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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

March 21, 2000

The Honorable Chad Prosser
Chairman, Horry County Council
P.O. Box 1236
Conway, South Carolina 29528

Dear Mr. Prosser:

Your recent opinion request has been forwarded to me for reply. In your request letter, you state:

> On December 7, 1999, the County Council adopted two ordinances relating to proposed development in the County. Ordinance No. 170-99 approved a Development Agreement between the County and Myrtle Beach Farms Company, Inc. and Burroughs & Chapin, Inc. In addition, Ordinance No. 170-99 authorized and directed the County Administrator to execute and deliver the Development Agreement, but allowed the County administrator to delay execution to allow time for final action by the City of Myrtle Beach on certain matters that would affect the Development Agreement. County Council included language, in Section 1(B), to the effect that "[i]n no event, however, shall execution of the Development Agreement be delayed beyond January 3, 2000."
>
> Ordinance No. 174-99 approved an agreement for the joint development of a business park in conjunction with Dillon, Georgetown, and/or Marion Counties, and, like the Development Agreement Ordinance, authorized and directed the County Administrator to execute and deliver the business park agreement. The County Council included language to allow time for the City of Myrtle Beach to consent to the creation of the business park for the portion of the business park that would be within the boundaries of the City of Myrtle Beach. Specifically, Ordinance No. 174-99, in Section 4(b), provided that "[i]f the City of Myrtle Beach has not consented to the creation of the Multi-County Business Park by January 3, 2000, then the County Administrator is authorized to execute and deliver an Agreement in which the properties located within the limits of the City of Myrtle Beach are not included in the

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Request Letter

Park." I need to point out to you that the Horry County School District has brought a declaratory judgment action challenging, among other things, the constitutionality of Ordinance No. 174-99; however, the School District's suit does not contest the execution provisions of the Ordinance.

Since passage of Ordinance Nos. 170-99 and 174-99, County Council has adopted on two occasions a resolution extending the time for the County Administrator to execute the respective documents. Resolution No. 256-99 extended the date until January 18, 2000, and Resolution No. 4-00 extended the date until February 18, 2000. The County's efforts to conclude its work on all matters relating to these two ordinances have continued beyond the time set for the County Administrator to execute the agreements. For example, it is anticipated that County Council will give third reading approval on March 21, 2000, to an Intergovernmental Agreement relating to certain financial matters associated with the business park. In addition, the County has been in discussions with Dillon, Georgetown, and Marion Counties on their interest in participating in the business park. Final action by the City of Myrtle Beach on matters affecting the Development Agreement and Multi-County Business Park has not been completed, but is imminent. Simply put, execution of the agreements by the County Administrator at the times set by the County Council could not occur because matters relating to the agreements had not been completed. As a final comment, I expect the County Council to consider a resolution at its meeting March 21, 2000, to authorize the County Administrator to execute the agreements at a time subsequent to the passage of the resolution.

QUESTION

Given that the agreements could not be executed because work on matters relating to them had not been completed, is the County Administrator now prevented from executing the agreements because passage of the dates set for the execution of the agreements?

Pursuant to Section 4-9-120 of the South Carolina Code of Laws, "legislative action" of a county governing body must be taken by ordinance. "Non-legislative action" may be taken by resolution or similar method. Op. Atty. Gen. dated October 1, 1976. A legislative act is an act that predetermines what the law shall be for the regulation of future cases falling under its provision. Life of the Land v. City Council of Honolulu, 606 P.2d 866 (Haw. 1980). A non-legislative act, or administrative act, is one that executes or administers a law. Id. The crucial test for determining that which is legislative from that which is administrative or executive is whether the action taken was one making a law, or executing or administering a law already in existence. Kelley v. John, 75 N.W.2d 713 (Neb. 1956).

Courts in other jurisdictions have typically found that the granting of time extensions is a non-legislative act which need not be made by ordinance. For example, in Hui Malama Aina O Ko'olau v. Pacarro, 666 P.2d 177 (Haw. Ct. App.1983), plaintiffs argued that time extensions granted by council were amendments or revisions of the ordinance which could only be made by ordinance. The court disagreed finding the time extensions did nothing to change the effect or requirements of the ordinance. The court further found the granting of an extension under the ordinance was a non-legislative act which need not be made by ordinance because "[i]n exercising its non-legislative power, the City Council may do so by resolution or by resorting to some other parliamentary procedure, such as by voting on a motion made at council meeting."

This Office has long recognized the general rule of law which provides "an ordinance cannot be amended, repealed or suspended by an order or resolution, or other act by a council of less dignity than the ordinance itself." However, for various reasons, this rule is not applicable in this situation. A time extension is not an amendment or revision of an ordinance. Instead, it is a non-legislative act affecting the execution of a law rather than the substance of the law. Here, in essence what council is doing is instructing its executive officer, the county administrator, as to the execution of an administrative action. This is not the type of action which county council must take by way of ordinance and, therefore, does not fall within the usual rule that council may only amend an ordinance with another ordinance.

Based on the foregoing, since the Horry County Council may, by resolution, extend the time set in Ordinances Nos. 170-99 and 174-99 for the county administrator to execute the aforementioned agreements, the agreements may now be carried out.

Sincerely yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General

REVIEWED AND APPROVED BY:

Zeb C. Williams, III

Zeb C. Williams, III
Deputy Attorney General