



HENRY McMASTER
ATTORNEY GENERAL

August 4, 2010

The Honorable Shannon S. Erickson
Member, House of Representatives
129 S. Hermitage Road
Beaufort, South Carolina 29902

Dear Representative Erickson:

We received your letter requesting an opinion of this Office concerning Beaufort County's (the "County's") policy of delegating its authority to enforce the County's tree removal ordinance to homeowners associations. In your letter, you informed us that "[c]odes enforcement has stated that HOAs to whom the ordinance authority has been delegated by the County Administrator are 'exempt' from the ordinance and County enforcement." You state your desire for an opinion "on the delegation of ordinance authority to HOAs."

Law/Analysis

It is our understanding that the County's tree removal ordinance is part of the County's zoning ordinances. Section 6-29-950 of the South Carolina Code (2004) gives counties the authority to enforce zoning ordinances. Furthermore, section 4-9-145 of the South Carolina Code (Supp. 2009) states that counties "may appoint and commission as many code enforcement officers as may be necessary for the proper security, general welfare, and convenience of the county. These officers are vested with all the powers and duties conferred by law upon constables in addition to duties imposed upon them by the governing body of the county."

According to section 106-1846(b) of the Beaufort County Code, governing tree protection, "[t]he Beaufort County Codes Enforcement Officers shall be required through permitting to inspect to insure compliance [with the County's tree protection ordinance]." Beaufort County, S.C., Code § 106-1846(b). This provision evidences the County's delegation of its enforcement authority to its code enforcement officers. In accordance with section 4-9-145, we believe the County appropriately

delegated its authority to its code enforcement officers. However, you state that the County further delegated its enforcement authority with regard to tree protection to homeowners associations. Therefore, you are concerned as to whether the delegation of the County's enforcement authority to a private entity is legal under South Carolina law.

In several prior opinions, this Office addressed various governmental entities' abilities to delegate their authority. In a 2004 opinion, we discussed whether or not a county can delegate its authority to a County Director. Op. S.C. Atty. Gen., March 10, 2004. Quoting several treatises, we stated:

It is well recognized that:

[t]he right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant.

20 C.J.S., Counties, § 89. Another treatise similarly states:

While legislative or discretionary powers or trusts devolved by charter or law on a council or governing body, or a specified board or officer cannot be delegated to others, it is equally well established that ministerial or administrative functions may be delegated to subordinates. The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer of department or governing body in which the power is vested, and the performance of merely ministerial duties by subordinates and agents.

McQuillin, Municipal Corporations, § 10.41.

Id.

Similarly, in a 2003 opinion we discussed whether or not a county could employ a contract county administrator. Op. S.C. Atty. Gen., June 10, 2003. We stated:

As a general rule, courts draw a clear line of demarcation between the performance of ministerial duties by private corporations and the implementation of discretionary functions by such private entities. Thus, it is well understood that “[i]n general, administrative officers and bodies cannot alienate, surrender or abridge their powers or duties, and they cannot legally confer on their employees or other authority and functions which under the law may be exercised only by them or other officers or tribunals.” Op. S.C. Atty. Gen., September 6, 1996, quoting 73 C.J.S., Public Administrative Law and Procedure, § 56. For this reason, it is a recognized principle that

... in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character or which require the exercise of judgment.

Id.

Id. We also cited to the South Carolina Supreme Court’s decision in G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980). Id.

In G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980), our Supreme Court declared invalid an agreement whereby the North Charleston Sewer District entered into an agreement with a private company to transfer the privately owned sewer system to the district. Pursuant to the agreement, the company retained the power to approve or disapprove for connection to the system “any project other than a single family dwelling and small commercial establishments of a defined class.” The Court, in concluding that the delegation of power to a private company was unlawful, reasoned that the district could not “delegate away those powers and responsibilities which give life to it as a body politic.” In the Court’s view, “[a] municipal corporation or other corporate political entity created by state law, to which police power has been

delegated, may not divest itself of such power by contract or otherwise.” 266 S.E.2d at 85.

Id. Finding that the General Assembly did not provide authority by which Georgetown County Council could delegate the duties of the County Administrator to a private corporation, we opined that the Georgetown County was prohibited from employing a contract county administrator to perform the functions of a county administrator. Id.

In a 1996 opinion, we addressed whether the Medical University of South Carolina had the ability to lease or sell its hospital to a private entity. Op. S.C. Atty. Gen., April 4, 1996. Citing to a prior opinion addressing whether the State could contract with a private entity to operate its prisons, we concluded that statutory authority must exist for governmental authority to be delegated. Id. Therefore, we opined that without clear statutory authorization, MUSC could not delegate away control of its hospital. Id.

In another opinion, this Office addressed a special tax district’s ability to contract with a private company to provide law enforcement. Op. S.C. Atty. Gen., April 7, 2008. The County ordinance creating the special tax district specifically charged it with the responsibility for providing police protection for its area. Id. The special tax district contracted with a private security company to provide this service. Id. We cited to a prior opinion stating that municipalities cannot contract with a private company for the purpose of providing law enforcement and reiterated our opinion that municipalities may not “by contract part with the authority delegated it by the State to exercise the police power.” Id. (quotations omitted). Accordingly, we found that “a county would not be authorized to contract with a private security company for law enforcement purposes even though services, while not ‘police protection’, would constitute private security.” Id.

As our Supreme Court explained in Whitfield v. Seabrook, 259 S.C. 66, 73, 190 S.E.2d 743, 746 (1972), the enactment of zoning ordinances involves the exercise of a county’s police powers. Thus, we believe a court would similarly find that enforcement of such ordinances also involves the exercise of a county’s police power. The Legislature specifically, through the enactment of section 6-29-950, gave counties the authority to enforce their zoning ordinances. While Legislature, through section 4-9-145, allows for such enforcement to be delegated to code enforcement officers, we do not find any statutory authority allowing counties to delegate zoning enforcement authority to private entities or groups. Furthermore, we believe that the enforcement of a zoning ordinance involves the exercise of the County’s police powers and is not simply a ministerial function. As such, we do not believe the County may delegate its authority to enforce its zoning ordinances to a private entity, such as a homeowner’s association.

Conclusion

In accordance with our prior opinions, we are of the opinion that governmental entities are precluded from delegating their police powers to individuals or private entities. We believe that enforcement of a County zoning ordinance involves the exercise of the County's police powers. Accordingly, we would advise that the County is precluded from delegating its authority to enforce its ordinances to an individual or private entity, such as a homeowner's association.

Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General