ALAN WILSON
ATTORNEY GENERAL

July 11, 2012

Benjamin F. Thomas, III, Assistant Chief
South Carolina Law Enforcement Division
P.O. Box 21398
Columbia, SC 29221-1398

Dear Assistant Chief Thomas:

We received your letter requesting an opinion from this Office by the South Carolina Law Enforcement Division ("SLED") regarding the power of a municipality to disband its police department. By way of background, you indicate that Town Council ("Town Council") of the Town of Norway ("Town") has disbanded its Police Department (the "Department"). We obtained a letter dated August, 18, 2011, from then-Town Mayor Cindy Williams informing the South Carolina Criminal Justice Academy that the Town "made a decision to disband our Police Department due to the lack of funding for the police department."[1]

Law/Analysis

According to the Office of the South Carolina Secretary of State and the Norway Town Code, the Town has adopted the mayor-council form of municipal government.[2] See S.C. Code Ann. §5-9-10 *et seq.*

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[1]We have been provided with a letter to SLED from the new "Chief" of the Department, dated April 2, 2012, requesting the re-establishment of the Department and reinstatement of the Department's ORI number. Attached to the Town's request are minutes from a meeting of Town Council dated "January 2, 2011," which state that "[Town] Council approved first reading of an ordinance to hire a Chief Constable to provide Law Enforcement in Norway." There was no second reading. We note from further documents that at its December, 2011, meeting, Town Council voted that, because January 2, 2012, fell on a holiday, the official January, 2012, meeting and swearing in of the Mayor and [Town] Council would be held on January 9, 2012. In the minutes dated "January 9, 2011," the Mayor and [Town] Council were sworn into office. In addition, the minutes state that "[Town] Council approved the 2nd reading of an amended ordinance to provide Law Enforcement in [Town] as amended. Motion made and motion carried unanimously." Because these minutes show the Mayor and Town Council members being sworn into office, this is a clear indication that the minutes dated "January 2, 2011" do not reflect the "official" meeting of Town Council when it was conducted. Further, these minutes are dated January of 2011, not 2012. Because of the question presented in your request, this opinion will not address the issues regarding any re-establishment of the Department or reinstatement of the Department's ORI number, and we will defer to the regulatory authority of the appropriate agencies regarding certification in this regard.

[2]See Norway Town Code, §2.101.

Pursuant to §5-9-10, "[e]xcept as specifically provided for in this chapter, the structure, organization, powers, duties, functions and responsibilities of municipal government under the mayor-council form shall be as prescribed in Chapter 7 [of Title 5]." Further, §5-7-160 provides that the powers of a municipality are vested in its council: "All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law...." In addition, §5-9-40 gives municipal council the authority to "establish municipal departments, offices, and agencies in addition to those created by Chapters 1 through 17 and may prescribe the functions of all departments, offices and agencies, except that no function assigned by law to a particular department, office or agency may be discontinued or assigned to any other agency...."

Clearly, the formation and operation of a municipal police department is an important focus of the establishment of a municipality in South Carolina. We have previously stated that "[a] primary function of a municipal corporation is the preservation of public peace and order. In fact, the desire for adequate law enforcement services is most often an impetus, if not the driving force, behind the formation of a municipal corporation. See Op. S.C. Atty. Gen., April 20, 2011. In keeping with such is the authority of a municipality to establish a police force." Op. S.C. Atty. Gen., November 6, 1992 [citing 62 C.J.S. Municipal Corporations, §134]. Specifically, §5-7-110 authorizes a municipality to "appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties." Such officers are bestowed "all the powers and duties conferred by law upon constables, in addition to the special duties imposed upon them by the municipality." With respect to this statute, we note that §5-7-110 gives municipalities "broad authority" regarding a municipal police department. See Ops. S.C. Atty. Gen., April 28, 1998; April 2, 1996.

Further, we note that S.C. Const. art. VIII, §17 provides:

> [t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

This power granted to municipalities is not absolute, however. Specifically, the powers of a municipal government are outlined in §5-7-30. This statute provides that:

> [e]ach 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 ...

In this regard, the South Carolina Supreme Court stated Williams v. Town of Hilton Head Island, 311 S.C. 417, 429 S.E.2d 802, 805 (1993), that:

> ... Article VIII[, §17] and Section 5-7-30 [taken together] ... bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state.

