ALAN WILSON
ATTORNEY GENERAL

July 22, 2019

Jennifer C. Blumenthal, Esq.
Burr Forman McNair
P.O. Box 1431
Charleston, SC 29402

Dear Ms. Blumenthal:

You have requested an opinion from this Office regarding the interpretation of a contract between the Commissioners of Public Works of the City of Charleston ("CPW") and the Town of Sullivan's Island ("SI"). In your request letter, you provided us with the following information regarding the contract:

> On July 19, 1994, CPW entered into a Water Supply Contract with the Town of Sullivan's Island ("SI") for the sale of potable water to SI on a wholesale basis (the "Contract").
>
> The Contract includes a prefatory recital: 'Sullivan's Island desires to purchase quality potable surface water on a wholesale basis from a reliable wholesale supplier to help supply the needs of its customers over the next thirty (30) years.'
>
> The Contract goes on to provide in Section D.2 for a term of thirty years with automatic, unlimited fifteen year renewal terms unless SI elects not to renew the Contract:
>
> > 2. The life of this contract shall extend for a term of thirty (30) years from the date of execution and shall be automatically renewed for additional fifteen (15) year periods unless the [*sic*] Sullivan's Island gives 180 day [*sic*] written notice to CPW of its intent not to renew this contract.

You directed our attention to the following laws:

> As a commission of public works of a municipality, CPW is governed by Chapter 31 of Title 5 of the Code of Laws of South Carolina, 1976, as amended (the "Code").
>
> While there are no apparent statutory requirements specific for water supply contracts of a commission of public works of a municipality,

> there are statutory limitations on the terms of several types of contracts governed by Chapter 31 of Title 5 of the Code . . .
>
> Contracts for service within and without the city limits are governed by Article 19 of Chapter 31 of Title 5 of the Code. Section 5-31-1910 of the Code limits the term of contracts for water by cities and towns owning a water plant to two years, subject to like renewals . . .
>
> For cities with a population over 70,000 according to the 1940 census (that would include the City of Charleston), Section 5-31-1920 of the Code limits the term of such contracts for water by cities owning a water plant to fifty years with like renewals . . . While the foregoing statute permits options to renew, it does not specifically reference a commission of public works, and it does not address automatic renewals, unilateral termination rights and perpetual terms.
>
> Perpetual contracts are disfavored under South Carolina law and are generally upheld only where the contract expressly states that the term is perpetual. See Childs v. City of Columbia, 87 S.C. 566 (1911); and see also Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98 (1994). When the parties do not include in the contract a definitive period for the contract's duration and no definitive term can be implied from the circumstances, courts will construe the contract as being one terminable at the will of either party, upon the giving of reasonable notice of the party's intention to terminate to other party. Childs at 572; and Carolina Cable at 102 – 103.

We will address each of your questions below.

LAW/ANALYSIS:

We have stated in prior opinions that we are not empowered to interpret contracts. We have elucidated that "[a]s a threshold matter, we note that this Office ordinarily does not review and interpret contractual agreements 'where it has not participated in the negotiation thereof.'" Op. S.C. Atty. Gen., 2013 WL 650578, at *2 (Feb. 7, 2013) (citing Op. S.C. Atty. Gen.. 2007 WL 4686606 (Dec. 6, 2007). We have further explained "the difficulties in attempting to resolve contractual issues through the issuance of an opinion of the Attorney General" as follows:

> [a] legal opinion cannot resolve such obviously critical questions as precisely what expectations the parties may have had or what reliance was placed upon any representations made ....
>
> Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body ... we do not

> possess the necessary fact-finding authority and resources to adequately determine the difficult factual questions present here.

Op. S.C. Atty. Gen., 2003 WL 21691879, at 6 (July 1, 2003) (citing Op. S.C. Atty. Gen., Op. No. 85-132 (November 15, 1985)).

However, we can provide you with the applicable law, and our analysis in a May 21, 2014 opinion is germane to your questions. In the May 21, 2014 opinion, we concluded that a municipality could charge people who lived outside the city limits higher rates for water than it charged its residents. Op. S.C. Atty. Gen., 2014 WL 2619138 (May 21, 2014). In our analysis, we determined that "fees charged to nonresidents are governed by contract, as opposed to statute." Id. at *1 (citing Op. S.C. Atty. Gen.. September 27, 2011). We stated that a "nonresident purchaser of water from a municipality would have only those rights set forth or necessarily implied from the contract to sell and furnish water, and further that the non-resident has no rights beyond those in the contract." Id. at 3 (citing Op. S.C. Atty. Gen., July 17, 1989).

