ALAN WILSON
ATTORNEY GENERAL

August 9, 2012

Rebecca V. Rhodes, AICP
City Manager
City of Cayce
P.O. Box 2004
Cayce, SC 29171-2004

Dear Ms. Rhodes:

We received your letter requesting an opinion of this Office on behalf of the City of Cayce ("Cayce") regarding water and sewer rates for the Richland-Lexington Airport District ("Airport District"). By way of background, you indicate that:

> [t]he Airport District adjoins Cayce but is not located within the City limits. Because it is not within the City limits, the Airport District pays nonresident utility rates. The Airport District has never requested to be annexed into Cayce so that it could pay the lower in-City resident utility rates.
>
> In the past, Cayce has annexed, by the 100% petition method, properties adjacent to the Airport District pursuant to S.C. Code [Ann.] §55-11-355. A Bill pending in the General Assembly (S.934) is aimed at Cayce and requires that municipalities charge a special purpose district the resident utility rate if the municipality annexes property adjacent to the district. S.934 would add a new [§5-31-695] to read:
>
> > [n]otwithstanding another provision of law, a municipality that utilizes the definition of 'contiguous' as provided pursuant to Section 5-3-305 to annex property that is adjacent to a special purpose district, but not the special purpose district itself, shall provide municipal services to the special purpose district at the same rate that individuals and entities within the municipality are charged for these services.
>
> If the proposed S.934 is enacted and construed to apply prospectively only (that is, to apply based only on annexations that occur after enactment), Cayce can avoid the requirement of charging resident utility rates to the Airport District by declining to annex any other properties adjacent to the Airport District. However, if the proposed S.934 is enacted and construed to apply retroactively

> (that is, to apply based on annexations that occurred before enactment), Cayce cannot avoid the requirement of resident utility rates for the Airport District and will be financially penalized for past conduct.
>
> The difference between resident and nonresident rates for the Airport District's own utility accounts, based on current usage, will be approximately $180,000 per year. Revenues of Cayce's utility systems are pledged to satisfy about $45 million of bonded indebtedness. Bondholders relied upon Cayce's representations and financial projections as to utility revenues based on resident/nonresident rate differentials. Application of the rate requirement of proposed S.934 based on past annexations would financially damage Cayce and impair its utility contract with the Airport District and impair its bond obligations with its utility bondholders. [Emphasis in original].

With this background in mind, you ask whether S.934, if applied based on past annexations, would violate the principles of statutory construction as to prospective application and violate the constitutional prohibition on impairment of contracts.

Law/Analysis

We note that S.934 was referred to a Senate Judiciary Subcommittee on January 9, 2012. Upon information and belief, no further action has been taken by the Legislature on this proposed legislation. Although S.934 has not yet been enacted, the presumption of constitutionality will be considered if it in fact becomes law. In considering the constitutionality of an act of the Legislature, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Townsend v. Richland County, 190 S.C 270, 2 S.E.2d 777 (1939); Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional. Ops. S.C. Atty. Gen., May 14, 1996; February 17, 1994.

As you note, S.934 would add §5-31-695, to read:

> [n]otwithstanding another provision of law, a municipality that utilizes the definition of 'contiguous' as provided pursuant to Section 5-3-305 to annex property that is adjacent to a special purpose district, but not the special purpose district itself, shall provide municipal services to the special purpose district at the same rate that individuals and entities within the municipality are charged for these services.

Significantly, we note that S.934 makes no mention of whether the legislation would apply prospectively or retroactively.

"[T]he primary purpose of statutory construction is to ascertain the intent of the Legislature." State v. Martin, 293 S.C. 46, 358 S.E.2d 697, 697 (1987). In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation, unless there is a specific provision in the enactment or clear legislative intent to the contrary. S.C. Dept. of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 528 S.E.2d 416 (2000); Bartley v. Bartley Logging Co., 293 S.C. 88, 359 S.E.2d 55 (1987). Accordingly, it is frequently recognized that "[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt." American National Fire Ins. Co. v. South Grading and Paving, 317 S.C. 445, 454 S.E.2d 897, 899 (1995); see Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542, 546 (1973). As the South Carolina Supreme Court observed in Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123, 125 (1978):

> . . . the party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough, if it is not satisfied that the Legislature did intend such effect.

