ALAN WILSON
ATTORNEY GENERAL

December 28, 2012

The Honorable Katrina Shealy
Senator, District 23
613 Gressette Building
Columbia, SC 29201

Dear Senator Shealy:

We received your request for an opinion of this Office regarding the position of "Police Commissioner" for the Town of South Congaree (the "Town"). By way of background, the South Congaree Town Code §37.01 established the Town's Police Department (the "Department"). The ordinance also creates the position of Chief of Police, setting forth his/her authority and duties. In addition, the South Congaree Town Council ("Town Council") created the position of "Police Commissioner." The South Congaree Town Code §30.05 provided that:

> [t]he Town Council shall have the power to establish subordinate offices as it sees fit and assign to the offices appropriate duties. The following have been so established: Police Commissioner . . .

However, upon information and belief, Town Council has since amended §30.05 and thereby abolished the position of "Police Commissioner."[1] With this background information in mind, you ask us whether Town Council is authorized to establish the position of "Police Commissioner."

Law/Analysis

We must begin our analysis with the basic principle that a local ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. Scranton v. Willoughby, 306 S.C. 421, 412 S.E.2d 424 (1991); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). An ordinance will not be declared invalid unless it is clearly inconsistent with general State law. Hospitality Ass'n of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995). Only the courts, and not this Office, would possess the authority to declare any ordinance invalid. Therefore, any ordinance would have to be followed until a court sets it aside. Op. S.C. Atty. Gen., April 2, 2012 (2012

[1]For purposes of this Opinion, we will assume that Town Council abolished the office of "Police Commissioner" by ordinance in a manner not inconsistent with applicable State law. See S.C. Code Ann. §§5-7-260, -270.

WL 1260182). In a prior opinion of this Office dated January 3, 2003 (2003 WL 164476), we advised that "... keeping in mind the presumption of validity and the high standard which must be met before an ordinance is declared invalid, while this office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with a state statute. Thus, ... an ordinance may continue to be enforced unless and until set aside by a court of competent jurisdiction."

With this background in mind, we noted in the April 2, 2012, opinion, that the "Home Rule" amendments to Article VIII of the South Carolina Constitution state:

> [t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

According to the Office of the South Carolina Secretary of State and the South Congaree Town Code, the Town has adopted the Council form of municipal government.[2] Town Council's authority under this form of government is found in S.C. Code Ann. §5-11-10 *et seq*. Pursuant to §5-11-10, "[e]xcept as specifically provided for in this chapter, the structure, organization, powers, duties, functions and responsibilities of municipal government under the council form shall be as prescribed in Chapter 7 [of Title 5]." Further, §5-11-30 provides that the powers of a municipality are vested in its council: "[a]ll legislative and administrative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council. Each member of council, including the mayor, shall have one vote." Significantly, §5-11-40 explains the various powers of the council in a council form of government:

> (a) The council may establish municipal departments, offices or agencies . . . and may prescribe the functions of all departments, offices, and agencies. The council may hire an administrator to assist the council.
>
> (b) All departments, offices and agencies may be administered by an officer appointed by and subject to the direction and supervision of the council.
>
> (c) The municipal council shall adopt annually, prior to the beginning of the fiscal year, operating and capital budgets for the operation of city revenue including taxes necessary to meet the financial requirements of the budgets adopted. . . . [Emphasis added].

Clearly, the formation and operation of a municipal police department is an important focus of the establishment of a municipality in South Carolina. We have previously stated that "[a] primary function of a municipal corporation is the preservation of public peace and order. In fact, the desire for adequate law enforcement services is most often an impetus, if not the driving force, behind the formation of a

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[2]See South Congaree Town Code §30.01.

municipal corporation. See Op. S.C. Atty. Gen., April 20, 2011 (2011 WL 1740740). In keeping with such is the authority of a municipality to establish a police force." Op. S.C. Atty. Gen., November 6, 1992 (1992 WL 575673) [citing 62 C.J.S. Municipal Corporations, §134]. Specifically, §5-7-110 authorizes a municipality to "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." With respect to this statute, we have noted that §5-7-110 gives municipalities "broad authority" regarding a municipal police department. See Op. S.C. Atty. Gen., April 28, 1998 (1998 WL 261526).

As we have previously observed, the autonomy and authority of municipalities has increased significantly since the advent of Home Rule. See, *e.g.*, Op. S.C. Atty. Gen., March 20, 2012 (2012 WL 1036301). The relevant provisions of the South Carolina Constitution, often referred to as the Home Rule Amendments, are found in Article VIII. Section 17 of Article VIII provides:

> [t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

The South Carolina Supreme Court recognized in Williams v. Town of Hilton Head, 311 S.C. 417, 429 S.E.2d 802, 805 (1993) that "by enacting the Home Rule Act ... the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government." As the Court explained, the doctrine of Dillon's Rule provided that a municipal corporation possessed only those powers expressly granted, "those necessarily or fairly implied" from such express powers, and "those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable." Id., 429 S.E.2d at 804. Considering Article VIII in conjunction with the Home Rule Act, the Court concluded municipalities now have the authority to "enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and the general law of the state." Id., 429 S.E.2d at 805.

In Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361, 363 (1999), the Court declared that, pursuant to §5-7-30, "... municipalities enjoy a broad grant of power regarding ordinances that promote public safety.... The exercise of a municipality's police power is valid if it is not arbitrary and has a reasonable relation to a lawful purpose." Thus, while the powers bestowed by "Home Rule" upon municipalities are now broad, it is clear not only from the language of Article VIII itself, but the decisions of the Court, that neither Article VIII nor the concept of "Home Rule" bestows unlimited powers upon municipalities. Pursuant to S.C. Const., art. III, §1, the Legislature remains vested with "the legislative power of this State." The purpose behind "Home Rule" was simply to remove the Legislature from interference in the day-to-day local affairs of municipalities.

In addition, we note the general rule as stated by the Court in Wright v. City of Florence, 229 S.C. 419, 93 S.E.2d 215, 218 (1956), citing 6 McQuillin, Municipal Corporations, §21.10, as follows:

> 'Specific grant of power to repeal ordinances, however, ordinarily is not necessary since it is the general rule that power to enact ordinances implies power, unless otherwise provided in the grant, to repeal them. It is patently obvious that the effectiveness of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it.' The following is also quoted from the cited section of McQuillin: 'The power of repeal extends, generally speaking, to all ordinances. Indeed, a municipal corporation cannot abridge its own legislative powers by the passage of irrevocable ordinances. The members of its legislative body are trustees for the public, and the nature and limited tenure of their office impress the ordinances enacted by them with liability to change. One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government. Accordingly, in the absence of a valid provision to the contrary, a municipal council or assembly, having the power to legislate on, or exercise discretionary or regulatory authority over, any given subject may exercise that power at will by enacting or repealing an ordinance in relation to the subject.... [Emphasis added].

See Ops. S.C. Atty. Gen., July 11, 2012 (2012 WL 3057451); March 14, 1991 (1991 WL 632942).

A municipal council is vested with all legislative and administrative powers needed to operate town government. Most relevant to your question, we note that in addition to authority of a municipal council to hire an administrator to assist council pursuant to §5-11-40(a), it is also provided in §5-11-40(b) that "[a]ll departments, offices and agencies may be administered by an officer appointed by and subject to the direction and supervision of the council." [Emphasis added]. As we read this provision, a municipal council would thereby be authorized to hire an administrator, *i.e.*, a police commissioner, to assist council with overseeing the administration and operations of a municipal police department. See Op. S.C. Atty. Gen., May 6, 2010 (2010 WL 2320800) [advising that it is fully within the authority of a municipal council to enact reasonable rules and regulations regarding governance of its police force]. Of course, the administrator or police commissioner would be subject to the direction and supervision of council under the council form of government, and would also serve at the pleasure of a municipal council. Id. In addition, because the provisions do not set forth the powers and duties of the such an administrator, the determination of his/her duties is left to the discretion of council.[3] By way of illustration, in an opinion of this Office dated March 30, 1998 (1998 WL 196484), we addressed the authority of the city administrator of Traveler's Rest to dismiss the city's fire or police chief. We concluded that, in the absence of specific authority to do so set forth by city council, the city administrator

[3]We were unable to find any ordinances which previously set forth either the qualifications for or the authority and duties of the "Police Commissioner" in his/her administration of the Department.

had no power to suspend or dismiss the fire chief or chief of police and that such power was left in the hands of council.

Although we are cognizant of §§23-21-10 *et seq.*, which provides for the establishment and administration of a board of police commissioners, we note that these provisions are expressly limited to "any city of not less than twenty and not more than fifty thousand inhabitants." The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 (2000). "The Legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Landis, 362 S.C. 97, 606 S.E.2d 503, 505 (Ct. App. 2004). Moreover, "[w]here the language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464, 465 (2007). We believe the canon of statutory construction, "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*," which holds that 'to express or include one thing implies the exclusion of another, or of the alternative," may be used as necessary guidance in construing these provisions. See Hodges, 533 S.E.2d at 582 [quoting Black's Law Dictionary 602 (7th ed. 1999)].

There appears very little doubt to us that the Legislature intended to provide for and to regulate boards of police commissioners only for those cities with a population exceeding twenty thousand but not exceeding fifty thousand. For our purposes, we note that, according to the 2010 census, the Town's population was 2,306. Clearly, the Legislature did not intend to otherwise limit the authority of municipalities to appoint an administrator, *i.e.*, a police commissioner, to assist in overseeing and operating a municipal police department, as discussed above. See Op. S.C. Atty. Gen., October 4, 1972 (1972 WL 25467) [concluding that in the same section the Legislature had provided that cities with more than five thousand inhabitants may not extend their liens for more than ten years, the section has no provision which limits the duration of the liens for taxes of cities between one thousand and five thousand inhabitants; the fact that the Legislature specifically provided a limit for only those towns with a population exceeding five thousand indicates an intention not to limit the liens of towns with populations between one and five thousand].

Conclusion

Town Council is vested with all legislative and administrative powers needed to operate the Town's government. Pursuant to the Home Rule amendments of Article VIII of the South Carolina Constitution and §5-7-30, Town Council is given authority to enact ordinances for the general welfare of the Town, provided such ordinances are not inconsistent with State law. In keeping with such is the authority of Town Council to establish the Department. It is provided in §5-11-40(b) that "[a]ll departments, offices and agencies may be administered by an officer appointed by and subject to the direction and supervision of the council." As we read this provision, Town Council would be authorized to hire a police commissioner to assist council with overseeing the administration and operations of the Department. Said police commissioner would be subject to the direction and supervision of Town Council, and would also serve at the pleasure of Town Council. In addition, the powers and duties of a

police commissioner would be left to the discretion of Town Council. We would suggest that Town Council consult with the Town's attorney in this regard.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General