

April 7, 2008

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McCormick County Attorney
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Dear Mr. Callison:

In a letter to this office you raised several questions regarding the special tax district created for Savannah Lakes Village (“SLV”) by McCormick County Ordinance 91-21.

You stated that one of the purposes of the creation of SLV special tax district was to provide “police protection”. To accomplish this purpose, the SLV Special Tax District Commission entered into an agreement with a private security company to provide security for the SLV community. You stated that the SLV community is not a gated community but is a part of the unincorporated area of McCormick County. The roads in the community are maintained by the County and the State.

In a subsequent letter you stated that historically, since the development of Savannah Lakes District, “police protection” has been provided by the McCormick County Sheriff’s Department and that is still the case today. Since its formation in 1992, the SLV Special Tax District Commission has contracted with the SLV Property Owner’s Association to provide security services/community patrol and that is a practice that has been renewed every year since 1992. This private security contracted by the SLV Special Tax District Commission did not replace the responsibility of the Sheriff’s Department but was a supplement to providing “police protection” and assisted the Sheriff’s Department in providing such protection.

You questioned whether the practice of entering into an agreement with a private security agency satisfies the purpose or requirement of providing “police protection”. If not, how can the SLV Special Tax District Commission provide the “police protection” necessary to meet and satisfy the purpose and/or requirement of McCormick County ordinance creating the tax district? You also asked what is the legally acceptable definition of “police protection”.

You stated that Savannah Lakes Village is an unincorporated area of McCormick County. You asked what responsibility does the McCormick County Sheriff have for maintaining patrols and

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providing law enforcement services in the special tax district of Savannah Lakes Village and how does the Sheriff's Department patrols relate to "police protection" as provided in Ordinance 91-21. You asked whether the SLV Special Tax District can enter into a contract with the McCormick County Sheriff's Department to provide "police protection" to the tax district in addition to regular Sheriff's Department patrols and law enforcement activities.

In your subsequent letter, you asked whether or not it is appropriate for the SLV Special Tax District Commission to use the funds generated with the tax imposed on the special tax district for the purpose of contracting with a private security agency to provide, not necessarily "police protection", but private security.

According to the ordinance creating the SLV special tax district, Ordinance 91-21, the special tax district was to be created for the purposes of providing fire protection, police protection and emergency medical services for Savannah Lakes Village. As to your question regarding the definition of "police protection", I am unaware of any State statute or case law in this State defining such term. However, in an opinion dated December 21, 1993, the Ohio Attorney General defined such term as "...services and programs that protect the public by preventing crimes. In Alvarado v. City of Brownsville, 865 S.W.2d 148 at 157 (Tex. App. 1993), a Texas appeals court defined such term as "...the prevention of crime and the apprehension, punishment and rehabilitation of criminals."

The Commission created for purposes of the SLV Special Tax District, known as the Savannah Lakes Village Commission, would

...have the powers to negotiate all lawful contracts concerning the providing of fire protection, police protection, and emergency medical services for the district and shall generally look after the business affairs of the district relating to such services.

Counties, like municipalities, generally have police powers. See S.C. Code Ann. § 4-9-25. A prior opinion of this office dated May 23, 1998 recognized that "...counties of this State may exercise police powers...Health, public safety and sanitation are among the functions of a county...which may be regulated by a county." With regard to municipalities, a prior opinion of this office dated September 29, 2006 stated that

...a municipality is not authorized to contract with a private security company for law enforcement purposes...An opinion of this office dated June 8, 1993 stated that "[l]aw enforcement is a proper exercise of this State's police power. The power of a municipality to establish a law enforcement agency is found in Section 5-7-110...It may not be inferred from the language of the legislation that this delegation of the State's police power may be performed by a private entity such as a private security agency." Another opinion dated March 6, 1980 similarly concluded that a municipality "...is powerless to contract with a private security agency for law

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enforcement purposes...[N]o municipality may by contract part with the authority delegated it by the State to exercise the police power.” See also: Sammons v. Beaufort, 225 S.C. 490, 83 S.E.2d 153 (1954) (a municipality delegated police power may not divest itself by such by contract or otherwise.).