"A principal exception to the ... presumption [of prospective effect] is that remedial or procedural statutes are generally held to operate retroactively." Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45, 48 (1980). A statute is remedial where it creates new remedies for existing rights unless it violates a contractual obligation, creates a new right, or divests a vested right. JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629, 631 (2005); Smith v. Eagle Constr. Co., 282 S.C. 140, 318 S.E.2d 8, 9 (1984); Hooks v. Southern Bell Telephone & Telegraph Co., 291 S.C. 41, 351 S.E.2d 900, 902 (Ct. App. 1986). However, "where a statute ... creates new obligations [or] imposes a new duty ... it will be construed as prospective only." Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC, 394 S.C. 97, 713 S.E.2d 650, 655 (Ct. App. 2011) [quoting 82 C.J.S. Statutes §585 (2009)]; see also Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984) [statutes which create duties, rights and obligations are not remedial or procedural, and are not given retroactive effect].

Important to our analysis of your question, we note that Article I, §10 of the United States Constitution provides in relevant part: "No state shall ... pass any ... law impairing the obligation of contracts ... ." Similarly, Article I, §4 of the South Carolina Constitution provides that: "No ... law impairing the obligation of contracts ... shall be passed...."

In an opinion of this Office dated May 14, 1996, we addressed two proposed legislative bills dealing with the provision of fire protection, and water and sewer services by a municipality, which would be retroactively applied to customers outside the corporate limits of municipalities. We determined that the legislation, if adopted, would likely impair existing contracts between municipalities and recipients, as well as existing contracts between the recipients of the service and third parties with whom they may have contracted. We therefore advised that the bills should be reassessed. Also in this opinion, we considered the constitutional validity of the proposed legislation under the federal and South Carolina Constitutions. We explained that:

> [t]he purpose of the Contract Clause of the United States Constitution is explained in Nowak, Constitutional Law (2d Ed. 1983), at page 462:
>
> > This prohibition prevents the states from passing any legislation that would alleviate the commitments of one party to a contract or make enforcement of the contract unreasonably difficult. The primary intent behind the drafting of the clause was to prohibit states from adopting laws that would interfere with the contractual arrangements between private citizens. Specifically, the drafters intended to inhibit the ability of state legislatures to enact debtor relief laws. Those who attended the Constitutional Convention recognized that banks and financiers required some assurance that their credit arrangements would not be abrogated by state legislatures.
>
> While the initial emphasis of the Contract Clause of the federal constitution was on contracts between private parties, the United States Supreme Court in deciding The Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), made it clear that the Contract Clause would prevent a state from abrogating contracts or agreements to which it was a party.

As the South Carolina Supreme Court noted in G-H Insurance Agency, Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336, 338 (1982), "[c]ontracts generally are subject to legislative regulation prospectively." In 2 Sutherland, Statutory Construction §41.07, it is stated that:

> [t]here are numerous decisions which purport to rest on an unqualified proposition that retroactive laws may not violate obligations of contract. However, the protection against retroactive impairment of contract rights is subject to the same considerations as those which apply in determining the legality of retroactive impairment of noncontract rights, under the due process clauses.... ... [R]etroactive application of statutes to preexisting contracts is acceptable when the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.[1]

In G-H Insurance Agency, an insurance agency entered a contract with an insurance company. Under the terms of the contract, termination could be made by either party at any time. Subsequently, the Legislature enacted a statute which required that no insurer could cancel its representation by an agent for certain reasons. The Court held that the legislative enactment unconstitutionally impaired existing contracts. Relying primarily upon the Fourth Circuit Court of Appeals decision in Garris v. Hanover Ins. Agency, 630 F.2d 1001 (4th Cir. 1980), and the United States Supreme Court's decision in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Court invalidated the statute, stating:

---

[1]We observe that nowhere on the face of S.934 does the reason for enactment appear, so that the "end" to which the statute would be addressed is unclear.

> [t]he impact of the provision was traumatic to some agents and insurance companies. There was no provision for gradual application for a grace period. No opportunity was given to renegotiate agency contracts. The impact of the proscription was immediate, irrevocable and without limit as to time.

G-H Insurance Agency, 294 S.E.2d at 340.

