



ALAN WILSON
ATTORNEY GENERAL

January 3, 2013

The Honorable William "Bo" McMillan
Mayor, City of Mullins
P. O. Drawer 408
Mullins, South Carolina 29574

Dear Mr. McMillan:

Attorney General Alan Wilson has referred your letter of December 5, 2012 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: Is the City of Mullin's Ordinance number 11-304 enforceable under South Carolina law? In other words, may a municipal council remove by ordinance certain powers of a mayor and assign them to a mayor pro tempore?

Short Answer: Ordinance number 11-304 appears to have potential issues under South Carolina law. Under a Council form of government, a municipal council may delegate some duties statutorily, but a mayor pro tempore has statutory limitations and requirements.

Law/Analysis:

The City of Mullin's ordinance number 11-304 reads:

1. **Amend Section 2.04.120. Presiding Officer:** The Mayor Pro-Tem shall be the chief executive officer of the City. He/She shall cause the ordinances and laws for the government of the City to be duly executed and put in force. He/She shall preside at all meetings of the Council and in his/her absence, the Council shall elect a presiding officer for the meeting and he/she shall preside.
2. **Amend Section 2.04.130. Appointment of Committees:** The Mayor Pro-Tem shall appoint all Committees and especially a standing committee of finance, streets and sanitation, police, fire, water-sewer-waste treatment, and recreation.
3. **Amend Section 2.04.150. Contracts, agreements, and checks:** The Mayor Pro-Tem shall sign in the name and on behalf of the Council, all contracts and agreements made by the Council, and shall see that such contracts and agreements are faithfully performed by those contracting with the City. He/She shall also sign all deeds to real property sold by the City, and all checks and other obligations issued or authorized by the Council.

In determining whether a local ordinance is valid, it must pass a two-part test. The first prong of the test is to determine if the municipality was authorized to adopt the ordinance. The second prong is if the municipality had the power to adopt the ordinance whether it is consistent with the South Carolina

Constitution and laws. Denene v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (citing Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000)).

In analyzing the first prong (whether the municipality was authorized to adopt the ordinance) one first must determine what statutes govern the municipality. In South Carolina, municipal governments have no inherent powers other than what the legislature has given statutorily to a municipality, and any questions of power will be construed against the municipality. Ops. S.C. Atty. Gen., 1967 WL 8693 (December 19, 1967); 1968 WL 8878 (July 26, 1968); 1987 WL 245451 (May 7, 1987) (all citing Lomax v. City of Greenville, 225 S.C. 289, 82 S.E.2d 191 (1954)). South Carolina law specifies three different forms of municipal government:

- 1) Mayor-council (§ 5-9-10ff),
- 2) Council (§ 5-11-10ff), and
- 3) Council-manager (§ 5-13-10ff).

Every municipality must choose one of the three forms of government to form under South Carolina law. S.C. Code §5-5-10 (1976, as amended). Based on discussions with you and information on the City's website, this Office understands that the City of Mullins is operating under a Council form of government and therefore would be subject to Title 5 Chapter 11 of the South Carolina Code of Laws. Under a Council form of government, a mayor is merely another member of the municipal council and has the same power (one vote) as each of the other councilman. S.C. Code § 5-11-30.

South Carolina Code § 5-7-190 specifies that a mayor pro tempore should be elected for a term of not more than two years and shall act as mayor "during the absence or disability of the mayor" and is authorized to serve as mayor only when there is a vacancy until a successor mayor is elected. This State's Supreme Court has upheld that a mayor pro tempore may serve and vote on behalf of a mayor who is absent from a meeting. See, e.g. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984). Additionally, South Carolina Code § 5-7-200 specifies the grounds for forfeiture of the office of a mayor or a councilman under one of three circumstances if he:

- 1) lacks at any time during his term of office any qualification for the office prescribed by the general law and the Constitution;
- 2) violates any express prohibition of Chapters 1 to 17 [of Title 5]; or
- 3) is convicted of a crime involving moral turpitude.

Based on the information provided in your letter, as mayor you have neither forfeited the office, nor are you absent or disabled. Therefore these exceptions would not prevail over any of your statutory or assigned powers and duties as mayor to allow the mayor pro tempore to accept your powers and duties.

Generally, the purpose of ordinances passed by a city council will be presumed to be constitutional as opposed to unconstitutional. City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961). However, in analyzing the City of Mullins Ordinance 11-304, it appears Ordinance 11-304 violates statutory law concerning a mayor pro tempore, and therefore would not likely be upheld in court under the two-prong test.

