



ALAN WILSON
ATTORNEY GENERAL

July 18, 2024

Mr. Charlie Funderburk
City Manager
7725 Tega Cay Dr.
Tega Cay, SC 29708

Dear Mr. Funderburk:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

Statement of Facts:

1. The City of Tega Cay ("City") is an incorporated South Carolina municipality.
2. The City has elected the council-manager form of government. (Code of Ordinances of the City of Tega Cay Chapter 2, Article I, Sec. 2.1 "The form of government shall be council-manager").
3. The City's ordinances provide that City Council shall be constituted of one mayor and four councilmembers, thereby constituting a voting total of five (5) and thus a quorum is three (3).
4. City ordinance Chap. 2, Article II, Division 2, Sec. 2-48 (e) provides: "Except for emergency meetings, all actions of the council shall be by majority vote of the council members constituting a quorum."
5. The City Attorney is not an employee of the City, is not paid a salary, and is not on retainer. His services are provided only upon specific request by either the City Manager or City Council, and such services provided are then billed by the hour.

6. Certain council members have proposed an ordinance pertaining to the position of City Attorney. It is referred to herein as “the Ordinance.”
7. Article VI, Sec. 2-420 (3) of the Ordinance provides as follows:

“When called upon by at least two members of City Council to give advice and direction to City Council, with such advice or direction being related to City procedure, form, and law which may arise in the discharge of the duties of their respective offices.”

8. Article VI Sec. 2-417 (B) (Appointment) of the Ordinance provides “A City Attorney shall serve a two (2) year term.”

Questions Presented- Opinions Requested

- A. May a majority of City Council, other than in a duly called meeting in compliance with the South Carolina Freedom of Information Act, direct the City Attorney to “give advice and direction to City Council, with such advice or direction being related to City procedure, form, and law which may arise in the discharge of the duties of their respective offices.”
- B. May a minority of City Council, at any time, direct the City Attorney to “give advice and direction to City Council, with such advice or direction being related to City procedure, form, and law which may arise in the discharge of the duties of their respective offices” i.e. can a majority of City Council, by ordinance, delegate to less than a majority of City Council the authority to incur legal expenses and request legal advice.
- C. May a current City Council, by ordinance, bind future City Councils to a specific term of service for a City Attorney.

Law/Analysis

This Office has previously opined on the role of the city attorney and the legality of a proposed municipal ordinance that would establish a procedure to process all legal services. For instance, a prior opinion presented a proposed ordinance that required “all legal services to the City of Abbeville to first be approved by city council and then processed through the city clerk to the city attorney, and furthermore would make the city clerk solely responsible for reporting to the

city council the status of all such legal services.” Op. S.C. Att’y Gen., 1977 WL 24632 (September 15, 1977). The opinion found that the proposed ordinance did not apparently violate the South Carolina Constitution or general laws of the State.

The Constitution provides only that ‘[t]he structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law ...’ S.C.CONST. art. 8, § 8. There are no relevant constitutional limitations on what municipalities may or may not do with city attorneys.

The statutory law, § 5–7–230, CODE OF LAWS OF SOUTH CAROLINA, 1976, provides that the city council may elect or appoint a municipal attorney whose duties shall be as prescribed by law. In addition, there are two other statutory sections that impose duties by law on the city attorney:

(1) Section 9–13–30 provides that the city attorney shall advise and represent the board of trustees of the city's firemen's pension fund; and

(2) Section 39–5–130 provides that the city attorney shall assist the Attorney General upon request to prosecute violations of the Unfair Trade Practices Act.

Apart from these statutory duties, the city attorney would be required only to perform the duties of his office in a manner prescribed by city ordinance.

This opinion is consistent with the law in other jurisdictions.

As a general rule, the duties of a city attorney require him to act as attorney, counsel, and legal advisor of every agency of the city, and of the heads of the departments. ... [I]n construing an ordinance defining his duties in general terms, all duties naturally appertaining to his office will be held to be covered unless the language used clearly indicates a contrary intent.

A city attorney has such duties as are imposed on him by law ... [H]is duties may be broadened or narrowed by ... ordinance, or rules or orders properly promulgated by the municipal authorities ... 62 C.J.S. § 695(d).