To determine whether a contract may have been impaired by legislation, a test is suggested by the Spannaus Court.

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by the factors that reflect on the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id., 438 U.S. at 243-44.

For our purposes here, we refer to an opinion of this Office dated February 24, 2012, where we addressed whether Cayce is obligated to provide the same water and sewer rates to the Airport District that it charges to resident customers. Concluding that Cayce could charge higher water rates to noncustomers, including the Airport District, we emphasized that "[water and sewer] fees charged to nonresidents are governed by contract, as opposed to statute." [Emphasis added]. Id. [citing Op. S.C. Atty. Gen., September 27, 2011]. We further explained that:

> . . . in an opinion dated July 17, 1989, we addressed whether the City of Columbia could charge different rates to nonresidents for municipal services. We noted the authority given to municipalities in §§5-7-60 and 5-31-1910, and cited to an opinion of this office dated February 5, 1976, construing §5-31-1910, that stated a "nonresident purchaser of water from a municipality would have only those rights set forth or necessarily implied from the contract to sell and furnish water, and further that the non-resident has no rights beyond those in the contract." In addition, we reviewed the statutory authority allowing municipalities to provide services to nonresidents. We thus stated:

> ... the establishment of higher rates or charges for the provision of water or sewer services to nonresident customers is not covered by statute but is instead a matter of contract. This Office has advised previously that a municipality has considerable discretion in entering into contracts to provide its services to persons residing outside municipal boundaries. [Op. S.C. Atty. Gen., December 22, 1986]. As noted therein, the use of the term " "may" in Section 5-7-60 "indicates that extra-territorial provision of services by a municipality, by contract with an individual, is within the discretion of the municipality." The setting of rates thus appears to be within the discretion of the municipality, as well; we have identified no authority which requires city residents and nonresidents to be charged the same rates. See also [Op. S.C. Atty. Gen., February 5, 1976].
>
> * * *
>
> Because the terms offered to nonresidents are a matter of contract, so long as the nonresident authority agrees to the terms offered by the municipality, a court is not likely to question the agreement. We have previously advised that there is no requirement that municipalities provide service to nonresidents on reasonable terms. Op. S.C. Atty. Gen., June 16, 2011; see also Op. S.C. Atty. Gen., February 5, 1976 ["A nonresident purchaser of water from a municipality has only those rights set forth or necessarily implied from the contract to sell and furnish water and the nonresident has no rights beyond the contract"]. In other words, a municipality may profit from providing water to nonresidents. Id. [citing Sossamon v. Greater Gaffney Metropolitan Utilities Area, 236 S.C. 173, 113 S.E.2d 534 (1960)]; see Op. S.C. Atty. Gen., June 30, 2006.

In another opinion of this Office dated November 17, 2000, we addressed amendments to statutes governing annexation. The amendments to §5-3-310 provided a method to modify the boundaries of a special purpose district when a municipality annexes part of the service area of the district upon petition by either 75% of the freeholders (§5-3-150) or 25% of the freeholders (§5-3-300). We noted that before the amendments by the Legislature in 2000, §5-3-310 only provided for the modification of the special purpose district boundaries when the annexation occurred pursuant to the 25% method, or §5-3-300. The requestor asked how the boundaries to a special purpose district were modified after an annexation pursuant to the 75% method (§5-3-150) that was completed before the amendments were enacted. Discussing prospective application of statutes, generally, we stated that:

> [u]nder similar principles of statutory interpretation, the South Carolina Supreme Court found that the retroactive application of an annexation exception, applying to a rural electric co-operative's service in an area annexed by a municipality, was compelled to prevent the co-op's ouster from the town. See Carolina Power & Light Co. v. Town of Pageland, 321 S.C. 538, 471 S.E.2d 137 (1996). In that case the Court said that a prospective application of

> the statute would defeat its legislative intent, which was to permit co-operatives to continue serving existing customers in the annexed area. In this instance, the legislative intent of the amendments is less clear. Indeed, in contrast to Carolina Power & Light, the boundaries of special purpose districts would be reduced by retroactive application to prior annexations. As a result, contractual obligations formed prior to the amendments could be adversely affected. Thus, because the retrospective operation of a statute is not favored by the courts, and statutes are presumed to be prospective in effect, we are inclined to conclude that the amendments to §5-3-310 apply prospectively.

