March 3, 2008

Lee W. Zimmerman, Esquire
Blythewood Town Attorney
Post Office Box 11390
Columbia, South Carolina 29211

Dear Mr. Zimmerman:

As attorney for Blythewood, you note that the Town "has adopted the mayor-council form of municipal government, as prescribed by S.C. Code Ann. §§ 5-9-10 ... [through] 5-9-40." You provide the following information and pose the following questions:

> [d]uring a Town Council meeting on February 4, 2008, a question arose as to where the authority lies in the Town for the hiring of a person to fill the position of Town Administrator. We advised the Town Council that we would research South Carolina law on this issue and provide them with a legal opinion. During our research we reviewed Attorney General Opinion No. 06-081, issued April 27, 2006 .... In that Opinion, it was suggested that the City Council of Lake City "either seek clarification from the courts on the interpretation of [the] statute or legislative action to make the statute more clear." We have contacted the current Lake City ... Attorney and he advised that the City Council did not pursue judicial or legislative action.
>
> Because we have not found any state court opinions directly on point, we are seeking the Attorney General's opinion on the following issues:
>
> (1) Assuming the opinion of the Attorney General in Opinion No. 06-081 is correct that S.C. Code Ann. § 5-9-40 "gives the Council, and the Mayor solely as a member of Council, the authority to appoint a City Administrator, "may a Town Council either by ordinance or otherwise delegate its authority under § 5-9-40 to the Mayor?"
>
> (2) If the Town Council may delegate its authority under § 5-9-40 to employ a Town Administrator to the Mayor, does the Town of Blythewood Code of Ordinances, Section 32.02, delegate to the

Mayor the Town Council's authority to appoint a Town Administrator?

(3) Because § 5-9-30(1) gives the Mayor the power "(1) to appoint and, when he deems it necessary for the good of the municipality, suspend or remove all municipal employees and appointive administrative officers ..." may the Town Council by ordinance or otherwise require the Mayor to consult with Council prior to suspending or removing municipal employees and appointive administrative officers?

Law / Analysis

As you indicate, the statutory provisions governing the mayor-council ["strong mayor"] form of government for municipalities in South Carolina are codified at S.C. Code Ann. Sections 5-9-10 through 5-9-40. Section 5-9-30 provides in pertinent part that

> [t]he mayor shall be the chief administrative officer of the municipality. He shall be responsible to the council for the administration of all city affairs placed in his charge by or under Chapters 1 through 17. He shall have the following powers and duties:
>
> > (1) to appoint and, when he deems it necessary for the good of the municipality, suspend or remove all municipal employees and appointive administrative officers, provided for by or under Chapters 1 through 17, *except as otherwise provided by law*, or personnel rules adopted pursuant to Chapters 1 through 17."
> >
> > ... (2) to direct and supervise the administration of all departments, offices and agencies of the municipality *except as otherwise provided* by Chapters 1 through 17.

(emphasis added). In addition, § 5-9-40 provides the following:

> [t]he council may 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. *The mayor and council* may *employ an administrator to assist the mayor in his office.*

(emphasis added).

> We note the general rule regarding the power of appointment of municipal officers:
>
> [t]he power to appoint municipal officers may be exercised only by that board or officer in whom the power resides, or to whom the power has been delegated. ... While a statute may transfer the exercise of a power of appointment of one person or body to another, ... an ordinance which assumes to usurp the power of appointment, ... or which assumes to transfer the power of appointment to persons other than those on whom it has been committed by charter is invalid ... .

62 C.J.S. *Municipal Corporations*, § 355. More specifically, the following principle is also pertinent:

> [p]rovisions for the appointment of certain officers by the mayor with the consent and approval of the council should be complied with in order to effect a valid appointment .... Where the Constitution ... or the charter ... thus ... [provides,] an ordinance may not authorize the appointment by either alone ....

Id.

The foregoing rule was amply illustrated in a decision of the Pennsylvania Supreme Court in *Commonwealth v. Crogan*, 155 Pa. 448, 26 A. 697 (1893). There, the Court held that, pursuant to an Act of the Legislature, the street commissioner was to be appointed by the mayor and council. The Court held that an ordinance, signed by the mayor, giving council alone the authority to make such appointments was ineffective. In the Court's view, an officer appointed by the council without the mayor's participation has no right to office because "[n]either the mayor nor the councils can make the appointment any more than they could make the ordinances the officers are appointed to enforce." 26 A. at 698. A city ordinance, concluded the Court, "cannot change the law, or deprive the mayor of the powers which the law gives him, without his consent." Id.

