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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 16, 2002

The Honorable Frank Brafman
Chairman, Ad Hoc Legal Committee
Beaufort County Council
Post Office Drawer 1228
Beaufort, South Carolina 29901-1228

**Re: Your Letter of June 28, 2002
Council-Administrator Form of Government**

Dear Mr. Brafman:

In your above-referenced letter, you ask this Office for opinions on three issues concerning a County Government's authority to retain the services of certain professionals. You indicate that Beaufort County has a council-administrator form of government. Generally, the issues you raise relate to the necessity to involve the county administrator in the process of obtaining "independent contractors" to perform professional services for the County and for Council. Specifically, your questions and issues are as follows:

1. "... who or what body in a Council-Administrator form of government has the authority to retain a County attorney, or Council Attorney as an independent contractor - not an employee; whether the County Council as a body can do this, or whether the involvement of the County Administrator is required."
2. "... is it possible to retain as an independent contractor, an internal auditor to report directly to County Council." (With reference to this question, you state that "[i]t is our understanding that an internal auditor who is hired as an 'employee' must be under the dominion and control of the County Administrator"); and
3. Council "... would also like clarification of the existence of attorney client relationships and among whom."

By way of background, you indicate that Beaufort County has enacted an ordinance which "... provides that no contract for the services of legal counsel may be awarded without the approval of County Council." (Beaufort County Ordinance, Section 2-512(b)). You have also attached to your letter a copy of Section 2-512 which provides in subsection (c) that "[a]uditing, consulting and other

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professional services shall be procured in accordance with section 2-542.” While no further information was attached to your letter, it appears that additional sections of the Beaufort County Code of Ordinances may be relevant to a discussion of the issues raised in your request. Those sections are all contained in Chapter 2, Administration, of the Beaufort County Code of Ordinances and include Sections 2-502 (Definitions), 2-504 (Applicability), 2-508 (Establishment, appointment and qualifications of purchasing director), 2-517 (Small purchases), and 2-542 (Architect-engineer, construction management, land surveying and other professional services).¹

LAW/ANALYSIS

I. Questions 1 & 2

A. County Administrator’s Role in Hiring Independent Contractor

County Councils are given certain general powers by the South Carolina General Assembly. Pursuant to S.C. Code Ann. §4-9-30, a County Council is given, inter alia, the power to make and execute contracts, to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, to develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly 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. The general powers expressed in Section 4-9-30 are applicable no matter which form of government has been chosen by a County under the Home Rule Act.

The implementation of acts of a county council accomplished pursuant to its general powers can depend on the form of government chosen, however. In the county-administrator form, S.C. Code Ann. §4-9-620 provides that “[t]he council shall employ an administrator who shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the council has the authority to control.” Section 4-9-630 provides for the powers and duties of the administrator and states:

The powers and duties of the administrator shall include, but not be limited to, the following:

- (1) to serve as the chief administrative officer of the county government;
- (2) to execute the policies, directives and legislative actions of the council;

¹ The cited ordinances are taken from the Code of Ordinances, County of Beaufort, South Carolina as displayed at www.co.beaufort.sc.us.

- (3) to direct and coordinate operational agencies and administrative activities of the county government;
- (4) to prepare annual operating and capital improvement budgets for submission to the council and in the exercise of these responsibilities he shall be empowered to require such reports, estimates and statistics on an annual or periodic basis as he deems necessary from all county departments and agencies;
- (5) to supervise the expenditure of appropriated funds;
- (6) to prepare annual, monthly and other reports for council on finances and administrative activities of the county;
- (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 and subject to the appropriation of funds by the council for that purpose; and
- (9) to perform such other duties as may be required by the council.

Further, Section 4-9-660 provides that “[e]xcept for the purposes of inquiries and investigations, the council shall deal with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall give orders or instructions to any such officers or employees.”

This Office has previously examined the powers and duties of the county administrator in the council-administrator form of government. By opinion dated May 7, 1991, we noted that this Office has “... exhaustively examined the authority within the council-administrator form of government to employ and discharge county employees (zoning administrator, internal auditor, and county attorney), concluding that such employment and discharge was ultimately the responsibility of county council but that the county administrator would actually perform the duties since council could deal with county employees only through the administrator.” See OPS. ATTY. GEN. DATED APRIL 9, 1986; MARCH 5, 1987; AND JANUARY 8, 1987.