The issue of impairment of contracts was examined in an opinion of this Office dated February 17, 1994, where we looked at pending legislation which would have the potential effect of reversing municipal annexations, if adopted. Considering prior obligations of the municipality, which are also present as referenced by your letter, we explained that:

> [a]nnexations which have been completed give property owners vested property rights to receive municipal services and result in contracts for services which could be impaired by application of the legislation if adopted. Had financing of residential and/or commercial property been extended on the assurance of availability of municipal services, for example, it is possible that contractual obligations, notes, mortgages, insurance contracts, and similar loan instruments could be impaired. Leases with tenants of residential and commercial property could also be affected. The proposed legislation gives no protection to the potentially impaired interests of property owners and accords such owners no due process, also guaranteed by the constitutions if they are to be deprived of property interests.

Regarding the impairment of contractual rights by subsequent legislation, the authorities are clearly in agreement that:

> [a] statute . . . is not to be construed to impair the validity of contracts entered into before its passage. It is only where the intent of the legislature to make an act retrospective is plainly expressed that courts will undertake to apply it to antecedent contracts and determine whether it impairs their validity. 82 C.J.S. Statutes §417 at 995.

Op. S.C. Atty. Gen., October 1, 1976.

Also relevant to our consideration of your question is an opinion of this Office dated September 7, 1993, where we discussed the development of regional industrial parks pursuant to S.C. Const. art. VIII, §13, and §4-1-170, and whether these existing facilities could become part of a regional industrial park. Considering concerns similar to those here, we advised that:

> [b]ecause the industrial park agreement specifies how revenue is to be distributed between taxing entities, the distribution of the fee payment received in lieu of taxes will be different from the distribution of property taxes associated with that same property. In other words, counties, municipalities, school districts, and other political subdivisions which were receiving revenues from property taxes of an existing facility would no longer receive the same revenue once the property becomes part of a park. This may significantly affect the tax base of the various taxing entities.
>
> Additionally, the county or other political subdivisions may have issued general obligation debt based on the assessed value of the property in question. To the extent that the value of this property is necessary to permit the outstanding general obligation debt within the debt limit of the political subdivision, the political subdivision must continue to receive income from the existing property to the extent that the amount representing its value is necessary to permit the outstanding general obligation debt within the debt limit of the political subdivision. This treatment is consistent with the requirements for issuing special revenue bonds for the park under S.C. Code Ann. §4-1-175 (Supp.1992). Failure to allow the political subdivision to continue receiving this amount would jeopardize the political subdivision's bond status, as well as possibly result in an impairment of contract for the bondholders. If existing property is included in a park, the agreement should address this issue when describing how revenue is to be distributed between the counties and the various taxing entities.

In addition, we note that in Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000), the South Carolina Supreme Court examined the Governor's authority to remove members of the Board of Directors of the South Carolina Public Service Authority (Santee Cooper) pursuant to §1-3-240(B). Rainey had argued the application of the statute would be unconstitutional if used to remove a board member, because it violated the Contract Clause by impairing the contractual rights of Santee Cooper bondholders. The Court held that: "[t]o constitute a Contract Clause violation this Court must determine three issues: (1) whether there is a contractual relationship; (2) whether the change in the law impairs that contractual relationship; and (3) whether the impairment is substantial." Id., 533 S.E.2d at 585 [citing General Motors Corp. v. Romein, 503 U.S. 181 (1992)]. In rejecting Rainey's claim, the Court also explained the issue as it effects existing contracts and obligations of Santee Cooper. The Court stated, in relevant part, that:

> "[w]hen bonds are issued, there arises a contract between the purchaser and seller, the obligation of which cannot be impaired, as it would be in violation of article 1, §10, Const. U.S., and of article 1, §8, Const. S.C." Welch v. Getzen, 85 S.C. 156, 67 S.E. 294 (1910); see also South Carolina Pub. Serv. Auth. v. Summers, 282 S.C. 148, 318 S.E.2d 113 (1984) (holding municipal tax assessment impaired rights of holders of bonds issued by Santee Cooper in violation of the United States and State Constitutions). Santee Cooper is the seller of its bonds. The contract exists between the bondholders and Santee

> Cooper, not its Board of Directors. Therefore, any change in the Board of Directors does not affect the underlying contract with Santee Cooper. If that were the case, every time the Board of Directors changed, a contractual impairment would occur.