In the opinion of this office, a similar conclusion would be applicable to counties and the special tax districts authorized to be created within a particular county. See S.C. Code Ann. § 4-9-30. As a result, 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.

The September, 2006 opinion also stated that

...private security guards have no authority to exercise law enforcement authority except on the private property they are hired to protect...S.C. Code Ann. § 40-18-110 which grants arrest authority to licensed or registered security guards states that a licensed security guard “...may arrest a person violating or charged with violating a criminal statute of this State but possesses the powers of arrest only on the property on which he is employed.”...(An April 2, 1980)...opinion concluded that “...a private security guard is not authorized...to exercise the power of arrest on public property.”...The lack of authority to exercise law enforcement powers on public property would be an obvious hindrance to a security guard providing law enforcement protection to a municipality.

Such reasoning would similarly be applicable to a county or a special tax district within that county. As a result, the SLV Special Tax District should not contract police protection to a private security agency. Therefore, in answer to your questions, in the opinion of this office, the practice of entering into an agreement with a private security agency would not satisfy the requirement of providing “police protection”. As to whether funds could be utilized to provide “private security”, as spelled out in the referenced ordinance, the Savannah Lakes Village Commission is authorized to negotiate lawful contracts concerning the providing of police protection. Inasmuch as a private security agency should not provide such protection, it would appear to be inappropriate for the SLV Special Tax District Commission to use funds to contract with a private security agency to provide private security.

You next asked how can the SLV Special Tax District community provide the “police protection” necessary to satisfy the purpose or requirement of the McCormick County ordinance creating the tax district. In association with such, you also questioned what responsibility does the McCormick County Sheriff have for maintaining patrols and providing law enforcement services in the special tax district of Savannah Lakes Village and how does sheriff’s department patrols relate to “police protection” as provided in the referenced ordinance. You also asked whether the SLV Special Tax District could enter into a contract with the McCormick County Sheriff’s Department

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to provide “police protection” to the tax district in addition to the regular Sheriff’s Department patrols and law enforcement activities.

Generally, pursuant to S.C. Code Ann. § 23-13-70, a deputy sheriff “...shall patrol the entire county at least twice a week...” (emphasis added) A prior opinion of this office dated March 1, 2005 referenced another prior opinion of this office dated December 21, 1988 which determined that a sheriff is the chief law enforcement officer of a county and he and his deputies have full law enforcement authority in any area of his county. See also Op. dated May 8, 1989 (sheriff recognized as the chief law enforcement officer of a county).

An opinion of this office dated April 18, 1995 commented on the question as to whether a sheriff’s department could contract with a subdivision to provide additional law enforcement protection and services. That opinion cited a prior opinion dated April 11, 1985 and stated that

[t]he general law in this State presently requires a sheriff and his deputies to patrol their county and provide law enforcement services to its citizens...As a matter of public policy, a political subdivision, such as a county, is prohibited from entering into a contract by which it receives remuneration from a citizen for the performance of a public duty which is imposed on it by law, either expressly or by implication. McQuillin, Municipal Corporations, Section 29.08 p. 234. As stated by our Supreme Court in Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346, 360 (1929), “[a]s a general rule, [a governmental body] ... may not contract with ... the public to discharge a purely public duty owed to the public generally.” The rationale of the rule, noted the Court, “is grounded upon the theory that such a contract would restrict the discretion of the ... [governmental body] ...; that is, embarrass or control it in the exercise of governmental functions, which cannot be surrendered or abrogated.” 147 S.E. at 360.

