



ALAN WILSON  
ATTORNEY GENERAL

July 5, 2016

The Hon. John Richard C. King  
South Carolina House of Representatives  
PO Box 11555  
Rock Hill, SC 29731

Dear Representative King:

Attorney General Alan Wilson referred your request dated May 27, 2016 to the Opinions section for a response. We understand that you request an opinion regarding the legality and implications of certain actions by a county supervisor. By way of background, you state:

*A County Council voted and authorized a county supervisor to purchase and spend \$36,000 on a vehicle as part of its annual budget. Throughout the budget, there was money saved from various areas. The county supervisor then proceeded to take the money saved from the other areas of the budget and purchased a vehicle in excess of \$60,000. As I previously stated, the county council did not authorize the county supervisor to spend more than \$36,000 on the vehicle.*

*The issues I would like addressed are as follows:*

- 1. Are the actions of the County Supervisor lawful?*
- 2. What are the potential criminal charges and penalties for such actions if they are not lawful?*
- 3. Are there any civil remedies?*

#### **Law / Analysis**

Based on the following analysis, in our opinion, a court of competent jurisdiction would find that the actions of a public official who spends public money in excess of the appropriated amount exceeds his or her legal authority, and therefore acts unlawfully. See S.C. CONST. art. X, § 8. We also believe that a public official who is at least negligent in exceeding his or her budgetary authority would be personally liable for the public money spent in excess of the appropriated amount. See Op. S.C. Att'y Gen., 2003 WL 21040136 (February 21, 2003). This is our conclusion based on the analysis below.

As you may be aware, this Office does not determine facts in a legal opinion. Op. S.C. Att’y Gen., 2012 WL 440540 (February 6, 2012). For that reason, this Office will not determine in this opinion whether specific, illegal actions actually were taken or whether a public official is actually liable. We merely opine here on the law as relevant to your questions.

***1. Are the actions of the County Supervisor lawful?***

Generally speaking, a properly-passed county budget has the force of law because it is a legislative action passed by ordinance.<sup>1</sup> S.C. Code Ann. § 4-9-120 (1986) (“The council shall take legislative action by ordinance . . .”). In a council-supervisor form of government, the county supervisor has the power and duty “to execute the policies and legislative actions of the council” generally. S.C. Code Ann. § 4-9-420(2) (1986). The law also gives the county supervisor in a council-supervisor form of government the power and duty “to supervise the expenditure of funds appropriated by council.” S.C. Code Ann. § 4-9-420(4) (1986). Our Office has opined that “[w]hen the Council properly enunciates policies, the supervisor’s only function is to carry out such policies.” Op. S.C. Att’y Gen., 1970 WL 16805 (April 22, 1970). Moreover, our State’s constitution mandates that “[m]oney shall be drawn from the treasury of the State or the treasury of any of its political subdivisions only in pursuance of appropriations made by law.” S.C. Const. art. X, § 8. Therefore, if a county supervisor spends public money in a manner that is contrary to an ordinance of the county, then he or she has acted unlawfully by exceeding his or her legal authority.

For these reasons, it is the opinion of this Office that expending public money in excess of the budgeted amount is an unlawful act. Having said that, determining whether the county supervisor you refer to in your letter actually acted unlawfully would require a factual determination, which is outside the scope of this opinion.<sup>2</sup> See Op. S.C. Att’y Gen., 2012 WL 440540 (February 6, 2012).

***2. What are the potential criminal charges and penalties for such actions if they are not lawful?***

I regret to inform you that our Office must respectfully decline to answer this question, because we do not opine in a legal opinion on questions regarding potential criminal charges and penalties for an action already taken. Our longstanding policy is to recommend that you direct those questions to local law enforcement and the local solicitor to make a prosecutorial decision. See Op. S.C. Att’y Gen., 1989 WL 406160 (July 11, 1989) (“this Office can only set forth the general law to you in the abstract. [W]hether a specific prosecution is warranted, or is on sound legal ground in an individual case, remains a matter within [the solicitor’s] exclusive discretion

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<sup>1</sup> Based on your question, it appears that the county you describe is governed by the county-supervisor form of government described in S.C. Code Ann. § 4-9-410 (1986) et. seq. We also assume for the sake of this opinion that the county council in your question properly adopted the budget after public notice and public hearings required by S.C. Code Ann. § 4-9-130 (1986).

<sup>2</sup> However, we must not exclude that in making a factual determination, one must consider extenuating circumstances and other intervening actions.

and jurisdiction.”). However, in the past, prosecutors have charged public officials with, e.g., misconduct in office for such action.

