



ALAN WILSON
ATTORNEY GENERAL

February 21, 2018

Mr. Skip Wilson, former Town of Chapin Mayor
c/o Wilson Financial Group, LLC
111 Columbia Avenue
Chapin, SC 29036

Dear Mr. Wilson:

We received your letter to Attorney General Alan Wilson dated December 4, 2017 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):

"The more important concern regarding Mayor-elect David Knight and members of Chapin Town Council's intent, is that [the lawyer they intend to hire on a contractual bases] is a very good friend of Mr. Knight's. In fact, in 2014, [the lawyer] was the Plaintiff's attorney representing 3 members of Chapin Town Council in a lawsuit, whereas, Council members [...] sued Mayor Skip Wilson, [a] Council member [...] and the Town of Chapin. In addition, [the lawyer] argued on behalf of Mr. Knight which was part of the lawsuit. [The lawyer] also represented[a] Council Member [...] as a Plaintiff when she sued the Town in a separate lawsuit in 2015, alleging any member of Chapin Town Council has the authority to access all and any information, including reported business license revenue on business license applications. The lawsuit provided no specific reason by [a] Council member [...] for accessing business license information and yet [the lawyer] pursued this matter through the courts. [The council member's] lawsuit was dismissed. If [the lawyer] is appointed as town attorney by Mayor-elect Knight and Chapin town council, his argument to allow any council member access to private business license information as stated in the dismissed lawsuit will be revived and the business community will lose trust in him as a town attorney as well as the entire Chapin town council.

Would there be a conflict of interest for the Mayor and Chapin Town Council to offer [the lawyer] an opportunity to be appointed as town attorney or would there be a conflict of interest if [the lawyer] desired, pursued or accepted an appointment as Chapin's town attorney. Given the past actions of [the lawyer], the Town of Chapin community could perceive his actions as serving the Mayor and/or town council's personal interests as opposed to the Chapin community. Please see state law addressing business license matters in Section 30-4-50.

I have 3 questions relative to the state code listed below.

- (1) Is the Chapin municipal code superseding state code if Chapin's municipal code specifically states "council shall appoint a town attorney" instead of "may" appoint a town attorney?*
- (2) Please explain the last sentence as it is underlined in Section 5-7-230*

(3) *Will there be a conflict of interest for the Chapin Town Council to appoint [the lawyer] as Chapin's town attorney or for [the lawyer] to accept the appointment as town attorney given his past relations with the Town of Chapin?*

South Carolina Code of Laws specifically states:

SECTION 5-7-230. Appointment or election of municipal attorney and judge of municipal court.

The city council may elect or appoint a municipal attorney and a judge or judges of the municipal court, whose duties shall be as prescribed by law. No mayor or councilman shall be so elected or appointed to serve as municipal judge during his term of office. The provisions of this section do not apply to a mayor who presides over a mayor's court in his capacity as mayor as authorized in Section 5-7-90.

HISTORY: 1962 Code Section 47-52; 1975 (59) 692.

SECTION 30-4-40. Matters exempt from disclosure.

(a) A public body may but is not required to exempt from disclosure the following information:

(2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. Information of a personal nature shall include but not be limited to, information as to gross receipts contained in applications for business licenses, information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap, and any audio recording of the final statements of a dying victim in a call to 911 emergency services. Any audio of the victim's statements must be redacted prior to the release of the recording unless the privacy interest is waived by the victim's next of kin. This provision must not be interpreted to restrict access by the public and press to information contained in public records.

As the current Mayor of Chapin, and future citizen/resident and business owner in Chapin, I believe it's my duty to seek guidance and an opinion from the Attorney General's office regarding all matters stated above. ... "

Law/Analysis:

Usually when this Office discusses a conflict of interest in a legal opinion, we do so regarding the master and servant principle. This Office has issued many opinions discussing master and servant conflicts that create a conflict of interest under the common law. See, e.g., Ops. S.C. Atty. Gen., 2014 WL 7505272 (S.C.A.G. Dec. 22, 2014); 2014 WL 212887 (April 25, 2014); 2013 WL 5291571 (September 9, 2013); 2010 WL 4391634 (October 14, 2010). In one such opinion we stated regarding the master and servant principle that:

This Office has consistently described such a principle where "one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other." Op. S.C. Atty. Gen., 2006 WL 2382449 (July 19, 2006). This also can include the power to determine the compensation or other supervisory authority. Id. The court outlined this principle in McMahan v. Jones,

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stating “[n]o man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.” Id. (quoting McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1022 (1913)).

