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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 23, 1995

Dennis J. Rhoad, Esquire
Kiawah Island Town Attorney
127 1/2 King Street
Charleston, South Carolina 29401

Dear Mr. Rhoad:

You have advised that an agreement has been reached between the Town of Kiawah Island and the Kiawah Island Community Association, Inc. Such agreement would provide for the issuance of an ordinance summons by the Community Association's security force for violations of the Town's ordinances on the beach between the high-tide line and the low-tide line. You seek clarification regarding the legality of such an arrangement.

By way of background, you state the following:

> In 1993, the Town of Kiawah Island adopted a series of ordinances that governed conduct on the beach (e.g. prohibiting littering, non-permitted camp fires, fireworks, etc.) the Town of Kiawah Island does not employ a police force. The Community Association has a duly licensed premises security force that patrols the private property on the island, which is everything down to the high-tide line (virtually all the property behind the security gate is privately owned). Rather than employ a separate police force to patrol the beach, the Town requested that the security officers of the Community Association issue summons if they observed a violation of the town's beach ordinances while on the beach. Under the arrangement

> envisioned by the Town and the Community Association, the security officer would not arrest or detain anyone; the security officer would merely issue a summons.
>
> The summons would be solely for violation of a Town ordinance pursuant to the legislation passed in 1992 permitting municipalities to use an ordinance summons. See S.C. Code Section 56-7-80 (Cum. Supp. 1993). Section 56-7-80(B) specifically states that the "ordinance summons may not be used to perform a custodial arrest." Section 56-7-80(A) states that any municipal "code enforcement officer" is authorized to use an ordinance summons.

Law/Analysis

The South Carolina Constitution requires Home Rule for counties and municipalities. Art. VIII, Section 7 implements this mandate by stating:

> The General Assembly shall provide by general law for the structure, organization, powers, duties, functions and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided . . . (emphasis added).

In addition, Art. VIII, § 17 provides:

> The provisions of this Constitution and all law 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.

Pursuant to the foregoing Constitutional amendments, the General Assembly has enacted S. C. Code Ann. § 5-7-30 (1976), which provides in pertinent part:

> Each municipality of the State . . . may enact regulations, resolutions, and ordinances, not inconsistent with the constitu-

> tion 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, including the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments and establish uniform service charges relating to them . . . (emphasis added).

Any municipal ordinance adopted pursuant to Section 5-7-30 is presumed to be valid. Town of Scranton v. Willoughby, ___ S.C. ___, 412 S.E.2d 424 (1991). Within the limits of a municipality, an ordinance has the same local force as does a statute. McCormick v. Cola. Elec. St. Ry. Light and Power Co., 855 S.C. 455, 675 S.E. 562 (1910). Any ordinance must be demonstrated to be unconstitutional beyond all reasonable doubt. Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985). The presumption of validity especially applies to legislation relating to a city or a town's police powers. Town of Hilton Head v. Fine Liquors, Ltd., 302 S.E. 550, 397 S.E. 662 (1990).

Only recently, our Supreme Court, in Williams v. Town of Hilton Head Island, ___ S.C. ___, 429 S.E.2d 802 (1993), reaffirmed the considerable degree of autonomy that municipalities now enjoy. The Court held in Williams, that the so-called "Dillon's Rule", long-recognized by our Court in previous cases to limit substantially the power of municipalities to specific statutory authorization or fair implications therefrom was, in keeping with the Home Rule amendments and their implementing statutory authority, no longer valid. Recognizing that Home Rule meant just that, the Court left no doubt as to the intent of the General Assembly:

> This Court concludes that by enacting the Home Rule Act, S.C. Code Ann. § 5-7-10 et seq. (1976), the legislature, intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities 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 a such regulations are not inconsistent with the Constitution and general law of the state. (emphasis added).

429 S.E.2d at 805.

Section 5-7-110 authorizes any 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." The Section further provides that police officers "shall be vested with 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 read this provision as being exclusive with respect to law enforcement in a municipality. See, Ops. Atty. Gen., January 24, 1994 and March 6, 1980. However, in those earlier opinions, we did not consider the impact of Home Rule and particularly the abolition of Dillon's Rule in the Williams case referenced above.

