ALAN WILSON
ATTORNEY GENERAL

9297-9847

November 18, 2014

Thomas L. Martin, Esquire
Oconee County Attorney
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Post Office Box 447
Greenville, SC 29602

Dear Mr. Martin:

Attorney General Alan Wilson has referred your letter dated October 28, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issues (as quoted from your letter)**:**
[*We seek an] opinion as to the constitutionality and legality of Oconee County Ordinance No. 2014-24 giving indemnification, specifically:*

1) *Whether or not a county may defend and indemnify public employees in the circumstances denoted in Ordinance 2014-24, should it desire to do so;*
2) *Whether the means of defending and indemnifying County employees, as set forth in Ordinance 2014-24 is lawful and constitutional;*
3) *Whether the limits on indemnification set forth in Oconee County Ordinance 2014-24 meet the requirements of avoiding unlimited indemnification as required by South Carolina law and Constitution; and*
4) *Whether the Ordinance, in all other regards, passes legal and constitutional muster.*

Law/Analysis:
This opinion in no way makes a determination as to the constitutionality of the ordinance, as only a court may declare an ordinance unconstitutional. Ops. S.C. Atty. Gen., 1998 WL 485264 (August 9, 1988); 1998 WL 383512 (March 31, 1988); 1988 WL 485247 (March 17, 1988); 1986 WL 289836 (September 15, 1986). This opinion does not address any ethical issues. Moreover, while the ordinance references federal and state law, this opinion only reviews applicable state law. It is this Office's understanding you have already received an informal opinion from the State Ethics Commission regarding any potential ethical issues.

Regarding indemnification at the State level, this Office has consistently stated that the State or one of its agencies must have specific statutory authorization for indemnification. In a 2010 opinion, we noted examples of opinions reaching this conclusion and summarized these opinions as follows:

> *... this office has issued several prior opinions holding that, generally, state agencies do not have the authority to enter into indemnification agreements. As stated in an opinion dated September 29, 2004 determining that indemnification agreements "are without legal authority",*

> *"[i]t is our longstanding opinion that a state agency possesses no authority to enter into indemnification agreements. It is our further opinion that this conclusion is not changed by the addition of language "so far as the laws of the State permit" or any other language. Because a state agency possesses no authority to enter into indemnification agreements, insertion of the above-cited language or any other language cannot change or alter such lack of authority. Our opinions concluding that a state agency possesses no authority to enter into indemnification or "hold harmless" agreements date back at least to 1966.*

Another opinion dated September 27, 1972 by former Attorney General McLeod stated that

> *[i]n my opinion, there is no authority for the execution by the State of "hold harmless" clauses. Similar instances occur in nearly all agreements with the federal government and, while such clauses have been inserted in many instances in various agreements, there is, in my opinion, no authority for the inclusion of such clauses. The basis for this position is that the State thereby subjects itself to tort action, for which there is no authority absent legislative authorization. (emphasis added).*

An opinion of this office dated August 15, 1972 determined that

> *[it] has been the consistent opinion of this Office that governmental agencies, in the absence of specific authority therefor, do not have the authority to execute such "hold harmless" clauses. The basis of this conclusion is that this State possesses sovereign immunity, with certain deviations therefrom in limited circumstances...The execution of a "hold harmless" clause is nothing more nor less than subjection of the State or one of its political subdivisions to tort liability and, in the opinion of this Office, can only be done by the State itself through legislative enactment. (emphasis added).*

See also: Op. dated February 13, 1968 ("[w]e have uniformly advised State agencies that they do not have authority to enter into indemnification agreements of this nature. Even if entered into, it is questionable if any rights could arise thereunder.").

As also stated in the referenced September 29, 2004 opinion, "...we have consistently concluded that a state agency 'derives its powers solely from the statutes created by the Legislature."' See also: Op. Atty. Gen. dated March 18, 2004 citing Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1993) and Nucor Steel v. S.C. Public Service Comm., 310 S.C. 539, 426 S.E.2d 319 (1992). As pointed out by the 1972 opinions referenced above, generally, the State cannot subject itself to tort action "absent legislative authorization" or "in the absence of specific authority therefor."

