1981 WL 157869 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 15, 1981

***1** Mr. James F. Hendrix
State of South Carolina
Election Commission
Post Office Box 5987
Columbia, South Carolina 29250

Dear Mr. Hendrix:
You have asked for the opinion of this Office on three questions concerning the impact on municipal annexations of the decision entitled Hayward v. Clay, 273 F.2d 187 (U.S. Circuit Court of Appeals for the Fourth Circuit, 1978) [hereinafter Hayward]. [1] These questions are as follows:
1. Is it necessary to hold the freeholders referendum required by Section 5-3-170, Code of Laws of South Carolina, 1976?

2. Can this referendum be held in light of the aforesaid decision?

3. If held, what effect would the results of the referendum have on the proposed annexation?

The Hayward case arose out of an annexation to the City of Charleston conducted pursuant to the method provided by Sections 5-3-160 to 5-3-240, as amended. [2] As a prerequisite to an annexation pursuant to this method, Sections 5-3-170 and 5-3-180 require the approval of a majority of the freeholders, which are defined as the owners of real property in the area proposed for annexation, voting in a referendum thereon. Subsequent to or simultaneous with the freeholders referendum, an annexation pursuant to this method also requires the approval of a majority of the registered electors voting in an election conducted both within the area to be annexed and within the corporate limits of the annexing municipality. Section 5-3-180. In Hayward, the requirement of the freeholders referendum as a prerequisite to the annexation election and the annexation was challenged in the United States District Court for the District of South Carolina as being Violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The order of the District Court in the Hayward case is reported at 456 F.Supp. 1151 (1977).

The District Court and the Circuit Court of Appeals in Hayward concluded that the freeholders referendum requirement created a property-based classification empowering those owning property in the area proposed for annexation to override the votes of those without such property on a matter concerning a basic change in the structure of local government. Both courts held that this requirement violated the equal protection clause, citing in support of their conclusion several decisions of the United States Supreme Court which dealt with similar voting schemes. [3] The Circuit Court also affirmed the holding of the District Court that the unconstitutional provisions in Sections 5-3-160 to 5-3-240 were severable from the provisions which did not refer to the freeholders referendum. Accordingly, the District Court further held, and the Circuit Court affirmed, that the annexation to the City of Charleston was valid because it had been approved by the vote of the registered electors, as required by those remaining provisions of that statutory method of annexation. [4]

***2** The decision of the Circuit Court in Hayward is binding on the named parties to the litigation, who were not dismissed. Further, it is binding precedent on the District Court for the District of South Carolina. Forrest v. Southern Railway Co., 20 F.Supp. 851, 854 (D.S.C. 1937), 21 C.J.S., Courts, Section 198, p. 341. Although there is some doubt whether the Hayward

decision is precedent binding on the courts of this State, it is at least persuasive, if not conclusive, authority on the issues decided therein. U.S. v. Woods, 432 F.2d 1072 (7th Cir. 1970) cert. den. 402 U.S. 903; Florida v. Dwyer, 332 So.2d 333 (Fla. 1976); 20 Am.Jur.2d, Courts, Section 230.

With regard to the second and third questions posed by you, a comment by this Office is more appropriate than an opinion. A county election commission, other than the one in Charleston County which was a party to the Hayward litigation, as the appropriate authority, is not necessarily prevented by that decision from conducting a freeholders referendum. Section 5-3-160. The result of an annexation in which the referendum is conducted, however, is subject to being overturned or enjoined from implementation by an appropriate judicial forum using the Hayward decision as authority. It should be noted that one such appropriate forum should be the United States District Court for the District of South Carolina, which is bound by the Hayward decision. In addition, an annexing municipality might choose to disregard the result of a freeholders referendum for the same reason.

Based on the decision in Hayward and the decisions of the United States Supreme Court on which it relied, it is the opinion of this Office, with regard to the first question posed by you, that the freeholder referendum requirement set forth and referred to in Sections 5-3-160 to 5-3-240 violates the equal protection clause of the Fourteenth Amendment. The language referring to this requirement should be considered severed, or deleted, from the remaining language in those sections, and the sections applied accordingly, as was done in Hayward.

Sincerely,

James M. Holly
Assistant Attorney General

Footnotes

1 Certiorari denied 439 U.S. 959.

2 These sections were enacted as Act No. 231, Acts and Joint Resolutions, 1963, as amended.

3 Kramer v. Union Free School District, 395 U.S. 621 (1969); Cipriano v. City of Hauma, 395 U.S. 701 (1969); City of Phoenix v. Kolodzieski, 399 U.S. 204 (1970); Hill v. Stone, 421 U.S. 289 (1975).

4 Chief Judge Haynsworth, who dissented, agreed that the freeholders requirement was unconstitutional, but concluded that the unconstitutional provisions were not severable.

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