ALAN WILSON
ATTORNEY GENERAL

July 7, 2016

The Honorable Joe Nates, Chief
Irmo Police Department
Post Office Box 406
Irmo, SC 29063-0406

Dear Chief Nates:

You have requested our opinion regarding a recurring situation in Irmo. By way of background, you state the following:

> In your opinion to a letter sent to you by Irmo Town Council members, Mr. King, Mr. Waites, and Mr. Pouliot, on April 20, 2016, you stated that you were asked to clarify whether town council possesses the authority to discipline one of its members by removing the member at issue from a council meeting and, assuming council has such authority, you were further asked if town council may instruct municipal police to enforce such an order.
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> In your opinion dated May 31, 2016, you reversed your answer to the first question addressed in your April 20, 2016 opinion, and since doing so, I would like to respectfully ask you to address the second question in your April 20, 2016 opinion specifically, may town council instruct municipal police to enforce an order to remove a council member.
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> I do not believe town council possesses such authority. The South Carolina Constitution states in Article I, Section 8, Separation of Powers, that in 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.
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> The Municipal Association of South Carolina publishes a Handbook for Municipal Officials which states on page 7, "State law forbids the mayor and council members from dealing with employees or interfering with the operation of municipal departments, offices or agencies under the manager's direction §5-13-40. The mayor and council set municipal policy. The manager implements the policy through administrative control of municipal departments, offices and agencies." State Law §5-13-40(c) specifically states that except for the purpose of inquiries and investigations, neither the council nor its members shall deal with municipal officers and employees who are subject to the direction and supervision of the manager

> except through the manager, and neither the council nor its members shall give orders to any such officer or employee, either publicly or privately.
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> I agree that a legislative body has the right to discipline itself as you indicated in your May 31, 2016 opinion. I believe the intent is that the Legislative branch has to handle the discipline within its own branch of government. It is my opinion that the removal of a town council member by a municipal officer can only be done after a custodial arrest. Town council may use a municipal ordinance to enforce a disciplinary measure, specifically, ejecting of one of its members. Municipal ordinances are generally enforced with a courtesy summons rather than a custodial arrest. A custodial arrest lies within the discretion of the municipal officer and a municipal officer cannot be ordered to make a custodial arrest by town council through the city manager as outlined in State Law §5-13-40 (c).

Law/Analysis

We have, to date, issued three opinions regarding this same situation. The first, dated November 16, 2015, concluded that "council does not possess the authority to summarily remove a fellow councilmember, either from Office or attendance at a meeting, absent the existence of cause. . . . Indeed, to do so would be to ignore not only the recognized rights of Officeholders, but also the representational interests of their constituents." The second opinion, dated April 20, 2016, found that "Irmo's town council lacks the authority to discipline one of its members by removing such an individual from a meeting."

Finally, in our last issued opinion on this topic, we stated the following:

> [b]ased upon the above analysis, our opinion dated April 20, 2016 is modified. We believe a municipal council does possess the power to discipline one of its own members by removal from a meeting as an inherent legislative power; however, it is also our opinion that such power should be exercised with great caution to prevent abuse and a potential infringement of one's First Amendment rights. Furthermore, as the inherent power of a municipal council to discipline one of its own members is far from defined, we believe legislative guidance as to the extent of such power would be beneficial.

We further advised the following:

> [w]hile we are of the opinion that a municipal council possesses inherent authority to discipline one of its members by removal from a meeting, we also emphasize the need for considerable caution. There is a fine line between First Amendment rights of free speech and disruption of a meeting. The members of council must thus be very careful to avoid infringing upon First Amendment rights. See Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2010) (finding that attendee of city council meeting has a First Amendment right to be free from view point discrimination; the person must actually be disruptive to warrant ejectment). Thus, council must be vigilant in not abusing its power. Additionally, we believe legislative guidance as to

> the extent of such authority would be beneficial to ensure the power is appropriately used.

