ALAN WILSON
ATTORNEY GENERAL

April 20, 2011

Daniel L. Draisen, Esquire
Law Offices of Krause, Moorhead and Draisen, P.A.
207 East Calhoun Street
Anderson, SC 29621

Dear Mr. Draisen:

You represent the Town of Pendelton ("Town"), a municipality chartered in Anderson County. Your letter provides the following background:

> [o]ver the past several years, the Town has contracted with the County of Anderson to provide law enforcement services to it at a sizable cost (over $600,000/yr.). The Town believes the County has not been providing the minimum level of services required by the contract, and the Town now wishes to terminate the contract with the County.

You request this office to address the following issues:

1. Is the Town required to provide at least a minimum level of law enforcement services?

2. If the Town is required to provide a minimum level of law enforcement services, how is the "minimum level" determined for an existing municipality?

3. If the Town is not required to provide a minimum level of law enforcement services, is the County in which the municipality is located required to provide minimum law enforcement services to the municipality?

Law/Analysis

In your letter, you reference S.C. Code Ann. §5-1-30, which provides, in part:

> (A) Before issuing a corporate certificate to a proposed municipality, the Secretary of State shall determine based on the filing submitted and the recommendation of the Joint Legislative Committee on Municipal

> Incorporation whether the proposed municipality meets the following requirements:
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> > (5) the area seeking to be incorporated has filed a proposal for providing either directly or indirectly a substantially similar level of law enforcement services to the area's existing law enforcement coverage prior to seeking incorporation . . . [Emphasis added].

Prior to the 2006 amendment, §5-1-30(A)(5) stated that a proposal had to be filed for providing either directly or by contract a minimum level of law enforcement services as required in regulations promulgated by the State Law Enforcement Division ("SLED"). 2005 Acts No. 77, §1. The 2006 amendment deleted "as required in regulations promulgated by the State Law Enforcement Division" and added the current language. In the comments to the Act it was noted: "By passing this act, the General Assembly intends and declares that any regulations passed by the State Law Enforcement Division to comply with the requirements of Act 77 of 2005 do not for any past, present, or future time represent or establish any minimum level of law enforcement service requirements for existing municipalities or towns or areas seeking to incorporate as municipalities or towns." However, §5-1-30(A)(5) applies only to proposed municipalities and does not address existing municipalities. See State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999)[holding all rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute's intended purpose].

In an opinion of this office dated August 2, 2005, we discussed whether SLED should issue emergency regulations to carry out its regulatory responsibilities under the 2005 Act. Relevant to the issues presented in your request, we addressed the importance of law enforcement protection when considering any new incorporation.

> The reason for this emphasis is fundamentally important. As our Supreme Court recognized in Tovey v. City of Chas., 237 S.C. 475, 117 S.E.2d 872, 874 (1961), a municipal corporation "is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purpose of local government thereof." (emphasis added). The provision of adequate law enforcement services is typically an important reason - sometimes, the most important reason - justifying municipal incorporation. As you note in your letter, many times, Sheriff's offices in the more rural counties are underfunded and, through no fault of the Sheriff, lack sufficient manpower. This problem was illustrated for example, in Boling v. City of Jackson, 279 So.2d 590 (Miss. 1973), the Mississippi Supreme Court reversed the lower court's denial of incorporation to the town of Pearl, Mississippi. The Supreme Court found as important to its decision that incorporation was mandated was that, among other immediate needs of the 15,000 person community of Pearl, "[t]here are only three constables and three justices of the peace and six deputy sheriffs for the entire County of Rankin, the result being that there is no concentration of law officers in Pearl. On the average, it takes forty-five minutes to get someone

> from the Sheriff's office in Brandon." 279 So.2d at 592. In concluding that the community had met the requirements of incorporation, the Court concluded that
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> > [t]he record shows without dispute that there is an urgent need for the incorporation of the Pearl area into a municipality so that the community can cope with the problems of police protection, garbage, fire protection, drug control, health hazards, recreation, sanitation, street improvement and zoning . . . . In our opinion, the law does not require that this large and growing community, beset by so many problems that could be alleviated at least in part within a reasonable time if allowed to incorporate, should be denied the right to incorporate until some indefinite time in the future when it may be annexed by the City of Jackson.
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> Id. at 593. (emphasis added). The problems facing Sheriffs in rural counties in South Carolina - one of the principal ones, that of being underfunded - is recognized in a study conducted by Clemson University which states that "... law enforcement coverage over large rural areas is inadequate." See, Ransom, "Planning for Development In Rural Areas: An Assessment of the Strategic Plans for South Carolina's Enterprise and Champion Communities." found at www.strom.clemson.edu/opinion /ransom/rural.html.