In the opinion, we relied upon sections 5-7-60 and 5-31-1910 of the South Carolina Code of Laws. We explained that "S.C. Code Ann. § 5-7-60 provides general authority for municipalities to provide services outside their corporate limits" while "section 5-31-1910 specifically addresses a municipality's ability to furnish water outside of its municipal boundaries." Id. at 1.

Section 5-7-60, the general authority, provides:

> [a]ny municipality may perform any of its functions, furnish any of its services . . . and make charges therefor and may participate in the financing thereof in areas outside the corporate limits of such municipality by contract with any individual, corporation, state or political subdivision or agency thereof or with the United States Government or any agency thereof, subject always to the general law and Constitution of this State regarding such matters, except within a designated service area for all such services of another municipality or political subdivision, including water and sewer authorities . . . .

S.C. Code Ann. § 5-7-60 (1976 Code, as amended).

Section 5-31-1910 more specifically states:

> Any city or town in this State owning a water or light plant may, through the proper officials of such city or town, enter into a contract with any person without the corporate limits of such city or town but contiguous thereto to furnish such person electric current or water from such water or light plant of such city or town and may furnish such water or light upon such terms, rates and charges as may be fixed by the contract or agreement between the parties in this behalf, either for lighting or for manufacturing purposes, when in the judgment of the city or town council it is for the best interest of the municipality so to do. No such

> contract shall be for a longer period than two years but any such contract may be renewed from time to time for a like period.

S.C. Code Ann. § 5-31-1910 (1976 Code, as amended).

In a footnote of our May 21, 2014 opinion, we stated that section 5-31-1910 was not the only "mechanism" by which a municipality could furnish water service to properties outside of its corporate limits. Op. S.C. Atty. Gen., 2014 WL 2619138, supra, n.1 (citing Op. S.C. Atty. Gen., 2012 WL 719481). A municipality could also provide water service to nonresidents pursuant to sections 5-31-1920, 5-31-1930, and 5-31-1520. Id. The municipality had the discretion to determine which mechanism to use as long as "the municipality complies with the specific requirements of the chosen mechanism and with the general requirements found in section 5-7-60 of the South Carolina Code." Id., n.1.

In the footnote, we described the differences between the mechanisms as follows:

> §§ 5-31-1920 and -1930 change the time limit and eliminate the contiguity requirement of § 5-31-1910, but these provisions apply only to cities of a certain minimum population. On the other hand, § 5-31-1520 permits a city to extend its water and sewer systems to any property beyond the corporate limits, and it states neither a time limit nor a threshold population.

Id., n.1.

Section 5-31-1920, which you cited in your request letter, is worthy of individual mention since it allows municipalities with a larger population, such as the City of Charleston, to provide services for a longer period of time to political subdivisions which are not contiguous to their corporate limits:

> The limitation of two years imposed by § 5-31-1910 shall not apply to cities having a population of over seventy thousand according to the 1940 United States census, and such cities may enter into a contract as set forth in said section with persons, other cities, towns, public service commissions or political subdivisions without the corporate limits of the city, whether contiguous to the corporate limits or not, either for lighting or manufacturing or any other purposes, for any period or periods not exceeding fifty years, and such contracts may include options for extending the existence thereof beyond the date of their expiration for any additional period or periods, not exceeding fifty years, and for similar extensions beyond the date of any such extended period or periods.

S.C. Code Ann. § 5-31-1920 (1976 Code, as amended).

You expressed concern in your letter that section 5-31-1920 "does not specifically reference a commission of public works . . . ." However, in a prior opinion, this Office noted that:

> [a]s to the question of whether the [Elloree Water System] board of commissioners [of public works] may take unilateral action to extend the water and sewer system beyond the corporate limits,...the board of commissioners is an agency of the municipality and is the proper official for purposes of...(S.C. Code Ann. § 5-31-1910 which authorizes cities and towns to furnish water beyond city limits)...to enter into contracts for extension of the water system to contiguous areas beyond the corporate limits. The town council, however, is charged also with the responsibility of approving such an extension in accordance with the best interests of the municipality, and no such contract should be entered into except upon approval of the town council.

