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# The State of South Carolina



## Office of the Attorney General

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March 23, 1992

The Honorable Donald H. Holland  
Senator, District No. 27  
211 Gressette Building  
Columbia, South Carolina 29202

Dear Senator Holland:

On behalf of the Camden City Council, you have forwarded a proposed ordinance, a provision of the present ordinance, and legal research of the City Attorney to our Office. The proposed ordinance, as explained more fully below, purports to establish certain retirement benefits for certain retired city employees or officers in a manner which seems to bind future city councils from further acting on the matter. You have requested our opinion as to the proposed ordinance. Though no particular legal question has been presented to our Office, the City Attorney's research identifies several areas of concern which we will address.

### Proposed Ordinance

The Camden City Code would be amended, in §37.101, by adding the following section:

Any employee, elected or appointed official who is employed, elected or appointed for one (1) day or more while any particular City retirement benefit is in effect shall have the right as a matter of contract to receive that benefit for the duration of that employee's retirement without any abatement by future action of the City; provided that said City employee is otherwise eligible for retirement benefits.

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The legislative history of the proposed amendment was also provided, specifying the purposes of the amendment:

to provide a guarantee which is contractually enforceable against the City of Camden so that municipal employees who were employed and retired in anticipation of receiving certain retirement benefits based upon duly adopted municipal ordinance shall continue to receive those benefits as a matter of contract unabated by subsequent change in municipal ordinances....

#### Present Ordinance

Present § 37.101 of the City Code provides for retired employees' insurance benefits. After retirement of a city employee with the requisite number of years of service, the City will pay premiums for life and hospitalization insurance as specified therein; coverage is provided for hospitalization, life, and dental insurance. The retirement referred to is that retirement, whether by age, length of service, or disability, to which the employee would be entitled under the state retirement system.1/

As § 37.101 presently exists, there are numerous references to the "retirement of any employee," a "retired employee," or merely the term "employee." By way of contrast, § 37.102 as to membership in the state retirement system specifies that "[e]lected and appointed officials and officers of the city, not otherwise considered regular and permanent salaried employees of the city under the provisions of this chapter ..." may elect to become members of the state retirement system as provided by state law. As the ordinances presently exist, the city has heretofore recognized and distinguished between employees and elected or appointed officers and officials.

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1/ Employees of the City of Camden participate in the State Retirement System, according to §§ 37.100 and 37.102 of the City Code and verified by personnel at the System. It is not suggested nor could any reasonable argument be advanced that the proposed ordinance would amend state law as to the retirement system.

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### Discussion

As noted in the City Attorney's letter, the proposed ordinance attempts to bind all future councils; the City Attorney has advised that such ordinance could not bind the action of future councils. We agree with the City Attorney's assessment. It is well-recognized that the power to adopt an ordinance carries with it the power to amend the ordinance. As stated in the leading treatise on municipal law, "A municipal legislative body ordinarily cannot restrict the power of its successors to amend ordinances." 6 McQuillin, Municipal Corporations, § 21.02. See also Ops. Atty. Gen. dated June 13, 1985 (as to the General Assembly); October 9, 1985 (as to counties, citing McQuillin); and Manigault v. Springs, 199 U.S. 473, 50 L.Ed. 274 (1905). 2/

An ordinance may be viewed, in the proper instance, as a contract. 10 McQuillin, § 29.03. Where an ordinance is treated as a contract, however, "it is generally subject to the rules relating to ordinances in general." Id. A purported contract relating to benefits may have other troublesome aspects, however. The City Attorney raises one of those points in his observation of the difficulty in creating contractual rights for elected officials; as noted in 63A Am.Jur.2d Public Officers and Employees § 431, "an office is usually not regarded as a contract or as a vested property right, but rather as a public trust to be exercised for the benefit of the public." The right to receive compensation for service as a public officer is not contractual in nature. Id., § 432. In addition, mutuality of consideration could also possibly be a potential concern where an ordinance purports to create a valid contractual obligation, Brown v. City of East Point, 152 Ga. App. 801, 264 S.E.2d 267, aff'd 246 Ga. 144, 268 S.E.2d 912 (1980), depending upon the circumstances. See also 4 McQuillin, §§ 12.177a, 12.177b, 12.177c.

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2/ If such ordinance is viewed in the nature of a contract and rights have vested thereunder (as may be the case if benefits are immediately determined thereunder and funded immediately), caution should be exercised in amending the ordinance to ensure that any vested rights are not disturbed or contractual obligations impaired. 6 McQuillin, §§ 21.06 and 21.07.

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As noted earlier, § 37.101 as presently in force, at least on its face, applies only to municipal employees. The legislative history of the proposed amendment refers only to municipal employees. The proposed amendment would appear to apply to employees and elected officials in the first two lines of the document submitted to this Office; in lines five and seven, reference is made only to employees. This internal inconsistency and the inconsistency between current § 37.101 and the amendment seem to create an ambiguity, which is compounded when the legislative history is considered. Unknown to this Office is whether there is a definition of "employee" elsewhere in the City Code which might resolve this seeming ambiguity. Because the City Code seems to recognize the difference in employees and public officers, see §§ 37.101 and 37.102, and further because public officers' compensation is not in the nature of a contract, exactly what right or obligation is being created is, at best, unclear.

To summarize the foregoing, this Office must concur with the City Attorney that certain legal problems could well exist with the proposed ordinance as presently drafted, particularly as it purports to bind future councils as to the legislative function.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

*Robert D. Cook*

Robert D. Cook  
Executive Assistant for Opinions

cc: Charles V. B. Cushman, III, Esquire  
Camden City Attorney