We further noted in the 2005 opinion that it is evident "the formation and operation of a municipal police department is an important focus of the establishment of a municipality in South Carolina." Indeed, §5-7-30 grants every municipality in the State the power to "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 . . ." We have previously stated that "[a] primary function of a municipal corporation is the preservation of public peace and order. In keeping with such is the authority of a municipality to establish a police force." Ops. S.C. Atty. Gen., August 2, 2005; November 6, 1992 [citing 62 C.J.S. Municipal Corporations §134, p. 279]. Pursuant to §5-7-110, a municipality may "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." We have previously observed that §5-7-110 gives "'broad authority'" with respect to a municipal police department." Op. S.C. Atty. Gen., April 28, 1998.

Prior opinions of this office also recognize that, pursuant to §§ 23-13-50 et seq., and 23-15-40 et seq.: "[t]he general law in this State presently requires a sheriff and his deputies to patrol their county and provide law enforcement services to its citizens." Ops. S.C. Atty. Gen., November 6, 1992; April 11, 1985. Such is consistent with opinions of this office recognizing the status of a sheriff as the chief law enforcement officer of a county. Ops. S.C. Atty. Gen., March 16, 2011; September 10, 2010; April 20,

2006. As noted in an opinion dated March 1, 2005, a sheriff's jurisdiction encompasses the entire county. Section 23-13-70 requires deputy sheriffs to "patrol the entire county" where they serve as deputies. Such enactment obligates deputies "to prevent or detect crime or to make an arrest . . . for the violation of every law which is detrimental to the peace, good order and morals of the community." Moreover, §23-13-20 prescribes the oath of office of a deputy sheriff to be "alert and vigilant to enforce the criminal laws of the State." [Emphasis added].

In an opinion dated May 20, 1996, we noted the decision by the Missouri Supreme Court in McKittrick v. Williams, 346 Mo. 1003, 144 S.W.2d 98 (1940), which discussed the duties and responsibilities of a sheriff as compared to other law enforcement officials in the county. The court wrote with respect to the sheriff's powers:

> [h]is authority is county wide. He is not restricted by municipal limits. For better protection and for the enforcement of local ordinances the cities and towns have their police departments or their town marshals. Even the state has its highway patrol. Still the authority of the sheriff with his correlative duty remains. It has become the custom for the sheriff to leave local policing to local enforcement officers but this practice cannot alter his responsibility under the law. . . . There is no division of authority into those of the sheriff and the police. Each is a conservator of the peace possessing such power as the statutes authorize . . . In every county there are a number of peace officers of varying authority. They and the sheriff must work in harmony.

McKittrick, 144 S.W.2d at 104. The Virginia Supreme Court also recognized in Commonwealth ex rel. Davis v. Malbon, 195 Va. 368, 78 S.E.2d 683, 686 (1953), that the creation of two separate and distinct police departments in a county, one in a municipality and the other in the county, did not relieve the county sheriff of his duty to enforce the criminal laws of the state within the county.

The referenced 1985 opinion of this office indicated that as a matter of public policy, a county is prohibited from contracting with a residential subdivision to provide additional law enforcement protection and services to that subdivision for a fee. The opinion cited the decision of the South Carolina Supreme Court in Green v. City of Rock Hill, 149 S.C. 234, 147 S.E.2d 346, 360 (1929), where it was stated "[a]s a general rule . . . [a governmental body] . . . may not contract with . . . the public to discharge a purely public duty owed to the public generally."

