ALAN WILSON
ATTORNEY GENERAL

February 21, 2012

Sarah G. Noel, Clerk
Bamberg County Probate Court
599 Guess Drive
Denmark, South Carolina 29042

Dear Ms. Noel,

We received your letter requesting an opinion concerning your intent to file as a candidate for Probate Judge for the County of Bamberg ("County") and the applicability of a County ordinance purporting to terminate employees of the county who become candidates for an elected county office. By way of background, you explain you are currently employed as a clerk to the Bamberg County Probate Court. It is your intent to file as a candidate for Bamberg County Probate Judge on March 16, 2012. You have written this letter at the request, and with the approval, of the Honorable Nancy Green, Probate Judge for Bamberg County. As indicated in your letter, the text of Ordinance No. 9-96-5 provides:

> Be it ordained by the County Council of Bamberg County, South Carolina that the "Bamberg County Personnel Rules and Procedures Manual" (Ordinance No. 9-88-1 as amended) is amended as follows:
>
> 1. Establish a new section entitled:
> <u>208 Employee Seeking Elected Office</u>
>
> In the event that an employee of the county decides to seek an elected county office, then the employment with the County shall be terminated at the time the employee files or otherwise qualifies as a candidate for office.

You specifically ask the following questions:

1) Is the referenced ordinance lawful, i.e., is it lawful and/or appropriate to effectively bar county employees (by terminating their employment) from seeking public office when there is no tangible or legal conflict of interest at the time of filing?

2) Are public officers (duly elected) subject to the provisions of Bamberg County Ordinance 9-88-1 (Personnel Rules and Procedures)? After further discussion, it is our understanding you intended this question to focus on whether the clerk of a probate court is a "county employee" subject to the ordinance.

3) Does the Probate Judge hold an <u>elected county office</u> for purposes of interpreting the county ordinance?

Law/Analysis

Question 1

Your first question pertains to the general validity of the ordinance in question. In addressing the validity of a local ordinance, we always begin with the presumption that an ordinance is valid and constitutional. See Whaley v. Dorchester Co. Zoning Bd. Of Appeals, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional"). An ordinance will not be struck down by a court unless "palpably arbitrary, capricious or unreasonable." U.S. Fidelity & Guaranty Co. v. City of Newberry, 257 S.C. 433, 438-39, 186 S.E.2d 239, 241 (1972) (citation omitted). "Moreover, only a court, not this Office, may declare an ordinance unconstitutional." Ops. S.C. Atty. Gen., November 23, 2010; April 9, 2010.

In determining whether a local ordinance is valid, courts employ a two-step process:

> The first is to determine whether the municipality had the power to adopt the ordinance. If no power existed, the ordinance is invalid. If the municipality had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State.

Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000).

In prior opinions, this Office has addressed the validity of local ordinances similar to Ordinance No. 9-96-5. In a 1998 opinion, we addressed the validity of an ordinance enacted by the City of Barnwell providing "[t]hat no employee who offers for any elective public office shall remain an employee of the City of Barnwell." Op. S.C. Atty. Gen., March 18, 1998. We provided the following analysis of case law relevant to the issue:

> There is overwhelming support for the proposition that the government has an appropriate and substantial interest in proscribing certain political activities by public employees. Naccarati v. Wilkins TP., PA, 846 F.Supp 405 (W.D.Pa 1993). The leading case on this subject is Broadrick v. Oklahoma, 413 U.S. 601 (1973). In this case, the United States Supreme Court upheld the constitutional validity of [an] Oklahoma statute which restricted partisan political conduct by state civil service employees. The Court held that a state could prohibit certain public employees from becoming "candidate[s] for nomination or election to any paid public office." Id. Many other courts have also upheld the validity of statutes and ordinances similar to Ordinance No. 1997-97-1. In doing so, these courts recognized the important governmental interest in promoting efficiency and integrity in the discharge of official duties and in insulating public employees from political pressures so as to protect their individual rights. Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977); Moses v. Town of Wytheville, Virginia et al., 959 F.Supp 334 (W.D.Va 1997); Naccarati v. Wilkins TP., PA, supra; Pennsylvania ex rel. Specter v. Moak, 307 A.2d 884 (1973).