Op. S.C. Atty. Gen., 2010 WL 1808721 (April 6, 2010). Furthermore, this Office has also previously opined that a county, like the State, would not likely be able to enter into an indemnification agreement without specific authority. Op. S.C. Atty. Gen., 1991 WL 633070 (November 4, 1991). In that opinion this Office stated:

> *We realize that the question you have presented is not whether the County may agree to indemnify a third party; however, as to that limited question, we advise that this Office has previously opined that State agencies, as a general rule, lack authority to enter into open-ended indemnification agreements.* Op. [S.C.] Atty. Gen., *April 10, 1991. We have no doubt that a similar conclusion would be reached with regard to counties. See* Wright v. Colleton County School District, *301 S.C. 282, 391 S.E.2d 564 (1990) [A political subdivision may not waive immunity provisions provided by State law]; see also, S.C. Const. Art. X, Section 8 (1990 Cum.Supp.) ["Monies shall be drawn from ... the treasury of any of [the State's] political subdivisions only in pursuance of appropriations made by law."];* Id., *Art. X, Section 7(b) [Annual expenditures shall not exceed annual revenues].*

Id.

Against this background, let us review certain rights belonging to a county applicable to this opinion. A county may sue and be sued. S.C. Code § 4-1-10 (1986 & Supp. 2013). A county may execute contracts and do all acts necessarily relating to the property and concerns of the county. Id. A federal court has acknowledged that "[a]lthough a state and its agencies are entitled to Eleventh Amendment immunity, the Eleventh Amendment does not bar suits against local government entities or local government officials sued in their official capacity. Gray v. Laws, 51 F.3d 426, 431 (4th Cir. 1995)." Curry v. S.C., 518 F. Supp.2d 661, 668-669 (D.S.C. 2007).

As stated above, this opinion in no way makes a determination as to the constitutionality of the ordinance, as only a court may declare an ordinance unconstitutional. Ops. S.C. Atty. Gen., 1998 WL 485264 (August 9, 1988); 1998 WL 383512 (March 31, 1988); 1988 WL 485247 (March 17, 1988); 1986 WL 289836 (September 15, 1986). As this Office has previously stated:

> *We start with the basic proposition that a county ordinance would be entitled to a presumption of validity. Consistent with Article VIII of the South Carolina Constitution, which mandates Home Rule, a county possesses police power to enact ordinances to further the health and welfare of its residents. See § 4-9-30. As the Supreme Court of South Carolina cautioned in* Rothschild v. Richland County Bd. of Adjustment, *309 S.C. 194, 420 S.E.2d 853, 855 (1992), "it is well settled that ordinances, as with other legislative enactments, are presumed constitutional; their unconstitutionality must be proven beyond a reasonable doubt." A court will not declare an ordinance invalid unless it is clearly in conflict with the general law.* Hospitality Assn. of S.C. v. County of Charleston, *320 S.C. 219, 464 S.E.2d 113 (1995). Keeping in mind the presumption of validity and the high standard which must be met before an ordinance is declared invalid, we note that, while this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with State law. Accordingly, an ordinance will continue to be enforced unless and until set aside by a court of competent jurisdiction.* Op. S.C. Atty. Gen., *March 21, 2003 (2003 WL 21043502).*
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> *In* Hospitality Assn., *the Court recognized the test for resolving the issue of the validity of a local ordinance vis-a-vis State law. There, the Court stated that:*

> *[d]etermining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.*

Id., 464 S.E.2d at 116. The Court referenced § 4-9-25, which provides that:

> *[a]ll counties of the State ... have authority to enact regulations, resolutions, and ordinances ... respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them....*

The Court and this Office recognize that § 4-9-25 provides general police powers to counties. See, e.g., Greenville County v. Kenwood Enterprises, Inc., 353 S.C. 157, 164, 577 S.E.2d 428, 431 (2003), overruled on other grounds by Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005); Op. S.C. Atty. Gen., September 22, 2008 (2008 WL 4489051). This broad grant of power, noted the Court, "is limited only by the requirement that the regulation, resolution, or ordinance be consistent with the Constitution and general law of this State." Hospitality Assn., 464 S.E.2d at 116. Moreover, the [...] Court stressed that § 4-9-25 states that "[t]he powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties." Id.

Thus, the first question which must be addressed in analyzing whether an ordinance is consistent with State law is the authority of counties to regulate in this area. Put another way, is the ordinance preempted by state law? The test for preemption of local government regulation is set forth in Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000), in which the Court stated that:

> *[i]n order to preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990). In Fine Liquors, Ltd., the Court held, although the General Assembly gave the Alcoholic Beverage Control Commission the sole and exclusive authority to sell beer, wine and alcohol, it had not preempted the field so as to preclude the Town of Hilton Head from passing a zoning ordinance which prohibited internally illuminated "red dot" signs.*

Bugsy's, 530 S.E.2d at 892.

