The State of South Carolina

Office of the Attorney General

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May 7, 1987

The Honorable David A. Wright
Mayor, Town of Irmo
Post Office Box 406
Irmo, South Carolina 29063

The Honorable Joyce C. Hearn
Member, House of Representatives
503B Blatt Building
Columbia, South Carolina 29211

Dear Mayor Wright and Representative Hearn:

You have asked for the opinion of this Office as to the legality of the Town of Irmo paying a portion of the expenses to be incurred in an effort to annex a portion of Richland County to Lexington County. The territory of the Town of Irmo presently covers a portion of both counties; the annexation effort would place the portion of Irmo presently located in Richland County into Lexington County if it should be successful. As we understand the facts, the Town of Irmo has offered to assist the petitioners by paying $10,000 or $15,000 toward the costs which must be posted with the Richland County Clerk of Court when the petition for annexation is presented to the Governor. Mayor Wright's letter of February 11, 1987 also states that the area proposed to be annexed into Lexington County also includes some areas adjacent to but not within the corporate limits of Irmo. For the reasons following, such an expenditure by the Town would be of doubtful legality and constitutionality.

Section 4-5-120 et seq., Code of Laws of South Carolina (1976, as revised), specifies the procedure to be followed in county-to-county annexations. Section 4-5-120 provides in pertinent part that:

> ... 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 petitioners ... shall deposit with the clerk of court of such county an amount of money sufficient to cover the expenses of surveys and plats and of the annexation commission and the election to be held to determine whether the proposed annexation shall be effected ... .

Clearly, the petitioners must deposit the required funds, but the statute is silent as to the source of those funds. The funds are usually provided by the petitioners themselves by "passing the hat." However, you wish to know whether public funds may be used to provide all or a part of this deposit.

Article X, Section 5 of the Constitution of the State of South Carolina provides:

> No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied. [Emphasis added.]

Any expenditure of funds by the Town of Irmo must meet the public purpose test. In addition, any tax which would be levied for any reason must state the public purpose for which it is being levied. Thus, the requirements of Article X, Section 5 must be applied to any tax levy or expenditure of funds by the Town of Irmo toward defraying the expenses of the petitioners for annexation.

Whether a particular expenditure of public funds will be for a public purpose may be determined according to the test found in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975):

> [A] public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part

> thereof. Legislation does not have to benefit all of the people in order to serve a public purpose. ...
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> Many objects may be public or beneficial in the general sense that their attainment will benefit or promote the public convenience, but not be public in the sense that legislation is permitted ... to bring about the objects.
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> It is not sufficient that an undertaking bring about a remote or indirect public benefit to categorize it as a project within the sphere of "public purpose."

265 S.C. at 162-163.

Some of the Irmo residents are already residents of Lexington County and thus would not be benefitted at all by such an expenditure of public funds. Only those residents of Irmo presently in Richland County could possibly be benefitted by this expenditure of funds; clearly, then, not all residents of Irmo will be benefitted. Whether a "substantial part" of Irmo residents would be benefitted is at best speculative at this point. 1/ As noted in Anderson v. Baehr, supra, convenience of the public (or the administration of the Town) is not sufficient as a public purpose.

Because a part of the territory to be possibly benefitted by this expenditure is within Richland County but not within the

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1/ We must note that a feasibility study relative to the annexation is underway but has not yet been completed. Until such study has been completed, the benefit to any Richland County-Irmo resident is only speculative at best. Furthermore, if the annexation attempt fails, no benefit will be received by any resident regardless of the result of the feasibility study.

Town of Irmo, it is most doubtful that taxes could be levied within Irmo for the benefit of non-residents. Such a levy and expenditure would most probably violate Article X, Section 6 of the State Constitution. Cf. Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). As is stated in 85 C.J.S. Taxation § 1057:

> It is a sound principle of taxation which prescribes that the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation, so that a legislature cannot divert taxes raised by one taxing district to the ... benefit of another district; and, in general, state, county, and district tax moneys must be expended respectively for state, county, and district purposes, except in so far as the constitution may provide for an exception to that rule. ...

Thus, taxes levied in Irmo could not be used for the benefit of non-residents.

By making such an expenditure to assist the annexation effort, the elected officials of the Town of Irmo are actually taking a position toward bringing about a favorable vote on the issue of annexation. This Office has previously advised that such activity on the part of elected public officials, using public funds, was unauthorized in the absence of express statutory language. See Ops. Atty. Gen. dated May 29, 1979 and June 11, 1979 (copies enclosed). See also 15 McQuillin, Municipal Corporations, §§ 39.21 and 39.23 and 16 McQuillin, § 44.36; also Peacock v. Georgia Municipal Association, Inc., 247 Ga. 740, 279 S.E.2d 434 (1981); McKinney v. Brown, 242 Ga. 456, 249 S.E.2d 247 (1978); and Harrison v. Rainey, 227 Ga. 240, 179 S.E.2d 923 (1971). In Peacock, the Georgia Supreme Court noted that "[t]he expenditure by a political subdivision of public money to influence the citizens and voters of the entity contains within it the possibility of the corrupt use of influence to perpetuate a local administrator's power." Id., 279 S.E.2d at 437. Notwithstanding the likelihood of violating Article X, Sections 5 and 6 of the State Constitution,

the legality of such an expenditure would be suspect since there is no specific statutory authorization for the Town Council to expend funds to promote one cause over another, in this case annexation of the proposed area of Richland County into Lexington County. 2/

The case of Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961), must be distinguished from the situation present within the Town of Irmo. In Tovey, the City of Charleston initiated and partly financed the circulation of petitions for territory contiguous and adjacent to the City to be annexed thereto. The Supreme Court summarily stated, "We find nothing in the statute [now Code Section 5-3-80] prohibiting such activities." The court did not discuss such legal principles as the necessity of public purpose for such an expenditure of funds; however, the City of Charleston would be directly benefitted in that the annexation sought in that case was to the City of Charleston itself. In the case of Irmo, the Town boundaries remain the same; only Richland and Lexington counties will be affected by the annexation. The statute under consideration was Section 5-3-180 and not Section 4-5-120, under consideration herein. As noted earlier, any convenience resulting to Town officials is not a sufficient public purpose; further, management of either Richland or Lexington county governmental affairs is not a concern of the Town of Irmo. Thus, whatever justification existing in the Tovey case for such an expenditure of funds is seriously lacking in this instance.

For the foregoing reasons, there would be serious legal and constitutional problems to be overcome if the Town of Irmo were to expend public funds to assist the petitioners in the annexation effort who must make a deposit with the Richland County

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2/ It must be noted that municipal corporations such as the Town of Irmo "have and can exercise only their inherent powers and such as have been conferred upon them by the legislature in express terms or by reasonable implication; and that, as a general rule, the grant of power will be strictly construed against the municipality." Lomax v. City of Greenville, 225 S.C. 289, 295, 82 S.E.2d 191 (1954).

Clerk of Court when the petition for annexation from Richland County into Lexington County is presented to the Governor.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook
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