

STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT ERR IN DISMISSING APPELLANTS' CASE AND FINDING AS A MATTER OF LAW THAT A COUNTY COUNCIL IN A COUNCIL-ADMINISTRATOR FORM OF GOVERNMENT COULD DIRECTLY HIRE AN EMPLOYEE OTHER THAN A COUNTY ADMINISTRATOR OR COUNCIL CLERK, AND USE HIM AS AN INTERNAL AUDITOR OR OTHER FINANCIAL ADVISOR WHO REPORTS DIRECTLY TO COUNCIL?

- II. DID THE COURT ERR IN DISMISSING APPELLANT'S CASE AND FINDING AS A MATTER OF LAW THAT A COUNTY COUNCIL IN A COUNCIL-ADMINISTRATOR FORM OF GOVERNMENT CAN DIRECTLY CONTRACT WITH ACCOUNTANTS TO ASSIST A DIRECTLY HIRED EMPLOYEE WHEN NEITHER IS CONDUCTING A SPECIAL AUDIT AND THE ENGAGEMENT WAS DONE WITHOUT ANY KIND OF COMPETITIVE BIDDING PROCESS?

- III. DID THE COURT ERR IN DISMISSING APPELLANT CASE AND FINDING AS A MATTER OF LAW THAT A COUNTY'S COUNCIL IN A COUNCIL-ADMINISTRATOR FORM OF GOVERNMENT CAN DIRECTLY HIRE ATTORNEYS TO WORK FOR IT WITHOUT PERFORMING ANY KIND OF COMPETITIVE BIDDING PROCESS AND CONTRARY TO ITS OWN COUNTY ATTORNEY STATUTE.

STATEMENT OF THE CASE

The appellants come from differing segments of the Anderson County community and from all walks of life. These parties do not work for Anderson County and have the sole interest of Anderson County at heart.

Appellant Erick Bradshaw is a local Anderson County businessman who serves as the executive director for a non-profit organization that provides home buyer education, down payment assistance, workforce development, mentors for children whose parents are incarcerated, and services for local fatherhood initiatives. R.p. 104. The Monteparas are local community activists in the Homeland Park area of Anderson County and head the Homeland Park Community Task Force. In just the past few months, the Homeland Park Community Task Force won an award from the South Carolina Litter Association as the “Community Group of the Year” and from “Keep America Beautiful” (KAB) as “Volunteer of the Year.” Appellant Doreen Montepara got an individual award from KAB as “Community Leader of the Year.”

Concerned about the erratic actions of a new County Council that ran counter to the lawfully passed ordinances of the County, on February 9, 2009, these Plaintiffs brought suit to enforce the County’s elected form of government – a council-administrator form of government. Specifically, Plaintiffs filed their initial complaint asserting four claims. R.p. 30-42. Those claims are as follows:

- 1) A declaratory judgment that the direct hiring of Robert C. Daniel by the Council as either an internal or external auditor and/or employee of Defendant Anderson was illegal and improper under Home Rule and Anderson County Code. R.p. 33-35;

- 2) A declaratory judgment that the direct engagement of Greene & Company, LLC by the Council was illegal and improper under Anderson County Code, R.p. 35-37;
- 3) A declaratory judgment that the direct engagement of William W. Wilkins and Nexsen Pruet Law Firm by the Council was illegal and improper under Anderson County Code and Home Rule. R.p. 37-39;
- 4) A declaratory judgment that these acts violated “home rule.” R.p. 39-40;

Three days after filing suit, Respondent Moore called a special meeting of Anderson’s County Council to be held on Friday, February 13, 2009. At that meeting, the Wyche law firm was engaged to represent both Moore and the County in the defense of that action.

As a result, Plaintiffs amended their suit on February 17, 2009 to add an additional claim for:

- 4) Declaratory judgment that the engagement of the law firm of Wyche Burgess Parham to defend the original action filed was illegal and improper under Anderson County Code, violated Home Rule, and was the result of actual fraud committed by Respondents Waldrep and Allen and constructive fraud by Defendant Moore. R.p. 62-64;

On February 24, 2009, Defendants filed a Motion to Dismiss Plaintiff’s complaint, which they amended on March 5, 2009. On February 25, 2009, the Court held a hearing on Plaintiff’s Motion for a Preliminary Restraining Order and denied the same. R.p. 1-12. On March 5, 2009, Defendants Anderson County and Moore filed an Amended Motion to Dismiss. R.p. 119-121. On March 16, 2009, Defendants Allen and

Waldrep also filed a Motion to Dismiss, which mirrored the Amended Motion of Defendants Moore and Anderson County. R.p. 119-121, 174-176.

