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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 20, 1997

G. Trenholm Walker, Esquire
P. O. Drawer O
Charleston, South Carolina 29402

Re: Informal Opinion

Dear Mr. Walker:

You have asked for an opinion concerning the following situation. A Municipal Judge of the Town of Kiawah Island directed a Memorandum and Order to all security organizations and code enforcement officers on Kiawah Island concerning the law enforcement authority of the Charleston County Sheriff on Kiawah Island.

The issue presented by you is the extent to which a Municipal Judge may issue administrative orders (where no specific case is pending) concerning the activities of the private security department operated by the Kiawah Island Community Association (KICA) as well as the Charleston County Sheriff's deputies who work after hours for the security department. An additional question raised is whether the Town of Kiawah possesses the authority to place police agents or Sheriff's personnel its agents within KICA's gated community. It is our understanding that all of the property within the community is privately owned by either KICA or its constituent homeowner with the exception of property consisting of a fire station owned by the local fire district. Finally, it is questioned whether the Town of Kiawah possesses the authority to control the operation of KICA's private security department or the off-duty sheriff's deputies who work for the department.

The Order in question attempts to clarify a variety of points. Section 1 of the Order states that it is

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> the primary responsibility of the Municipal Corporation to preserve peace and order (and that) the status of certain property within the municipality as private is immaterial.

Section 2 establishes the Charleston County Sheriff's law enforcement authority on Kiawah Island. This Section states that

> [t]he Sheriff is the Chief Law Enforcement Officer of the County and his authority extends over the entire county.

Section 3 of the Order emphasizes the Sheriff's authority over Kiawah's private property as follows:

> [d]eputy Sheriffs may enforce the Laws of the State or County within the entire county and whether an offense occurs on private property is immaterial.

Section 4 maintains that the Sheriff's authority includes an unqualified right to patrol and investigate crime on private property:

> the distinction of whether property is private or public is irrelevant to the Sheriff's authority to investigate and detect crime (and that the Sheriff is) required to "use every means" to do so.

Section 5 of the Order recognizes the Sheriff's responsibility to enforce traffic laws on the private roads owned by the Kiawah Island Homeowner's Association. Such Section states that

> [o]nce dejure private roads have been placed under the State's Uniform Act Regulating Highways [§ 56-5-6310] by any "homeowners association holding title to community roads" ... the enforcement of speed limits and traffic control signs thereon shall be the responsibility "of the State Highway Patrol [and] officers of the Sheriff's Department ..." (S.C. Code § 56-5-6340)

Section 6 reemphasizes the Sheriff's authority to police Kiawah and bars Kiawah Island Homeowner's Association's private security force from interfering with the Sheriff's efforts:

> [d]eputy Sheriffs are authorized to carry out their duties in any area within their jurisdiction ... without interference from anyone including a private security guard. (emphasis added).

Section 7 establishes sanctions for a private security guard who may interfere with a Sheriff's deputy. Such Section states:

> [i]n appropriate circumstances, any person, including a licensed security guard on private property, directly or indirectly interfering with any of the above, may be subject to arrest for obstruction of justice.

Law / Analysis

It is well-recognized that the courts of this State are without authority to issue advisory opinions. Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970). Our Supreme Court has stated that it is not the role of a court "to advise the legislative or executive branches how to proceed nor to render an advisory opinion on a hypothetical situation." Shasta Beverages v. S.C. Tax Comm., 280 S.C. 48, 310 S.E.2d 655 (1983), citing Booth v. Grissom, 265 S.C. 190, 217 S.E.2d 223 (1975).

Following this established principle of judicial self-restraint, in Chas. Co. School Dist. v. S.C. Dairy Commission, 274 S.C. 250, 262 S.E.2d 901 (1980), the Supreme Court refused to issue an advisory opinion to the Attorney General to "advise him whether the School District and Coburg were guilty of misconduct for which penalties and/or prosecution might be pursued." 262 S.E.2d at 902. And in Matter of Robinson, 274 S.C. 187, 262 S.E.2d 30 (1980), the Court held that it did not have jurisdiction to render an advisory opinion respecting the constitutionality of minors' initial detention where, instead of challenging their delinquency adjudications or the orders committing them to the Department of Youth Services, the minors challenged only the constitutionality of their initial detention.

