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October 24, 1990

The Honorable Michael T. Rose
Senator, District No. 38
314 Chessington Circle
Summerville, South Carolina 29485

Dear Senator Rose:

By your letter of October 17, 1990, you have asked whether there are any legal grounds for voiding a contract entered into by an outgoing, "lame duck" county council, especially if the contract is not in the best interest of the county. You have mentioned a possible situation which may arise before the end of the year in Dorchester County though no actual or proposed contract has been submitted to this Office for review.

At the outset, we have advised previously that a contract executed for a multi-year term by a county council or a state agency would be binding on the county or state agency, though failure to appropriate funds for the continuation of the contract in subsequent years would subject the contract to cancellation. Copies of opinions dated November 15, 1983 and February 22, 1982 are enclosed herewith.

The notion that an outgoing or "lame duck" entity would be entering into those contracts was not addressed in these opinions. A succinct statement of the legal principles applicable in such a situation is found in 63A Am.Jur.2d Public Officers and Employees § 333, a copy of which is enclosed. A review of cases from other jurisdictions revealed several in which contracts entered into by "lame duck" entities were avoided; some of these included: Hayden v. Richland Parish School Bd., 544 So.2d 164 (La. Ct. App. 1989); Bd. of Sup'rs of Lafayette County v. Parks, 71 So.2d 197 (Miss. 1954); Rivenbark v. Pender Co. Bd. Ed., 381 S.E.2d 183 (N.C. Ct. App. 1989) (by statute, in renewing contract during last year of employment, a board could not act until new board members sworn in, if new members were to be elected that year; renewal was alright

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here because it was not an election year); City of Hazel Park v. Potter, 169 Mich.App. 714, 426 N.W.2d 789 (1988) (employment contract contravened public policy by taking away governmental or legislative power of incoming council to appoint or remove public officers); Duggan v. City of Taunton, 277 N.E.2d 268 (Mass. 1971); Falls Township v. McManamon, 537 A.2d 946 (Pa. Cmwlth. 1988) (contract for employment of police chief void as against public policy, as an attempt to bind successors in office in performance of a governmental function); City Council Members v. Consumers Education and Protective Association, 428 A.2d 711 (Pa. Cmwlth. 1981) (if the action is ill-conceived, clandestine, a 13th hour device to avoid public scrutiny, such can be voided).

To summarize the foregoing, the response to your question will depend to a great extent on the facts and circumstances surrounding adoption of the contract, whether it is viewed as governmental or proprietary in nature, the terms of the contract, whether such is intended to bind future councils, and many other, as yet unknown, factors.

We must also caution that there is no absolute statutory or constitutional prohibition on a county council's entering into a contract in the waning days of the terms of some council members. As stated in Argo High School Council v. Argo Community High School District 217, 163 Ill.App.3d 578, 516 N.E.2d 834 (1987), "it is axiomatic that public boards are continuing and that changes in composition do not affect the legality of actions taken by predecessor boards." 516 N.E.2d at 837. The facts and circumstances surrounding a particular contractual arrangement must be carefully considered, as noted above.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

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Executive Assistant for Opinions