However, the 1985 opinion further commented:

> . . . while a county and county officials are not as a general matter obligated to perform services within the corporate limits of a city, the General Assembly has provided by statute for municipal residents to contract for county services in certain situations. Section 4-9-40 of the Home Rule Act authorizes a county to "perform any of its functions, furnish any of its services within the corporate limits of any municipality, situated within the county, by contract with any individual, corporation or municipal governing body, subject always to the

> general law and the Constitution of this State regarding such matters." Such services cannot be provided, however where the service "is being provided by the municipality or has been budgeted or funds have been applied for" unless permission is given by the municipal governing body. See also, §23-27-10 et seq. and §4-9-30(5) [authorizes county to create special districts for police protection]. . . .

Another opinion of this office dated May 17, 1978, stated

> [t]here are currently no state statutes which would prevent . . . [a sheriff's department] . . . from offering contract law enforcement services to municipalities . . . [within that same county] . . . Both counties and incorporated municipalities have the ability to contract, a power given them by Sections 4–9–30(3) and 5–7–60 of the Code . . . The ability of political subdivisions to enter into an agreement for the joint administration, responsibility and sharing of the costs of services with other political subdivisions is granted by Article VIII, Section 13 of the South Carolina Constitution and §6–1–20, Code. . . .

The 1985 opinion concluded that such statutes enable an incorporated municipality to contract with a county to provide law enforcement services to the municipality. The opinion further stated:

> [t]here are currently no state statutes which would preclude a municipality from making an appropriation in its budget for payment of law enforcement services to the county general fund with later disbursement to the sheriff's department. . [However] . . . [e]nabling legislation would be necessary in order for the municipality to pay the same funds directly into the Sheriff's Department County budget account.

Another opinion of this office dated June 13, 1985, indicated that a county could create a special tax district for police protection. Citing a opinion from May, 1978, the opinion further indicated that a county and a political subdivision could contract with one another to provide for the joint administration of services such as law enforcement. The opinion stated:

> [w]e could caution . . . that any contract between the county and a special tax district created for law enforcement purposes should take into account §23-13-70 which mandates that sheriff's deputies patrol the entire county. Thus, even where the county decides to contract with a separate political subdivision . . . care should be taken in drafting any such contract, not to limit the sheriff's discretion in the placement of his deputies or the providing of adequate personnel in other areas of the county. In short, any such contract must be consistent with the terms of Section 23-13-70.

On another point, opinions of this office, again referencing §23–13–70, commented that "[t]he assignment of deputies within the county remains within the sheriff's discretion." Ops. S.C. Atty. Gen., November 6, 1992; June 13, 1985.

We would further note our opinion dated September 29, 2006, where the Town of Gray Court requested whether it could contract with a private security company for law enforcement purposes. Gray Court explained the agreement with the Laurens County Sheriff's Department for the services of a deputy was not working out and, because of the costs involved there was no present consideration to Gray Court having its own police department. Citing to our previous opinions, we reiterated that while a municipality is authorized to employ police officers, it has no authority to contract with a private security agency for law enforcement purposes. See Ops. S.C. Atty. Gen., April 7, 2008; March 1, 1989; March 6, 1980.

This office advised the Town of Gray Court, however:

> one alternative that may be considered is allowing deputy sheriffs to "moonlight" and provide law enforcement services to the Town as authorized by S.C. Code Ann. §§23-24-10 et seq. Section 23-24-10 states that
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> > [u]niformed law enforcement officers, as defined in Section 23-6-400(D)(1), and reserve police officers, as defined in Section 23-28-10(A), may wear their uniforms and use their weapons and like equipment while performing private jobs in their off duty hours with the permission of the law enforcement agency and government body by which they are employed.
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> Section 23-24-20 provides that
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> > [e]ach agency head shall determine before such off-duty work is approved that the proposed employment is not of such nature as is likely to bring disrepute on the agency, the officer, or the law enforcement profession, and that the performance of such duties and the use of such agency equipment is in the public interest.
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> As to off duty work by a deputy sheriff in the same county in which he is employed, an opinion of this office dated April 18, 1995 stated that
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> > [a]s long as law enforcement officers are moonlighting within their jurisdiction, they possess complete law enforcement authority while working off-duty pursuant to Section 23-24-10 et seq. With respect to deputy sheriffs, this jurisdiction includes the entire county.
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> Another opinion of this office dated December 7, 1994 concluded that

> [d]eputy sheriffs are given law enforcement authority throughout the county, including sites within incorporated town limits. They are allowed to work off duty performing private jobs in uniform and armed under . . . (Section) . . . 23-24-10 with the permission of the enforcement agency and governing body by which they are employed.