The reason for this concept of judicial restraint is founded in the South Carolina Constitution. Article V, § 1 provides that

> [t]he judicial power shall be vested in a unified judicial system which shall include a Supreme Court, a Court of Appeals, a Circuit Court and such other courts of uniform jurisdiction as may be provided for by general law.

The municipal courts fall within the unified judicial system, Pickens v. Schmitz, 297 S.C. 253, 376 S.E.2d 271 (1989) and within the doctrine that such courts shall exercise "judicial power" only. Cf. State v. Whittington, 278 S.C. 661, 301 S.E.2d 134 (1983).

Moreover, Art. I, § 8 mandates that each of the three branches of government be kept separate. Such Section provides that

> [i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

The reason, therefore, that a court is prohibited from issuing an advisory opinion is that "[s]uch an opinion would go beyond the limits of determining an actual case or controversy and would violate the doctrine of separation of powers." State ex rel. Stephan v. Johnson, 248 Kan. 286, 807 P.2d 664 (1991). For the same reason, our Supreme Court has consistently recognized that courts which are part of the unified judicial system "are permitted to exercise only the duties and powers of the judicial branch." State v. Whittington, supra. In State ex rel. McLeod v. Yonce, 274 S.C. 81, 261 S.E.2d 303, 306 (1979), the Court, quoting from 16 Am.Jur.2d Constitutional Law § 223 stated in this regard that

> It has been said that the policy and intent of the constitutional system is that courts and judges not only shall not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to, or connected with, the administering of the judicial function, and that the exercise of any power or trust or the assumption of any public duty other than such as pertains to the exercise of the judicial function is not only without constitutional warrant, but is against the constitutional mandate in respect of the powers they are to exercise and the character of duties they are to discharge ....

Accordingly, statutes which have imposed administrative or executive duties upon judges have been declared unconstitutional by our Supreme Court. Yonce, supra; Whittington, supra.

Our Court has also expressly recognized that the enforcement of the criminal law is a matter which is beyond the judiciary's power under the doctrine of separation of powers. In State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994), the Court commented as follows in this regard:

> [u]nder the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case. Both the South Carolina Constitution ... and South Carolina case law ... place the unfettered discretion to prosecute solely in the prosecutor's hands. The Attorney General as the State's chief prosecutor may decide when and where to present an indictment any may even decide whether an indictment should be sought. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions. We must, therefore, analyze the State's [plea] agreement within our judicial constraints.

440 S.E.2d at 346.

The Courts have shown the same reluctance to enmesh or interject themselves into the day-to-day operations of police departments. For example, in Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed. 561 (1976), the United States Supreme Court stated the following:

> When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system his case must contend with the "well-established rule that the Government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs," Cafeteria Workers v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961), quoted in Sampson v. Murray, 415 U.S. 61, 83, 94 S.Ct. 937, 950, 39 L.Ed.2d 166 (1974). The District Court's injunctive order here, significantly revising the internal procedures of the Philadelphia police department, was

> indisputably a sharp limitation on the department's "latitude in the 'dispatch of its own internal affairs.'"

In addition, it is basic to the concept of due process that there must be every appearance of neutrality on the part of the Court. State v. Cook, 295 S.C. 421, 368 S.E.2d 907 (1988). It is a fundamental principle of law that "'Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge. ...'" State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966), quoting Withers v. Lane, 144 N.C. 184, 192, 56 S.E. 858. For this reason, it is obvious that a person cannot function both as judge and prosecutor, or give the appearance thereof. Figueroa Ruiz v. Delgado, 359 F.2d 718 (1st Cir. 1966) [procedure whereby Commonwealth's witnesses take stand at request of trial judge and are interrogated by him, trial judge conducts redirect examination, etc. offends due process of law.] There must be the "appearance of justice." In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942. Thus, the United States Supreme Court has held that a town justice who allowed himself to become a member of a search party conducting a generalized search did not manifest the neutrality and detachment demanded of a judicial officer when present with a warrant application for search and seizure. In such a situation, the Court concluded that the justice "was not acting as a judicial officer but as an adjunct law enforcement officer." Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979).

