HENRY MCMASTER
ATTORNEY GENERAL

January 11, 2010

Bonum S. Wilson, III, Esquire
Wilson & Heyward LLC
Post Office Box 13177
Charleston, South Carolina 29422

Dear Mr. Wilson:

We understand you represent the town of James Island (the "Town") and wish to request an opinion on the Town's behalf. In your letter, you state as follows:

> A county in South Carolina has instituted a policy restricting the use of county funds for public works to municipalities in the county with populations under 5000 persons. For municipalities of greater than five thousand person, a fee for service contract is available. Only one municipality exists in the county of over 5000 persons which does not have its own public works department. While it is understood a county may contract with municipalities pursuant to S.C. Code § 4-9-40, my question is whether such a restriction by size is constitutionally permissible.

Law/Analysis

Counties are given authority pursuant to section 4-9-30(5)(a) of the South Carolina Code (Supp. 2008) to appropriate funds for general public works. However, section 4-9-30(5)(c) of the South Carolina Code (Supp. 2008) provides:

> Notwithstanding any provision to the contrary, the county council shall not finance any service not being rendered by the county on March 7, 1973, by a countywide tax where the service is being provided by any municipality within that municipality or where the service has been budgeted or funds have been applied for as certified by the municipal governing body, except upon concurrence of the municipal governing body. For purposes of this subitem, "municipality" means a municipal corporation created pursuant to Chapter 1 of Title 5.

In addition, as you mentioned in your letter, section 4-9-40 of the South Carolina Code (1986) allows counties to contract for services with municipalities and states as follows:

> Any county may perform any of its functions, furnish any of its services within the corporate limits of any municipality, situated within the county, by contract with any individual, corporation or municipal governing body, subject always to the general law and the Constitution of this State regarding such matters. Provided, however, that where such service is being provided by the municipality or has been budgeted or funds have been applied for that such service may not be rendered without the permission of the municipal governing body.

In a 1992 opinion, quoting a 1985 opinion, we explained:

> while a county and county officials are not as a general matter obligated to perform services within the corporate limits of a city, the General Assembly has provided by statute for municipal residents to contract for county services in certain situations. Section 4–9–40 of the Home Rule Act authorizes a county to "perform any of its functions, furnish any of its services within the corporate limits of any municipality, situated within the county, by contract with any individual, corporation or municipal governing body, subject always to the general law and the Constitution of this State regarding such matters." (emphasis added). Such services cannot be provided, however where the service "is being provided by the municipality or has been budgeted or funds have been applied for" unless permission is given by the municipal governing body.

Op. S.C. Atty. Gen., November 6, 1992. Thus, clearly a county may contract with a municipality to provide public works services.

With regard to a county's decision to fund public works in one municipality located within its borders and not another, we first note that we were unable to locate any provision in the Code or in the Constitution requiring a county to fund municipal public works. Thus, we look to a county's general budgetary authority. Section 4-9-30(5)(a) of the South Carolina Code specifically allows counties to appropriate funds for general public works. Thus, so long as the expenditure furthers a county purpose, we do not find any law prohibiting such an expenditure. Therefore, we are of the opinion that the county may choose to enter into agreements with municipalities to provide certain services and may appropriate funds with regard to such services, so long as the county's interests are served.

Conclusion

Finding no obligation within the Code or the Constitution requiring counties to fund municipal public works, we are of the opinion that this is a decision best left to the individual county. While the decision to appropriate funds to a municipality for this purpose is limited in that it must further a county purpose and must be with the permission of the municipality's governing body, we find no provision in the State Constitution or statutes prohibiting a county from choosing which municipalities to provide services to. As such, we do not believe the decision by the county mentioned in your letter to restrict funding based on municipal population violates state law. Of course, we do not comment herein on the wisdom of the county's policy.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General