Id. We noted that in prior opinions addressing the validity of ordinances and policies similar to the City of Barnwell's ordinance, we relied on many of the cases cited above to conclude that such ordinances were valid. Id. (citing Ops. S.C. Atty. Gen., August 24, 1982; September 27, 1979). Thus, we concluded the City of

Barnwell's ordinance "would most likely withstand a challenge to its constitutionality" if the ordinance "is being offered to promote important governmental interests similar to the one discussed in the previously cited cases." Id.

In a 2009 opinion, we addressed the validity of a Charleston County personnel policy prohibiting county employees from becoming a candidate for any elective office in a partisan election or for any political party office. Op. S.C. Atty. Gen., December 16, 2009. The personnel policy also provided that any employee who announced his candidacy for such elections must submit his resignation to be effective on the date of the announcement or the date of filing. Id. Based on several prior opinions including the 1998 opinion discussed above, we expressed the belief "Charleston County likely has an appropriate and substantial interest in limiting the political activities of its employees." Id. Thus, we concluded a court would likely uphold the personnel policy as reasonable and constitutional. Id.

Consistent with these prior opinions and the court decisions cited therein, we believe the County "has an appropriate and substantial interest in limiting the political activities of its employees." Id. We presume the County enacted Ordinance No. 9-96-5 for the purpose of "promoting efficiency and integrity in the discharge of official duties and in insulating public employees from political pressures so as to protect their individual rights." Op. S.C. Atty. Gen., March 18, 1998. Thus, we believe a court would likely uphold Ordinance No. 9-96-5 as reasonable and constitutional.

Questions 2 & 3

Your second and third questions generally ask whether Ordinance 9-96-5 is applicable to the clerk of a probate court. The probate courts of South Carolina were established in each county a through the enactment of legislation by the General Assembly. See § 14-23-1010 ("There is established in each of the counties of this State a probate court"). Probate judges are elected officials under any form of county government. See § 14-23-30 ("The judges of the probate court shall be elected by the qualified electors of the respective counties"). Section 14-23-1090 provides that a probate judge "may appoint a clerk and may remove him at his pleasure." The duties of the clerk to a probate court are further set forth in section 14-23-1100.

Article VIII, section 7 of the South Carolina Constitution charges the General Assembly with the duty to "provide by general law for the structure, organization, powers, duties, functions, and responsibilities of counties ...." In keeping with this responsibility, the General Assembly provided for the governance of counties with the Home Rule Act, S.C. Code sections 4-9-10 et seq. Section 4-9-30 provides the governing body of each county with certain enumerated powers, all of which remain "*subject to the general law of this State*." (emphasis added). These enumerated powers include, in relevant part, the power:

> (7) to develop personnel system policies and procedures for county employees by which all county employees are regulated *except those directly elected by the people*, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government. This employment and discharge authority *does not extend to any personnel employed in departments or agencies under the direction of an elected official or an official appointed by an authority outside county government*....

§ 4-9-30(7) (emphasis added).

Under the council-administrator form of government adopted by Bamberg County, the county administrator has the following relevant powers and duties:

> (1) to serve as the chief administrative officer of the county government;
>
> (2) to execute the policies, directives and legislative actions of the council;
>
> ....
>
> (7) to be responsible for the administration of county personnel policies including salary and classification plans approved by council;
>
> (8) to be responsible for employment and discharge of personnel *subject to the provisions of subsection (7) of § 4-9-30* ....

§ 4-9-630 (emphasis added). Section 4-9-650 further provides that, "[w]ith the exception of organizational policies established by the governing body, the county administrator *shall exercise no authority over any elected officials of the county whose offices were created either by the Constitution or by the general law of the State*." (emphasis added).

Ordinance 9-96-5 necessarily implicates the extent of a county government's power to enforce its personnel policies as well as its employment and discharge authority pursuant to the above provisions. Thus, we must determine whether the clerk of a probate court is subject to either the personnel policies of a county or the employment and discharge authority of a county.

