ALAN WILSON
ATTORNEY GENERAL

July 21, 2017

The Honorable Dennis Carroll Moss, Chairman
Joint Committee on Municipal Incorporation
South Carolina House of Representatives
503 Blatt Building
Columbia, SC 29201

Dear Chairman Moss:

Attorney General Alan Wilson has referred your letters dated June 21 and July 14, 2017 to the Opinions section for a response. The following is this Office's understanding of your questions and our opinion based on that understanding.

Issue (as quoted from your letters):

A municipal incorporation application must include the corporate limits of the proposed municipality, the number of inhabitants residing within the proposed corporate limits, and a petition signed by fifteen percent of the qualified electors who reside within the proposed municipality. South Carolina Code Sections 5-1-24 and 5-1-30 list the statutory requirements for a municipal incorporation application and the minimum service standards. ... On May 9, 2017, the Joint Committee met to consider the municipal incorporation application for the area of Van Wyck. The Joint Committee determined that the Van Wyck application met the minimum service standard requirements, and submitted its recommendation letter to the Secretary of State's Office that afternoon. Also on May 9th, Joint Committee staff received an initial municipal incorporation application for the area of Indian Land. The Indian Land application includes the Van Wyck area in its proposed corporate limits. The Indian Land application could be amended to exclude Van Wyck from its proposed corporate limits. However, if the Van Wyck area is excluded from the Indian Land application, what impact, if any, does this have on the petition signed by registered voters within the currently proposed Indian Land area? The proposed corporate limits of Indian Land contains approximately 22,500 registered voters, which includes registered voters in the Van Wyck area. ... The only inquiries that I, on behalf of the Committee, wished for you to address were:

1) *Whether or not the corporate boundaries could be revised by those seeking incorporation of Indian Land after submission of a petition to the Secretary of State's Office, and*
2) *If the boundaries could be revised, could the election commission adjust the voter signatures on the original petition accordingly?*

Law/Analysis:

Since you mention the Joint Legislative Committee on Municipal Incorporation, we note that the Committee "is created to review the petition and documentation submitted by an area seeking municipal incorporation and to make a recommendation to the Secretary of State whether the area meets the minimum service standard incorporation requirements as provided in Section 5-1-30." S.C. Code Ann. § 5-1-26 (1976 Code, as amended). Keeping that in mind, we will address your questions.

1) *"Whether or not the corporate boundaries could be revised by those seeking incorporation of Indian Land after submission of a petition to the Secretary of State's Office,"*

This Office believes a court will determine that the law clearly requires that a petition for municipal incorporation must be signed by fifteen percent (15%) of the qualified electors who reside within the proposed municipality. See S.C. Code § 5-1-24. The statute requires that:

> (A) After June 30, 2005, citizens of an area seeking municipal incorporation shall file an application for incorporation with the Secretary of State's office containing:
> (1) a petition setting out the corporate limits proposed for the municipality and the number of inhabitants residing within the proposed corporate limits, and signed by fifteen percent of the qualified electors who reside within the proposed municipality; and
> (2) documentation concerning the minimum service standard incorporation requirements as provided in Section 5-1-30.
> (B) Upon receipt of a filing for a proposed municipal incorporation, the Secretary of State shall transfer a copy of the filing to the Joint Legislative Committee on Municipal Incorporation for review.

S.C. Code Ann. § 5-1-24 (emphasis added). Thus, a revision of the corporate boundaries of a proposed municipality would alter which signatures should be counted among the "qualified electors who reside within the proposed municipality" as required by South Carolina Code § 5-1-24. Id.

This Office has previously opined that where a petition was submitted to voters as to one issue cannot be changed by the preparers of the ballot to include an additional issue. See Op. S.C. Att'y Gen., 1994 WL 649293 (S.C.A.G. October 7, 1994). This Office has also previously opined that the Governor of South Carolina does not have authority to change the description of an area submitted within a petition to merge a portion of one county into another county unless there is a follow-up petition with the living petitioners' signatures changing the description of the area to be annexed. Op. S.C. Att'y Gen., 1977 WL 24400 (February 14, 1977). While the 1977 opinion discussed amending a petition to annex a portion of a county into another county pursuant to Act No. 697 of 1976, we believe the same principle would apply to your question. Act No. 697, 1976 S.C. Acts 1889. The principle being a legal description in a petition cannot be amended after the petition is signed without statutory authority. The Office has also previously opined that even where a petition nominating candidates for office did not specify a requirement to live within the district that there was an implicit requirement within the statute that one must be a resident to sign a petition regarding the district. See Op. S.C. Att'y Gen., 1974 WL 27950 (S.C.A.G. September 9, 1974). Thus, under that same reasoning we also believe there is an implied requirement that the petition a voter signs cannot be altered later.

