ALAN WILSON
ATTORNEY GENERAL

February 7, 2020

Jennifer C. Blumenthal, Esq.
Burr & Forman LLP
Post Office Box 1431
Charleston, South Carolina 29402

Dear Ms. Blumenthal:

We received your letter requesting an opinion of this Office on behalf of the Commissioners of Public Works of the City of Charleston, South Carolina, d/b/a Charleston Water System ("CPW"). In your letter, you informed us that Charleston County recently adopted an ordinance that "attempts to make unlawful the act of denying or conditioning sewer services to residents of the unincorporated area of Charleston County (the "County") based on annexation into the city limits, if sewer service is available and is adjacent to or crossing the boundary of an improved parcel." You state this ordinance "attempts to force municipal sewer providers to provide sewer service to residents of unincorporated areas of the County." You note that no contractual agreement exists between CPW and the County for sewer service. As such, you present the following question to us:

> Can a county in South Carolina make it unlawful by a specific county ordinance for municipal commissioners of public works to refuse to provide sewer services to residents of unincorporated areas of the county or otherwise require municipal commissioners of public works to provide such sewer service without any condition for annexation or without a contractual agreement to provide such service to unincorporated areas of the county?

Law/Analysis

The ordinance you reference states as follows:

> Within the unincorporated areas of the County (excluding special purpose districts which provide sewer) it shall be unlawful to deny or condition sewer services to residents of the unincorporated area based on annexation, if sewer service is available and is directly adjacent to and/or crossing the boundary of an improved parcel.

You indicate County Council adopted this ordinance on September 19, 2019.

As we stated in numerous opinions, we must begin with the presumption that the ordinance is valid and enforceable. Op. Att'y Gen., 2009 WL 1968616 (S.C.A.G. Jun. 12, 2009). Our courts

employ a two-step process to determine if an ordinance is valid. Hosp. Ass'n of S.C., Inc. v. City of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116 (1995).

> The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.

Id. at 224, 464 S.E.2d at 116-17.

By section 4-9-25 of the South Carolina Code (Supp. 2019), the Legislature gave counties vast authority to enact ordinances. This provision provides:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. §4-9-25. This provision instructs us to liberally construe the authority given to county governments. Arguably, an ordinance ensuring county residents access to water and sewer services would serve the general welfare of the County. However, we find no provision giving county governments the authority to regulate the municipalities within their borders.

As you point out in your letter, this Office on numerous occasions questioned the ability of a county to enforce an ordinance within an incorporated municipality. In a 2011 opinion, we considered whether Jasper County could enforce its ordinance prohibiting the sale of beer and wine between the hours of 2:00 am and 6:00 am. Op. Att'y Gen., 2011 WL 3918176 (S.C.A.G. Aug. 10, 2011). We considered prior opinions of this Office stating

> in 1988, this Office addressed the applicability of a county ordinance within the incorporated areas of the county. Op. S.C. Atty. Gen., February 25, 1988. Although the passage of the Home Rule Act granted police powers to counties, the opinion states "it is doubtful, that counties have the power to extend their regulatory authority to areas that are within the confines of incorporated municipalities." Id. We stated the Constitution does not provide for such power. Id. In addition, we noted that through the Home Rule Act,

> the Legislature acknowledged limitations on a county's authority within incorporated areas. Id.
>
> This Office has, on several occasions, expressed its belief that a county's exercise of police power is restricted to the unincorporated areas of the county. In an opinion dated October 2, 1984, the 'intent of the General Assembly to recognize the autonomy of a municipality within its borders and likewise recognizes the autonomy of the county within the unincorporated areas of the county' was discussed. Likewise, in an opinion dated May 21, 1987, we concluded that a Richland County anti-smoking ordinance would be of no effect for facilities of the Richland County Recreation Commission located within a municipality of the county.