Consistent therewith is the following proposition of law:

[t]he general rule with reference to peace officers is well settled that a promise of reward or additional compensation to a public officer for services rendered in the performance of his duty cannot be enforced. Both public policy and sound morals forbid that such an officer should be permitted to demand or receive for the performance of a purely legal duty any fee or reward other than that established by law as compensation for the services rendered, including the arrest of criminals, protection of property and the recovery of stolen property. 70 Am.Jur. 2d, Sheriffs, Police and Constables, § 71.

The foregoing basic common law and public policy principles have been codified by the General Assembly in specific statutory enactments. For example, Section

16-9-250 makes it a misdemeanor for any sheriff or other peace officer in South Carolina "... to make any charge for the arrest, detention, conveying or delivering of any person charged with the commission of crime in this State, except the mileage and necessary expenses as now provided by law." A public employee is proscribed from receiving additional compensation to that provided by law for the performance of duties by Section 16-9-230. Moreover, a provision of the Ethics, Government Accountability and Campaign Reform Act of 1991, Section 8-13-720, requires that no person "... may offer or pay to a public official [etc.] ... and no public official [etc.] ... may solicit or receive money in addition to that received by the public official [etc.] in his official capacity for advice or assistance given in the course of his employment as a public official [etc.]"

Certain exceptions to the general rule that a public entity or public official may not contract or receive remuneration to provide the services required by law are also provided in specific statutory provisions. One example is that the Sheriff may contract with a municipality within the county for the provision of law enforcement services. As was concluded in an Opinion, dated May 17, 1978, "[t]here are currently no state statutes which would prevent the Greenville County Sheriff's Department from offering Contract Law Enforcement services to municipalities within Greenville County." Another notable exception is found in Section 4-9-30(5). As we noted in an opinion of June 13, 1985, a county is authorized to create a special tax district for police protection in a specific area of a county, pursuant thereto. Article VIII, Section 13 of the South Carolina Constitution and Section 6-1-20 of the Code authorizes the tax district to contract with the county for the provision of services like law enforcement. *Id.* The contract may not, however, unreasonably limit the Sheriff's duty, and discretion to carry out his statutory mandate to patrol the entire county. See, Section 23-13-70.

Therefore, that opinion specifically recognized the authority of a special tax district to contract with the county for police protection.

Another prior opinion of this office dated November 6, 1992 referenced another prior opinion stating that

[w]e would caution...that any contract between the county and a special tax district created for law enforcement purposes should take into account Section 23-13-70 which mandates that sheriff's deputies patrol the entire county. Thus, even where the county decides to contract with a separate political subdivision, such as a tax district, ...care should be taken in drafting any such contract, not to limit the sheriff's discretion in the placement of his deputies or the providing of adequate personnel in other areas of the county. In short, any such contract must be consistent with the terms of Section 23-13-70.

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The September 29, 2006 opinion referenced previously stated that one alternative to providing police protection was to allow deputy sheriffs to “moonlight” and provide law enforcement services as authorized by S.C. Code Ann. § 23-24-10 et seq. Section 23-24-10 states that

[u]niformed law enforcement officers, as defined in Section 23-6-400(D)(1), and reserve police officers, as defined in Section 23-28-10(A), may wear their uniforms and use their weapons and like equipment while performing private jobs in their off duty hours with the permission of the law enforcement agency and government body by which they are employed.

That opinion cites another opinion of this office dated April 18, 1995 which stated that

...[a]s long as law enforcement officers are moonlighting within their jurisdiction, they possess complete law enforcement authority while working off-duty pursuant to Section 23-24-10 et seq. With respect to deputy sheriffs, this jurisdiction includes the entire county.

Also cited was another opinion of this office dated December 7, 1994 which concluded that

[d]eputy sheriffs are given law enforcement authority throughout the county, including sites within incorporated town limits. They are allowed to work off duty performing private jobs in uniform and armed under...(Section)...23-24-10 with the permission of the enforcement agency and governing body by which they are employed.