However, if the City of Mullins council were to assign these same duties to someone other than the mayor pro tempore, would those same duties be upheld? It seems many of the duties Ordinance 11-304 attempts

to assign to the mayor pro tempore are duties delegated to a mayor under a mayor-council form of government. S.C. Code § 5-9-30. There may be some confusion because in a Council form of government, a mayor is just another member of council and has the same power (one vote) as each of the other councilman. S.C. Code § 5-11-30.

Under a Council form of government, legislative and administrative powers are vested in the municipal council. S.C. Code § 5-11-30. Additionally, a city council may create municipal departments, offices or agencies and prescribe their functions, hire an administrator and hire an officer. S.C. Code § 5-11-40. However, a city council should not delegate legislative or policy-making powers but may delegate administrative and ministerial powers. See Op. S.C. Atty. Gen., 1985 WL 259106 (January 7, 1985).

Under South Carolina law, all municipal powers not otherwise proscribed statutorily belong to the municipal council. S.C. Code § 5-7-160. Additionally, a city council is required to meet monthly and is authorized to "determine its own rules and order of business and shall provide for keeping minutes of its proceedings which shall be a public record." A council is authorized to issue emergency ordinances without regard to readings, public hearings, publications, requirements, or public notice. Such emergency ordinances automatically expire sixty-one days after enactment. S.C. Code § 5-7-250. In this situation, it does not appear that Mullins ordinance 11-304 was an emergency ordinance so that exception would not apply.

This Office has consistently held a council cannot usurp duties that are specifically granted statutorily to a mayor. Op. S.C. Atty. Gen., 2012 WL 440544 (January 13, 2012) (citing Op. S.C. Atty. Gen., 1979 WL 43108 (October 12, 1979)). Additionally, "departmental powers conferred by statute cannot be overridden by local ordinance, taken away or limited by the municipal council or governing body, or overridden by an officer acting beyond his or her authority..." Op. S.C. Atty. Gen., 2012 WL 440544 (January 13, 2012) (citing 62 C.J.S. Municipal Corporations § 568). As we further explained in a prior opinion:

"[I]t is well established that a municipal council may not delegate discretionary duties to individual members of council. It has thus been recognized as the governing rule" that

[a] municipal governing body cannot delegate to a municipal officer or even to one of its own committees the power to decide legislative matters properly resting in the judgment and discretion of that body or to one member of the governing body. Thus, acts by individual members of a public body cannot bind the municipality unless officially sanctioned in accordance with a statute. The members of the governing body are chosen by the people to represent the municipality and they are charged with a public trust and the faithful performance of their duties and the public is entitled to the judgment and secretion of each member although the governing body may refer matters coming before it to a committee for examination and fact-finding.

Op. S.C. Atty. Gen., 2003 WL 22862787 (November 13, 2003) (citing 56 Am.Jur.2d, Municipal Corporations, § 134). This office would urge caution in passing any such Ordinances to ensure compliance with legislative intent under a Council form of government.

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Please note if the City of Mullins were under a Mayor-council form of government, the ordinance would likely also present issues. South Carolina Code § 5-9-10 provides that "[e]xcept as specifically provided for in this chapter, the structure, organization, powers, duties, functions and responsibilities of municipal government under the mayor-council form shall be as prescribed in Chapter 7." South Carolina Code § 5-9-30 says the mayor "shall be responsible to the council for the administration of all city affairs placed in his charge by or under Chapters 1 through 17 [of Title 9]." Under a Mayor-council form of government, "the 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. All departments, offices and agencies under the direction and supervision of the mayor shall be administered by an officer appointed by and subject to the direction and supervision of the mayor. The council shall adopt an annual budget for the operation of the municipality and capital improvements." S.C. Code § 5-9-40. All three parts of Mullin's ordinance would likely be found to violate parts of South Carolina Code § 5-9-30 if the City of Mullins were a Mayor-council form of government.

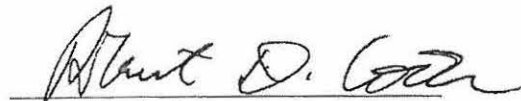
Conclusion: Based on the understanding that the City of Mullins is organized as a Council form of government under Title 5 Chapter 11 of the South Carolina Code of Laws, it is likely a court would find Ordinance 11-304 violates statutorily-prescribed duties of a mayor pro tempore and could possibly violate other laws. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let me know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General