



ALAN WILSON
ATTORNEY GENERAL

October 16, 2012

Jacob M. Jennings, Esquire
Bishopville Town Attorney
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Bishopville, South Carolina 29010-0106

Dear Mr. Jennings:

Attorney General Alan Wilson has referred your letter of August 16, 2012 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issues:

- 1) Which town council members are authorized to vote on a matter concerning per diem?
- 2) How many members would be required to constitute a quorum for such a vote on a per diem or other reimbursement issue where the Bishopville Municipal Code requires a majority vote, and a majority constitutes a quorum?
- 3) Does the rule of necessity apply here?

Short Answer:

- 1) Per diems and whether or not to return reimbursement money paid on a per diem basis for town council members is not issue which should be voted on. Per diems are not authorized by statute for council members, and this Office has issued numerous opinions on this issue, as referenced below.
- 2) A quorum would be a majority of the council, which would be four (4) of the seven (7) members, and all members are authorized by statute to vote on issues regarding compensation and reimbursement. Per diem is not an issue that should be voted on, as stated above.
- 3) Based on the answers to questions (1) and (2), this Office does not find it necessary to address the third question.

Law/Analysis:

- 1) South Carolina Code of Laws § 5-7-170 (1976) says that “the mayor and council members may also receive payment for actual expenses incurred in the performance of their official duties within limitations prescribed by ordinance.” Specifically in regard to municipal councils, this Office interpreted reimbursement limited to actually expenses incurred by council members while performing their official duties, which would implicitly exclude a per diem reimbursement. See *Ops. S.C. Atty. Gen.*, 1977 WL 24591 (August 10, 1977). Additionally, South Carolina Code of Laws § 4-9-100 (1976) provides that “members (of a county council) may also be reimbursed for actual expenses incurred in the conduct of their official duties.” We have repeatedly advised that reimbursement for such expenses for county council must be paid for actual expenses, not on a per diem or flat rate basis. *Ops. S.C. Atty. Gen.*, 1990 WL 599170 (January 17, 1990); 1991 WL 474769 (June 21, 1991); 1987 WL 107 (April 24, 1987); 1981 WL 157961 (September 14, 1981); 1980 WL 120834 (August 19, 1980); 1978 WL 34626 (March 31,

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1978). It is likely a South Carolina court would hold the same to be true for both a municipal council as for a county council. Therefore, any such per diem that is paid or was being paid to council members is likely not authorized and should be returned, less any actual expenses. No vote is necessary by council on an issue that has consistently been interpreted to be unlawful.

2) Since per diem is not authorized, that leaves the question of which council members are authorized to vote on a reimbursement issue. South Carolina Code of Laws § 5-7-170 (1976) also provides that “the council may determine the annual salary of its members by ordinance...the mayor and council members may also receive payment for actual expenses incurred in the performance of their official duties within limitations prescribed by ordinance.” Council members across the State are authorized to vote on their own salaries and expenses to be reimbursed. Section 2-50 of the Bishopville Municipal Code, which you reference in your letter, appears to only limit voting any issue “of a private nature in which he is personally or pecuniarily interested.” In this case, reimbursement for actual expenses would not be of a private nature, as actual expenses requesting reimbursement would only be for work performed in their official duties as council members. Therefore all members are authorized to vote on reimbursement for expenses, just as they are all authorized by statute to for their salaries. On a side note, this office has previously opined that “as a general rule, the legislative body (...) may not abdicate its essential power to legislate or delegate that power to any other department or body” in regards to a council setting its own salary. Op. S.C. Atty. Gen., 1997 WL 419929 (June 24, 1997).

As your letter states, the Bishopville Municipal Code requires a majority vote, and a majority of the council constitutes a quorum. This Office and our courts have consistently held a majority is required for a quorum. Ops. S.C. Atty. Gen., 2006 WL 3199983 (October 27, 2006); 1990 WL 599263 (July 20, 1990); 1989 WL 406135 (April 13, 1989); 1986 WL 192038 (July 11, 1986); Gaskins v. Jones, 198 S.C. 508 18 S.E.2d 454 (1942); Fidelity Fire Ins. Co. v. Harby, 156 S.C. 238 (1930). A majority is more than half of the eligible voters. Op. S.C. Atty. Gen., 1990 WL 599263 (July 20, 1990). In this situation your opinion that a quorum consists of four (4) of the seven (7) council members appears to be consistent with the law and the findings of this Office. Therefore, your opinion that three (3) members of the four (4) constituting a quorum would be needed for a majority vote also would be consistent with those findings.

Conclusion:

Based on the conclusion that per diems are not authorized, it appears no vote is needed in regards to them. Any other compensation issues should be addressed by a quorum of your council. However, this office is only issuing a legal opinion. Until a court 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. If it is later determined otherwise or if you have any additional questions or issues, please let me know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General