You next asked whether the special tax district, created by County Ordinance 91-21, can be changed by ordinance? You specifically questioned whether “police protection” can be deleted as a purpose of the tax district. You indicated that if “police protection” was deleted as a purpose, this would leave fire protection and emergency medical services as the stated purposes of the tax district. If this was permitted, the taxes for the support of the tax district would be adjusted to reflect the deletion of “police protection”.

As noted by the referenced ordinance, an election was held seeking the approval of the electors in the special tax district after which the ordinance was adopted. The purpose for the election regarding the formation of the special tax district was to provide funds for the establishment of police protection, fire protection and emergency medical services for Savannah Lakes Villages. As provided in Section 4-9-30, “...an election must be held in which a majority of the electors in that area voting in the election shall approve...the nature of the services to be rendered....”

A prior opinion of this office dated July 9, 1985, a copy of which is enclosed, stated that generally, “in abolishing a special tax district, the safest and most prudent course would be to follow

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the same procedures set forth in Section 4-9-30(5) in the creation of such special tax district.” Such conclusion would support the conclusion that the purposes of the special tax district could not be changed by ordinance but only by one of the procedures authorized by Section 4-9-30(5) which provides the methods for creation of a special tax district, such as an election, the basis by which the creation of the SLV special tax district and its purposes were authorized initially.

Included in the referenced 1985 opinion was the statement that “...even if a county possesses the authority to abolish a special tax district, it is doubtful whether such district could be abolished by simple ordinance.” However, since that opinion was issued, in 1991 by Act No. 114, the General Assembly amended Section 4-9-30 in subsection (5)(e) to state that “[c]ounty council may by ordinance diminish boundaries of or abolish a special tax district.” It is generally recognized that the greater power to accomplish a purpose includes the lesser powers contained within the greater. In the Matter of Johnson, 568 P.2d 855 (Wyo. 1977); Langley v. Police Jury of the Parish of Calcasieu, 201 So.2d 300 (Ct.App. La. 1967). Therefore, it could be asserted that the tax district could be changed by ordinance, such as in eliminating the purpose of police protection. However, I am unaware of any opinions of this office or of the State Supreme Court recognizing such an option. As a result, the safer approach to deleting “police protection” may be to seek approval of the electors for such a change of purpose. Of course, consideration could also be given to seeking a declaratory judgment to resolve the issue with finality.

You next stated that Ordinance 91-21 provides that the special tax district shall be governed by a commission composed of five commissioners appointed by the county council for a term of four years. You questioned whether this can be changed by ordinance. Additionally, you asked whether the county by ordinance can provide that the tax district is abolished and that the tax district will operate as a division of the county. As to your question of whether the tax district can be abolished, as specified above, Section 4-9-30(5)(e) specifically provides that a “[c]ounty council may by ordinance...abolish a special tax district.” As to your question of whether the provision that the commission be composed of five commissioners appointed by council for terms of four years be changed by ordinance, inasmuch as the composition of the commission was enacted by ordinance and as a general rule, as recognized in opinions of this office dated January 20, 2004 and November 18, 2004, one council cannot restrict the authority of its successors to amend an ordinance, in the opinion of this office, it appears that the composition of the commission may be amended by ordinance.

You also questioned whether the terms of the special tax district commission members can be amended to provide that the tax commission members serve for a period of one year. Again, consistent with the previous advice, it appears that such a future change can be accomplished by amending the ordinance creating the commission.

You next asked whether under the current ordinance, can the special tax district commission members be removed at the discretion of the county council without cause. If not, can the ordinance be amended to provide that the commission members can be removed without cause by the majority

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vote of the McCormick County Council. Presently, the ordinance provides that commissioners hold appointive office for a term of four years. A prior opinion of this office dated November 28, 2000 stated that

[t]he general law states that if an office is appointive and there is no set term, the officer can be removed at will. If the office has a set term, then there must exist good cause to remove the appointed officer.

Therefore, it appears that the removal of the present officers must be guided by such principles. However, it appears that an ordinance could be enacted regarding a set term as to allow for the removal process for future appointees.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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