ALAN WILSON
ATTORNEY GENERAL

September 12, 2011

The Honorable Dean Fowler, Jr.
Florence County Treasurer
180 North Irby Street, MSC-Z
Florence, South Carolina 29501

Dear Mr. Fowler:

You have indicated that Chairman Rusty Smith of the Florence County Council currently is seeking selection as the Florence County Administrator, and therefore, you have requested an opinion of this Office concerning what steps Chairman Smith should take in order to "distance himself" from the selection process.

Law/Analysis

Participation in the selection process would be improper

South Carolina authorities clearly state that it would be contrary to public policy for Chairman Smith to participate in any aspect of the selection of the new administrator. E.g., Bradley v. City Council of Greenville, 212 S.C. 389, 397, 46 S.E.2d 291, 295 (1948) ("In the absence of constitutional or statutory provision it is, as said in 42 Am.Jur. 955, Public Officers, Sec. 97, 'contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself . . . .'").

This policy has become law in the form of the Ethics, Government Accountability, and Campaign Reform Act of 1991 ("the Ethics Act" or "the Act"). The South Carolina Ethics Commission has provided guidance with respect to the application of the Act to a situation in which the chair of a county council seeks a position that will be appointed by the council on which he serves. Specifically, the Commission has opined that where the chair of a county council seeks the position of Director of County Public Works:

> [T]he Chair . . . is not required by the S.C. Ethics Reform Act to resign prior to submission of an application for employment . . . however, the Chair is required to comply with the abstention and disclosure provisions of Section 8-13-700 [of the South Carolina Code]. In this case, the Chair would deliver the appropriate disclosure information to the acting Chair and then abstain. This procedure must be followed on all issues affecting the application process, to include, but not be limited to, setting the

> position description, salary, establishing the hiring procedure, screening of applications, or any other action on the hiring process.

Op. S.C. Ethics Comm'n 98-012 (emphasis added).[1]

Therefore, it is the opinion of this Office that Chairman Smith must abstain from all aspects of the process for selecting an administrator, including any decisions related to the procedures that other members of council will follow in screening applications.

The Ethics Act does not require resignation prior to appointment

Your request to this Office indicated concern with respect to whether Chairman Smith must vacate his seat at some time prior to appointment as administrator.[2] The South Carolina Ethics Commission has

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[1] Section 8-13-700, as recently amended, provides in relevant part as follows:

> (A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself . . . .
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> (B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he . . . has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself . . . shall:
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> (1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;
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> . . . .
>
> (4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body . . ., who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes.

(Emphasis added).

[2] It is clear that Chairman Smith would vacate his seat on council if he was appointed as the new administrator. See Darling v. Brunson, 94 S.C. 207, 77 S.E. 860, 862 (1913) ("As the petitioner could not hold two offices, the law interprets his acts of accepting the second office as an abandonment of the first."); Letter to the Honorable Pickens Williams, Jr., Op. S.C. Att'y Gen. (Sept. 12, 1996) ("This Office

opined that the Ethics Act does not require resignation from council prior to an appointment by that council. Op. S.C. Ethics Comm'n 98-012 ("[T]he Chair . . . is not required by the S.C. Ethics Reform Act to resign prior to submission of an application for employment . . ." as Director of County Public Works). However, as discussed below, an appointment of this kind might contravene other law.

The appointment of a councilmember might violate other law

As an initial matter, section 4-9-100 of the South Carolina Code (1986) provides that "[n]o member of [county] council . . . shall hold any other office of honor or profit in government . . . during his elected term." The plain language of this provision suggests that Chairman Smith may not hold the office of administrator during the term for which he was elected as council member, even if he resigns from the council position.

More generally, public policy might prevent county council from appointing one of its members to public office, even if no statute explicitly prohibits such appointment. At common law, an appointing body could not confer a public office on one of its members, even if that member abstained from the selection process. See, e.g., Op. Iowa Att'y Gen. No. 73-1-1 (Jan. 2, 1973) ("It has long been established in the common law such an appointing body cannot use its members in its appointments as is clearly set forth in 67 C.J.S. 130, Officers § 20: 'Officers who have the appointing power, or who are members of the appointing board, are disqualified for appointment to the offices to which they may appoint.'"). This common law rule has been recognized in South Carolina. Bradley, 212 S.C. at 397, 46 S.E.2d at 295 ("In the absence of constitutional or statutory provision it is . . . 'contrary to public policy . . . to permit an appointing body to appoint one of its own members.'").[3]

Some might argue that the Ethics Act has replaced the common law.[4] For example, section 8-13-705(B)(1) prohibits a public official from receiving "anything of value" in exchange for being "influenced

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has advised previously that one who serves as a county administrator for a county in which the council-administrator form of government has been properly adopted, would hold an office for dual office holding purposes."); Letter to Robert L. Kilgo, Jr., Esquire, Op. S.C. Att'y Gen. (July 9, 1986) ("This Office has advised on numerous occasions that a member of a county council holds an office for dual office holding purposes.").