Likewise, in *City of East St. Louis v. Thomas*, 11 Ill.App. 283, 1882 WL 10607 (1882), the Illinois Appellate Court held that where the city charter provided that the city council possessed the power annually to appoint an attorney and certain other officers, an ordinance providing that in certain contingencies, the mayor might appoint an attorney was void. The Court concluded "[t]hat the city council was attempting to delegate a power that the legislature had given it alone." *See also*, *Forbes v. Kane*, 316 Mass. 207, 55 N.E.2d 220 (1944) [under charter, power of appointment was vested in city council; in absence of statute, council had no power to delegate such appointment authority to superintendent of public works].

And, in *City of Harlan v. Coombs Land Co*., 199 Ky. 87, 250 S.W. 501 (1923), the Court concluded that the city council could not delegate authority to the mayor to employ an engineer. The

pertinent statute empowered the council "in its discretion [to] employ an engineer for a particular work ...." In the Court's view,

> [t]his statement is so clear and definite as to leave no doubt that in cities of this class not only may the city council employ an engineer for a particular work, but that this power is confided to the discretion of the city council. This being true, it is clear that the power cannot be delegated by the council ... .

250 S.W. at 502. *See also*, *City of Sullivan v. Cloe*, 277 Ill. 56, 115 N.E. 135 (1917) [where power is expressly delegated to city council, the power must be exercised by it as a body, and cannot be delegated to others]; 3 McQuillin *Municipal Corporations*, § 12.72 [if the charter confers power on the council to point or elect an officer or a municipal employee, "the power cannot be delegated....."].

Other general authorities have also recognized that the power of appointment cannot be re-delegated or subdelegated. It has been written that "[t]he municipal agency which is empowered to employ a person for a particular kind of work cannot delegate the right to exercise such power to another ...." 63 C.J.S. *Municipal Corporations* § 602. And, "[w]hen the power to appoint ... is conferred on a particular body exclusively, it cannot be delegated ...." 78 C.J.S. *Schools and School Districts* § 205. Thus, we have concluded in *Op. S.C. Atty. Gen.*, Op. No. 85-36 (April 11, 1985) that a county council could not "delegate its appointment power over the Greenville Airport Commission by ordinance or by agreement or contract to City Council."

We turn now to Sections 5-9-10 *et seq.* As noted above under the mayor-council or "strong mayor" form, § 5-9-30(1) authorizes the mayor to hire and fire all municipal employees and appointive administrative officers "except as otherwise provided by law ...." *See*, *Miller v. Town of Batesburg*, 273 S.C. 434, 257 S.E.2d 159 (1979). As we read this express language, inasmuch as § 5-9-40 authorizes the "mayor and council" to employ an administrator to assist the mayor, such provision constitutes an exception to § 5-9-30(1). In other words, § 5-9-40 falls into the category of "except as otherwise provided by law ...."

Reference is made in your letter to our 2006 opinion, dated April 27, 2006. There, we concluded that § 5-9-40 "authorizes a city council to appoint, and thus remove, a city administrator." Additionally, we opined that § 5-9-40 "does not grant a mayor separate authority to approve or disapprove the appointment or removal of a city administrator." In our view, "[b]ecause a mayor does not have such authority and if he or she is not given such authority by council, a mayor may not bind the municipality to such a term by including it in a city administrator's contract." Our reasoning was stated as the following:

> [t]hus, we believe the phrase "mayor and council" refers to the mayor with respect to his authority as a member of council and affording him or her the right to act as

> a member of council, but not affording the mayor any additional authority. Alternatively, section 5-9-40 may be read as giving a municipality, acting through its council, which includes the mayor, the authority to employ a city administrator .... Therefore, we opine section 5-9-40 gives the Council, and the Mayor solely as a member of Council, the authority to appoint a city administrator. Accordingly, we conclude the Council holds the incidental power to remove a city administrator. See *State ex rel. Williamson v. Wannamaker*, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948) (stating the power to terminate or remove is incidental to the power to appoint).
>
> Nevertheless, we recognize one could arguably read section 5-9-40 another way, and only a court may make a final determination as to is interpretation. Thus, we suggest the Council either seek clarification from the courts on the interpretation of statute or legislative action to make the statute more clear.