Hodges, 533 S.E.2d at 585. Significantly, the Court addressed "substantial impairment" of contracts as follows:

> "[f]or purposes of Contract Clause analysis, a statute can be said to substantially impair a contract when it alters the reasonable expectations of the contracting parties." [Ken Moorhead Oil Co. v. Federated Mutual Ins. Co., 323 S.C. 532, 542, 476 S.E.2d 481, 486 (1996)]. A change in the composition of Santee Cooper's Board of Directors for any reason does not alter the reasonable expectations of the bondholders. Rainey argues that the "bondholders could reasonably expect that the rights of Santee Cooper, including the right to a stable board (which in turn translates into stable management) whose members may only be removed for cause by the Advisory Board, would not be altered or limited until after the bonds were retired." Rainey argues that the Governor's discretionary removal of the Chairman of Santee Cooper constitutes a threat to the stability of Santee Cooper, which may result in a lowering of the value of the bonds. According to Rainey, affecting the Board of Director's stability will have adverse effects on: (1) Santee Cooper's favorable bond ratings; (2) the bond's attractiveness to buyers; (3) the marketability of the outstanding Santee Cooper debt securities; and (4) increased credit insurance costs.
>
> The adverse effects proposed by Rainey do not rise to the level of a substantial impairment of contract. A change in the composition of the Board of Directors, as a result of the Governor's will, death of a member, retirement, or removal for cause, would not lead to the vast instability that Rainey proposes. The Board of Directors would still be able to function and the outstanding bonds would still exist. Rainey has supplied no evidence that the value of the outstanding bonds would be affected by the Governor's removal of a board member.

Hodges, 533 S.E.2d at 585-86.

Conclusion

S.934 would require a municipality to charge a special purpose district the resident utility rate if the municipality annexes property adjacent to the special purpose district. If enacted, S.934 is presumed constitutional. However, the proposed legislation is silent as to whether it applies retroactively. In the absence of words expressly evincing legislative intent that the such legislation be applied retroactively or necessarily implying such intent, there is a presumption S.934 will be considered prospective rather than retroactive in its operation. The legislation is not remedial or procedural in nature, and thus would not fit into any recognized exception to the rule of prospective application. In addition, water and sewer fees

charged to nonresidents by a municipality are governed by contract. Contracts are generally subject to legislative regulation prospectively only. Any retroactive application of S.934 might, therefore, impair existing contractual rights regarding Cayce water and sewer rates to nonresidents, in addition to bonds or other sources of funds, which could violate state and federal constitutional provisions to the effect that contracts may not be impaired. However, we note that this Office is not authorized to make a factual determination on any particular contract in a legal opinion. See Ops. S.C. Atty. Gen., February 21, 2012; July 1, 2003; February 26, 2001; see also Op. S.C. Atty. Gen., February 19, 1999 ("[u]nlike a fact-finding body such as a ... court, we do not possess the necessary fact-finding authority and resources required to adequately determine ... factual questions"). Although we are of the opinion that a court would probably determine that S.934 applies prospectively and not retroactively, this Office cannot opine with certainty whether a court will necessarily concur with our opinion. Ops. S.C. Atty. Gen., June 5, 2008; November 17, 2000. Ultimately, clarification from the appellate courts would be necessary to determine your question with finality. Op. S.C. Atty. Gen., January 10, 2012.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

April 11, 2012

The Honorable Rick Quinn
Member, House of Representatives
323-A Blatt Building
Columbia, South Carolina 29201

Dear Representative Quinn:

You request "a legal opinion as it relates to a potential annexation in the Town of Lexington." You note that the "annexation was on the Town of Lexington's December 5, 2011 agenda" but that"[t]he Town agreed to wait" for our opinion before the annexation was approved. By way of background, you state that "the town approved to be using right of way parcels to cross Highway 378 at the I-20 intersection." According to your letter, "[t]he Town argued that [it] had [the] legal ability to use [a] previously annexed right of way to become contiguous to the property in question."