Op. S.C. Atty. Gen., 2005 WL 2250219, at 6 (Aug. 24, 2005) (emphasis added).

Similar to the Elloree Commissioners of Public Works, Charleston CPW is an agency of the municipality and is the proper official body to enter into contracts to furnish water beyond its corporate limits. Section 5-31-1920 provides that cities with a population of over 70,000 may enter into a contract as set forth in section 5-31-1910 (although, as stated above, section 5-31-1920 changes the time limit of the contract and eliminates the contiguity requirement).

In your letter, you also expressed concern that section 5-31-1920 "does not address automatic renewals, unilateral termination rights and perpetual terms." However, you then directed our attention to Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98; 447 S.E.2d 189 (1994) and to Childs v. City of Columbia, 87 S.C. 566; 70 S.E. 296 (1911). In the Carolina Cable case, Carolina Cable Network ("CCN") entered into a contract with Alert Cable TV, Inc. ("Alert") on July 12, 1985 "to provide local cable advertising and local origination cable programming to Alert's Dorchester County cable television system." Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98, 100, supra. Pursuant to the contract, CCN controlled and established advertising rates between CCN and its advertising customers and paid Alert twelve cents per cable subscriber per month. The term of the contract was for one year with CCN having the right to renew at the expiration of the year.

From July 12, 1985 to July 12, 1991, CCN paid Alert the contractual monthly fees. Alert was purchased by another company (also known as "Alert"), who in March 1991, sent CCN a proposed new contract increasing the monthly fees based on the current market rate. CCN rejected the proposed new contract. In June 12, 1991, CCN advised Alert that it would be renewing the original contract for the upcoming year under the renewal option. On June 18, 1991, Alert notified CCN that it would be terminating the contract on July 12, 1991 because of the low monthly fees CCN was paying.

CCN brought an action against Alert, and issues raised on appeal included "[w]hether the disputed contract granted CCN the unilateral perpetual right of renewal, and, if not, whether Alert's actions to terminate the contract were reasonable as a matter of law." Id. at 101. The parties conceded that Childs v. City of Columbia, 87 S.C. 566, supra was the governing law and CCN acknowledged "that the contract term between CCN and Alert did not provide for a specific duration." Id. at 102.

In its analysis, our South Carolina Supreme Court relied on Childs. The Court quoted Childs regarding perpetual contracts, stating "[h]istorically, perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the

contract." Id. at 101 (citing Childs v. City of Columbia, 87 S.C. 566, supra). It quoted the holding in Childs:

> [w]here the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other.

Id. at 102 (quoting Childs v. City of Columbia, 87 S.C. 566, supra).

The Supreme Court determined "[h]ere, as in Childs, the fatal defect of the complaint is that it alleges a contract term lacking specific duration." Id. at 102. Based upon Childs, it concluded:

> [p]lainly, the contract attempts to confer on CCN the indefinite right of renewal, and in light of the clear precedent of Childs, supra, this contract can only be construed as terminable at will. Where the contract is terminable at will, reasonable notice from either party is all that is required to terminate the agreement. Childs, supra.

Id. at 102.

The Court also considered whether Alert's actions in terminating the contract were reasonable. The Court determined that "CCN did not offer any evidence at trial that the notice from Alert was insufficient, arbitrary, malicious, or unreasonable." Id. at 104. The Court looked "for evidence that the termination of this contract was done arbitrarily, maliciously or in bad faith." Id. at 104. The Court found that "Alert was motivated by a legitimate business purpose" and its actions in terminating a contract which cost it "significant sums of lost revenue was not an arbitrary or malicious decision." Id. at 104 – 105. Alert's actions in trying to re-negotiate the contract showed that "Alert did not exercise bad faith." Id. at 105.

We will now answer each of the questions presented in relation to the contract between CPW and SI.