You have indicated that your questions relate to the hiring of attorneys and auditors as “independent contractors” rather than as “employees” of the County. It is my conclusion, however, that the reasoning expressed in our prior opinions is applicable to the situation you describe regardless of the label attached to the attorney or auditor. Initially, in determining whether one is an employee or an independent contractor, the test is one of control over the person doing the work. “In determining control, it is not the actual control exercised by the employer but, ‘whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner and means of its accomplishment; the principal factors showing right of control are direct evidence of right or exercise of control, method of payment, furnishing of equipment and right to fire.’ Todd’s Ice Cream, Inc. v. South Carolina Employment Security Commission, 315 S.E.2d 373, 375 (1984).” See OP. ATTY. GEN. DATED OCTOBER 10, 2000. Therefore, depending on the amount of control the County is capable of exercising, the attorney or auditor may be considered an

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employee rather than an independent contractor regardless of the manner in which the employment relationship is created.

Moreover, while hiring an independent contractor rather than an employee may remove that person from the prescriptions of Sections 4-9-660 and 4-9-630(7)&(8), such does not necessarily eliminate entirely the involvement of the county administrator. The county administrator is the chief administrative or chief executive officer of the county. S.C. Code Ann. §4-9-630; See also OP. ATTY. GEN. DATED AUGUST 13, 1979. In addition to his or her duties regarding county employees or personnel, the administrator is also "to execute the policies, directives and legislative actions of the council ... direct and coordinate operational agencies and administrative activities of the county government ... [and] ... to supervise the expenditure of appropriated funds." S.C. Code Ann. §4-9-630(2)(3)&(5). Surely, once county council makes a policy decision to appropriate public money to contract with an auditor or attorney, the clear statutory authority of the administrator would require that he or she be involved in the execution of that policy decision and the supervision of the appropriated funds. For a county council to implement a practice with the intent to circumvent the express authority of the administrator would most likely be in violation of the Home Rule Act itself. If a county council were to attempt to assume administrative duties statutorily assigned to the county administrator, such action could be viewed as an illegal alteration of the form of government without following the required statutory procedures. See OP. ATTY. GEN. DATED JANUARY 7, 1985.

B. County Ordinances

As stated above, county councils are granted a number of powers pursuant to S.C. Code Ann. §4-9-30. Council generally exercises these powers through the adoption of ordinances or resolutions. Once a county council passes a valid ordinance, they are bound to operate according to its provisions. See OP. ATTY. GEN. DATED NOVEMBER 28, 2000 (county council cannot violate its own ordinance in expanding number of members on parks and recreation commission); and OP. ATTY. GEN. DATED MARCH 8, 1988 (action of council in bypassing duly-adopted ordinance will be deemed void). With the caveat that the following are not intended to represent an exhaustive search and that the citations are merely examples of local provisions which may effect the appropriate answer to the issues raised, several Beaufort County Ordinances appear to be relevant.

Chapter 2, Article VII, Division 4 of the Code of Ordinances of Beaufort County relates to administration, finance and purchasing. Section 2-504 provides that Division 4 "... applies to contracts for the procurement of supplies, services, and construction, entered into by the county" Also within Division 4, Section 2-502 (Definitions) states that "*Employee* means an individual drawing a salary or wages from the county, whether elected or not; any compensated individual performing personal services for the county or department, agency, commission, the council, board, or any other entity established by the executive or legislative branch of the county" Accordingly, it appears as though an individual compensated in any way by the county, even one as an independent contractor, would meet the definition of employee as used in the Beaufort County Code of Ordinances. Therefore, not only would the hiring of an independent contractor for the services

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of attorney and auditor require the administrators involvement as mentioned above, it appears as though his or her authority under S.C. Code Ann. §§4-9-660 and 4-9-630(7)&(8) would also come into play.

Further, and specifically concerning the hiring of an independent auditor, Section 2-542 relates to the contracting for professional services and includes "auditing" within its provisions. Section 2-542(c) states that the "purchasing director" is to negotiate any contract with the "firm" that is to provide professional services, including audits.² According to Section 2-508, the purchasing director is appointed by the county administrator. It appears that, should County Council attempt to exclude entirely the county administrator from the hiring of an auditor, a violation of the County's own ordinances may occur.