Several constituents of yours question the validity of the annexation. Apparently, the concern is "that the proposed annexation would actually cross two roads using the right of way." Thus, you seek our opinion as to this issue.

Additional Background

We are also advised by the Lexington Town Attorney, Mr. Cunningham, that "[t]he town believes contiguity is established by virtue of the fact that the current town limits are directly across the right of way of Riverchase Way ... . Riverchase Way intervenes between the current town limits and the subject property." We are further advised by the Town Attorney that the property sought to be annexed is owned by the County of Lexington. A Resolution of Lexington County Council, dated October 25, 2011, has been provided to us requesting that the Town annex the property into its corporate limits. Such Resolution provides as follows:

> *Whereas*, The County of Lexington is the owner of that certain parcel of land containing 1.43 acres bearing Lexington County Tax Map 003698-03-114, which is described on the Attached Exhibit A; and
>
> *Whereas*, The Town of Lexington has represented to the County that subject property is contiguous to Tax Map 003698-02-013 and public right of way which lies within the corporate limits of the Town of Lexington;

> *Whereas*, The Town of Lexington has requested that the County consent to the annexation of the subject property;
>
> *NOW THEREFORE*, based upon the above representation and request of the Town of Lexington, be it resolved that Lexington County Council, Lexington, South Carolina, consents to the annexation of the property attached hereto as Exhibit A and as shown by Tax Map No. 003698-03-114.

The Town Attorney further advises that "it is possible to walk directly from 003698-02-013 to the subject property without crossing anything but road right of way ... . And, this is walking straight across, or directly across the right of way, from 003698-02-013 to the subject parcel at a 90° angle from the property line (no curving or manipulating lie – it goes straight across the right of way."

Law / Analysis

We begin our analysis by noting that this Office is unable to make a determination as to whether a particular parcel of property is or is not contiguous for purposes of annexation. As we stated in an Opinion dated January 28, 1988 (1988 WL 485221),

> [t]his office can not make factual determinations and would, therefore, be unable to say in this specific case, having not seen the petition or maps of the area, whether or not this specific area is or is not contiguous.

Thus, while we are able to advise you as to the issues of law regarding annexation, and to set forth the legal requirements of contiguity, we cannot determine contiguity itself. Such involves factual determinations which are beyond the scope of an opinion of the Attorney General, and must ultimately be determined by the courts.

Moreover, like any other ordinance of a municipality, an annexation ordinance must be presumed valid. As the court noted in *In Re Annexation of Portion of South Pymatuning Tp. To Borough of Clarksville*, 409 Pa. 324, 329, 186 A.2d 13, 15 (19622), "... we have the presumption that an ordinance having been adopted by a legislative body is presumably legal and the burden of proving illegality is upon those who aver illegality." See also, *In re Mountainville Election Dist.'s Annexation*, 304 Pa. 559, 562, 156 A.2d 162, 163-164 (1931) ["The ordinance having been adopted by council, a legislative body, is presumptively legal ...."]. McQuillan, *Municipal Corporations* § 7:50 (3d ed.) ["There is a presumption that once an annexation ordinance is passed the annexed territory lies within the annexing municipality."]; Cf. *Bob Jones Univ. Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) ["A municipal zoning ordinance is presumably valid. Hence, the burden of proof is upon the party attaching the amendment to establish that the acts of the city council were arbitrary, unreasonable and unjust."].

We turn now to the legal requirements of contiguity for annexation.

Our Supreme Court has stated that "the sole requirement for annexation is contiguity." *St. Andrews Pub. Serv. Dist. v. City Council of the City of Charleston*, 349 S.C. 602,606, 564 S.E.2d 647, 649 (2002), citing *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1998) It is clear that territory sought to be incorporated or annexed must meet the requirement of contiguity. *Glaze v. Crooms*, 324 S.C. 249, 478 S.E.2d 841 (1996). The necessity for contiguity exists even in absence of a statutory mandate to that effect. *Tovey v. City of Chas.*, 237 S.C. 475, 117 S.E.2d 872 (1961). In *St Andrews, supra*, the Court emphasized that "[t]he wisdom of an annexation is a legislative, not judicial determination." *Id.*, citing *Harrell v. City of Cola.*, 216 S.C. 346, 58 S.E.2d 91 (1950); *Pinckney v. City of Bft.*, 296 S.C. 142, 370 S.E.2d 909 (Ct. App. 1988).