Nevertheless, the Supreme Court of South Carolina has previously concluded that a petition for municipal incorporation "sufficiently describe[s] the boundaries of the proposed municipality so long as it fairly apprised the public of what is to be included, even if there are some errors or inconsistencies." Cabiness v. Town of James Island, 393 S.C. 176, 186, 712 S.E.2d 416, 421-422 (2011). However, the Court in Cabiness found the subject petition did not fairly apprise the public with an accurate description of the boundaries of the proposed municipality and concluded a "*post hoc* judicial determination" concerning the inclusion of a substantial amount of property would not meet the test of fairly apprising the voters of an accurate description. Id. at 187. The Court clarified that:

> The language of section 5–1–24 does not require strict construction of incorporation petitions, nor would such a requirement be reasonable. During the time it takes to incorporate a municipality, many different eventualities may occur that are out of the incorporating body's control. Annexation into an existing municipality is a prime example. During the pendency of a petition for incorporation, an existing municipality can validly annex properties that are within the proposed limits of the new entity. Such an act is perfectly lawful, and we do not wish to punish areas seeking to incorporate by holding their petitions invalid because the precise limits are in a state of flux due to continuing annexations. Penalizing the municipality for these actions would be inconsistent with the goal of allowing and encouraging local areas to attain self-governance by permitting an adjoining area to thwart these noble efforts. Furthermore, when areas comprised of thousands of separate properties seek to join together into a unified municipality, requiring one-hundred percent accuracy for the boundary description may be practically impossible. County and local tax maps may not be in sync, and there are often discrepancies between which properties lie in unincorporated areas and which have already been incorporated or annexed. Again, we cannot hold the expectant municipality accountable for such errors. Accordingly, a petition will sufficiently describe the boundaries of the proposed municipality so long as it fairly apprises the public of what is to be included, even if there are some errors or inconsistencies.
>
> ...
>
> While the mere fact that Charleston was annexing properties during this time does not by itself impact the sufficiency of Town's Petition, we must draw the line where those actions potentially impact the inclusion of large portions of the properties sought to be incorporated by cutting off sizeable areas from the main body of Town. When this happens, we are no longer faced with "certain errors or omissions" or a fair notification of what is to be included. Instead, we are confronted with a situation where the inclusion of a significant number of properties is contingent upon a *post hoc* judicial determination, which leaves the voters unaware of whether large portions of Town will ever be incorporated at the time they cast their votes. In the case before us, this causes sufficient uncertainty over what the public believes is included within Town such that they could not be fairly apprised of the property involved.

Cabiness v. Town of James Island, 393 S.C. 176, 185–87, 712 S.E.2d 416, 421–22 (2011) (emphasis added). Thus, taking the Court's decision in Cabiness into consideration, we believe a court will determine that the statutes regarding a legal description in a petition cannot be amended after the petition is signed without statutory authority for anything more than minor errors or inconsistencies. Id. It is this Office's understanding that Cabiness contemplated the annexation of property into a municipality during the time of incorporation, but the removal of a substantial area from the legal description, such as our understanding would be the case here,[1] would not be upheld for failing to fairly apprise the voters of the land to be incorporated. Thus, anything more than minor errors or inconsistencies altering a petition after

[1] Though we leave such a factual determination up to you and the Committee. This Office issues legal, not factual opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (S.C.A.G. September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (S.C.A.G. December 12, 1983)).

it was signed would be a "*post hoc*" determination outside the scope of what was intended by the voters who signed the petition.