Furthermore, our Supreme Court has expressed disapproval of a trial court, particularly one which is of limited jurisdiction adopting its own "rules of procedure." For example, in Sptg. Co. DSS v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988), the Court held that the trial judge abused its discretion by holding an attorney in contempt for violation of a "Notice to Attorneys," which was "clearly a local administrative rule affecting the operation of courts." Quoting from the Court's opinion, the Supreme Court cautioned that Art. V, § 1 mandates a unified judicial system and § 4 designates the Chief Justice of the Supreme Court as the administrative head of the unified judicial system and directs that the Supreme Court make rules governing the administration of all courts in this state. Warned the Court:

> The "Notice to Attorneys" ... has not been submitted to or approved by the Chief Justice. It exceeds the authority vested in the Chief Justice under the Order of Appointment. It is nowhere authorized by the statutory law of this state.
>
> We had occasion to address the issue of non uniform local circuit court rules affecting practice and procedure in State v. Duncan, 274 S.C. 379, 382, 264 S.E.2d 421, 423

> (1980) where we declared a local circuit court rule regulating mutual discovery unconstitutional and void. We hold today that by reason of the mandates of Article V of the South Carolina Constitution, a family court may not adopt its own rules of administration or practice and procedure. Such local, non uniform rules are inconsistent with both the provisions and purpose of the constitutional mandate and are therefore unconstitutional and void.

370 S.E.2d at 874.

There is one other important factor which further indicates that such orders should not be issued in addition to the preceding reasons discussed above. The issue of the privacy of the residents behind the gate must also be considered. It is well-recognized that "[s]ince Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the scope of Fourth Amendment protection against unreasonable searches and seizures extends to those areas in which a person has a "'reasonable expectation of privacy.'" United States v. Roberts, 747 F.2d 537 (9th Cir. 1984), quoting Katz, Id. 389 U.S. 360-61, 88 S.Ct. at 516 (Harlan, J. concurring). In Roberts, the Court stated that

> [i]n his concurring opinion in Katz, Justice Harlan stated that the Fourth Amendment protects those areas in which a person exhibits an actual (subjective) expectation of privacy and the expectation is one that society is prepared to recognize as reasonable. 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J. concurring).

747 F.2d at 541. Moreover, in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984), the United States Supreme Court reaffirmed the distinction for purposes of the 4th Amendment between the "open fields" doctrine and the "curtilage." Oliver defined the "curtilage" as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life....'" Thus, the Oliver Court approved the practice of extending the Fourth Amendment's protection of the home to the area immediately surrounding it. 104 S.Ct. at 1742 (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). On the other hand, said the Court, "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance" and that "as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be." 104 S.Ct. at 1741.

Our own Supreme Court has stated that "[a]n expectation of privacy is legitimate for Fourth Amendment purposes if it springs from a 'source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988), quoting Rakas v. Illinois, 439 U.S. 128, 143-44, n.12, 99 S.Ct. 421, 430-31, n.12, 58 L.Ed.2d 387, 401-402, n.12 (1978). And in Matter of Bazen, 275 S.C. 436, 272 S.C. 178 (1978), the Court noted that in order to claim an expectation of privacy, it is important for the individual to "in some manner demonstrate" such expectation.

Accordingly, case law abounds in other jurisdictions where courts have found a reasonable expectation of privacy to exist in a variety of situations somewhat similar to here. While every case is obviously fact-specific, it is important to note that these cases all center upon the steps the individual has taken to insure his or her privacy. See, e.g. State v. Carter, 54 Or.App. 852, 636 P.2d 460 (1981) [outer gate; posted property; visitors permitted on property only with permission]; State v. Karston, 588 So.2d (La.1991) [area was not open to the public, but was a courtyard to a private apartment complex; area was fenced off to the general public by a brick wall and a solid black gate]; People v. Winters, 149 Cal.App.3d 705, 196 Cal.Reptr. 918 (1983) [a person who surrounds his backyard with a fence, and limits entry within a gate, locked or unlocked, has shown a reasonable expectation of privacy for that area]; State . Mitchell, 8 Kan.App.2d 265, 655 P.2d 140 (1982) [defendant's residence was located one-eighth mile from a public road along a private driveway; house and yard were enclosed in part by a stone wall and a wire gate permitting access; thus, the seriousness of a homicide investigation alone does not created exigent circumstances sufficient to justify a warrantless search of a constitutionally protected area]; State v. Rikard, 420 So.2d 303 (Fla. 1982) [property secluded from view by lack of proximity of neighbors and others and also by erection of chain length fence and partition is protected].