See Ops. S.C. Atty. Gen., March 14, 1991; February 14, 1978.

While §5-7-110 gives municipalities broad authority with respect to the creation of a municipal police department, we have previously advised that a municipality is not required by State law to establish or maintain a police force if it chooses not to do so. Ops. Atty. Gen., April 20, 2011; May 6, 2010; see Op. S.C. Atty. Gen., November 6, 1992 (advising that "[we are] unaware of any authority requiring a municipality to establish a police force").

Turning now to your question, we note that the power of Town Council to establish the Department also entails the power to abolish it. The general rule was stated by the Court in Wright v. City of Florence, 229 S.C. 419, 93 S.E.2d 215 (1956), citing 6 McQuillin, Municipal Corporations, §21.10 as follows:

> 'Specific grant of power to repeal ordinances, however, ordinarily is not necessary since it is the general rule that power to enact ordinances implies power, unless otherwise provided in the grant, to repeal them. It is patently obvious that the effectiveness of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it.' The following is also quoted from the cited section of McQuillin: 'The power of repeal extends, generally speaking, to all ordinances. Indeed, a municipal corporation cannot abridge its own legislative powers by the passage of irrevocable ordinances. The members of its legislative body are trustees for the public, and the nature and limited tenure of their office impress the ordinances enacted by them with liability to change. One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government. Accordingly, in the absence of a valid provision to the contrary, a municipal council or assembly, having the power to legislate on, or exercise discretionary or regulatory authority over, any given subject may exercise that power at will by enacting or repealing an ordinance in relation to the subject. . . .

Wright, 93 S.E.2d at 218; see Ops. S.C. Atty. Gen., March 14, 1991; July 3, 1984; February 14, 1978.

Significantly, §5-7-260 specifies that when a municipality abolishes a municipal department, office or agency, such action must be accomplished by ordinance. The statute states, in pertinent part, that:

> [i]n addition to other acts required by law to be done by ordinance, those acts of the municipal council shall be by ordinances which:
>
> (1) Adopt or amend an administrative code or establish, alter or abolish any municipal department, office or agency . . .

Accordingly, in abolishing the municipal department, office or agency by ordinance, the municipal council must follow the procedures outlined in §5-7-270, which provide that:

> [e]very proposed ordinance shall be introduced in writing and in the form required for final adoption. Each municipality shall by ordinance establish its own rules and procedures as to adoption of ordinances. No ordinance shall have the force of law until it shall have been read two times on two separate days with at least six days between each reading. [Emphasis added].

Therefore, until and unless this public hearing requirement is complied with by municipal council, an ordinance abolishing a municipal department, office or agency would have no force of law. See Ops. S.C. Atty. Gen., April 14, 2005; October 8, 1999; May 2, 1978; cf. Berkeley Electric Cooperative, Inc. v. Town of Mt. Pleasant, 308 S.C. 205, 417 S.E.2d 579, 580 n.1 (1992) [holding that a franchise agreement with respect to a municipality must receive two public readings required to create an ordinance].

Conclusion

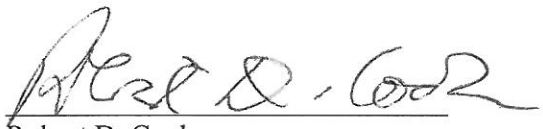
Pursuant to §5-7-30, a municipal council is given authority to enact ordinances for the general welfare of the municipality, provided such ordinances are not inconsistent with State law. In keeping with such is the authority of the municipal council to establish a police department. The power to establish a police department also entails the power to abolish it. In abolishing a municipal department, office or agency, §5-7-260 specifies that such action must be accomplished by ordinance of the municipal council. Section 5-7-270 further provides that "[n]o ordinance shall have the force of law until it shall have been read two times on two separate days with at least six days between each reading." Based upon the information provided to us, however, we are unable to determine whether the Department in this case was abolished by ordinance of Town Council in accordance with the foregoing authority. Clearly, the ultimate resolution of the issue raised involves a factual determination. As we have previously opined, because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions. See Ops. S.C. Atty. Gen., May 22, 2012; June 30, 2003. We find it more appropriate for a court of competent jurisdiction to make a decision as to whether or not Town Council complied with State law in this regard. Ops. S.C. Atty. Gen., December 21, 2009; July 7, 2009; March 31, 2006.

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