Several decisions of the South Carolina Supreme Court are on point. In Heath v. Aiken County, 295 S.C. 416, 368 S.E.2d 904 (1988), our Supreme Court addressed whether deputy sheriffs were subject to county personnel policies under section 4-9-30(7). Noting that the governing powers of a county under section 4-9-30 are "subject to the general law of this State," the Court observed that "[t]he 'general law' on deputy sheriffs is well-settled in South Carolina: a deputy serves at his sheriff's 'pleasure.'" Id. at 418, 368 S.E.2d at 905. The Court found the county personnel policy at issue was irreconcilable with common and statutory law establishing that a deputy serves at the pleasure of the sheriff, an elected official, and thus held the Legislature did not intend deputies to be "employees" subject to county personnel policies for purposes of section 4-9-30(7). Id. at 418-19, 368 S.E.2d at 905-06; see also Anders v. County Council for Richland County, 284 S.C. 142, 325 S.E.2d 538 (1985) (county council lacked authority to reinstate individual as chief investigator in solicitor's office after he was fired by solicitor; section 1-7-405, which states employees of solicitor serve at his "pleasure," is specific to solicitor and controlling over 4-9-30-(7) applying generally to elected officials).

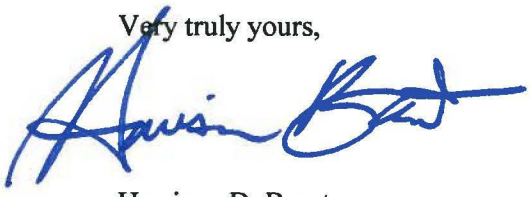
In a later case, Eargle v. Horry County, 344 S.C. 449, 545 S.E.2d 276 (2001), the Court addressed whether a county administrator had the authority to *suspend* the employees of a county auditor, an elected official under the county-administrator form of government. Noting a second or third offense for the same violations were punishable by dismissal under the county's personnel policies, the Court found "[t]he plain language of § 4-9-30(7) precludes the Administrator from imposing such a punishment upon any employee of an elected official." Id. at 454-55, 545 S.E.2d at 279. The Court observed that allowing the administrator to suspend the auditor's employees "could be construed as an exercise of authority by the Administrator over the Auditor in violation of S.C. Code Ann. § 4-9-650." Id. at 455, 545 S.E.2d at 280. In addition, the Court found the following policy considerations persuasive:

> It is undisputed that the employees the Administrator sought to suspend were acting with the permission of and under the direction of their elected supervisor. Granting the Administrator the authority to suspend in this case would require employees of elected officials to choose whose directives they follow, those of the elected official or those of the Administrator. This result could not have been intended by the legislature.

Id. Ultimately, the Court concluded the administrator lacked the authority to suspend the employees, stating: "the County's authority to promulgate personnel policies applicable to all county employees does not cloak the Administrator with the power to suspend employees of elected officials." Id.; see also Bales v. Aughtry, 302 S.C. 262, 263, 395 S.E.2d 177, 178 (1990) (stating "[t]he plain language of [§ 4-9-30(7)] limits the county government's power to employ or discharge elected officials or those under their direction").

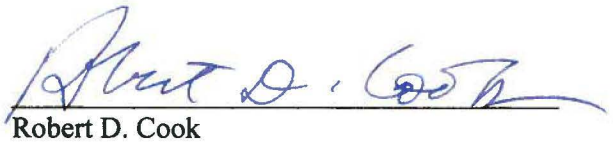
These cases are instructive here. The Legislature has granted probate judges broad discretion in employing and dismissing clerks who expressly serve at the judges' "pleasure." See § 14-23-1090. Consistent with Heath and Anders, section 14-23-1090 is the "general law" applicable to the employment and dismissal of the clerk to a probate court and controls over the provisions of section 4-9-30(7). Thus, the clerk of a probate court is not an "employee" for purposes of county personnel policies under section 4-9-30(7). Furthermore, like the employees of the county auditor in Eargle, the clerk of a probate court is the employee of an elected official. See § 14-23-30 (probate judge is elected by qualified electors of respective county). As such, a county government lacks the authority to terminate the clerk of a probate court under the plain language of section 4-9-30(7). See Amos-Goodwin v. Charleston County Council, 161 F.3d 1 (4th Cir.) (noting clerks of probate court, as at-will employees of probate judge, were not subject to county's authority under § 4-9-30(7) and thus could not be terminated by county). For these reasons, this Office is of the opinion that the County lacks the authority to enforce Ordinance 9-96-5 against the clerk of the probate court.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General