

6798 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 29, 1999

R. Allen Young, Esquire
Mount Pleasant Town Attorney
Post Office Box 745
Mount Pleasant, South Carolina 29465

Dear Mr. Young,

Thank you for your letter, dated September 21, 1999, to this Office, which has been referred to me for a response. You ask for an opinion about the applicability of South Carolina Code Section 25-9-120 to a municipality's operation of a hurricane shelter. You also ask whether this statute has been affected by the enactment of the South Carolina Tort Claims Act.

South Carolina Code Section 29-9-120 reads:

No person owning or controlling property who voluntarily and without compensation permits such property to be used as a public shelter for civil defense purposes shall be civilly liable for the injury or death of any person who may be injured or killed on such premises, or for the loss of or damage to the property of any person on such premises, during any time such premises are actually being used as a public shelter.

The statute only protects from liability a "person" owning or controlling property. Government entities are not expressly referred to in this provision and, thus, we must also consider other statutes in our analysis.

Traditionally, governmental entities were protected from liability under the aegis of the sovereign immunity of the State. However, in 1986 the General Assembly, recognizing that total immunity on the part of the government is no longer warranted, enacted the South Carolina Tort Claims Act, §15-78-10 et seq. The Act waives governmental immunity for certain torts committed by governmental entities, but also contains exceptions to this waiver of immunity. Thus, the Act both expressly preserves and extinguishes sovereign immunity in certain circumstances.

The provisions of the Tort Claims Act specifically compare the liability of a governmental entity to that of a private individual. Section 15-78-40 states:

The State, an agency, a political subdivision, and a governmental entity are liable for their

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torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

Furthermore, Section 15-78-50 (b) says:

In no case is a governmental entity liable for a tort of an employee where that employee, if a private person, would not be liable under the laws of this State.

Read together these provisions allow for a scope of governmental liability that is never greater than the liability for private individuals. Thus, because the Tort Claims Act provides for liability no greater than that of a private individual, the qualified immunity afforded to private individuals volunteering their property during an emergency is extended to a municipality. In this instance the Tort Claims Act preserves the shield of governmental immunity by extending its reach to an immunity expressly granted to private individuals. *Cf. Brooks v. Northwood Little League, Inc.* 327 S.C. 400, 489 S.E.2d 647 (S.C. Ct. App. 1997) (holding government may avail itself of immunity under the Recreational Use Statute).

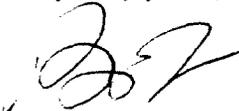
In addition to the analysis above, it is likely that governmental immunity is also preserved in these circumstances by the exceptions to the waiver of immunity found in the Tort Claims Act. A governmental entity is not liable for a loss resulting from "emergency preparedness activities." Section 15-78-60(19). South Carolina Code Section 25-9-120, which grants an exemption from liability to persons permitting property to be used as a public shelter, is located in the Chapter entitled "Emergency Measures." Although there appears to be no South Carolina case law on point, a municipality operating a hurricane shelter in similar circumstances would likely be considered an emergency preparedness activity and, thus, fall within the ambit of the exception.

In short, it is the opinion of this Office that the Tort Claims Act, in conjunction with South Carolina Code of Laws Section 25-9-120, preserves the immunity of a municipality in the operation of a hurricane shelter.

This letter is an informal opinion only. It has been written by a designated Senior 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 not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General