S.C. Code Ann. Sec. 5-3-305 defines contiguity for purposes of municipal annexations. Such provision states.

> [f]or purposes of this chapter, "contiguous" means property which is adjacent to a municipality and shares of continuous border. Contiguity is not established by a road, waterway right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous boarder, the intervening connector does not destroy contiguity.

In *Sonoco Products Co. v. South Carolina Dept. of Revenue*, 378 S.C. 385, 393, 662 S.E.2d 599, 603 (2008), our Supreme Court recognized that § 5-3-305, as well as other statutes defining contiguity, "reflect[ ] an intention by the Legislature to broadly construe and apply the term 'contiguous.' In each of the cited statutes, contiguity was not destroyed or defeated by an intervening dedicated road or public right of way." Moreover, concluded the Court,

> [o]ur state appellate decisions also appear to broadly interpret the term contiguous. See, e.g. *Kizer v. Clark*, 360 S.C.86, 90-91, 600 S.E. 2d 529, 532 (2004) (citing section 5-1-30 of the South Carolina Code and recognizing that marshlands and creeks do not defeat towns contiguity for annexation purposes); *Mosteller v. County of Lexington*, 336 S.C. 360, 364-65, 520 S.E.2d 620, 623 (1999) (explaining, in a constitutional taking of property case, the term "contiguous" and stating "'abut' means to be contiguous ... [h]owever, abut does not always mean there must be actual contact;" "property may still be deemed to abut a road when there is some intervening, natural barrier like a stream or river"); *Glaze v. Grooms*, 324 S.C. 249, 253, 478 S.E.2d 841, 844 (1996) (recognizing basic proposition that "contiguity is not destroyed by water or marshlands which separate parcels of highland," but finding town lacked requisite contiguity to incorporate where waters/wetlands it sought to use to establish contiguity had already been annexed by another municipality); *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 901 (1988) (affording "contiguous" its ordinary meaning of "touching," within context of annexation to municipal corporation pursuant to § 5-3-130 of the South Carolina Code, and finding code section only required annexed area to share a common boundary with annexing municipality; holding contiguity is not destroyed by water or marshland within either the annexing municipality's existing boundaries or those of the property to be

> annexed merely because it separates the parcels of highland involved"); *Tovey v. City of Charleston*, 237 S.C. 475, 485, 117 S.E.2d 872, 876-77 (1961) finding in municipal annexation case, presence of Ashley River did not destroy contiguity of two areas at issue); *Beaufort County v. Trask*, 349 S.C. 522, 527, 563 S.E.2d 660, 662 (Ct. App. 2002) (holding, in annexation case, that presence of state-owned river between city and property did not defeat contiguity); *St. Andrews Pub. Serv. Dist. v. City Council of the City of Charleston*, 339 S.C. 320, 324-25, 529 S.E.2d 64, 66 (Ct. App. 2000) ("To achieve contiguity, actual physical touching of the properties is not required. The Supreme Court has rejected an argument that the annexed parcels must have the additional qualifications of unity, substantial physical touching, or a common boundary. However, the Supreme Court has never held that non-adjacent properties not incidentally separated by a road, railway, or waterway are in fact contiguous.") (citation omitted), reversed by 349 S.C. 602, 605-06, 564 S.E.2d 647, 649 (2002) (reversing Court of Appeals on issue of standing, but affirming general contiguity analysis in municipal annexation case); *Pinckney v. City of Beaufort*, 296 S.C. 142, 147, 370 S.E.2d 909, 912 (Ct. App. 1988) (holding in case involving annexation of land by city, the fact that access from city to annexed area required crossing a bridge and traversing of unannexed property in the county did not preclude finding of requisite contiguity).
>
> *As evidenced in the above-cited cases, our appellate courts have repeatedly found an intervening boundary that is neither a barrier nor an obstruction does not operate to destroy contiguity. Stated another way, an incidental separation between properties should not serve to negate otherwise contiguous property.*

Sonoco, 378 S.C. at 393-394, 662 S.E.2d at 603-604. (emphasis added).