Thus, in our view, a town council's authority to eject a member of that body from a meeting should rarely, if ever, be used. Such action, under certain circumstances, could subject council members, as well as police officers, to potential liability if First Amendment rights are infringed. This is not a situation similar to that of the House or the Senate of the General Assembly, in which the State Constitution expressly authorizes "each house to punish its members for disorderly behavior. . . ." See Art. III, § 12 (South Carolina Constitution as amended). In these instances, courts often do not become involved because of separation of powers concerns. See Culbertson v. Blatt, 194 S.C. 105, 9 S.E.2d 218 (1940); but see Powell v. McCormack, 395 U.S. 486 (1969) [legislative immunity does not bar all judicial review].

However, the principle of separation of powers is inapplicable to local government. Op. S.C. Att'y Gen., 1995 WL 67625 (January 23, 1995). Moreover, state law expressly provides for the election by the Senate and House "at the same time . . . [of] a sergeant at arms and an assistant sergeant at arms. . . ." See § 2-3-90. In an earlier opinion, we also concluded that the Sergeant-at-Arms of the Senate possesses the authority to take into custody without warrant members of the Senate to compel those absent members to return to the Senate Chamber. In that opinion, we advised that

> . . . persons who are duly authorized by the Senate under the provisions of Rule 4 of the Senate may take what measures are reasonably necessary to compel the attendance of absent members; that such persons may requires of the Senate such evidence of their authorization to arrest a Senator as they may deem sufficient; that such documentary authorization, while it may be required by an officer, is not necessary in order to empower him to undertake the necessary action; and that no liability attaches to one who compels the attendance of an absent member of Senate when he has been authorized to undertake such arrest.

Here, by contrast, § 5-7-210 states in pertinent part that "[a] member charged with conduct constituting grounds for forfeiture of office shall be entitled to a public hearing, and notice of such hearing shall be published in one or more newspapers of general circulation in the municipality at least one week in advance of the hearing. Decisions made by the council under this section may be appealed to the Court of Common Pleas." In Wallace v. City of York, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981), a case involving several alleged violations of the Home Rule Act by the mayor, our Supreme Court cited § 5-7-210, stating that ". . . the power to determine the grounds for forfeiture of office or to otherwise act resides in the council as an entity and not its individual members." See also Op. S.C. Att'y Gen., 1992 WL 682835 (August 17, 1992) [mayor intentionally and willfully directing police chief to disregard and not enforce certain municipal ordinances; any decision to remove the mayor for such conduct "is a decision to be made by City Council."]. Thus, § 5-7-210 is, in our view, the principal means for disciplining a member of City Council, and such is a decision to be made by Council after a hearing, appealable to the Court of Common Pleas. If a member is continually disrupting

Council meetings, the matter could be addressed pursuant to § 5-7-210, with the member having a full hearing and any decision subject to appeal. Again, even here, the First Amendment would come into play.

Further, we note that a city police officer who physically removes a person from a city council meeting at the direction of council because of that person's creation of a disturbance, and where the individual's conduct does not constitute a criminal offense, is often the subject of litigation. See e.g., Acosta v. City of Costa Mesa, 718 F.3d 800 (9th Cir. 2013) [speaker at city council meeting brought action against the mayor, chief of police, the city and certain individual police officers challenging city ordinance making it a misdemeanor for members of public who speak at council meetings to engage in disorderly, insolent, or disruptive behavior. In Acosta, the Court concluded that the city ordinance was facially overbroad in violation of the First Amendment]; Monteiro v. City of Elizabeth, 436 F.3d 397 (3d Cir. 2006) [city council member brought action against president of city council, and police officers for ejecting him from public meeting, alleging a violation of the First Amendment in that the ejection was based upon council member's viewpoint]; Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2016) [meeting attendee brought § 1983 action against city, current and former council members and council's sergeant at arms (member of Santa Cruz police department) for ejection and arrest during council meeting]; and Collinson v. Goff, 895 F.2d 994 (4th Cir. 1990) [citizen brought § 1983 action against president of board of county commissioners, county, board and police officers claiming that his First Amendment rights were violated when president ruled him out of order while he was addressing a called public meeting and then had him ejected].