[3] In Bradley, the issue was whether board members could nominate themselves as their own successors to the same board. The Court concluded that "each member of [an appointing board], as his term expires, [must] be ineligible for appointment to an immediately succeeding term." 212 S.C. at 397-98, 46 S.E.2d at 295.

[4] See generally Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610, 614 (Ky. 1992) (refusing to apply "common law public policy" to invalidate a governor's appointment of himself as trustee of a state university, absent some statutory or constitutional provision prohibiting the same), overruled on other grounds by Commonwealth ex rel. Conway v. Thompson, 300 S.W.3d 152 (Ky. 2009); Raynovich v. Romanus, 299 A.2d 301, 303 (Pa. 1973) (3-2 decision) ("[A]bsent a statutory prohibition a borough council may select one of its members to fill a mayoral vacancy. Our Legislature has not spoken on this issue and thus absent any voting illegality or other impropriety there is no impediment to the authority of council to select a fellow council member to fill a vacancy in the office of mayor.").

in the discharge of his official responsibilities," and section 8-13-100(1)(a)(xiii) defines "anything of value" to include "a promise or offer of employment." Arguably, these provisions address the concern that members of council might exchange votes in order to obtain public office. Moreover, sections 8-13-750 and 8-13-770 prohibit certain appointments, but they do not include a general prohibition against appointing bodies choosing their own members for public office. See S.C. Code Ann. § 8-13-750 (prohibiting public officials, members, and employees from "caus[ing] the . . . appointment" of family members to certain offices and positions); S.C. Code Ann. § 8-13-770 (prohibiting members of the General Assembly from serving on state boards or commissions unless explicitly permitted by statute). Nevertheless, it is the opinion of this Office that the common law rule has survived the adoption of the Ethics Act.

While the Ethics Act proscribes misconduct of particular kinds, it is the opinion of this Office that the Ethics Act was not intended to be an exhaustive list of the official acts that are prohibited by law. Accord Raynovich, 299 A.2d at 304 (Eagen, J., dissenting) ("[I]t does not follow that everything may be done by a public officer that is not forbidden in advance by some act of assembly." (quoting Goodyear v. Brown, 26 A. 665 (Pa. 1893))); cf. In re Anonymous Member of the South Carolina Bar, 389 S.C. 462, 699 S.E.2d 693 (2010) ("Sexual involvement with the spouse of a current client, while not expressly proscribed by the language of our Rules of Professional Conduct, unquestionably has the propensity to compromise the most sacred of professional relationships . . . ." (emphasis added)); 67 C.J.S. Officers and Public Employees § 240 ("Public officers and employees owe a duty of loyalty to the public."). Thus, this Office would not construe compliance with the Ethics Act as a "safe harbor" for official behavior that violates long-standing principles of governance. On the contrary, absent a conflicting statutory provision, this Office would take the position that the common law principle recognized in Bradley remains in force.[5]

Assuming the Bradley rule remains good law, it is likely that the rule would prohibit Chairman Smith's appointment even if he resigns from his seat on council at some time prior to appointment. See, e.g., State ex rel. Bove v. McDaniel, 157 A.2d 463, 466-67 (Del. 1960) (holding that resignations "for the very obvious purpose of appointing the resigning members of the appointing body to other offices placed the [resigning members] in the same position as if they had been technically members of the Council at the time of their [appointments]"); 67 C.J.S. Officers and Public Employees § 31 ("[A] member of an appointing board is ineligible for appointment by the board . . . . The result cannot be accomplished indirectly by the member's resignation with the intention that his or her successor shall cast a vote for the

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[5] See S.C. Code Ann. § 14-1-50 (1976) ("All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section."); Singleton v. State, 313 S.C. 75, 83, 437 S.E.2d 53, 58 (1993) ("The common law remains in full force and effect in South Carolina unless changed by clear and unambiguous legislative enactment." (emphasis added)); see also Raynovich, 299 A.2d at 309 (Eagen, J., dissenting) ("Far from being persuasive of [a board member's] right to vote himself the increased salary, the failure of the Code specifically either to authorize or to forbid the practice is conclusive against him. It necessitates an explicit direction on the part of the legislature to overthrow such a wholesome and salutary rule of the common law . . . ." (emphasis added) (quoting Reckner v. School District of German Township, 19 A.2d 402, 403 (Pa. 1941))).

former member.").

Ultimately, a court must determine whether the common law prohibition against an appointing body appointing its own member to public office has survived the adoption of the Ethics Act. This remains an open question in South Carolina. It is the opinion of this Office that the common law prohibition does survive, and therefore, it would be unlawful to appoint Chairman Smith as administrator even if he fully complies with the requirements of the Ethics Act in "distancing himself" from the selection procedure.

Conclusion

At a minimum, South Carolina law requires that Chairman Smith remove himself from any influence over the process of selecting the new administrator. Moreover, while it does not appear the Ethics Act requires Chairman Smith to resign from his seat on council during his candidacy, section 4-9-100 of the South Carolina Code might make Chairman Smith ineligible for appointment at this time. Finally, it is the opinion of this Office that it would be contrary to the public policy of this State for a county council to appoint its own member as administrator.

Very truly yours,

Dana E. Hofferber

Dana E. Hofferber
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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