### *3. Are there any civil remedies?*

South Carolina public officials who misspend public funds may be personally liable for the those funds under the “due care” standard set out by the South Carolina Supreme Court in Chandler v. Britton, 197 S.C. 303, 15 S.E.2d 344 (1941). The Court in Chandler held that:

in the absence of any statutory law to the contrary a public official is not liable for the loss of funds deposited with him if he has exercised that degree of care and prudence in the management of the funds which a person of ordinary care and prudence would exercise in his own business.

Id.; see also Spartanburg Cnty. v. Mitchell, 214 S.C. 283 at 288, 52 S.E.2d 266 at 269 (1949) (citing Chandler).

The prior opinions of our Office consistently support holding public officials accountable for their stewardship of the public fisc. For example, our Office has opined that a public official who spends public money without authorization generally does so at his or her own risk of legal liability for those funds. Op. S.C. Att’y Gen., 2003 WL 21040136 (February 21, 2003). Our Office also has recognized that “[t]he law in South Carolina is supportive of liability for public officers who perform ultra vires<sup>3</sup> acts.” Op. S.C. Att’y Gen., 1997 WL 323769 (May 13, 1997).

Personal liability for misspent public funds arises from the role of public officers as trustees of the taxpayer’s funds. See Sumter Cnty. v. Hurst, 189 S.C. 316, 1 S.E.2d 242 (1939) ([W]hen a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended.”). Our Office thoroughly discussed this responsibility in a 1997 opinion which addressed the duties of public university officials to charge proper tuition rates. Op. S.C. Att’y Gen., 1997 WL 208002 (March 3, 1997). That opinion cited to numerous cases and secondary sources in support of our position that public university officials may be personally liable for failing to properly collect higher tuition rates from out-of-state students as required by law. Id. The opinion, for example, quoted 67 C.J.S. Officers § 212 for the statement that “[a]ny public officer who wrongfully withholds or misappropriates public funds, or who pays or authorizes the illegal payment of public funds is personally liable for such misappropriation or illegal payment.” Id.

Our Office also has opined that a public official may be liable for misspent public funds even when the funds are spent for a public purpose and not for private benefit. In 2003, we issued an opinion that addressed a question where a county council appropriated certain funds for a specific account, but the funds were deposited into another account instead and “not spent in

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<sup>3</sup> When a public officer acts outside the scope of his or her legal authority, that act is “ultra vires,” meaning that it is unauthorized and beyond the power of the actor. See Black’s Law Dictionary 1755 (10th ed. 2014).

accordance with County Council's appropriation." Op. S.C. Att'y Gen., 2003 WL 21040136 (February 21, 2003). That opinion reiterated the discussion in our 1997 opinion regarding the responsibility of public officers for public money, and concluded that:

a public official, such as an officer of county government, has a responsibility to use public funds subject to his or her control as the funds were intended by the governing body (i.e. county council). It is further apparent that, should a public officer fail to use public funds within his control as authorized, personal liability may result.

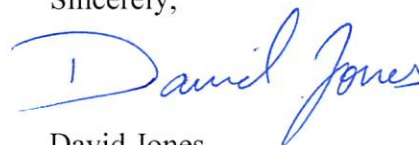
Id. The 2003 opinion noted that "personal liability for officers spending public funds for one public purpose when the governing body has expressed an intention that the funds be used for another public purpose is not as clear cut" as the case of money misappropriated for private use, but predicted that the due care standard of Chandler v. Britton would apply. Id.

For these reasons, it is the opinion of this Office that a court could find a public official personally liable for spending public funds in excess of the budgeted amount, even if the excess funds are spent for a public purpose. This liability would turn in part on a factual determination that the official acted at least negligently in exceeding the budgetary authority. We must reiterate that any such factual determination is outside the scope of this opinion. See Op. S.C. Att'y Gen., 2012 WL 440540 (February 6, 2012).

### Conclusion

In summary, for the reasons discussed above, this Office believes that a court of competent jurisdiction would find that the actions of a public official who spends public money in excess of the appropriated amount acts unlawfully. We also believe that a court would find that a public official who is at least negligent in such an ultra vires act would be personally liable for the public money spent in excess of the appropriated amount. However, this Office is only issuing a legal opinion based on the current law and the information as provided to us. Until a court or the General Assembly 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. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (2005). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

A handwritten signature in blue ink that reads "David Jones". The signature is written in a cursive style with a large, stylized "D" at the beginning.

David Jones  
Assistant Attorney General

The Hon. John Richard C. King

Page 5

July 5, 2016

REVIEWED AND APPROVED BY:

A handwritten signature in blue ink, appearing to read "Robert D. Cook", is written over a horizontal line.

Robert D. Cook  
Solicitor General