In addition, while there is a split of authority, some courts have concluded that a police officer may not rely upon the order of instruction of a superior officer or official for qualified immunity under § 1983. For example, in Raven v. City of Miami, 2007 WL 686609 (S.D. Fla. 2007), the District Court stated the following:

> [o]fficers following the orders of their superiors are entitled to qualified immunity unless they "acted unreasonably in following [their superior's] lead, or . . . they know or should have known that their conduct might result in a violation of the plaintiff's rights." Hartsfield v. LeMacks 50 F.3d 950, 956 (11th Cir. 1995). Qualified immunity has been afforded to officers' following superiors' orders where, for example, an officer is ordered to search a person previously questioned by the officer's superior (such that the officer reasonably believes that there is individualized suspicion supporting the search). See Brant v. Ashley, 247 F.3d 1294, 1306 (11th Cir. 2009).
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> This case is not a case of that type. The individual Defendants asserting this argument here had no reason to believe that an order from high-ranking Miami police officers to suppress legal protest on a wholesale basis with allegedly no justification would not result in a violation of clearly established federal law. Thus, the individual Defendants who have asserted this argument are not entitled to qualified immunity on the basis that they were following orders.

See also Cozzo v. Tangipahoa Par. Council, 279 F.3d 273 (5th Cir. 2002); Beir v. City of Lewiston, 354 F.3d 1058 (9th Cir. 2004) [officers could not reasonably rely on interpretation of protection order without confirming content through official channels]. Importantly, in Powell v. McCormack, the United States Supreme Court stated the following:

> [t]hat House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision. Kilbourn [v. Thompson, 103 U.S. 168 (1881)] decisively settles this question, since the Sergeant at Arms was held liable for false imprisonment even though he did nothing more than execute the House Resolution that Kilbourn be arrested and imprisoned.

Powell, 395 U.S. at 504-505 (emphasis added). Thus, in such circumstances, following the order of the body may not necessarily protect from liability the person so executing such order.

Furthermore, as you state in your letter, in a council-manager form of government, city council is not the direct supervisor of a police chief or members of the Town's police force. In addition to the Chief as head of his department, the city manager is the immediate supervisor pursuant to § 5-13-40. Subsection (c) of § 5-13-40 provides as follows:

> (c) Except for the purpose of inquiries and investigation, neither the council nor its members shall deal with municipal officers and employees who are subject to the direction and supervision of the manager except through the manager, and neither the council, nor its members shall give orders to any such officer or employee, either publicly or privately.

(emphasis added).

In Todd v. Smith, 305 S.C. 227, 231, 407 S.E.2d 644, 646-7 (1991), our Supreme Court stated the following regarding the council-manager form of government:

> [i]n the council/manager form of city government all legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote. Section 5-13-30, Code of Laws of South Carolina, 1976. Under the form of government adopted by the City of Myrtle Beach [council-manager], the city manager and the director of the Myrtle Beach Convention Center do not have the authority to set city policy, nor can their acts be said to represent the official policy in view of the legislative authority granted to the municipal council.

As we noted in Op. S.C. Att'y Gen., 2013 WL 3362070 (June 19, 2013), there can often be a "fine line . . . between administrative and legislative functions." And, as the Fourth Circuit concluded in Local 2106, Int'l. Assoc. of Firefighters v. City of Rock Hill, 660 F.2d 97, 99 (4th Cir. 1981), § 5-13-40(c) "simply prohibits city councils and their members from interfering with

the direct supervision of city employees." Thus, the city manager, rather than council, has direct supervisory authority over the police chief and police officers in the council-manager form. See Bane v. City of Cola., 480 F.Supp. 34 (D.S.C. 1979); Bunting v. City of Cola., 639 F.2d 1090 (4th Cir. 1981).