C. Council's General Power

The determination that denying the county administrator involvement in the hiring of independent contractors most likely violates state statutes and possibly Beaufort County's own ordinances does not mean that council is left without power and/or discretion in the matter. Section 4-9-30(6) gives county council the authority "to establish such ... positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such positions, except as otherwise provided for in this title" This Office has previously opined that "[b]y the clear and unambiguous language of this statute, the General Assembly has authorized a county council to regulate a position which it creates and to prescribe the functions of such position ... [and] ... [p]rescribing or limiting the functions of a county attorney would be encompassed by this statute." See OP. ATTY. GEN. DATED JANUARY 8, 1987. As long as not precluded by other state laws, Section 4-9-30(6) would also appear to encompass prescribing the functions of an internal auditor. See Op. Atty. Gen. Dated March 15, 1990 (county council should not contract with an independent agent to exercise powers and perform duties that by general law are imposed upon the county auditor). Again, however, while county council may determine what functions are to be served and what departments, boards, officials, etc. are to be served by a professional service provider, "the hiring of the individual to ... [perform these services] ... would be within the purview of the county administrator's functions." See OP. ATTY. GEN. DATED JANUARY 8, 1987.

II. Question 3

In the last question to be addressed, you indicate that Beaufort County Council "... would ... like clarification of the existence of attorney client relationships and among whom." In your letter, you indicate that Council employs a county attorney while the Administrator employs a staff

² Pursuant to Section 2-517, contracts not exceeding \$25,000 are to be made in accordance with the small purchase procedures established by the purchasing director.

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attorney. It is assumed that your question relates to the nature of the relationship between the staff attorney and the Administrator. In that regard, I have been able to locate no South Carolina authority on point, but I believe the statutory law concerning a county administrator's position and case law from other jurisdictions provide the likely answer to your question.

Pursuant to Section 4-9-620, county council employs the administrator and council has the authority to control the departments of the county government which the administrator heads. Further, no matter whether an attorney is hired to advise council directly or to assist the administrator, county council is responsible for appropriating public money to pay his or her fee. I have been able to locate no authority for the administrator to create professional relationships in his capacity as an employee of the county which would not be subject to council's ultimate control. It seems unlikely that the administrator would be able create an attorney-client relationship with a staff attorney, hired to advise the administrator in the exercise of his statutory and council assigned duties, to which council was not privy.³ Courts from other jurisdictions which have considered similar questions reach the same conclusion.

In In re Advisory Committee on Professional Ethics, Docket No 18-98, 745 A.2d 497 (2000), the New Jersey Supreme Court considered the relationship between a municipal administrator, with similar duties as our county administrator, and a municipal attorney. In holding that the attorney's client is the municipal body as represented through its mayor, council and other officials, the New Jersey Court stated that "[w]hen the municipal attorney counsels the municipal administrator, he or she is really giving legal advice to the municipality itself." 745 A.2d at 504. Similarly, the California Court of Appeals in Ward v. Superior Court, 138 Cal.Rptr. 532 (1977), held that a county assessor, as an agent of the county, has a duty of full disclosure to his principal, the county, therefore, no separate attorney client relationship existed between the county attorney and the assessor. The Ward court noted that "[t]he County [Attorney] has only one client, namely, the County" 138 Cal.Rptr. At 537.

Conclusion

Given the provisions of the State and local laws and ordinances cited above, it is my opinion that the involvement of the County Administrator is necessary in the hiring of an attorney or internal auditor, even if these persons are hired as "independent contractors" rather than "employees." County Council does, however, have the authority to prescribe or limit the functions of these persons and prescribe or limit the departments or bodies of the County which these persons serve. Further, it is my opinion that, generally, the hiring of an attorney to advise the county or any of its agents or

³ In certain instances, "extenuating circumstances" may require that "independent counsel" be retained to represent individual county officials thereby creating independent attorney-client relationships. See Op. ATTY. GEN. DATED FEBRUARY 15, 1985.

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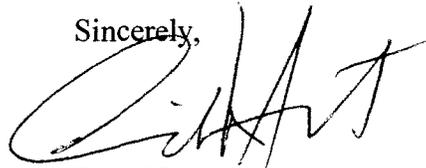
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officers in the exercise of their duties creates an attorney-client relationship with the county, not the individual agent or officer.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Avant", written over a horizontal line.

David K. Avant
Assistant Attorney General

DKA/an