A case decided by the Illinois Supreme Court, People v. Janis, 139 Ill.2d 300, 565 N.E.2d 633 (1990) is also instructive. The Court held that an individual possessed a reasonable expectation of privacy in a gravel area behind a commercial business even though such area was accessible to his tenants and young people occasionally parked there and even though the gravel area appeared to be a common area. The Court looked to the fact that the gravel area was not visible from any public way; it was not accessible to the public except through a private driveway; it was partially enclosed by a fence and partially by a pipe rack; and no one was permitted to use the area except individuals associated with his business during business hours.

As the Order indicates, it is true that § 23-13-70 authorizes deputy sheriffs to "patrol the entire county ... to prevent or detect crime or to make an arrest ... and shall use every means to prevent or detect, arrest and prosecute for the violation of every law which is detrimental to the peace, good order and morals of the community." Thus, this Office has consistently concluded that an arrest or enforcement of the law may be made on private property. Op. Atty. Gen., Op No. 88-90 (December 21, 1988). However, as we have also consistently pointed out, such does not mean that the protections of the Fourth Amendment do not apply. Of course, the Fourth Amendment guards against "unreasonable searches and seizures." Its basic purpose is "to safeguard the privacy and security of individuals against arbitrary invasion by government officials." Camara v. Municipal Ct., 387 U.S. 523, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). Thus, "except in certain carefully defined classes of cases, a search of private property without consent is unreasonable' unless it has been authorized by a valid search warrant. Id. In the 1988 opinion, we quoted 6A C.J.S. Arrest, Section 52 at p. 123, which recognizes that the fact that private property is involved, does not eviscerate the protection of the Fourth Amendment. We stated:

> (g)enerally, a lawful arrest may be made any where, even on private property or in a home. This rule is applicable both where the arrest is under a warrant, and where there is an arrest without warrant in case of hot pursuit ... . Of course, the Fourth Amendment makes warrantless entries into an individual's home presumptively unreasonable. Mincey v. Arizona, 437 U.S. 385 (1978). Therefore, in most instances a warrant is necessary to enter an individual's home. Of course, exigent circumstances may justify an exception to the requirement for a warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Also consent which is fully and voluntarily given may also authorize entry. Bumper v. North Carolina, 391 U.S. 543 (1968).

See also, State v. Carter, supra ["The upshot of the state's argument here seems to be that if the police are unable to obtain a search warrant for want of probable cause, they may, nevertheless, enter the property to investigate. That is not an acceptable proposition." Our Supreme Court has stated repeatedly that the exceptions to the requirement of a search warrant which have been recognized are: search incident to a lawful arrest; hot pursuit [or other exigent circumstances]; stop and frisk; automobile exceptions; plain view doctrine; and consent, State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981).

There is very little case law, as yet, regarding the degree of expectation of privacy behind the walls of a gated community. However, the legal literature recognizes that such communities are certainly entitled to some expectation of privacy -- in essence, that these communities are to be compared with the "company town" in Marsh v. Alabama, 326 U.S. 501 (1946) where Justice Black likened such a town to any other municipality. It has been written by one commentator that