You note in your letter that Kiawah Island has chosen not to maintain a separate police force, pursuant to Section 5-7-110, but instead relies upon a private security detail employed by the Kiawah Island Community Association, Inc. to enforce the laws on the property down to the high water mark, this being largely private property. The problem as you present it, is how the town can now insure enforcement of its ordinances down to the low-water mark consistent with § 5-7-150,[1] in view of the fact that Kiawah does not maintain a police department, and the authority of the private security guards employed does not extend beyond the private property.

The authority and regulation of private security guards is provided for in Section 40-17-10 et seq. Pursuant thereto, a security guard possesses the power of arrest upon the property he is employed to guard or patrol. Accordingly, we have concluded that a private security guard is a "law enforcement officer" on such property for purposes of

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[1]Section 5-7-150 provides in pertinent part that "[f]or the purpose of maintaining proper policing and to provide proper sanitation, the police jurisdiction and authority of any municipality bordering on the high tide line of the Atlantic Ocean is extended to include all that area lying between the high tide line and the low tide line. Such area shall be subject to all the ordinances and regulations that may be applicable to the area lying within the corporate limits of the municipality . . . ."

issuing a Uniform Traffic Ticket pursuant to Section 56-7-10. Op. Atty. Gen., April 30, 1987.

Away from the property, however, a security guard has the same arrest authority as does a private citizen. Op. Atty. Gen., No. 88-90, p.249 (December 21, 1988); Op. No. 84-80, p.199 (July 23, 1984). Thus, the security guard has no power to engage in "hot pursuit" of offenders off assigned property. Op. No. 87-73 (August 4, 1987). Likewise, we have advised that a security guard should not transport to jail an individual he has lawfully placed under arrest on the assigned property, but should utilize a law enforcement officer for such purpose. Op. Atty. Gen., November 9, 1977. As a result, we have previously opined that a municipality could not contract with a private security agency for the purpose of enabling such security guards to arrest on public property. Op. Atty. Gen., April 2, 1980. Security officers would carry with them on public property no more authority than private citizens. Op. No. 77-203, p. 154 (June 29, 1977). However, if a private security guard observes an offense occurring off designated property, he "could make an arrest within the same constraints placed upon any other private citizen." Op. Atty. Gen., August 29, 1986.

As you indicate, Section 56-7-80 specifies in pertinent part:

> (A) Counties and municipalities are authorized to adopt by ordinance and use an ordinance summons as provided herein for the enforcement of county and municipal ordinances. Upon adoption of the ordinance summons, any county or municipal law enforcement officer or code enforcement officer is authorized to use an ordinance summons. Any county or municipality adopting the ordinance summons is responsible for the printing, distributing, monitoring, and auditing of the ordinance summons to be used by that entity.
>
> (B) The uniform ordinance summons may not be used to perform a custodial arrest. No county or municipal ordinance which regulates the use of motor vehicles on the public roads of this State may be enforced using an ordinance summons . . . . (emphasis added).

Other statutory restrictions and limitations are contained in Section 56-7-80, but are not relevant here.

Since the town has no separate police force and a security guard is not a "law enforcement officer" beyond the property assigned to him, the specific question raised here is whether Kiawah can appoint members of the security force of the Kiawah Community Association, Inc. to the position of "code enforcement officer" consistent with Section 56-7-80. It is our opinion that such arrangement would be valid within the caveats set forth below.

Section 4-9-145 establishes the position of "code enforcement officer" for counties. That Section provides:

> The governing body of a county may appoint and commission as many code enforcement officers as may be necessary for the proper security, general welfare and convenience of the county. These officers are vested with all the powers and duties conferred by law upon constables in addition to duties imposed upon them by the governing body of the county. However, no code enforcement officer commissioned under this section may perform a custodial arrest. These code enforcement officers shall exercise their powers on all private and public property within the county. (emphasis added).

