9323-9873

ALAN WILSON
ATTORNEY GENERAL

March 13, 2015

The Honorable Jake Evans
Town of Atlantic Beach
P.O. Box 5282
North Myrtle Beach, SC 29597

Dear Mayor Evans:

Attorney General Alan Wilson has referred your letter dated December 17, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

> [Town of Atlantic Beach O]rdinance No. 9-2009 was adopted on September 14, 2009. The purpose of the ordinance was to prohibit anyone with litigation ["adverse to the Town's interests"] from serving or being appointed to a committee. Several members of the Town Council have requested an opinion on this legislation. A review by your office is requested.

Town of Atlantic Beach Ordinance No. 9-2009 amending 1-2-7 of the Code of Ordinances for the Town of Atlantic Beach states:

> ...Council has the authority to remove any member of any board, commission, or committee, for good cause shown, after notice and an opportunity to be heard. Without limiting the foregoing, anyone who engages in litigation adverse to the Town's interests is good cause shown....

Law/Analysis:

By way of background, it is this Office's understanding that there have been multiple lawsuits in the past regarding elections within the Town of Atlantic Beach. As our State's Supreme Court stated, "[t]his Court has unfortunately become familiar with the Town of Atlantic Beach's municipal elections, and the disputes that inevitably accompany them." Cole v. Town of Atlantic Beach, 393 S.C. 264, 267, 712 S.E.2d 440, 442 (2011) (referencing Armstrong v. Atlantic Beach Mun. Election Comm'n, 380 S.C. 47, 668 S.E.2d 400 (2008); Taylor v. Town of Atlantic Beach Election Comm'n, 363 S.C. 8, 609 S.E.2d 500 (2005)). Moreover, we are aware of other lawsuits involving the Town of Atlantic Beach. See, e.g., Price v. Town of Atlantic Beach, No. 4:12-cv-02329-MGL, 2013 WL 5945728 (D.S.C. Nov. 6, 2013); Kenion v. Town of Atlantic Beach, No 4:10-cv-01745-JMC, 2013 WL 2156404 (D.S.C. May 15, 2012); Christian Methodist Episcopal Church v. Rizzo, No. 4:08-cv-00263-TLW-TER, 2010 WL 619061 (D.S.C. Feb. 18, 2010). It appears the substance of your question was addressed in federal district court opinion under "Ground Seven: Conspiracy," where the court found sufficient facts to survive a Rule 12(b)(6) motion to dismiss, and "Ground Eight: Bills of Attainder," where the court found sufficient allegations in the complaint to survive a Rule 12(b)(6) motion to dismiss. Price v. Town of Atlantic Beach, No. 4:09-cv-

2708 TWL, 2010 WL 1433121 (D.S.C. April 8, 2010). That action was filed in October 2009, and the ordinance in question was passed in September of 2009. Id. In that case, the federal district court addressed the bill of attainder claim concerning the ordinance passed that prohibited appointments to committees by one who has filed litigation opposed to the Town in stating:

> The Court does note that the second policy addressed in the complaint appears to limit the qualifications for individuals appointed to positions by the Town of Atlantic Beach. As the United States Supreme Court has noted, the leading cases "applying the federal constitutional prohibitions against bills of attainder ... recognized that the guarantees against such legislation were not intended to preclude legislative definition of standards of qualification for public or professional employment," and noted that " '[t]he legislature may undoubtedly prescribe qualifications for the office to which [an individual] must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' " *Garner v. Board of Public Works of City of Los Angeles,* 341 U.S. 716, 722, 71 S.Ct. 909, 95 L.Ed. 1317 (1951) (quoting *Ex parte Garland,* 4 Wall. 333, 71 U.S. 333, 18 L.Ed. 366 (1867)). Thus, it will be up to the plaintiff to establish that the qualifications created by the town policies, allegedly aimed directly at the plaintiff, constitute improper bills of attainder in light of this precedent.

Id. at *5-6. Because this Office does not opine regarding pending litigation or court orders, we will presume the unpublished opinion has since been resolved and that you are only seeking a legal opinion that will not be the subject of litigation. This Office does not intend to undermine the court system or the judicial process by issuing a legal opinion, and we will presume you would not put us in such a position to do so. Op. S.C. Att'y Gen., 2014 WL 1398591 (February 24, 2014).