Op. S.C. Att’y Gen., 2014 WL 7505272, at *1 (S.C.A.G. Dec. 22, 2014). However, it appears your initial question is not asking about a master-servant conflict as much as it is implying the existence of a conflict of interest such as those which are prohibited by the South Carolina Rules of Professional Conduct for Lawyers. The South Carolina Rules of Professional Conduct for Lawyers are found in Rule 407 of the South Carolina Appellate Court Rules. The Commission on Lawyer Conduct investigates complaints of lawyer misconduct pursuant to Rule 413 of the Appellate Court Rules. Moreover, the South Carolina Bar has a Risk Management Director and Counsel in addition to an ethics committee that issues ethics and advisory opinions. For example, Rule 1.7 of the Rules of Professional Conduct for Lawyers states that even if there is or could be a concurrent conflict of interest, a lawyer may represent the client as long as “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client...; and each affected client gives informed consent, confirmed in writing.” Rules of Professional Conduct, Rule 1.7. RPC, Rule 407 SCACR. Any such representation by the Town’s lawyer would need to comply with the Rules of Professional Conduct. We advise consulting these resources if you have questions regarding lawyer conduct and past clients of a lawyer.

As you may be aware, the South Carolina Ethics Commission enforces the State Ethics Act and may “initiate or receive complaints and make investigations” of alleged violations. S.C. Code Ann. §§ 8-13-310, 8-13-320. Thus, we advise consulting the Ethics Commission if you think there may be a potential violation of the Ethics Act.

Regarding the compensation and employment of an attorney, the Town should be following its procurement policy based on guidelines developed by the State Fiscal Accountability Authority and the Procurement Policy Committee. See S.C. Code Ann. § 11-35-50. This Office has previously opined regarding a political subdivision’s contractual employment of an attorney that it need only follow its own procurement policy. See Op. S.C. Att’y Gen., 2014 WL 1398599 (S.C.A.G. January 14, 2014). Regarding employment, South Carolina law requires, among other things, that:

Except as otherwise provided or as prohibited by the Constitution of this State, the compensation of all officers and employees of the State or any political subdivision, department or agency thereof shall be as from time to time provided by the General Assembly or the particular political subdivision, department or agency concerned, as the case may be.

S.C. Code Ann. § 8-15-10 (1976 Code, as amended). Thus, the Town should review its employment contract with the attorney and review its procurement policy based on guidelines developed by the State Fiscal Accountability Authority and the Procurement Policy Committee.

Now let us address the remaining questions in your letter.

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1) *“Is the Chapin municipal code superseding state code if Chapin's municipal code specifically states ‘council shall appoint a town attorney’ instead of ‘may’ appoint a town attorney?”*

South Carolina Code Ann. § 5-7-230 states that:

The city council may elect or appoint a municipal attorney and a judge or judges of the municipal court, whose duties shall be as prescribed by law. No mayor or councilman shall be so elected or appointed to serve as municipal judge during his term of office. The provisions of this section do not apply to a mayor who presides over a mayor's court in his capacity as mayor as authorized in § 5-7-90.

S.C. Code Ann. § 5-7-230 (1976 Code, as amended). Your letter underlines “may” as referenced in the statute. Though we have not seen a copy of the municipal ordinance, your letter tells us it states that council “shall” appoint a municipal attorney. This Office has previously opined regarding a variation in a local law versus state law that:

[T]o summarize, political subdivisions have only those powers granted to them by the Constitution or statutes, or those powers necessarily implied therefrom. Political subdivisions may not vary from the provisions of general law unless such variance is specifically authorized. In the context of your proposed bill, this would mean that the legislature could, if it wished, preempt further regulation in the same matter by local political subdivisions.

Op. S.C. Att’y Gen., 1990 WL 599227, at *1 (S.C.A.G. Feb. 27, 1990). Additionally, State law grants that “[e]ach municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general laws of this State” S.C. Code § 5-7-30 (Supp. 2009). While we acknowledge that you see a variance of “shall” and “may,” this Office does not believe a court will find this ordinance to be outside of the powers granted statutorily to the municipality. The term “shall” in a statute means that the action is mandatory. Johnston v. S.C. Dep’t of Labor, Licensing, & Regulation, S.C. Real Estate Appraisers Bd., 365 S.C. 293, 296–97, 617 S.E.2d 363, 364 (2005) (citing Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003); Charleston County Parents for Pub. Schools, Inc. v. Moseley, 343 S.C. 509, 541 S.E.2d 533 (2001)). This Office has previously opined regarding “may” that:

We also note that when construing statutes “[t]he word ‘may’ will be given a permissive meaning, indicating that a matter of discretion is involved, in the absence of any indication of a contrary legislative intent.” 82 C.J.S. Statutes § 498 (2015). In other words, “the word ‘may,’ as used in a statute, ordinarily does not suggest compulsion.” Id.

