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The State of South Carolina

Office of the Attorney General

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November 21, 1990

The Honorable D. N. Holt, Jr.
Chairman, Charleston County
Joint Legislative Delegation
Room 317-A
2 Courthouse Square
Charleston, South Carolina 29401

Dear Representative Holt:

By your letter of November 7, 1990, on behalf of the Charleston County Joint Legislative Delegation, you have advised that in the general election held on November 6, 1990, the voters of Charleston County annexed a small area of Berkeley County known as the Exchange Club Fairgrounds. Berkeley County did not have such a question on the ballot, and there are no permanent residents residing in this area. You have requested our opinion on three questions:

1. Would Berkeley County have to vote to release the Exchange Club Fairgrounds to Charleston County?

2. Would the State legislators have to introduce a bill to transfer the Exchange Club Fairgrounds to Charleston County?

3. Would the House member and Senate member from Berkeley County, representing no people, become a part of the Charleston County Legislative Delegation?

Each of your questions will be addressed separately, as follows.

Question 1

A county-to-county annexation of property which contains no residents is rather unique. To resolve your question about appropriate procedures in such a unique situation, the constitutional and statutory provisions about annexation procedures require examination.

Article III, Section 1 of the State Constitution vests legislative power of the state in the General Assembly; such legislative power would include the power to establish county boundary lines. However, this power is limited by Article VII, Section 7 which provides in relevant part:

> The General Assembly shall have the power to alter County lines at any time: Provided, That before any existing County line is altered the question shall be first submitted to the qualified electors of the territory proposed to be taken from one County and given to another, and shall have received two-thirds of the votes cast; ....

Other requirements to be met in a county-to-county annexation are specified in other provisions of Article VII and are not pertinent herein.

The procedure for alteration of county boundaries is further detailed in S.C. Code Ann. § 4-5-120 et seq. (1986). The annexation process is initiated according to § 4-5-120:

> Whenever the governing body of a county by resolution requests that a part of such county be merged with one or more adjoining counties or whenever ten percent of the registered voters in an area of one county petition in writing that such area be transferred to another county, the county governing body or the petitioners, as the case may be, shall deposit with the clerk of court of such county an amount of money sufficient [to cover the various costs] ... and shall file such resolution or petition in the office of the clerk of court of such county and transmit the petition or resolution to the Governor.

Though there are currently no registered voters or residents in the affected area of Berkeley County, we understand that a petition signed by registered voters of that county initiated the annexation attempt. Other statutes provide for appointment of an annexation commission, employing surveyors to survey the area, filing plats, making reports, ordering of the election by the Governor, conduct of election, canvass of the results, and so forth.

By § 4-5-170, the Governor is empowered to order "an election to be held in the area sought to be transferred and an election to

be held in the county to which the area is proposed to be transferred." The section further provides: "All qualified electors of the area proposed to be annexed and the county to which such area is proposed to be annexed shall be eligible to vote in the elections."

Reflecting the requirements of Article VII, Section 7, supra, § 4-5-220 requires, for annexation, a vote of

> two-thirds of the qualified electors voting on the question in the area to be transferred [voting] in favor of such transfer and [] a majority of the qualified electors voting in the county to which the transfer is proposed [voting] in favor of such transfer ... .

Apparently a majority of voters of Charleston County voted in favor of the annexation, though a two-thirds vote could not be obtained in Berkeley County since the area proposed to be transferred contained no voters.

An opinion of this Office dated March 25, 1971 discussed whether a portion of one county could be annexed to another county when no electors reside in the territory to be annexed. The opinion notes Article VII, Section 7 but predates the current provisions of § 4-5-120 et seq. The opinion states: "I have been unable to find any case law to assist me in determining whether this constitutional provision would prevent legislative action when no electors reside in the area but it is my opinion that it would not." (Subsequently, § 4-5-120 has been amended to permit the county governing body of the county which would lose territory to initiate the process.)

Additional research shows that some states have statutes governing annexation which contemplate that an area to be annexed might not have any inhabitants or qualified electors. See, for examples, Township of Genesee v. Genesee County, 369 Mich. 592, 120 N.W.2d 759 (1963) and Weber v. City Council of Thousand Oaks, 9 Cal.3d 950, 513 P.2d 601 (1973). In Township of Genesee, the statute provides that if no qualified electors reside in the territory to be annexed and if a majority of the voters in the district to be affected vote affirmatively to alter the boundaries, then the annexation is permitted.

A Missouri case, State ex inf. Nesslage v. City of Lake St. Louis, 718 S.W.2d 214 (Mo. App. 1986), presents a similar case to that under consideration herein. The annexation statute under scrutiny in Missouri required approval by a majority of the total votes cast in the municipality and by a separate majority of the

total votes cast in the unincorporated area sought to be annexed. 1/ The area sought to be annexed was uninhabited and thus the required majority could not be obtained. Construing the statute, the court noted:

> The plain words of the statute provide little guidance here: when no votes are cast in the area to be annexed because it is uninhabited, there cannot logically be either a "majority" or "less than a majority" of those votes. Thus, we turn to the circumstances extant when § 71.015(6) was enacted.
>
> Section 71.015 was amended in 1980 to include the election requirement amidst allegations the prior statute violated the due process rights of those whose property was being annexed as they were given no voice in the annexation process. ... We can infer from this that the intent of the legislature was to give inhabitants of an area sought to be involuntarily annexed a means of protecting their interests.
>
> That rationale is clearly inapplicable here, as no one live in the area of the proposed annexation. To construe the statute to require a second election in this circumstance would be a patently absurd waste of public time and money. The legislature is presumed to intend a just law that will serve the general welfare rather than an absurd one ... Accordingly, we find that § 71.015(6) does not dictate a second election where a simple majority is achieved in the city seeking to annex and the area to be annexed is uninhabited.

