The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

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Robert M. Bell, Esquire
Aiken County Attorney
Post Office Drawer I
Langley, South Carolina 29834

Dear Mr. Bell:

By your letter and accompanying memorandum of April 29, 1986, you have asked that this Office re-examine its conclusion of an opinion dated February 20, 1986. In response to the question of whether three favorable readings are required for adoption of ordinances by a county council pursuant to Section 4-9-120, Code of Laws of South Carolina (1976, as revised), it was concluded that three favorable readings are required. It was noted in that opinion that authority on the issue was scarce (and indeed continues to be scarce) and thus the conclusion could not be completely free from doubt.

The standard employed by this Office for the review of a previously-issued opinion is that it must be clearly erroneous in order to be overruled or superseded. An opinion is clearly erroneous when, upon review, this Office is firmly convinced that a mistake has been made, that such opinion does not present sound legal reasoning or an accurate interpretation of applicable law. See Ops. Atty. Gen. dated April 9, 1984 and March 21, 1986.

In Sherman v. Reavis, 273 S.C. 542, 257 S.E.2d 735 (1979), the Supreme Court construed the procedure for adopting municipal ordinances, for which two readings are required; the statute, Section 5-7-270, of the Code of Laws of South Carolina (1976), is silent as to voting requirements, as is Section 4-9-120 pertaining to counties. In Sherman, the court noted that "notice [as to zoning ordinances and public hearings] was published ... five days before City Council gave favorable first reading to an ordinance adopting the recommendations of the

[Planning and Zoning] Commission." 273 S.C. at 547, 257 S.E.2d at 738 (emphasis added).

Similarly, in Haake v. Borough of Norwood, Bergen County, 99 N.J.L. 479, 125 A. 6 (1924), the court stated that the ordinance under consideration therein had passed its first reading, having received the unanimous vote of the council members present. The council was apparently following parliamentary procedure rather than a statutory requirement of voting. The court stated:

> According to strict parliamentary practice, no step may be taken in the progress of a bill or ordinance from one stage to another except as the result of some affirmative action on the part of the body in which it is. ...
>
> It will be observed that the ordinance had already been read at the time when the motion that it pass its first reading was made and adopted. We may or may not be able to interpret this as a motion that it be read a second time, the next step in the orderly progress of an ordinance. At any rate, it seems quite clear to us that it is indubitable proof of the fact that no opposition to the first reading was made by the borough council or any member thereof.
>
> Since we have seen that a right to object to such reading, and to demand a vote thereon, exists, their failure to do so object ex necessitati, in our opinion, implies a consideration of the ordinance. On any other view, it seems to us that the members of the council would be derelict in their duties. This because, if they have a right to reject an ordinance at any stage of its passage, they must be under obligation to their constituents to apply their minds to the problem of whether the interests of such constituents would be best served by a rejection. ... The members of a deliberative body may, either individually or collectively,

> reverse their previous action at any one of the various stages through which the measure before them is passing. ...

125 A. at 6-7. Voting as a measure passes from any one stage to another would thus give a deliberative or legislative body the opportunity to reject a measure at any stage of proceeding.

On the other hand, it has been stated that because legislatures generally provide the procedure for cities and counties to adopt ordinances, which procedure is often based on the procedure used by that legislature to enact laws, resort may be had to court decisions construing the legislative process to assist in interpreting the process of adopting ordinances. Metropolitan Government of Nashville and Davidson County v. Mitchell, 539 S.W.2d 20 (Tenn. 1976). In this regard, the decision of Thompson v. Livingston, 116 S.C. 412, 107 S.E. 581 (1921) is appropos:

> A careful examination of the journals of the House and Senate since the adoption of the Constitution shows that the Legislature has interpreted this provision as meaning that the first reading of a bill is merely a formal matter on which no vote is taken, and I feel that the construction placed by the Legislature upon its own procedure for so many years should be regarded as the correct interpretation.

116 S.C. at 419. The rule under consideration provided for first and third reading of bills or joint resolutions by title only. Thus, there is some support for the position that no vote be required by a county council upon first reading of a proposed ordinance.

It may also be noted that in the various authorities on statutory construction, discussions of readings and voting are not within the same sections. For example, in Sutherland's treatise on Statutory Construction (Sands, fourth edition), chapter 10 discusses "reading," while chapter 14 details the voting process. Similarly, in 73 Am.Jur.2d Statutes, § 59 covers reading, while § 60 discusses voting. Arguably, then, the two processes are thought of separately.

We further note that Section 4-9-110 of the Code mandates that "[t]he council shall determine its own rules and order of business." It may well be that the decision to take a vote

after first reading falls within rules of council rather than under Section 4-9-120. Richland County Council's rules require that any ordinance which would levy taxes or incur indebtedness be voted on following all three readings, for example. We have found that other county councils also require a vote after first reading, as well. However, we have learned that, most probably, more county councils do not vote upon passage of an ordinance from first to second reading.

Thus, we cannot say with certainty that our opinion of February 20, 1986, is clearly erroneous; there is support, though slim, for both points of view. Perhaps the better approach would be to view the taking of a vote as a rule of procedure neither prohibited or required under Section 4-9-110, instead of a requirement of Section 4-9-120 of the Code.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions