

1983 WL 182053 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 14, 1983

*1 Gerald C. Smoak, Esquire
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Walterboro, South Carolina 29488

Dear Mr. Smoak:

Attorney General Medlock has referred your letter of October 13, 1983, to me for comment. Attached to your letter was a copy of an opinion given by you to the Collection County Supervisor concerning the authority to employ the Collection County Attorney. I concur with your opinion and offer the following comments.

Act No. 808 of the South Carolina Acts and Joint Resolutions, 1976 (Supply Act for Colleton County) contained the following provision in Part II, Permanent provisions:

Section 1. The tax assessor and Auditor is hereby authorized to retain a qualified tax consultant for as long as necessary during the current reassessment period required by general law, at such compensation as may be provided in the annual appropriation act. His duties shall be to consult with and advise the tax assessor and auditor on matters of taxes and assessments. However, such consultant shall not infringe upon the duties of the county attorney who shall be retained by the county board of commissioners to advise and represent all county officers, boards and commissions, except the school board, all other provisions of law not withstanding.

[Emphasis added.] This provision should be noted in your opinion, though it is likely that the provision would not withstand a challenge in court. It would appear to be special legislation, in violation of Article VIII, § 7 and [Article III, § 34 of the Constitution of South Carolina](#). In particular, this Act was approved by the Governor on July 22, 1976, well after the effective date of Article VIII, § 7 (March 7, 1973).

In addition, a document titled 'Organization and Rules for Collection County Council' contains references to the County Attorney. The pertinent portion of Section 1.D states:

The Council shall designate an attorney, not a member of the council, to serve as the County Attorney. He shall perform such duties as are assigned to him from time to time by Council. He shall prepare all deeds, contracts, ordinances and other legal documents necessary to assist Council in performing its function as such. He shall attend all Council meetings and advise Council when required of matters and things pertaining to the legality of proceedings before Council and its actions thereon. He shall participate in any litigation involving the County and shall carry out any assignments delegated to him by Council. The County Attorney shall serve at the pleasure of the Council and his salary and conditions of employment shall be set by Council. . . .

[Emphasis added.] These provisions must be read in terms of the powers given to the council-supervisor form of county government selected by Colleton County pursuant to the Home Rule Act, Act No. 283 of the Acts and Joint Resolutions, 1975. In conjunction with the selected form of government by Collection County, the following language in [Poore v. Gerrard, 271 S.C. 1, 244 S.E. 2d 510 \(1978\)](#) is particularly appropriate:

*2 We think that the statutory scheme evidenced by the foregoing sections is that, under Section 4-9-30(7), county council has the duty and responsibility to provide for personnel to operate the county functions over which it is granted control and to

appropriate funds for the employment of such personnel. Section 4-9-420(12), dealing specifically with the county supervisor form of government, make the county supervisor 'responsible for the employment and discharge of personnel subject to the provisions of subsection 7 of Section 4-9-30' and for which council has appropriated funds, *i.e.*, county council is empowered to create and fund positions for the operation of county government, but personnel to fill such positions shall be appointed by the county supervisor. This conclusion is reenforced by further provisions of Section 4-9-430 which provide that

Except for the purposes of inquiries and official investigations, neither the council nor its members shall give direct orders to any county officer or employee, either publicly or privately.

271 S.C. at 4. Other relevant statutory provisions are cited in Poore, as well; the case sets forth the scope of authority of a county council under the council-supervisor form of government in personnel matters. In enacting an ordinance contradictory to general law, county council would be acting *ultra vires*. See, United States Rubber Products, Inc. v. Town of Batesburg, 183 S.C. 49, 190 S.E. 120 (1937). Hence, if the Collection County Council provisions pertaining to the County Attorney were challenged in court, the general law as stated in Poore would most likely prevail, county council having acted *ultra vires* in adopting Section 1.D of its Rules.

In conclusion, I advise that your opinion accurately states the law concerning appointment of a county attorney under the council-supervisor form of government. Please be advised that this is my opinion and should not be construed as a formal opinion of the Attorney General. If I may assist you further with this matter, please contact me.

Sincerely,

Patricia D. Petway
Staff Attorney

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