718 S.W.2d at 217.

In Informal Opinion 85-68 dated August 22, 1985, the New York Attorney General's office construed a statute which required that a majority favorable vote be obtained in a referendum prior to the

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1/ If a majority of the municipality's voters voted favorably for the annexation but less than a majority of the voters in the area sought to be annexed voted favorably, then a second vote was required. If at least two-thirds of the qualified electors voted in favor of annexation, then the annexation would proceed.

territory in question being annexed to a local government. The territory examined in that opinion contained no residents. The New York Attorney General's interpretation of the relevant annexation provisions was that "if there are people residing in the territory proposed to be annexed, their consent by majority vote on a referendum must be obtained, and conversely if there are no people residing in such territory, no election need be held...." The opinion concluded that "an election need not be held in the territory proposed to be annexed, where there are no persons residing in this territory."

Based on the foregoing, it is our opinion that, since the area of Berkeley County sought to be annexed contained no inhabitants and therefore no registered voters, no election was required to be held in Berkeley County. Due to the lack of judicial precedent in this state and the little judicial guidance available generally, however, this conclusion cannot be completely free from doubt.

Question 2

Upon the receipt of certified referendum returns reflecting the necessary favorable votes, § 4-5-220 directs the General Assembly to alter the county line or lines in accordance with the request or petition, "provided that all the constitutional requirements for the alteration of county lines have been complied with, all of which shall be determined by the General Assembly. The annexation shall then become effective." 2/

Exactly how the General Assembly is to alter the county line or lines is not specified in § 4-5-220. Research reflects that previous county-to-county annexations have been effected by the General Assembly by acts. A Hampton County to Allendale County annexation was effected by Act No. 774 of 1988; a Charleston County to Colleton County annexation, by Act No. 259 of 1987; and a Charleston County to Dorchester County annexation, by Act No. 267 of 1985, as recent examples. Thus, an act of the General Assembly would be the appropriate means to carry out the mandate of § 4-5-220, assuming that all constitutional requisites are found to have been met by the General Assembly as that statute requires. Introduction of a bill (and subsequent adoption of an act) would be necessary to effect the annexation.

2/ The referendum results and the legislation adopted pursuant to § 4-5-220 would still require submission for preclearance under the Voting Rights Act by the United States Department of Justice, prior the annexation becoming effective. See Op. Atty. Gen. dated June 29, 1987.

Question 3

Assuming that the required legislative act is enacted and that the preclearance required under the Voting Rights Act is obtained from the United States Department of Justice, whether the House and Senate members representing the unpopulated area of Berkeley County being added to Charleston County would become members of the Charleston County delegation is your final question. As noted, those legislators have no constituents in the affected area.

Our Office has stated previously that "[a] legislative delegation would constitute all Senators and House of Representative members who represent any part of a county." Op. Atty. Gen. dated June 30, 1981. In that opinion, considering who would comprise the Anderson County delegation, it was stated that "[e]ach person elected to represent a portion of Anderson County would therefore be a part of the Anderson County Legislative Delegation and would have votes equal to each other." See also Op. Atty. Gen. dated November 18, 1966. Thus, this Office has not apparently previously restricted its opinion of the composition of a county delegation to only those legislators representing persons in a given county, though the question has not been squarely presented. Matters could well arise in a county affecting property which might not necessarily (at least directly) affect a voter; thus protection of property is a consideration in addition to protection of inhabitants.

Apportionment of the legislature is constitutionally mandated. Article III, Sections 3 and 4 of the State Constitution provides that the House of Representatives shall be apportioned by the General Assembly among the several counties allowing one Representative to every one hundred and twenty-fourth part of the population of the State. Apportionment of the Senate is covered by Article III, Section 6. See also §§ 2-1-10 and 2-1-60. Apportionment of the legislature according to population is also required by the Fourteenth Amendment of the United States Constitution as interpreted in Reynolds v. Sims, 377 U.S. 533 (1964). As to the House by reference to § 2-1-10, the population of each of the 124 House districts and the variation of each district's population from the stated proportion is a part of the definition of each district. Because the area under consideration is unpopulated, the geographic boundaries of the affected House districts could be altered by the General Assembly without affecting the required apportionment. Presumably, the same alteration could be accomplished with respect to the senatorial districts in question. Since the area in question would no longer be identified with Berkeley County vis a vis property or population or other related considerations and would no longer receive services from Berkeley County, the General Assembly might wish

to consider alteration of the legislative districts to more accurately reflect the newly altered interests of both the Berkeley and Charleston County delegations. Until such should be done, however, the Senator and Representative in whose districts the affected area is located would apparently be members of the Charleston County delegation.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook

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