1974 WL 27617 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
January 30, 1974

***1** Honorable Allen R. Carter
State Senator
The State House
Columbia, South Carolina

Dear Senator Carter:
An amendment to H-2349 has heretofore been submitted to me by you with the request that I advise you as to parts thereof that may present constitutional questions. In my previous letter, I did not consider Part 8 (Section 29) which provides:
'No part of the territorial limits of the township shall be annexed by any municipality pursuant to Title 47 of the 1962 Code of Laws unless approved in an election held pursuant to Title 47 by a majority of the qualified electors of the township voting in the election.'

The amendment submitted would have the effect of constituting two existing public service districts (North Charleston Sewer District and North Charleston District) as a township to be known as the Township of Charleston Heights. I pointed out in my previous letter that the entire amendment presents uncertain questions with respect to the application of the prohibition against special legislation contained in the local government amendment of the Constitution, as well as older provisions of the Constitution (Article III, Section 34), which prohibit the enactment of a special law where a general law can be made applicable. This uncertainty cannot be settled until the Supreme Court of this State has issued decisions affording a guide to the construction to be given to these provisions. Some of this uncertainty may be resolved by a case now under appeal to the Supreme Court from Dorchester County.

With respect to Section 29, quoted above, there is little doubt in my mind that its provisions will be special legislation prohibited by the local government amendment ratified on March 7, 1973, assuming that the conclusions of Judge Rosen in the Dorchester case are affirmed by the Supreme Court. The effect of such affirmance of the portions of Judge Rosen's order, which held that the prohibition against special laws contained in that amendment became effective upon its date of ratification, leads me to this conclusion. Its application to the present circumstances, however, may still be unresolved in spite of such affirmance, in that the Dorchester case considered the establishment of a special service district, whereas the instant problem concerns the establishment of a township, and it is entirely possible that a valid distinction may be drawn between the two insofar as special legislation is concerned. The net result is that a question of serious constitutional import exists, but that some criteria for expressing a judgment in other cases may be afforded by the Dorchester decision when it is rendered.

Assuming that the Act may be generally considered as being upheld, the provisions of Section 29, in my opinion, are more likely to be considered special legislation and therefore prohibited. The basis for this conclusion is that there appears to be/national reason why a general law cannot be enacted (if that is the test ultimately determined to be applicable) with respect to all cities and towns in the State bordering upon townships, whereas H-2349 proposes only to affect cities and towns bordering on a single township existing in Charleston County.

***2** Irrespective of its invalidity, the concept of the prohibitions contained in Section 29 may still be applicable. The Supreme Court has held that a special service district is not a municipality, as used in the annexation statutes contained

in Title 47 and therefore portions of a special service district may be annexed without a majority vote of the electors therein. Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872. The Court has also held that a township is not a municipality within the statutes contained in Title 33. Hinnant v. South Carolina Highway Department, 226 S.C. 10, 83 S.E.2d 209. See also Wagener v. Smith, 221 S.C. 438, 71 S.E.2d 1. The Supreme Court has also held that a portion of an incorporated city or town may not be annexed without a vote of approval of the majority voters of the town affected. Town of Forest Acres v. Seigler, 224 S.C. 166, 77 S.E.2d 900, and Town of Forest Acres v. Town of Forest Lake, 226 S.C. 349, 85 S.E.2d 192. The question remains to be decided by the Supreme Court as to whether a township, such as the Township of Charleston Heights, will be considered a city or town within the meaning of the Forest Acres cases. If it concludes that the decisions of those cases are applicable to a township, such as is proposed, then the consent to annexation must be approved by the voters of the entire township, and the intent of Section 29 will be carried out. On the other hand, if it considers that the township is not within the scope of those decisions, then a portion of it may be annexed without a vote of the entire electorate. It is my judgment that the township will not be considered within the scope of the Forest Acres cases, but will be considered as coming within the scope of Tovey v. Charleston, the result being that the intent of Section 29 will not be carried out. I emphasize that this matter is subject to extreme and bona fide doubt and can only be resolved with finality by appropriate court decisions.

I therefore advise that, in my opinion, Section 29 is mot probably unconstitutional, and that its intent can most probably not be carried out by considering the township as a city or town so as to bring it within the scope of the Forest Acres decisions.

Very truly yours,

Daniel R. McLeod
Attorney General

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