This past session, the General Assembly also created the position of "code enforcement officer" for municipalities, using virtually identical language. See, S.C. Code Ann. § 5-7-32.

Previous opinions of this Office addressing your question not only did not consider the effect of a municipality's Home Rule powers, most recently articulated in Williams, but were rendered prior to the enactment of § 5-7-32. However, in our judgment, the Town could now appoint security guards employed by the Kiawah Island Community Association, Inc. as code enforcement officers for the beach area. This would enable these code enforcement officers to issue the ordinance summons specified by Section 56-7-80 in the area between the high and low tide line.

It is true that we have previously stated that police officers should not be registered as private security guards because of potential conflicts of interest. See, Op. Atty. Gen., March 6, 1990; February 3, 1989; September 24, 1985. We have given similar advice with respect to state constables. Op. Atty. Gen., March 11, 1983. But here, however, the Town itself would actually authorize by ordinance the service of security guards in the capacity of code enforcement officers. Moreover, code enforcement officers are

specifically prohibited from making custodial arrests and the authority given to the officers on public property would be based upon Section 56-7-80 rather than upon any authority as a security guard. Rather than a conflict of interest, such appointment for enforcement of Town ordinances on public property would be complementary to the patrolling of the private property just a short distance away. In each instance, the overall beneficiary is the Town itself.

This situation is more akin to that in the opinion issued by this Office to Chief J. P. Strom on August 29, 1986. There, we concluded that private security guards employed to patrol the property of Columbia College, which is private, although not authorized to make an arrest on the adjacent public property, could still enforce the law to the same extent as could a private citizen. Of course, a private citizen can even make a custodial arrest of an individual under certain circumstances such as for a felony committed in his presence. See, Section 17-13-10 et seq. A fortiori, it follows, that such individual could be designated to issue a code summons where a custodial arrest is not authorized.

Moreover, Section 23-7-10 offers another parallel. By that Section, the Governor is authorized to appoint "employees of a contractor" of the United States Atomic Energy Commission to patrol the public property at the Savannah River Plant. In Op. No. 85-2 (January 15, 1985), we reviewed an agreement where, through a contractural arrangement, "Wackenhut private security guards are now providing law enforcement and other services at the Savannah River Plant, in addition to those Federal agents who may still be operating there." We concluded that by virtue of the language of Section 23-7-10, "those individuals now employed by the Department of Energy, through the contractual arrangement with Wackenhut Services, Incorporated . . ." could seize illegal substances in the course of their duties and thus SLED laboratory facilities could be utilized to examine such substances. For many of the same reasons, we are of the opinion that private security guards could be appointed as code enforcement officers to enforce the Town's ordinances on the public property adjacent to the private property which they regularly patrol.

We would add one additional word of caution, however. It goes without saying that the municipality could not abdicate its police power responsibilities to a private corporation. As we stated in Op. Atty. Gen., No. 85-81, p.217 (August 8, 1985), "[i]n essence, no governmental agency can by contract or otherwise suspend its governmental functions." Supra at p.229. In that same opinion, however, we concluded that the State could contract with a private entity for the operation and management of a prison so long as the State maintains sufficient supervision and control, in essence, so long as it retains its governmental functions through the contract. As we observed in that opinion,

> [t]he validity of any specific contract is in large measure dependent upon the particular duties delegated to the corporation and the degree of control which the State maintains over it. Important policy considerations would underlie the legal questions involved.

Op. No. 85-81 also referenced a number of cases where the courts have found that a contract with a private entity to assist a governmental agency or subdivision in carrying out its official functions was valid as not unlawfully delegating those functions. There, we stated:

> . . . In Robinson v. City of Phil., 400 Pa. 80, 161 A.2d (1960), for example, the Supreme Court of Pennsylvania upheld a contractual agreement between a municipality and two private universities relating to the operation, management and control of the city's general hospital.

Reviewing the contract in detail, the Court concluded:

> It will suffice us to say that our study of the contract convinces us that neither the city of Philadelphia nor the Board of Trustees of Philadelphia has unlawfully delegated their powers and responsibilities in and by the above mentioned contract.

