

## The State of South Carolina



## Office of the Attorney General

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November 13, 1987

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Dear Mr. Merriman:

By your letter of October 5, 1987, you have described activities of the Quinby Town Council relative to establishing a bookkeeping system for the Town. With respect to these activities vis a vis the law pertaining to the mayor-council form of government, you have asked several questions, each of which will be set forth separately, as follows.

Question 1

Does the mayor under the mayor-council form of government have the authority to refuse to carry out a vote of council when the action does not infringe on the responsibilities and powers of the mayor in the mayor-council form of government as set forth in South Carolina Code of Laws, 1976, section 5-9-30?

Under the mayor-council form of government, the mayor has the power or duty "to preside at meetings of the council and vote as other councilmen." Section 5-9-30(3) of the Code. Each member of council, including the mayor, thus has one vote. The mayor has not been given veto powers, which would be the effective result if the mayor refused to carry out a vote of council on an action which does not infringe upon the responsibilities and powers of the mayor in the mayor-council form of government.

Furthermore, by Section 5-9-30(4), the mayor is required "to act to insure that all laws, provisions of Chapters 1 through 17 and ordinances of the council, subject to enforcement by him or by officers subject to his direction and supervision, are faithfully executed." A mayor's failure to carry out the

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terms of a properly adopted and authorized ordinance of council would run afoul of this statute. For the foregoing reasons, we concur with your opinion that the mayor must carry into effect all lawful ordinances that do not improperly infringe on his statutory responsibilities.

#### Question 2

Does the mayor under the mayor-council form of government have the authority to refuse to carry out a vote of council when the action infringes on the responsibilities and powers of the mayor in the mayor-council form of government as set forth in South Carolina Code of Laws, 1976, section 5-9-30?

In cases such as Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951) and Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928), the courts have stated that a municipal ordinance "which is repugnant either to the Constitution or general laws is ipso facto void." Law v. City of Spartanburg, supra, 148 S.C. at 234. However, unless and until a court of competent jurisdiction should declare the ordinance to be repugnant to the Constitution or statutes of this State, such ordinance should continue to be followed. O'Shields v. Caldwell, 207 S.C. 194, 217, 35 S.E.2d 184 (1945). Thus, the mayor should continue to follow or enforce the ordinance which may violate Section 5-9-30 of the Code.

#### Questions 3 and 4

(3) Is the determination of the form and type of bookkeeping system and the person who sets up the system a duty and responsibility that belongs solely to the mayor in the mayor-council form of government?

(4) Can the town council in the mayor-council form of government direct what type of bookkeeping system the town will have and specify who will set up the system notwithstanding the objection of the mayor?

The mayor in the mayor-council form of government is the chief administrative officer of the municipality. Section 5-9-30 of the Code. He administers the affairs of the municipality, appoints and removes employees, administers all departments, presides and votes at meetings of council, enforces ordinances, prepares and submits the annual budgets, reports on finances,

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and makes other reports as necessary, according to Section 5-9-30. Whether the mayor is to determine the method of bookkeeping to be employed is not specifically covered by Section 5-9-30.

Section 5-9-10 of the Code states that "[e]xcept as specifically provided for in this chapter, the structure, organization, powers, duties, functions and responsibilities of municipal government under the mayor-council form shall be as prescribed in Chapter 7 [of Title 5]." Section 5-7-160 provides that the powers of a municipality are vested in its council: "All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law. ..." In addition, Section 5-9-40 gives the council the authority to "establish municipal departments, offices, and agencies in addition to those created by Chapters 1 through 17 and may prescribe the functions of all departments, offices and agencies, except that no function assigned by law to a particular department, office or agency may be discontinued or assigned to any other agency. ..."

Applying these statutes to the questions you have raised, the determination of a type of bookkeeping system to be utilized by all departments of a town does not appear to have been expressly reserved to the mayor in a mayor-council form of government. It could be argued that due to the costs to be incurred and the implications that implementation of the system would have upon all of the town government and the public as well, such may be a decision better made by the entire council including the mayor. Because the law on this point is not expressly stated, however, this conclusion is not completely free from doubt.