Op. S.C. Att’y Gen., 2015 WL 2148107, at *3 (S.C.A.G. Apr. 28, 2015). The “may” in § 5-7-230 permits but does not require the municipal council to “elect or appoint a municipal attorney.” S.C. Code Ann. § 5-7-230. Where the municipal council has voted to implement what it is statutorily-authorized to do, we believe a court will determine this is a proper implementation of a council’s authority. Phrased differently, we believe that a court will find that just because the council’s ordinance requires what it is statutorily-permitted to do, it is still a consistent and permitted determination within its authority. “If a

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statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation." Strickland v. Strickland, 373 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007). Along that same line of reasoning in determining the intent of the General Assembly, this Office has previously opined that where this statute authorizes a single individual as the municipal lawyer as opposed to a law firm, the statute still implied authorization for assistant attorneys to the municipal attorney. See Op. S.C. Att'y Gen., 1981 WL 158080, at *1-2 (S.C.A.G. Dec. 21, 1981).

2) *Please explain the last sentence as it is underlined in Section 5-7-230*

The last sentence of South Carolina Code Ann. § 5-7-230 states that "[t]he provisions of this section do not apply to a mayor who presides over a mayor's court in his capacity as mayor as authorized in § 5-7-90." South Carolina Code Ann. § 5-7-90 states that:

The municipal judge or judges of a municipality shall speedily try all persons arrested and incarcerated with violations of the ordinances of the municipality or the laws of the State within their jurisdiction in a summary manner without a jury unless jury trial is demanded by the accused. Trial must be held within ten days after the arrest or at a time scheduled by the court, in which event the trial is deferred. The municipal judge shall have the same power as a magistrate to compel the attendance of witnesses and require them to give evidence upon the trial before them of any person for the violation of ordinances of the municipality or the laws of this State subject to Section 5-7-30.

S.C. Code Ann. § 5-7-90. This Office has issued six prior opinions that address your question. See Op. S.C. Att'y Gen., 2013 WL 1695514 (S.C.A.G. March 28, 2013); 2012 WL 3732821 (S.C.A.G. August 20, 2012); 2005 WL 1024604 (S.C.A.G. April 5, 2005); 1982 WL 189385 (S.C.A.G. July 28, 1982); 1979 WL 43500 (S.C.A.G. August 1, 1979); 1978 WL 34724 (S.C.A.G. February 28, 1978). Those opinions are available by date on our website at www.scag.gov/opinions. Please refer to those opinions regarding this Office's interpretation of the last sentence of § 5-7-230.

3) *Will there be a conflict of interest for the Chapin Town Council to appoint [the lawyer] as Chapin's town attorney or for [the lawyer] to accept the appointment as town attorney given his past relations with the Town of Chapin?*

As we stated above, Rule 1.7 of the Rules of Professional Conduct for Lawyers states that even if there is or could be a concurrent conflict of interest, a lawyer may represent the client as long as "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client...; and each affected client gives informed consent, confirmed in writing." Rules of Professional Conduct, Rule 1.7. RPC, Rule 407 SCACR. However, this is a question to ask the Commission on Lawyer Conduct, the Risk Management Director and Counsel of the South Carolina Bar, or the ethics committee of the South Carolina Bar, as they address past clients and potential conflicts of interest in factual scenarios.

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Conclusion:

This Office urges caution in regards to potential conflicts such as a master-servant relationship, the Ethics Act, and the South Carolina Rules of Professional Conduct. We hope the resources mentioned herein will assist in addressing your ethical and legal concerns. Moreover, this Office recommends you check with the State Ethics Commission if you have any questions or concerns related to ethics or the Ethics Act, as they offer opinions and handle inquiries, investigations and complaints regarding the Ethics Act. S.C. Code § 8-13-320. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. 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. This opinion only addresses some of the sources in the subject area, but we can address other authority or additional questions in a follow-up opinion. 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 Ann. § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General