> [t]he quoted language of Marsh provides much ammunition for extending the Fourth Amendment to gated communities. If "a company town is a town," then many gated communities qualify as towns governed by the Fourth Amendment itself a "vital libert[y] guaranteed by the Constitution."
>
> ... The selections from Marsh appear to mandate that courts must extend basic liberties, like the Fourth Amendment, to private "town like" gated communities ... .
>
> Curtis Berger has developed a useful test to determine whether a forum is public or private for First Amendment rights, and his analysis proves useful in applying Marsh to gated communities. ... He lists the following factors as indicative of private property: Expectation of privacy, expectation of quiet, limited physical access, freedom of association, right of exclusion, exclusivity of possession, and expectation of security. ... Public properties usually retain the following qualities: Little expectation of privacy, no expectation of quiet, multiple points of entry, restricted freedom of association, privilege of free entry, lack of territoriality, and a reduced expectation of security ... .
>
> Applying these factors reveals, not surprisingly, that gated communities are private forums despite their many town-like attributes. Residents of walled neighborhoods and cities have strong expectations of privacy and security, and the communities have very limited access. ... By design, private communities keep unwanted people out by gates and guards. Therefore, if gated communities qualify under Professor Berger's test as private forums, then they must flunk the Marsh accessibility test. In United States v. Francouer [547 F.2d 891 (5th Cir. 1977)] the Fifth Circuit concluded that the

> Marsh rationale did not apply to Disney World because it was "not an open town fully accessible and available to all commerce .... No one is permitted into the outer gates of Disney World except by consent of the owners."

Owens, "Westec Story: Gated Communities and the Fourth Amendment," 34 Am. Crim. L. Rev. 1127, 1147-1148 (Spring, 1997). Thus, based upon this analysis, as well as the case law, referenced above, which concludes that there is an expectation of privacy in analogous circumstances to the gated community, it is my conclusion that in the referenced situation, there would be a reasonable expectation of privacy pursuant to the Katz test discussed above. See also, S.C. Const. Art. I, § 10 [the right of the people against unreasonable invasions of privacy protected].

For all the foregoing reasons, it is my opinion that a Municipal Court does not possess the authority to issue the Order in question. The Order raises concerns inasmuch as it has been issued in the form of an advisory opinion rather than as part of a case or controversy. If, instead, it has been promulgated as an administrative rule, there is the clear problem posed by Article V of the Constitution requiring a unified judicial system where all rules must be approved by the Chief Justice. See, Op.Atty.Gen., Nov. 6, 1989 [While recognizing that "courts have inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction," we were unable to conclude in light of Art. V that an administrative rule directed to law enforcement officers was or was not within the authority of a municipal judge]. Then too, is the problem of separation of powers and the appearance that the Court is enmeshing itself in the internal affairs of the police department and law enforcement agencies. This, in turn, raises issues of a "neutral and detached" magistrate where law enforcement issues come before the Court in the context of criminal law cases. Moreover, the Municipal Court possesses no injunctive authority and cannot function as a prosecutor. Finally, there is the question of the expectation of privacy within the confines of the gated community. Of course, whether in a particular situation there exists a reasonable expectation of privacy is a factual question beyond the scope of an opinion of this Office. However, the available literature seems to equate a gated community more with private property rather than as an everyday public street. While I have no doubt that law enforcement officers (county and state) possess the jurisdiction to arrest for or investigate crime on private property, still, the same issues of privacy would seem to arise in the context of the gated community as would be raised regarding curtilage with respect to a house or home. The foregoing cases where the individual or property owner has made a concerted effort to protect his privacy -- either with a gate, fence, wall, or natural obstacles or protections -- would, therefore, be applicable. Thus, there would be the necessity for a search warrant, consent, exigent circumstances, or some other recognized or applicable exception to the

warrant requirement in order for the area as a gated residential community to be searched by law enforcement officials.

Of course, this Office has nothing but the greatest of respect for the Municipal Court. I have no doubt that the Court possesses only the best of intentions to see that the law is followed here. The problem, however, arises in the context of the issuance of an Order where no case or controversy is pending and, thus, such Order appears advisory, and non-neutral, even though such may well have not been the intention of the Court in the issuance thereof. Moreover, as referenced, there is an expectation of privacy within the gated community.

Accordingly, I would advise that, for the foregoing reasons, the Order in question should not be effectuated because there is doubtful authority for its issuance or execution.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an