In this same regard, the Supreme Court's decision in *Eldridge v. S.C. Dept. of Transportation*, 384 S.C. 548, 683 S.E.2d 483 (2009) is particularly instructive. *Eldridge* involved review of the Court of Appeals decision affirming the Referee's ruling that certain "Property Between the Roads" in the City of Greenwood could not be used for on-premises identification signs. The "Property Between the Roads" was a median which runs through downtown Greenwood. The Referee had held that such an "on premises" sign was required by a Greenwood ordinance to be located on the actual property where the business is located. In the Referee's view, "the Property Between the Roads was not contiguous or adjacent to any land where businesses were located, because it is separated from any businesses by the existing roads."

The Court of Appeals affirmed, going further, and concluding that a 1996 circuit court order had found that "[a]s to that portion of the former right-of-way [of the Railroad] covered by streets, highways and sidewalks for more than 20 years ..., the title lies in the City, County, and Highway Department." Based upon this Order, according to the Court of Appeals, SCDOT, owned the portion of the property upon which the roads are situated, and thus the Property Between the Roads is physically separated from the business properties, and is not contiguous, adjacent to or adjoining such properties.

Thus, the issue before the Supreme Court was, in that Court's view, whether the Property Between the Roads was "contiguous" to the businesses. The Court concluded that, even though separated

by the roadway, such did not defeat contiguity. We quote the Supreme Court's explanation of contiguity in full:

> More recently, however, this Court acknowledged that the term "contiguous" has been broadly interpreted. *Sonoco v. SC Dep't of Revenue,* 378 S.C. 385, 662 S.E.2d 599 (2008), *citing Kizer v. Clark,* 360 S.C. 86, 90–91, 600 S.E.2d 529, 532 (2004) (recognizing that marshlands and creeks do not defeat town's contiguity for annexation purposes); *Mosteller v. County of Lexington,* 336 S.C. 360, 364–65, 520 S.E.2d 620, 623 (1999) (explaining the term "contiguous" and stating " '[a]but' means to be contiguous ... [h]owever, abut does not always mean there must be actual contact").
>
> In *Sonoco,* we went further and distinguished between "contiguous" in a lay or secondary sense, versus in legal contemplation, stating, "In the legal field, it has been defined as: '[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded by or traversed by.' Black's Law Dictionary 290 (5th ed.1979)." 378 S.C. at 391, 662 S.E.2d at 602. Significantly, S.C.Code Ann. § 5–3–305 is also cited in *Sonoco;* it states, in part:
>
> > For purposes of this chapter, "contiguous" means property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.
>
> In *Sonoco,* we ultimately held a taxpayer's office buildings were subject to property tax because the public road and railroad tracks did not defeat contiguity of the plant and office buildings. We find the issue presented here is squarely controlled by our opinion in *Sonoco;* we find the contiguity requirement is met here such that for purposes of the applicable ordinance, the signs may be considered "on premises."
>
> Further support for this result is found in the definition of "adjacent." *Black's Law Dictionary,* 38 (5th Ed.1979) defines it adjacent as "lying near or close to; sometimes, contiguous, neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch."
>
> We find the Court of Appeals and Referee unduly restricted the definition of "on premises." Given the liberal construction afforded the definition of "contiguity" in *Sonoco,* we find the Property Between the Road's separation by the roadway does not defeat contiguity, such that the signs may be considered "on premises" for purposes of the ordinance. Accordingly, the Court of Appeals opinion is reversed, and the case is remanded to the Referee for calculation of damages.

Conclusion

As stated above, we cannot determine definitively whether or not the property in question is contiguous to the Lexington town limits which, we are advised by the Town Attorney, are directly across the road from the property subject to be annexed. Such contiguity is a question of fact, more properly addressed ultimately to the courts. However, any ordinance of annexation would be presumed valid. Moreover, based upon the authorities referenced herein, it is clear that our Supreme Court does not deem an intervening road *or roads* or an intervening right of way as rendering such property non-contiguous to municipal boundaries. In the Supreme Court's view, the concept of contiguity is "broadly interpreted" and does not require touching. While such property must not be "widely separated," it need not touch. *Eldridge, supra.* Thus, in our opinion, based upon the circumstances described, the intervention of a road or roads or rights of way would not itself render the property non-contiguous.

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an