Id. We also considered article VIII, section 13 of the South Carolina Constitution, which allows local governmental bodies to enter into agreements for the joint administration of governmental functions. Id. We found this provision "further supports the understanding that 'a county could not exercise power within an incorporated municipality unless such an agreement existed or, in effect, the municipality has assented to the county's exercise of power.'" Id. Accordingly, we opined that

> [w]hile section 4-9-25 gives counties general police powers, we do not believe it gives counties any specific authority over municipalities. Thus, for the same reasons we explained in our 1988 opinion, we believe that despite the passage of section 4-9-25, county ordinances are not generally enforceable within the incorporated areas of a county. However, as we pointed out in [our] 1988 opinion, as well as several subsequent opinions, a municipality may choose to enforce a county ordinance within its boundaries by entering into an agreement with the county.

Id.

Our 2011 opinion dealt with applying a county ordinance to municipal residents. The ordinance you present to us appears to be an attempt to regulate the municipal itself rather than the conduct of its residents. Nevertheless, for the same reasons presented in our 2011 opinion, we do not believe section 4-9-25 gives counties the authority to regulate the municipalities within their borders.

Moreover, we note that just as the Legislature gave authority and power to counties through section 4-9-25, the Legislature also gave authority and power to municipalities through section 5-7-30 of the South Carolina Code (Supp. 2019). This provision states:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and

> ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it . . . .

S.C. Code Ann. § 5-7-30. As you mentioned in your letter, section 5-31-250 of the South Carolina Code (2004) gives authority to CPW's board of commissioners to build and operate waterworks facilities for citizens of towns and cities. Section 5-31-900 of the South Carolina Code (2004) allows municipalities to enact ordinances relating to the construction and operation of water and sewerage facilities within its corporate limits. In addition, article 15 of chapter 31 of title 5 contemplates municipalities providing water and sewer service beyond their boundaries. S.C. Code §§ 5-31-1510 et seq. (2004).

In an opinion issued by this Office in 2000, we determined municipalities may require property owners in unincorporated areas to be annexed to receive city sewer service. Op. Att'y Gen., 2000 WL 356784 (S.C.A.G. Jan. 14, 2000). Citing a United States Supreme Court decision finding such a refusal permissible under the Sherman Act, we concluded "in focusing on one aspect of the problem, it may be argued that the United States Supreme Court has at least impliedly, if not explicitly, approved such a scheme of requiring consent to be annexed before agreeing to provide services to persons or areas located outside city limits." Id. (citing Town of Hallie V. City of Eau Claire, 471 U.S. 34 (1985)). Thus, we advised "until a court rules otherwise, it would appear the practice of requiring adjacent property owners to agree to be annexed by a municipality in order to receive municipal services is permissible." Id. We again reiterated this conclusion in a 2006 opinion stating "we presume the City may choose not to provide such services to residents outside of its boundaries unless those areas are annexed to the City." Op. Att'y Gen., 2006 WL 1574911 (S.C.A.G. May 26, 2006).

In 2009, the South Carolina Court of Appeals determined the Greenville Water System's policy of requiring property owners within a one-mile radius of the City of Greenville to execute a covenant consenting to annexation to receive a new connection to water system lines was permissible. Robarge v. City of Greenville, 382 S.C. 406, 675 S.E.2d 788 (Ct. App. 2009). The Court determined a prior agreement between a water district and the City was not applicable to new taps and the policy did not discriminate between different classes of owners within the district. Id.

Conclusion

"The initial base for resolving interlocal disputes is the principle that all local governments are empowered by the state constitution and statutory framework." § 3A:13.Introduction, 1 McQuillin Mun. Corp. § 3A:13 (3d ed.). While the Legislature gave plenary authority to counties to enact ordinances for the security, general welfare, and convenience of counties, the

Legislature also gave such authority to municipalities. In addition, the Legislature gave municipalities specific authority to provide services beyond their borders without giving authority to counties to restrict this process. Accordingly, we believe municipalities have the ability to require annexation in exchange for services and do not believe counties may intervene in such authority. Nonetheless, only a court may declare the County's ordinance invalid. Op. Att'y Gen., 1993 WL 524118 (S.C.A.G. Nov. 17, 1993) (stating "while this office may comment on the validity of an ordinance, only a court can actually declare an ordinance invalid or unconstitutional."). Therefore, until and unless a court makes this determination, we advise treating the ordinance as if it has full force and effect.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General