Applying the "manifest intention" test, the Court in Bugsy's found that "while the General Assembly has enacted a comprehensive scheme regulating many aspects of video poker machines, the scheme does not manifest an intent to prohibit any other enactment from touching on video poker machines." Id. ...

Op. S.C. Atty. Gen., 2013 WL 1803938 (April 18, 2013).

The South Carolina Legislature has addressed the payment of defense of actions against public officers and employees by statute. South Carolina Code Section 1-7-50 states:

> In the event that any officer or employee of the State, or of any political subdivision thereof, be prosecuted in any action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the Attorney General, when requested in writing by any such officer or employee, to appear and defend the action or proceeding in his behalf. Such appearance may be by any member of his staff or by any solicitor or assistant solicitor when directed to do so by the Attorney General.

(Emphasis added) (1976 Code, as amended). However, the statute goes on to require an investigation first unless it appears the officer or employee was acting in good faith within the scope of his employment. S.C. Code § 1-7-60 (1976 Code, as amended). This Office stated in a previous opinion concerning this statute:

> *As can be seen, § 1-7-50 provides for legal representation by the Attorney General even in criminal matters, if the requisite good faith requirements are met. Former Attorney General McLeod drafted this statute in 1960, and submitted it to the General Assembly, which enacted it that year. In a letter written to the Attorney General of Arkansas on January 13, 1969, General McLeod wrote that "[i]n the past this office, for a number of years and without specific statutory authority, represented officers and employees of the State who were charged criminals as a result of their actions. Thus, in order to alleviate the absence of express statutory authority for such representation, the Attorney General proposed what is now § 1-7-50. In that same letter, General McLeod further advised that:*
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> > *I suggested the enactment of the statute referred to in the belief that officers should not have to undertake the payment of their own expenses in defending actions brought against them for acts done in the performance of their duties.*

Op. S.C. Atty. Gen., 2014 WL 4253409 (August 14, 2014). Therefore, any such ordinance should require good faith and that any action be within the course of employment in order to indemnify.

Regarding tort liability, the South Carolina Legislature expressed its intention in South Carolina Code § 15-78-20 regarding the public policy in this State "that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein." The statute goes on to grant the State, all political subdivisions and all employees acting within the scope of their official duty immunity from liability and suit for tort other than what is waived in Title 15, Chapter 78. S.C. Code § 15-78-20(b) (1976 Code, as amended). The law states that all other immunities for government entities are preserved and that Chapter 78 is the exclusive civil remedy for torts by government entities and their employees. Id. Therefore, the only liability for torts for political subdivisions of the State and their employees must be within the parameters of Title 15, Chapter 78.[1] South Carolina Code § 15-78-70 gives the exclusive remedy for torts committed by employees of

[1] Please note compliance with the South Carolina Tort Claims Act would also include compliance with the South Carolina Insurance Reserve Fund (pursuant to S.C. Code § 1-11-140, et al.) in addition to any other applicable laws and insurance requirements.

government entities as long as the employee's conduct was within the scope of his official duties and was not fraud, actual malice, intent to harm or a crime involving moral turpitude. An action brought against the governmental agency should name the agency or political subdivision as the defendant, not the employee individually, unless it cannot be determined which agency the individual is employed by. S.C. Code § 15-78-70 (1976 Code, as amended). Any person who "may suffer a loss proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty" has standing to file a claim under the Tort Claims Act. S.C. Code § 15-78-50(a) (1976 Code, as amended). Moreover, no governmental entity is liable for the tort of one of its employees if the employee, as a "private person" would not himself be liable. S.C. Code § 15-78-50(b) (1976 Code, as amended). One concern in any such ordinance would be that it attempts to expand tort liability outside of the scope of Title 15, Chapter 78. This Office has previously opined that a county council may indemnify a councilman acting within the scope of his official duties done in a good faith. Op. S.C. Atty. Gen., 1987 WL 342727 (November 23, 1987). An employee should not be personally named in a lawsuit for torts committed within the scope of his official duty. S.C. Code § 15-78-70 (1976 Code, as amended).

