particular the effect of any annexation which might have been effected pursuant to such policy. For example, would the annexation be negated? This and other questions may well require consideration.

Constitutional Considerations

Article I, Section 10 of the United States Constitution provides in relevant part that "No state shall ... pass any ... law impairing the obligation of contracts ... ." Similarly, Article I, Section 4 of the South Carolina Constitution provides that "No ... law impairing the obligation of contracts ... shall be passed... ." The purpose of the Contract Clause of the United States Constitution is explained in Nowak, Constitutional Law (2d Ed. 1983), at page 462:

> This prohibition prevents the states from passing any legislation that would alleviate the commitments of one party to a contract or make enforcement of the contract unreasonably difficult. The primary intent behind the drafting of the clause was to prohibit states from adopting laws that would interfere with the contractual arrangements between private citizens. Specifically, the drafters intended to inhibit the ability of state legislatures to enact debtor relief laws. Those who attended the Constitutional Convention recognized that banks and financiers required some assurance that their credit arrangements would not be abrogated by state legislatures.

While the initial emphasis of the Contract Clause of the federal constitution was on contracts between private parties, the United States Supreme Court in deciding The Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), made it clear that the Contract Clause would prevent a state from abrogating contracts or agreements to which it was a party.

As stated in G-H Insurance Agency, Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336, 338 (1982), "Contracts generally are subject to legislative regulation prospectively." In 2 Sutherland, Statutory Construction, §41.07, it is stated that

> [t]here are numerous decisions which purport to rest on an unqualified proposition that retroactive laws may not violate obligations of contract. However, the protection against retroactive impairment of contract rights is subject to the same considerations as those which apply in determining the legality of retroactive impairment of noncontract rights, under the due process clauses. ... [R]etroactive application of statutes to preexisting contracts is acceptable when the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.

It is observed that nowhere on the face of these two bills does the reason for enactment appear, so that the "end" to which the statute(s) would be addressed is unclear.

To determine whether a contract may have been impaired by legislation, a test is suggested by the United States Supreme Court in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978):

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by the factors that reflect on the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id., 98 S.Ct. at 2722-2723. The Court in Allied Structural Steel used a test which enunciated five characteristics found sufficient to withstand a Contract Clause challenge in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); that test was succinctly summarized in Garris v. Hanover Insurance Co., 630 F.2d 1001 (4th Cir. 1980):

> Those characteristics were, in summary: (1) its emergency nature; (2) its purpose to protect a broad societal interest, not a favored group; (3) the tailoring of its remedial effect to its emergency cause; (4) the reasonableness of its basic features; and (5) its limited effect in temporal terms.

Id., 630 F.2d at 1008. The bills in question do not contain information sufficient to address what interest is being protected; they do not appear to be of an emergency nature or of limited duration; nor is there sufficient information to determine the reasonableness of the features of the legislation.

This Office has previously looked at pending legislation which would have the potential effect of reversing municipal annexations if adopted; the issue of impairment of contracts was examined in the opinion dated February 17, 1994, in which was stated:

> Annexations which have been completed give property owners vested property rights to receive municipal services and result in contracts for services which could be impaired by application of the legislation if adopted. Had financing of residential and/or commercial property been extended on the assurance of availability of municipal services, for example, it is possible that contractual obligations, notes, mortgages, insurance contracts, and similar loan instruments could be impaired. Leases with tenants of residential and commercial property could also be affected. The proposed legislation gives no protection to the potentially impaired interests of property owners and accords such owners no due process, also guaranteed by the constitutions if they are to be deprived of property interests.

It is therefore possible that the bills, if adopted, could impair contracts between the municipality and recipients of the relevant municipal service (fire protection, water, or sewer services), as well as contracts between the recipients of the service and third parties with whom they may have contracted. It cannot be said that the bills are facially unconstitutional; such constitutional difficulty would likely require assessment as the bills, if adopted, are applied to particular circumstances. While the bills are entitled to the presumptions of constitutionality accorded to all legislation, nevertheless the potential for constitutional infirmity does seem to be present.

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.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General