Because the mayor under this form of government is responsible for appointing and suspending or removing all municipal employees, it would be appropriate for the mayor to employ the individual who would implement the system so selected, by Section 5-9-30(1), if a new employee should be needed. Your letter mentioned the possibility of hiring an accountant by contract after appropriate bidding; because this Office is not familiar with procurement procedures of the Town of Quinby, advice on contracting for such services would be more appropriately given by you as Town Attorney.

#### Question 5

Can the same accountant who sets up the  
Town's books also do the independent annual

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audit required by South Carolina Code section 5-7-240?

Section 5-7-240 of the Code requires:

The council shall provide for an independent annual audit of all financial records and transactions of the municipality and any agency funded in whole by municipal funds... . Such audits shall be made by a certified public accountant or public accountant or firm of such accountants who have no personal interest, direct or indirect, in the fiscal affairs of the municipal government... .

If an individual (i.e., accountant) or accounting firm should be employed or retained under contract by a municipality to set up the bookkeeping system of a municipality, this individual would, of necessity and by virtue of being paid for his services, have a personal interest in the fiscal affairs of the municipality. To then employ that individual or firm to conduct the annual audit of the municipality would remove the independence required by Section 5-7-240. For these and the reasons cited in your letter, we concur with your conclusion that the same accountant who sets up the system should not then be employed to audit the system, due to the individual's or firm's inherent interests.

Questions 6 and 7

(6) Does section 2-26, Duties of Clerk and treasurer, of the Code of the Town of Quinby make the clerk and treasurer answerable to Town Council rather than the Mayor for those duties and functions set out in the section?

(7) Do sections 2-25 and 2-26 of the Code of the Town of Quinby conflict with South Carolina Code of Laws, 1976, section 5-9-30 in that the section appears to place duties, responsibilities, and powers of the mayor under council by assigning those functions to the Town Clerk and treasurer and then making the Clerk and treasurer directly responsible to the Town Council?

The Code of the Town of Quinby provides in relevant part the following:

Sec. 2-25 Clerk and treasurer.

There shall be elected by the council an officer to be known as the Clerk and Treasurer of the town, who will hold office for the term of one year, or until his successor is duly elected and qualified, unless removed from office by the council.

Sec. 2-26 Duties of clerk and treasurer.

The clerk and treasurer shall collect all claims and accounts that may be due and payable to the town; receive all monies belonging to the town; issue all licenses and badges for which provisions may be made; pay all bills owed by the town when approved by the council; make statement of financial condition of the town as ordered by the council; keep account of all monies and accounts and report to council; give notice of regular and special meetings; and perform such other duties as may be required by the council.

The South Carolina Code, in Section 5-7-220, requires:

The council under the ... mayor-council [form] of government ... shall appoint an officer of the municipality who shall have the title of municipal clerk. The municipal clerk shall give notice of council meetings to its members and the public, keep the minutes of its proceedings and perform such other duties as are assigned by council.

The town clerk is considered to be an officer of a municipality rather than an employee. Op. Atty. Gen. dated March 14, 1983 (town clerk is an officer). This officer would perform those duties specified in Section 5-7-220 and any others which the council would assign to him.

As noted above, Section 5-9-40 also permits the council of a municipality to establish municipal departments, offices, and agencies and prescribe the functions of all departments, offices, and agencies. It would appear that, in adopting sections 2-25 and 2-26, the Town Council of Quinby has provided a mechanism to select its town clerk, has provided for a greater array of responsibilities than those in Section 5-7-220 (but which is permissible thereunder), and has made the town clerk responsible to council as under Section 5-7-220. Because this individual is a town officer rather than an employee, it does not appear that the mayor's responsibilities and powers under Section 5-9-30(1) have been usurped. If council chose, under Section 5-9-40, to

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establish a position of town treasurer, separate and apart from the town clerk, and prescribe the duties and functions of the position, then the mayor would be responsible for hiring and supervising that individual pursuant to Section 5-9-30(1).

We trust that the foregoing will be responsive to your inquiries. Please advise if clarification or additional assistance should be needed.

Sincerely,

*Patricia D. Petway*

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Assistant Attorney General

PDP/rhm

REVIEWED AND APPROVED BY:

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