1. **Does the inclusion of the continuing renewal provision, with a seemingly unilateral right of SI not to renew, make the Contract terminable at will by either party?**

In Carolina Cable, the term of the contract was one year with CCN having an indefinite right of renewal. Our State Supreme Court held that the contract was terminable at will by each party upon giving reasonable notice to the other party. Because the contract did not express a specific time period and one could not be implied, the Court found that it would be unreasonable to impute to the parties an intent to bind themselves perpetually.

Accordingly, when a contract does not expressly provide for a definite time period, such as a specific number of renewals available, and one cannot be implied, a court will most likely find that the contract is

terminable at will by either party. Only reasonable notice to the other party would be required to terminate the contract.

2. **Can CPW terminate the Contract at the end of the thirty year term (*i.e.*, July 19, 2024), provided CPW gives SI reasonable notice of its intent to terminate (*e.g.*, in excess of two years notice)?**

As stated above, our Office does not have the authority to interpret the contract between CPW and SI. We also cannot determine if termination is reasonable, because we do not have the authority to adjudicate or investigate factual questions. Op. S.C. Atty. Gen., 2003 WL 21691879, supra. When considering whether a party's actions in terminating a contract were reasonable, however, a court will most likely consider whether the actions were arbitrary, malicious, or in bad faith. Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98, supra. In a commercial contract, the court may also consider if the party had a legitimate business purpose in terminating the contract. Id.

Your question generally concerns whether the parties to a contract with an indefinite right of renewal are required to perform for the term provided for in the contract after a notice of termination has been given. The Court, in Carolina Cable, did not address this question because Alert terminated the contract after the initial one year term provided for in the contract. The South Carolina Court of Appeals provided some guidance in Dobyns v. South Carolina Dept. of Parks, Recreation, and Tourism, 317 S.C. 353, 454 S.E.2d 347 (Ct. App. Jan. 23, 1995). We must emphasize that this decision only provides guidance, since the part of the opinion which was relevant to your question was vacated by the South Carolina Supreme Court in Dobyns v. South Carolina Dept. of Parks, Recreation, and Tourism, 325 S.C. 97, 480 S.E.2d 81 (Jan. 13, 1997).

In Dobyns, 317 S.C. 353, supra, the State Court of Appeals considered leases which provided "for a ten-year term with a seemingly perpetual right to renew vested in the Tenant." Id. at 358. The Court found that the leases did "not provide a specific duration or a specific number of renewals available to the Tenant." Id. at 358. Relying on Carolina Cable, the Court held that the leases were "terminable at will by either party upon reasonable notice, and upon such notice the lease will continue only for the existing term of years." Id. at 358 (emphasis added).

The South Carolina Supreme Court vacated the part of the opinion holding that the leases were terminable at will by either party, on the basis that the State Court of Appeals did not have the authority to address an issue which had not been appealed. Dobyns v. South Carolina Dept. of Parks, Recreation, and Tourism, 325 S.C. 97, supra.

However, the Court of Appeals' decision in Dobyns, 317 S.C. 353, supra, serves as persuasive authority that parties to a contract with an indefinite right of renewal must perform for the initial term provided for in the contract after reasonable notice of termination has been given by a party.

CONCLUSION:

You are requesting that this Office interpret the water supply contract between the Commissioners of Public Works of the City of Charleston ("CPW") and the Town of Sullivan's Island ("SI"). We do not have the authority to interpret contracts. Op. S.C. Atty. Gen.. 2007 WL 4686606 (Dec. 6, 2007); Op. S.C.

Atty. Gen., 2003 WL 21691879 (July 1, 2003). However, the decision in Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98; 447 S.E.2d 189 (1994) shows that when a contract does not expressly provide for a definite time period, such as a specific number of renewals available, and one cannot be implied, a court will most likely find that the contract is terminable at will by either party. Only reasonable notice to the other party would be required to terminate the contract.

In determining whether a party's actions in terminating a contract are reasonable, a court will most likely consider whether the actions were arbitrary, malicious, or in bad faith. Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98, supra. The court may also consider in a commercial contract if the party had a legitimate business purpose in terminating the contract. Id.

Although we could not find any binding authority, we believe that parties to a contract with an indefinite right of renewal must perform for the initial term provided for in the contract after reasonable notice of termination has been given by a party.

Sincerely,

Elinor V. Lister

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General