In regards to your question, this Office has previously commented as follows concerning the constitutionality of a municipal ordinance:

> Generally, the purpose of ordinances passed by a city council will be presumed to be constitutional as opposed to unconstitutional. City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961). In determining whether a local ordinance is valid, it must pass a two-part test. The first prong of the test is to determine if the municipality was authorized to adopt the ordinance. The second prong is if the municipality had the power to adopt the ordinance whether it is consistent with the [] Constitution and laws. Denene v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (citing Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000)). While a municipal council may attempt to pass an ordinance, no such ordinance may violate state law.

Op. S.C. Att'y Gen., 2014 WL 1511520 (March 27, 2014). Therefore, we will begin and end with the presumption that the ordinance is constitutional, as only a court should declare an ordinance unconstitutional. Ops. S.C. Att'y Gen., 2014 WL 6705714 (November 18, 2014); 1988 WL 485264 (August 9, 1988); 1988 WL 383512 (March 31, 1988); 1988 WL 485247 (March 17, 1988); 1986 WL 289836 (September 15, 1986). Analyzing the ordinance under the two-part test established in Denene, the first question addressed in Price was whether the Town had the authority to adopt the ordinance. Price v.

Town of Atlantic Beach, No. 4:09-cv-2708 TLW, 2010 WL 1433121 (D.S.C. April 8, 2010). Price cited evidence of authority in favor of adopting such an ordinance. Id. Such authority included a United States Supreme Court case citing qualifications for what an office would be. Based on Price's conclusion, there seems to be evidence of the Town's authority to adopt the ordinance. Id. Moreover, this Office issued a previous opinion which discussed the overall authority of political subdivisions, stating that:

> Counties and municipalities are political subdivisions of the State and have only such powers as have been given to them by the State, such as by legislative enactment. Williams v. Wylie, 217 S.C. 247, 60 S.E.2d 586 (1950). Such political subdivisions may exercise only those powers expressly given by the State Constitution or statutes, or such powers necessarily implied therefrom, or those powers essential to the declared purposes and objects of the political subdivision. McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959). In so doing, however, political subdivisions cannot adopt an ordinance repugnant to the State Constitution or laws, which ordinance would be void. Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928).
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> With that general law in mind, it may be noted that the Home Rule Act (Act No. 283 of 1975) granted certain powers, duties, and responsibilities to counties and municipalities, with certain limitations. By Section 4–9–30 of the South Carolina Code of Laws (1976, as revised) each county government "within the authority granted by the Constitution and subject to the general laws of this State" was given a list of enumerated powers. Similarly, Section 5–7–30 of the Code authorizes municipal government to adopt ordinances, regulations, and resolutions "not inconsistent with the Constitution and general law of this State" with respect to a list of functions specified therein. Considering Article VIII, Section 14 of the Constitution and these two enabling statutes, it is clear that a county or municipality cannot adopt an ordinance which would conflict with the State Constitution or general law.

Op. S.C. Att'y Gen., 1990 WL 482456 (December 5, 1990). Furthermore, Article VIII Section 17 of the South Carolina Constitution states:

> The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

South Carolina's Constitution mandates "home rule" for all local government in the State which includes liberal construction in favor of local governments. Op. S.C. Att'y Gen., 2014 WL 5303044 (October 1, 2014) (citing S.C. Const. article VIII, § 17, etc.). As referenced above, municipalities in South Carolina may "enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it...." S.C. Code § 5-7-30 (1976 Code, as amended). Therefore, this

Office will presume the Town had adequate authority for passing such an ordinance sufficient to pass the first part of the Denene test.

Now let us address the second part of the test: whether the ordinance is consistent with Constitution and laws. While this Office is not aware of Price's ruling on the merits of your claims related to this question, the court in Price determined that because the United States Supreme Court has previously allowed standards for qualification for such a committee, the plaintiff must show the qualifications by the town were an improper bill of attainder. Id. Moreover, while there are many other possible inconsistencies with the Constitution one could make against an ordinance, we are not able to address all of them in an opinion unless specifically asked about each one. However, it should be noted our United States Supreme Court does not recognize the right to run for political office as a fundamental right. Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 E.Ed.2d 91 (1972). Nevertheless, one such potential inconsistency with the Constitution we will note is a due process claim against the ordinance. This Office has previously opined that the prohibition against taking one's "life, liberty or property" without due process of law pursuant to the Fourteenth Amendment also applies to municipalities. See Op. S.C. Att'y Gen., 2010 WL 3048330 (July 9, 2010) (citing Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills, 589 F.3d 865, 870 (7th Cir. 2009)). As stated in Price:

> The Fourth Circuit has noted that "the due process clause of the Fifth Amendment applies to action by the federal government," and that a due process action against a state entity "must be grounded in the Fourteenth Amendment's due process clause." *Quest Communications Corp. v. City of Greensboro,* 440 F.Supp.2d 480, 494 (M.D.N.C.2006). To state a claim for relief, the plaintiff "must set forth (1) a cognizable property interest, rooted in state law; and (2) an arbitrary and capricious deprivation of that right." *Id.* at 493–94 (citing *Scott v. Greenville County,* 716 F.2d 1409, 1418 (4th Cir.1983)). In addition, "the property interest claimed must be more than a 'unilateral expectation,' it must be a 'legitimate claim of entitlement.' " *Id.* at 494 (quoting *Biser v. Town of Bel Air,* 991 F.2d 100, 104 (4th Cir.1993)).

Price v. Town of Atlantic Beach, No. 4:09-cv-2708 TLW, 2010 WL 1433121 at *9 (D.S.C. April 8, 2010).[1] Any such right would derive its authority from State or local laws, depending on the authority for such a committee or board position with the requirement that an individual so deprived must have qualified pursuant to law for such a position. South Carolina's Constitution has a provision granting due process and equal protection of the laws. S.C. Const. art. I § 3. Under usual circumstances, we would think a court would not determine such an ordinance violates one's right to due process. This Office is aware that in one of the many lawsuits involving the Town, such a due process claim was made in regards to a leasehold and survived a Rule 12(b)(6) motion to dismiss. Id. In regards to due process, one concern is that the Town of Atlantic Beach is very small, four square blocks, and consequently we presume that it has a relatively small number of citizens. Christian Methodist Episcopal Church v. Rizzo, No. 4:08-cv-00263-TLW-TER, 2010 WL 619061 (D.S.C. Feb. 18, 2010). When an ordinance such as Number 09-2009 is passed with pending lawsuit(s) by one or more of the citizens against the Town, there is little

[1] While this Office is aware that Price is an unpublished opinion, it appears to address, at least in part, the subject of your question.

question to whom the ordinance is directed or what litigation it is referring to. In a 1949 case regarding a state statute passed affecting a pending lawsuit, the Supreme Court found that:

> The contention also is made that the provision which applies this statute to actions pending upon its enactment, in which no final judgment has been entered, renders it void under the Due Process Clause for retroactivity. While by its terms the statute applies to pending cases, it does not provide the manner of application; nor do the New Jersey courts appear to have settled what its effect is to be. Its terms do not appear to require an interpretation that it creates new liability against the plaintiff for expenses incurred by the defense previous to its enactment. The statute would admit of a construction that plaintiff's liability begins only from the time when the Act was passed or perhaps when the corporation's application for security is granted and that security for expenses and counsel fees which 'may be incurred' does not include those which have been incurred before one or the other of these periods. We would not, for the purpose of considering constitutionality, construe the statute in absence of a state decision to impose liability for events before its enactment. On this basis its alleged retroactivity amounts only to a stay of further proceedings unless and until security is furnished for expense incurred in the future, and does not extend either to destruction of an existing cause of action or to creation of a new liability for past events.
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> The mere fact that a statute applies to a civil action retrospectively does not render it unconstitutional. Blount v. Windley, 95 U.S. 173, 180, 24 L.Ed. 424; Western Union Telegraph Co. v. Louisville & N.R.Co., 258 U.S. 13, 42 S.Ct. 258, 66 L.Ed. 437; Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. Looking upon the statute as we have indicated, its retroactive effect, if any, is certainly less drastic and prejudicial than that held not to be unconstitutional in these decisions. We do not find in the bare statute any such retroactive effect as renders it unconstitutional under the Due Process Clause, and of course we express no opinion as to the effect of an application other than we have indicated.

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 553-554, 69 S.Ct. 1221, 1229 (1949). The court in Cohen did not find the ordinance unconstitutional, nor did it find the ordinance's application in violation of the law. Id. However, the situation you have presented differs from Cohen in that the Town of Atlantic Beach's ordinance eliminates a significant number of the eligible committee, board and commission members, which in turn could violate due process (in addition to equal protection or other rights) of those who would have otherwise been eligible due to the Town's virtual assurance of who would be in the potential pool of applicants and would be eliminated (i.e. in the Town's situation, potentially an entire congregation). See Morris v. Metriyakool, 418 Mich. 423, 476-477, 344 N.W.2d 736, 758-759 (1984) ("a basic tenet of due process is that the decisionmaker must be unbiased and impartial ... one situation which presents too great a probability of actual bias is when the decisionmaker has a direct or substantial pecuniary interest in the outcome of the controversy"). While a court would likely determine an ordinance preventing people with ongoing litigation against the municipality from serving on a committee for the municipality could serve a legitimate government interest (as a court did in Price), we believe a court would have to examine the ordinance in regards to specific circumstances, including, but not limited to, the size of the town, the number of registered voters, pending litigation at the time of the ordinance's passage, etc. As our State's Supreme Court and the United States Supreme Court have