As discussed above, because of significant First Amendment concerns, ejection of a person, particularly a member of the body itself, from a public meeting should rarely be employed. As one court has stated,

> [t]he government may not "regulat(e) speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). The government, however, may restrict the time, place and manner of speech, as long as those restrictions are reasonable and serve the purpose for which the government created the limited public forum. Pleasant Grove {City} v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 1132, 172 L.Ed.2d 853 (2009). A time, place, and manner restriction on speech is reasonable if it is (1) content-neutral, (2) narrowly tailored to serve an important government of interest, and (3) leaves open ample alternatives for communication or information. See Ward v. Rock Against Racism, 494 U.S. 781, 791-803, 109 S.Ct. 2746, 2753-60, 105 L.Ed.2d 661 (1989)

Galena v. Leone, 638 F.3d 186, 198 (3d Cir. 2011).

In Norse v. Santa Cruz, supra, the Court concluded that the First Amendment requires an actual disturbance to warrant ejection. According to the Ninth Circuit:

> [i]n this case, the City argues that cities may define "disturbance" in any way they choose. Specifically, the City argues that it has defined any violation of its decorum rules to be a "disturbance. . . ." We must respectfully reject the City's attempt to engage us in doublespeak. Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, nunc pro tunc disruption or imaginary disruption. The City cannot define disruption so as to include non-disruption. . . .

629 F.2d at 976. In addition, the Norse Court refused to extend the members of Council with absolute immunity because the act of ejection was "administrative rather than [a] legislative act. Thus, Krohn, Kennedy and Fitzmaurice are not entitled to absolute immunity for their part in removing Norse from the meetings." Id. at 977. Further, according to the Court,

> [a]lthough the record is incomplete, it appears that in both 2002 and 2004 Norse was singled out for expulsion and arrest. Mayors Krohn and Kennedy did not take any formal legislative action, but rather ordered Norse out of the room. And both expulsions lacked the hallmarks of the legislative process.

Id.

The New Jersey decision in State v. Charzewski, 811 A.2d 930 (N.J. 2002) is instructive in this regard. There, defendant was convicted of violation of a statute which prohibited the disruption of a meeting "with purpose to prevent a lawful meeting, procession of gathering, he does an act tending to obstruct or interfere with it physically." The New Jersey Court reversed the conviction and entered a judgment of acquittal. In the Court's view,

> . . . We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131; DeJonge v. Oregon, 299 U.S. 363, 365, 81 L.Ed. 278.

811 A.2d at 933. Continuing, the Court, quoting from the comments accompanying the statute, explained:

> [a]s noted, the section is limited to physical interference. . . . That is not to say that speech could never be physically disruptive; where an actor's speech was intended to make it impossible for the person addressing the meeting to be heard, speech would constitute a physical obstruction. Similarly, if a person with no privilege to speak in a meeting repeatedly interrupted it, he might well be in violation of the section whatever the content of his speech.

811 A.2d at 934. The Court went on to say that ". . . limitations on political speech in the context of a public meeting must be narrowly drawn." Id. at 933.

As the Third Circuit Court of Appeals stated in Monteiro, supra:

> [i]t is clearly established that when a public official excludes a elected representative or a citizen from a public meeting, she must conform her conduct to the requirements of the First Amendment. . . . It is also clearly established that content-based restrictions on speech in a public forum are subject to strict scrutiny, while the viewpoint-based restrictions violate the First Amendment regardless of whether they serve some valid time, place, manner interest.

436 F.3d at 404. Thus, when city council ejects a person, particularly a member, from a meeting, there is no question that the First Amendment may well come into play.