The ambiguity addressed in the 2006 opinion, however, did not involve the question presented here. Our concern in the 2006 opinion was whether, pursuant to § 5-9-40, the mayor is given a separate vote in the form of a "veto" in the appointment or removal of the administrator, or is to act "solely as a member of Council." While it is true, as you point out, that the opinion contains the phrase "if he or she is not given such authority by Council," it appears that this language is written in the context of whether or not the mayor has "separate authority to approve the appointment or removal of a City Administrator." Regardless, this language is not binding with respect to your question. Here, you wish to know whether the Blythewood Town Council may delegate the power to employ a town administrator *solely to the mayor*, with no participation by the Council in the appointment process. It is our opinion, based upon the foregoing authorities, that a court would likely conclude that no such delegation may be made.

As we noted in *Op. S.C. Atty. Gen.*, Op. No. 85-36, it is generally recognized that "once the General Assembly has delegated appointment power to a body other than itself, additional delegation may not be made absent statutory authorization." And, as we noted in an opinion dated March 27, 1981, § 5-9-40 expressly provides "that the mayor 'and council' may employ an administrator to assist the mayor in his office." Based upon this express language, we concluded in that opinion that "[i]f the position [of administrator] is abolished, it must be done *by the council* pursuant to the same Code Sections." Thus, it is evident that it has been our previous conclusion that the power provided for in § 5-9-40 may not be re-delegated.

Further, as we stated in an opinion dated December 9, 1970,

> [i]t is the general principle of law, expressed in the maxim, 'delegatus non protest delegare,' that a delegated power may not be further delegated by the person to whom such power is delegated. Merely ministerial functions may be delegated to assistants

> whose employment is authorized, but there is no authority to delegate acts, discretionary or quasi-judicial, in nature.

Moreover, in *Op. S.C. Atty. Gen.*, April 23, 1981, we concluded that "an appointment to a public office involves an act of discretion." Cases referenced above, such as *Crogan, supra*; *City of East St. Louis, supra*; and *Forbes v. Kane, supra, City of Harlan, supra,* as well as *Op. S.C. Atty. Gen.*, Op. No. 85-36, all of which conclude that the appointment power may not be delegated, fully support this view.

A different conclusion was seemingly reached, however, by our Supreme Court in *State ex rel. Wolfe v. Thompson*, 124 S.C. 474, 117 S.E. 717 (1923). There, a 1783 statute incorporating the City of Charleston authorized the appointment of officers by the city council. The council adopted an ordinance vesting such appointments in the mayor, subject to the confirmation of the Council. The Attorney General brought an action challenging the validity of such ordinance alleging that it invalidly deprived a member of the council of "a privilege conferred ... by the act of the General Assembly ...." However, the Court concluded that the ordinance was valid, holding that

> [t]he charter must be construed in its entirety, and when so interpreted it is apparent that the authority to appoint officers by the city council, was merely intended to be permissive, and not exclusive of the mode of selection provided by the ordinance, which was adopted herein by the city council.

Of course, any ordinance is presumed valid. *Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991). Moreover, the *Wolfe* case lends additional support to the validity of the Blythewood ordinance in that *Wolfe* upheld a somewhat similar delegation of authority by the Charleston City Council.

However, in our opinion, *Wolfe* may be confined to its facts. There, the Court concluded that the legislative intent of the act in question supported the conclusion that the authority to appoint officers was "permissive" only. Here, however, the Legislature, in creating the mayor-council form of government – a form which expressly makes the mayor the chief administrative officer and which authorizes the mayor to appoint municipal employees generally "except as otherwise provided by law" – at the same time, enacted § 5-9-40 which expressly placed the power to employ the administrator in the hands of the "mayor and council." Thus, in contrast to *Wolfe*, we deem the legislative intent in establishing the mayor-council form of government as not "permissive," but as prohibiting the further delegation of authority to appoint an administrator to the mayor only. Not only is this conclusion consistent with the general law disfavoring such further delegation, discussed above, but it is in accordance with the intent of the Legislature in generally authorizing the mayor in the "strong mayor" form to appoint and remove municipal officers, except where "otherwise provided by law ...." Accordingly, while *Wolfe* creates some uncertainty, it is our opinion that a

court would likely conclude that Blythewood may not delegate the authority to employ an administrator to the mayor only. In light of our conclusion in this regard, there is no need to address your second question regarding interpretation of the Blythewood ordinance.

Your third question is whether the Town Council by ordinance or otherwise may "require the Mayor to consult with Council prior to suspending or removing municipal employees and appointive administrative officers?" Apparently, the Blythewood ordinance makes consultation with Council a pre-condition to the mayor's exercise of his or her appointment or suspension/removal power authorized by § 5-9-30(1). In our opinion, such a condition may not be imposed.