Consistent with such, the Town could consider allowing deputy sheriffs to "moonlight" and provide law enforcement services to the Town in the manner referenced.

Op. S.C. Atty. Gen., September 29, 2006.

Conclusion

We are cognizant that "the desire for adequate law enforcement services is most often an impetus, if not the driving force, behind the formation of a municipal corporation." Op. S.C. Atty. Gen., August 2, 2005. We have also stated there is an absence of authority requiring a municipality to establish a police force. Op. S.C. Atty. Gen., November 6, 1992. We adhere to that opinion today. A municipality is granted broad authority to provide for the proper law enforcement in such municipality, but we are unaware of any State statute or case law in this State defining such. In the April 7, 2008, opinion, we addressed the responsibility of the sheriff's department to maintain patrols and provide law enforcement services to a special tax district, and how these patrols relate to "police protection" as provided in the county ordinance establishing the special tax district. Therein, we noted an Ohio Attorney General opinion dated December 21, 1993, which defined "police protection" as ". . . services and programs that protect the public by preventing crimes." We further cited to a Texas appeals court which defined such term as ". . . the prevention of crime and the apprehension, punishment and rehabilitation of criminals." Alvarado v. City of Brownsville, 865 S.W.2d 148, 157 (Tex. App. 1993), *rev'd on other grounds*, 897 S.W.2d 750 (Tex. 1995). As to your specific question regarding the minimum level of law enforcement, we refer to a Michigan Attorney General Opinion dated September 5, 1980, stating the following:

> [i]nasmuch as no definition of the term 'police protection' appears in [the statute] nor in the other authorities above cited, it must be concluded that the legislature, in enacting [the statute], intended that the term 'police protection', and the minimum number of peace officers required in a charter township, be they full-time or otherwise, would be variable and dependent on particular characteristics of the charter township in question (*eg*, population, geographic size, proximity to cities, et alia). Accordingly, the number of police officers which may be deemed necessary by a charter township board to afford police protection will vary in each charter township, and the township board is provided discretion in making the determination. [Citation omitted].

As stated above, this office has advised it appears that while a sheriff, as chief law enforcement officer of a county, is statutorily obligated to patrol his county, which presumably would include a municipality within that county, a sheriff, as a county official, is not generally considered to be obligated

to provide specific services within a municipality and could offer contract law enforcement services to a municipality. Ops. S.C. Atty. Gen., September 10, 2010; August 25, 2006; November 6, 1992. However, consistent with a sheriff's duties to provide law enforcement services to his citizens and "to prevent or detect crime or to make an arrest . . . for the violation of every law which is detrimental to the peace, good order and morals of the community," we advise that intergovernmental cooperation is necessary to provide law enforcement services to the Town.

However, it is not the province of this office to make factual determinations, so we are unable to render an opinion on the adequacy of law enforcement services provided to the Town pursuant to the agreement.[1] As to any specific question regarding this matter, we would refer you to the county attorney concerning these issues. We advise, however, that any determination regarding law enforcement services should be based on the particular characteristics of the Town, in light of the level of law enforcement services already provided by the County of Anderson by agreement and/or established by the Town.[2]

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

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[1]We note that "public policy is against the forfeiture of a charter of a municipal corporation if it can be sustained within the law and a presumption will be indulged in its behalf. . ., " particularly since no steps have apparently been taken by the State (*i.e.*, through the General Assembly or the Secretary of State) to cancel the charter of incorporation. Op. S.C. Atty. Gen., February 12, 1996. [citing §5-1-100(B) , which provides, *inter alia*, "[i]f the Secretary of State determines that any previously incorporated municipality is neither performing municipal services nor collecting taxes or other revenues and has not held an election during the past four years, he shall cancel the certificate of the municipality"].

[2]We note the request letter provided to us neither the specific terms of the agreement with County of Anderson nor the level of law enforcement services provided by it.