noted before regarding municipal zoning ordinances, what may be lawful in a big city may not be so in a rural community. McMaster v. Columbia Board of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660 (2011) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88, 47 S.Ct. 114, 71 L.Ed. 303 (1926)). Pursuant to that same reasoning, the plaintiffs affected by your municipal ordinance could make such a challenge to the ordinance. Without knowing all the facts or background (which we would leave to a court to determine) we believe a court could find in that scenario a plaintiff's rights have been violated.

Furthermore, one could make a claim that the ordinance is vague on its face. By stating that "anyone who engages in litigation adverse to the Town's interests is good cause shown" could imply many things. One possible meaning is any litigation where the town is listed as a party on the opposing side. Another meaning is that any litigation that the Town, in its own subjective determination, deems to be adverse to the Town's interest, whether the Town is listed as a party to the lawsuit or not. As our State's Supreme Court has stated, "[a] law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." Curtis v. State, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2002) (citing Toussaint v. State Bd. Of Med. Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991)). Moreover, the U.S. Supreme Court found a municipal ordinance invalid analyzing it pursuant to the strict scrutiny test regarding a church's rituals. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217, 124 L.Ed.2d 472, 61 USLW 4587 (1993). In that case, the Supreme Court held that the ordinance targeted religious conduct, even where the ordinance appeared facially neutral. In that case the Supreme Court stated:

> The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 837, 28, L.E.2d 168 (1971), and "covert suppression of particular religious beliefs," *Bowen v. Roy, supra,* 476 U.S., at 703, 106 S.Ct., at 2154 (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders," *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696, 90 S.Ct. 1409, 1425, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring).

Id. at 2227. Therefore, if a court determines such an ordinance was passed to suppress a particular religion or group of worshipers (or in this case exclude them from serving on a town committee or board), a court could find the ordinance was passed to "target" certain groups or religions. Id. at 2227. It is these aforementioned concerns that leave us to believe a court will conclude the ordinance is inconsistent with the Constitution. Therefore, we urge caution in regards to such an ordinance because if the court finds it violative of the Constitution, it would also fail the second prong in the Denene test and would be found invalid. Denene v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (citing Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000)).

As an aside, this Office will presume no one holding a public office would be on a committee constituting an office, as they would be violating the dual office holding prohibition by the South Carolina Constitution unless they were on such a committee in an ex officio capacity. S.C. Const. art. VI, § 3 (prohibiting dual office holding); Op. S.C. Att'y Gen., 1971 WL 17510 (June 10, 1971) (citing Darling v. Brunson, 94 S.C. 207, 77 S.E. 860 (1913) (municipal health officer and secretary to the municipal board

of health are both offices for dual office holding prohibition; the dual office holding prohibition in the South Carolina Constitution applies to municipalities; the acceptance of a second office forfeits the first)); Op. S.C. Att'y Gen., 1979 WL 43174 (November 14, 1979) (dual office holding). This Office has previously opined that a legislative committee member could be an office for dual office holding purposes using the factors in the Crenshaw case (including holding sovereign powers of the State: tax, police and eminent domain), concluding that purely advisory committees are not generally offices. Op. S.C. Att'y Gen., 2009 WL 1649228 (May 14, 2009). On the other hand, this Office has issued previous opinions that a member of a county or municipal election commission would be an office for dual office holding purposes. See, e.g., Op. S.C. Att'y Gen., 2006 WL 1207267 (April 10, 2006) (citing Ops. S.C. Att'y Gen., 2000 WL 1347165 ([August] 23, 2000); 1998 WL 261521 (April 21, 1998); 1995 WL 803327 (February 23, 1995)).

Conclusion:
Despite our conclusions that a court should find the ordinance inconsistent with the Constitution, there are many other sources and authorities you may want to refer to for a further analysis. However, as we stated above, we presume constitutionality and leave constitutional determinations to the courts. For a binding determination, this Office would recommend seeking a declaratory judgment from a court on these matters, as only a court of law should interpret such ordinances. S.C. Code § 15-53-20. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only a legal 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 us know.

Sincerely,

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General