The South Carolina Supreme Court decision of *State v. Pechilis*, 273 S.C. 628, 258 S.E.2d 433 (1979) is highly instructive here. In *Pechilis* the Court concluded that the procedure whereby nominations for the office of magistrate through advisory elections impermissibly chilled the appointment power of the Governor and Senate. In the Court's view,

> [t]he fact that the Governor is not bound to accept the individual named in such election is not decisive of the present issue. The decisive fact is the effect of such election upon the exercise of the power of appointment.
>
> *State v. Green*, 220 S.C. 315, 67 S.E.2d 509 (1951), though factually dissimilar provides a principle pertinent to this case. In *Green*, the trial court, after a guilty verdict was rendered, requested the jury to return to the jury room and make a recommendation as to the sentence to be imposed on the defendant. Although the court admonished the jury that its recommendation would be purely advisory and the ultimate sentencing decision remained solely within the province of the trial judge, this Court concluded the procedure was erroneous because it invaded the singular power of the court to fix punishment. This Court stated:
>
> > While we have no doubt that the course pursued by the trial judge was prompted by the best motives, and was designed for the purpose of aiding him in determining the punishment to be imposed, yet we feel bound to regard it as a highly irregular if not a dangerous innovation upon well settled legal principles, 220 S.C. at 320, 67 S.E.2d at 511.
>
> Similarly here, while we have no doubt that the holding of advisory elections to "nominate" magistrates is a well method of disclosing the choice of the people, there is simply no authority for this infringement upon the governor's discretion to appoint magistrates. The defendants assert that, since their primaries are advisory only and not binding upon the Governor, they do not contravene the constitutional

> method whereby magistrates are appointed. We disagree. The clear effect of such primaries is to chill the constitutional selection process and abridge the discretionary power of the Governor to appoint magistrates.

273 S.C. at 632-633, 258 S.E.2d at 435.

For the same reasons expressed in *Pechilis* and *Green*, we deem a requirement that the Mayor "consult" with Town Council prior to suspending or removing municipal employees and appointive administrative officers "chills" the discretion bestowed upon a mayor to make such decisions exclusively under the mayor-council form of government. As stated in your letter, § 5-9-30(1) bestows upon the mayor the power "to appoint and, when he deems it necessary for the good of the municipality, suspend or remove all municipal employees and appointive administrative officers." Nothing in this provision states that the mayor must "consult" with Council prior to suspending or removing an employee. An ordinance establishing such a requirement would, in our opinion, impose conditions upon the mayor's discretion which state law does not authorize.

Conclusion

It is well settled that a municipal ordinance may not vary state law. *City of North Chas. v. Harper*, 306 S.C. 153, 410 S.E.2d 569 (1991). On the other hand, any ordinance is entitled to a presumption of validity. Thus, only a court may set an ordinance aside. Section 5-9-40 expressly provides that the "mayor and council" may "employ an administrator to assist the mayor in his office." In our opinion, the express language of this provision does not permit a municipal council by ordinance to delegate to the mayor the exclusive power to appoint a town administrator where state law expressly states that such employment must be made by the mayor and council. As the Court concluded in *Commonwealth v. Crogan, supra*, a city ordinance "cannot change the law" thereby depriving officials of the powers bestowed upon them by state statutes. Numerous other decisions, cited herein, are in accord.

We note that there appears to be a contrary decision of the South Carolina Supreme Court in *State ex rel. Wolfe v. Thompson, supra*. This case concluded, based upon legislative intent, that further delegation of the appointment power by ordinance was valid. However, in contrast, here, we deem the legislative intent in establishing the mayor-council form of government as not "permissive" but as prohibiting the further delegation of authority to appoint an administrator to the mayor only. Not only is this conclusion consistent with the general law disfavoring such further delegation, but it is in accordance with the intent of the Legislature in carefully authorizing the mayor in the "strong mayor" form to appoint and remove all municipal officers except where "otherwise provided by law ...." Section 5-9-40 is such an exception. Accordingly, it is our opinion that a court would likely conclude that Blythewood may not delegate the authority to employ an administrator to the mayor only.

Moreover, it is also our opinion that an ordinance requiring the mayor – who is given exclusive authority to suspend or remove municipal employees under the mayor-council form of government – to "consult" with council before taking such removal or suspension action pursuant to § 5-9-30(1), is invalid. As our Supreme Court has recognized in other contexts, even though non-binding, the requirement to "consult" it unnecessarily "chills" the discretion given the mayor pursuant to state law.

Very truly yours,

Henry D. McMaster
Attorney General

By: Robert D. Cook
Deputy Attorney General

RDC/an