> 161 A.2d at 4. In Government and Civic Emp. Etc. v. Cook Co. School for Nursing, 350 Ill.App. 274, 112 NE.2d 736 (1953), the Court upheld a contract between a county and a nonprofit corporation which required the corporation to "furnish, direct and perform the nursing services required for the proper care and nursing of all patients in the County Hospital . . . ." 112 N.E.2d at 737. And in Bolt v. Cobb, 225 S.C. 408, 415, 82 S.E.2d 789 (1954), our own Supreme Court upheld a contract between a county an a private entity for the "performance of a public, corporate function," i.e. medical services in the form of a hospital. Only recently, in S.C. Farm Bureau Marketing Assoc. v. S.C. State Ports Auth., 278 S.C. 198, 253 S.E.2d 854 (1982), our Court found a contract

> between a private association and the State for the management and operation of a grain elevator and storage facilities to be constitutionally valid. As mentioned earlier, our Court has upheld a contract between a city and a private corporation for the management of a water plant. Green v. City of Rock Hill, supra. See also, 16 C.J.S., Constitutional Law, § 137 (a State may validly use a private corporation as an agent for the treatment of inebriates). See also, Murrow Indian Orphans Home v. Children, 171 P.2d 600 (Okl. 1946). In these instances, the governmental entity maintained supervision and control over the corporation by virtue of a contractual agreement.

Supra at pp.224-225.

Additionally, in Smith v. Board of Comrs. of Roads and Revenues, 244 Ga. 133, 259 S.E.2d 74 (1979), the Georgia Supreme Court upheld a county contract which employed a private corporation to procure, manage, supervise and direct the personnel in the county's fire protection delivery service. Plaintiffs attacked the contract, in part on the basis that it constituted an unauthorized delegation of authority. The Court rejected the argument, concluding that Home Rule enabled the county to contract with the private entity. Said the Court,

> . . . this court concludes that the Hall County Commissioners had authority to enter a contract with Metro to provide for protection services for the Hall County Fire District. Having had the authority to provide services of this nature, they had the duty and discretion to examine the methods available to implement that goal and select that method which they determined most effectively and efficiently provided fire protection.

259 S.E.2d at 77-78. See also, City of Boca Raton v. Gidman, 440 So. 2d (Fla. 1983) (city's contract with non-profit corporation to provide day care service is valid); 71 Md. Op. Atty. Gen. 197 (March 20, 1986) (county has the authority to contract with a private entity for the custody of its inmates if it does not "wholly abdicate its responsibility for the operation of a county jail", and thus, the "contract should not purport to prevent the county from controlling the operation of the jail.") In 1984 Fla. Op. Atty. Gen. 265, the Florida Attorney General concluded that a municipality "may proceed under its home rule power" to contract for fire protection services. Finally, in Section 23-7-10, the General

Assembly has previously authorized the Governor to "appoint and commission as special State constables of the United States Atomic Energy Commission . . . as shall be recommended to him in writing by a duly authorized representative of the Commission." In each of those instances, the governing body utilized a private entity to assist it in the performance of governmental functions, but maintained sufficient supervision and control over the entity to avoid the problem of unlawful delegation.

CONCLUSION

In conclusion, it is our opinion that your proposed contract whereby private security guards are appointed as code enforcement officers would be valid. So long as the municipality limits the duties of these officers to those set forth in Section 56-7-80, insures that such officers do not have the power of custodial arrest, and maintains sufficient supervision and control over these officers by virtue of the contract, we believe this arrangement would withstand scrutiny. We would also advise that by ordinance, the municipality should specify that the officers of the security force of Kiawah Island Community Association, Inc. serve as code enforcement officers in an ex officio capacity, thereby removing any possibility of dual officeholding. Otherwise, however, if these general guidelines are scrupulously followed, such contract would be valid.[2]

Sincerely,

Charles Molony Condon
Attorney General

CMC/an

[2] Any opinion to the contrary did not consider a city or town's Home Rule powers pursuant to Williams, nor Act of 341 of 1994, and is hereby overruled.