Id. While the ordinance established a process to initiate a request and assigned the city clerk as the party responsible for reporting the status of legal services, the opinion’s analysis is equally applicable to the present inquiry. S.C. Code § 5-7-230 has not been amended since the opinion was issued, and we, therefore, continue to interpret it to permit altering the scope of a city attorney’s duties or defining the parameters by which he is to undertake those duties so long as the

ordinance is consistent with the constitution and state law. See Op. S.C. Att’y Gen., 2020 WL 3619622 (June 22, 2020) (“This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or there has been a change in applicable law.”).

The first issue raised in your letter suggests an ordinance which directs a city attorney to request legal advice aside from in a public meeting may violate the South Carolina Freedom of Information Act (“FOIA”). S.C. Code §§ 30-4-10 *et seq.* It is this Office’s opinion that the FOIA does not limit a public body or its members to request legal advice solely during a public meeting. The FOIA requires every “meeting” of all public bodies to be open to the public unless closed to the public. The act defines “meeting” as “the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.” S.C. Code § 30-4-20(d). “Quorum” means “a simple majority of the constituent membership of a public body” except where otherwise defined by law. S.C. Code § 30-4-20(e). A public body is only permitted to close a meeting to enter executive session for one of the reasons listed in S.C. Code § 30-4-70(a). The “receipt of legal advice” is one of those listed reasons. Id. To close a meeting, a majority of the members present must vote affirmatively in public. S.C. Code § 30-4-70(b).

While the FOIA expressly allows a meeting to be closed to the public for the receipt of legal advice, there is no suggestion within the Act that this is the only method by which legal advice may be sought. As the opinion above states, a city attorney is often required “to act as ... legal advisor of every agency of the city, and of the heads of the departments.” Op. S.C. Att’y Gen., 1977 WL 24632 (September 15, 1977). The ordinance proposed in that opinion required city staff and department heads to relay requests for legal services to city council for approval before the services of the city attorney could be sought. Id. However, this Office is unaware of general state law or court decisions that require this process.

Assuming the city council has allocated funds for legal services in its annual budget, a city may develop a process where the city attorney bills for his services with approval for such services coming directly from the council itself or delegated to city personnel, such as the city clerk or city manager, with provisions for reporting to council. One concern relayed about the instant ordinance is that council could be surprised by expenses incurred at the request of less than a majority of the members. This appears to be a policy issue regarding the efficacy of a particular process and is generally beyond the scope of our opinions. We note, however, that city council has a fiduciary responsibility to monitor the city’s budget and financial statements. See Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596, 600 (1923) (“In the sense that all powers of municipal corporations are held in trust for public use, all property held by such corporations is held in a

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fiduciary capacity.”). Therefore, council should ensure that adequate reporting and accountability processes are implemented.

A separate provision of the proposed ordinance appoints the City Attorney to “serve a term of two years.” Your letter asks whether this provision can bind a future city council to a specific term of service with a city attorney. It is this Office’s opinion that a city council cannot bind future councils by entering into an employment contract extending beyond the terms of its members. The South Carolina Supreme Court explained in Piedmont Public Service District v. Cowart, 324 S.C. 239, 241, 478 S.E.2d 836, 837 (1996), “[T]he appointment or removal of a public officer is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body. Such a contract is not binding on the successors to the local governing body.” Accordingly, a future city council would be free to exercise its authority to appoint a city attorney and would not be bound by the decision of a prior council. See S.C. Code § 5-7-230 (“The city council may elect or appoint a municipal attorney ... whose duties shall be as prescribed by law.”).

Conclusion

As is discussed more fully above, it is this Office’s opinion that the FOIA does not limit a public body or its members to request legal advice solely during a public meeting. We have consistently interpreted S.C. Code § 5-7-230 to permit altering the scope of a city attorney’s duties or defining the parameters by which he is to undertake those duties so long as the ordinance is consistent with the constitution and state law. See Op. S.C. Att’y Gen., 1977 WL 24632 (September 15, 1977). Further, it is this Office’s opinion that a city council cannot bind future councils by entering into an employment contract extending beyond the terms of its members. Accordingly, a future city council would be free to exercise its authority to appoint a city attorney and would not be bound by the decision of a prior council.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General