These First Amendment concerns are complicated here, a situation where the Presiding Officer of a City Council, which is operating under the council-manager form of government, orders a city police officer to eject a member for disruption of a meeting. As we stated in Op. S.C. Att'y Gen., 2013 WL 3362070 (June 19, 2013), "[c]ouncil members . . . are prohibited by § 5-13-40(c) from interference with the supervisory function of the city manager, but maintain the 'legislative function' of a city council. See, Bishop v. City of Cola., 401 S.C. 651, 738 S.E.2d

255, 261 (Ct. App. 2013)." Courts have concluded that ejection of a person from a city council meeting for disruptive behavior is not a "legislative" function, but an administrative one and thus council members are not entitled to absolute immunity for such ejection. See Hansen v. Bennett, 948 F.2d 397 (7th Cir. 1991); Norse v. City of Santa Cruz, supra. Thus, a court may well conclude that any order for ejection, an administrative act, given to Irmo Police Officers may not be made by members of Council. As recognized in Rubio v. Skelton, 2008 WL 3853387 (D. Oregon 2008),[n]either the mayor nor any individual member of the City Council have direct authority regarding the training, supervision, or discipline of police personnel. Instead, the City Council as a whole has supervisory authority over the City Manager." Slip Op. at 3 (decision of Magistrate Judge, which is adopted).

Conclusion

We reaffirm our May 31, 2016 opinion that a municipal council possesses inherent authority to discipline its members, including the power to eject a member from a meeting for disruptive behavior. However, we also strongly stress that the First Amendment greatly constrains such authority. Robert's Rules of Order does not trump the First Amendment. As the courts have emphasized ". . . limitations on political speech in the context of a public meeting must be narrowly drawn." State v. Charzewski, 811 A.2d 930, 933 (N.J. 2002). Generally courts have concluded that although a municipal council may regulate the time, place and manner of speech, it may not define "disruptive" behavior as it pleases. Thus, Council's action of ejection must be neutrally grounded, rather than content-based. Such disruptive conduct is usually limited to physical interference with the meeting rather than simply disagreeing with the content of what is being said. In other words, Council may not impose content-based, viewpoint-based restrictions upon a Council member's speech. Thus, because of these First Amendment restrictions, a municipal council should rarely utilize its power to eject a person, particularly a member, from a meeting. If the ejection is based upon the content of speech, such action could well subject the Council and those officers who enforce Council's instructions to § 1983 and state tort liability.

Clearly, courts hold also that the members of council do not have absolute immunity from liability because removal is an administrative rather than a legislative act. Moreover, even in the case of qualified immunity, courts have concluded that a police officer who merely follows the order of removal of the Presiding Officer of Council will not entitle that officer to such qualified immunity. See Kilbourn, supra [Sergeant at Arms is not immune in executing the order of the House and monetary liability attaches to the Sergeant at Arms for such execution]. As the Court stated in Ritchie v. Coldwater Community Schools, 947 F.Supp.2d 791, 822 (W.D. Mich. 2013), ". . . no reasonable police officer would have believed that he could have arrested Ritchie, even if Kerr had asked Ritchie to leave the meeting." This is particularly the case here where council does not serve as the immediate supervisor of the police officer in the council-manager form of government. See § 5-13-40(c). Inasmuch as removal or ejection is an administrative function, rather than a legislative one, we express herein our doubt that City Council possesses the power to order city employees, such as municipal police officers, to remove such a member.

If the Town wishes to employ a "Sergeant-at-Arms" to enforce its instructions, that is one thing. However, use of Town police in such circumstance raises many legal issues, discussed above.

Thus, because of these numerous uncertainties, we would strongly recommend court action to resolve this matter. As we concluded in a previous opinion, also involving First Amendment issues relating to the disciplinary action taken by a public body against a fellow member,

> . . . it would appear that the safest course in attempting to enforce such regulation or by-law is for the board or public body, to seek some form of equitable relief (i.e. mandamus, injunction or quo warranto against a member who fails to comply. That way any First Amendment problems . . . could be dealt with by the court without subjecting the public body to possible liability.

Op. S.C. Att'y Gen., 1984 WL 566300 (September 21, 1984). We stand by that advice here as well. We would certainly hope this situation can be resolved amicably among the members of council who must cooperate with each other. In addition, § 5-7-210 exists as the principal means for disciplining council members. Such provision, however, requires a hearing and appellate review. On the other hand, expulsion of an elected member from a council meeting is a drastic step and places city police officers, who are not under the immediate supervision of council members, in a precarious legal position.

Sincerely,

Robert D. Cook
Solicitor General