2) *"If the boundaries could be revised, could the election commission adjust the voter signatures on the original petition accordingly?"*

First and foremost, let us examine the statutes regarding the election commission. We presume, for purposes of this opinion, you are referring to the election commission described in South Carolina Code Title 5, Chapter 1. The statute outlines the election commission's creation and authority when it states that:

> (A)(1) After receipt of a recommendation from the Joint Legislative Committee on Municipal Incorporation, the Secretary of State shall determine whether the requirements of Section 5-1-30 have been met. If the Secretary of State determines that the requirements of Section 5-1-30 have been met, he shall issue to three or more persons residing in the area of the proposed municipality, a commission empowering them to:
>
> (a) hold an election not less than twenty days nor more than ninety days after the issuance of the commission; and
> (b) appoint three managers of election who shall conduct the election.
>
> (2) Notice of the election must be published in a newspaper of general circulation in the community or by posting in three public places within the area sought to be incorporated which contains detailed information concerning the election. The notice must be published or posted not less than five nor more than fifteen days before the date of the election.
>
> (B)(1) At such election, all registered electors living in the area sought to be incorporated must be allowed to vote on the following questions:
>
> (a) incorporation;
> (b) name of the municipality;
> (c) the form of government;
> (d) method of election as prescribed in Section 5-15-20;
> (e) whether the election is partisan or nonpartisan; and
> (f) the terms of the mayor and council members.
>
> (2) When any of the above questions proposed in an election contain more than two options, the option receiving the highest number of votes will prevail.
> (3) If a community votes in favor of incorporation pursuant to this section and selects a form of government in an election, notwithstanding the results of the selections made by the voters as to questions (d), (e), and (f) in item (1) of this subsection, the initial governing body of the incorporated municipality consists of four council members and a mayor, all elected at large in a nonpartisan election for terms of two years.

> (C) The managers of election shall conduct the election, unless otherwise provided for in this chapter, according to the general law governing the conduct of special elections mutatis mutandi.

S.C. Code Ann. § 5-1-50 (1976 Code, as amended) (emphasis added).

Since the election commission in Chapter 1 of Title 5 is created by statute, as a creature of statute, it "only has those powers expressly conferred or necessarily implied to effectively and successfully accomplish the duties with which it is charged." Op. S.C. Att'y Gen., 2014 WL 3886691 (S.C.A.G. July 28, 2014) (citing S.C. Coastal Conservation League v. S.C. DHEC, 363 S.C. 67, 610 S.E.2d 482 (2005); see also Op. S.C. Atty. Gen., 2014 WL 2619140 (May 30, 2014) (citing Captain's Quarters Motor Inn v. S.C. Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991))). Thus, the election commission in Chapter 1 of Title 5 only has statutory authority to "hold an election" and appoint three managers to "conduct the election." S.C. Code Ann. § 5-1-50. After the managers "conduct the election," they only have authority to "make their sworn returns of the result of the election to the commissioners." S.C. Code Ann. § 5-1-60. Moreover, the "returns must show the total number of those voting in the election, together with the number of those voting on each question proposed." S.C. Code Ann. § 5-1-60. Furthermore, "[t]he commissioners shall certify the result of the election under oath to the Secretary of State, and if the result is in favor of incorporation, the Secretary of State shall issue a certificate of incorporation to the municipality and the municipality has all the privileges, powers, and immunities and are subject to the limitations provided by law." S.C. Code Ann. § 5-1-70. Thus, the commissioners have statutory authority to "certify the results." Id. Based on the statutory powers as discussed above, we do not believe a court will find authority for the election commission outlined in Chapter 1 of Title 5 to change the boundaries of a proposed municipality or to change the voter signatures or otherwise alter a petition for incorporation or the results of an election.

Conclusion:

It is for all of the above reasons including the ruling in Cabiness v. Town of James Island, 393 S.C. 176, 712 S.E.2d 416, (2011) that this Office believes a court would determine that a proposed municipality's petition may not be adjusted (other than for minor errors or inconsistencies) *post hoc* to reflect a change in the proposed municipality's boundaries, nor do we believe in this situation a court would find the election commission as created in South Carolina Code § 5-1-50 could adjust voter signatures to reflect the change in the proposed municipality's boundaries. It is this Office's understanding that the alteration of the description of the land to be incorporated would be more than minor and thus would not have fairly apprised the voters of the land to be incorporated.[2] However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. This opinion only addresses some of the sources in the subject area, but we can address other authority or additional questions in a follow-up opinion. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

---

[2] Though, as stated in Footnote #1, we leave all factual determinations to you and the Committee. This Office issues legal, not factual opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (S.C.A.G. September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (S.C.A.G. December 12, 1983)).

Sincerely,

Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General