Furthermore, the Tort Claims Act includes public officials and officers within the definition of an employee for purposes of the Act. S.C. Code § 15-78-30(c) (1976 Code, as amended). While a court has previously defined a public official as a government employee, this may not always be the case. Erickson v. Jones Street Publishers, LLC, 368 S.C. 44, 629 S.E.2d 653 (2006). While this Office is not aware of all the officers and employees the ordinance is attempting to indemnify, a county auditor is appointed by the Governor to a four-year term, and this Office has opined that an auditor holds a public office. See S.C. Code § 12-39-10; Op. S.C. Atty. Gen., 2005 WL 2652384 (September 26, 2005). Moreover, this Office has stated that while an employee of a county may be a public official, an official may not necessary be an employee of a county. Ops. S.C. Atty. Gen., 2013 WL 4636665 (July 26, 2013); 2013 WL 3479875 (June 28, 2013); 1999 WL 397927 (February 17, 1999). While the ordinance designates employees and public officials as "employees," a public official may or may not also be the employee of a county. Id.

Moreover, this Office has issued previous opinions concerning reimbursement of funds. As we stated in a 1997 opinion, neither public funds nor counsel paid for with public funds may be used in a criminal proceeding without specific statutory authorization. Op. S.C. Atty. Gen., 1997 WL 323769 (May 13, 1997). Furthermore, as quoted above, this Office answered a similar question concerning representation of a Retirement Systems Investment Commission member and stated in that opinion:

> *As one authority has stated,*
>
> > *[t]he purpose of a statute requiring a governmental entity to pay costs or fees incurred by or on behalf of an employee, in defense of a claim or suit for a loss occurring because of acts or omissions within the scope of employee's employment, is to protect office holders from litigation by those dissatisfied with the decisions they make ... In contrast, public officials who pursue or defend personal suits ordinarily must bear their own legal expenses.*
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> *67 C.J.S. Officers. § 387. Further, as stated in Fillipone v. Mayor of Newton, 352 Mass. 622, 629, 467 N.E.2d 182 (1984), "[a]s a matter of policy, public indemnification of public officials serves in part to encourage public service." Courts have concluded that such indemnification statutes are "'quintessentially remedial legislation,' enacted for the benefit of public employees, and thus are "to*

> *be liberally construed to effectuate [their] beneficial purpose." Montgomery County Bd. of Ed. v. Horace, 860 A.2d 909, 919 (Md. 2004).*

Op. S.C. Atty. Gen., 2014 WL 4253409 (August 14, 2014). In the 2014 opinion this Office also cautioned that in most circumstances involving criminal matters, especially where an officer has been indicted by a Grand Jury, indemnification would not be appropriate. Id.

Conclusion: The proposed ordinance you provided appears to limit indemnification to actions within the scope of an employee's duties and specifically excludes fraud, malice, intent to harm or a crime involving moral turpitude. However, the ordinance does not limit it to civil actions or to actions where no grand jury indicts an employee for criminal conduct. As discussed above, this Office has consistently opined where there has been a grand jury indictment, there is a finding of probable cause that a crime has been committed and would not be considered good faith. Op. S.C. Atty. Gen., 2014 WL 4253409 (August 14, 2014).

Moreover, while your ordinance lists employees and elected officials in its introduction, the body of the ordinance discusses employees generally. This Office has noted some public officials are not employees of a county, even though they work closely with a county. Ops. S.C. Atty. Gen., 2013 WL 4636665 (July 26, 2013); 2013 WL 3479875 (June 28, 2013); 1999 WL 397927 (February 17, 1999).

As we also stated above, while this Office does not have the authority to declare whether the proposed ordinance is constitutional or not, the law is clear indemnification cannot exceed the scope of the South Carolina Tort Claims Act, South Carolina Code Section 1-7-50, or the South Carolina Constitution. See, e.g., S.C. Const. Art. X, § 8 ("Monies shall be drawn from ... the treasury of any of [the State's] political subdivisions only in pursuance of appropriations made by law."); S.C. Cons. Art. X, § 7(b) (Annual expenditures shall not exceed annual revenues). Furthermore, this Office believes that without specific statutory authorization, indemnification cannot be for criminal acts where the accused has been indicted. Nevertheless, this Office presumes any such ordinance is constitutional until declared otherwise by a court. Op. S.C. Atty. Gen., 2013 WL 1803938 (April 18, 2013).

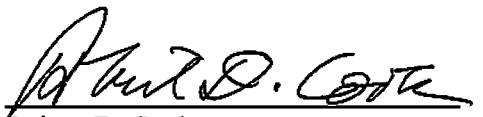
Please note this Office is only issuing a legal opinion based on the current law at this time. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. S.C. Code § 15-53-20, et al. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General