Appellants took Mr. Daniel's deposition on March 13, 2009. On March 20, 2009, less than forty (40) days after Appellants initially filed suit, the Court held a hearing on the Defendants' Motions to Dismiss and dismissed all Plaintiffs' claims. R.p. 13-29. This appeal followed. R.p. 177-178.

STANDARD OF REVIEW

“In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. A 12(b)(6) motion should not be granted if ‘facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.’ The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.” *Plyler v. Burns*, 373 S.C. 637, 645 (2007)(internal citations omitted).

ARGUMENTS

I. THE COURT ERRED IN DISMISSING APPELLANT'S CASE AND FINDING AS A MATTER OF LAW THAT A COUNTY COUNCIL IN A COUNCIL-ADMINISTRATOR FORM OF GOVERNMENT COULD DIRECTLY HIRE AN EMPLOYEE, OTHER THAN A COUNTY ADMINISTRATOR OR COUNCIL CLERK, AND USE HIM AS AN INTERNAL AUDITOR OR OTHER FINANCIAL ADVISOR WHO REPORTS DIRECTLY TO COUNCIL

Anderson County completes annual Comprehensive Annual Financial Reports (CAFR) by fiscal year. As of June 2008, Anderson County had twelve (12) consecutive

years of Clean, Unqualified Audits. Despite this, certain members of Anderson County Council have repeatedly claimed financial improprieties by a former administration. Despite Anderson County's employment of both a Finance Director and an Auditor, and the County electorate's choice of the Council-Administrator form of government, these certain individuals have tried for years to have an individual they would solely control that would perform financial functions and report directly to Council.

A. County Councils in Council-Administrator forms of government are prohibited under Home Rule from directly hiring internal auditors as employees or contractors regardless of the label given to the person engaged

Less than a year before this latest Council was sworn in, then County Attorney Thomas Martin of the McNair Firm, sought an opinion from the Attorney General about the engagement of an "internal auditor" for Anderson County that would report directly to Council. In responding to the inquiry on April 4, 2008, Attorney General McMaster replied as follows:

Section 4-9-30 of the South Carolina Code (1986 & Supp. 2007), provides the powers afforded to county governments. Among these is the power "to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title." S.C. Code Ann. § 4-9-30(6). However, under the provisions of the Code governing council-administrator forms of county government, section 4-9-620 states county administrators "shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the council has the authority to control." S.C. Code Ann. § 4-9-620 (1986). Furthermore, section 4-9-630 of the South Carolina Code (1986) explains the powers and duties afforded to county administrators. This statute provides:

The powers and duties of the administrator shall include, but not be limited to, the following:

- (1) to serve as the chief administrative officer of the county government;
- (2) to execute the policies, directives and legislative actions of the council;
- (3) to direct and coordinate operational agencies and administrative activities of the county government;
- (4) to prepare annual operating and capital improvement budgets for submission to the council and in the exercise of these responsibilities he shall be empowered to require such reports, estimates and statistics on an annual or periodic basis as he deems necessary from all county departments and agencies;
- (5) to supervise the expenditure of appropriated funds;
- (6) to prepare annual, monthly and other reports for council on finances and administrative activities of the county;
- (7) to be responsible for the administration of county personnel policies including salary and classification plans approved by council;
- (8) to be responsible for employment and discharge of personnel subject to the provisions of subsection (7) of § 4-9-30 and subject to the appropriation of funds by the council for that purpose; and
- (9) to perform such other duties as may be required by the council.

S.C. Code Ann. § 4-9-630. According to this provision, county administrators are charged with the responsibility of hiring county employees, which we would presume includes an internal auditor. Moreover, section 4-6-660 of the South Carolina Code limits the authority of council over county employees by stating:

Except for the purposes of inquiries and investigations, the council shall deal with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall give orders or instructions to any such officers or employees.

Thus, according to this provision, under a council-administrator form of county government, council must go through the county administrator with regard matters of county personnel including internal auditors.

As you noted in your letter, on several occasions this Office considered the question of whether the county administrator or county council has authority to employ an internal auditor under a council-administrator form of government. In an opinion issued in 1987, we considered this exact question and determined that “appointment of the internal auditor would be within the purview of the county administrator rather than county council.” Op. S.C. Atty. Gen., March 5, 1987.

In 1996, we addressed the same question with regard to Anderson County. Op. S.C. Atty. Gen., September 24, 1996. In that opinion, we cited to our 1987 opinion, as well as two opinions issued prior to 1987, “dictating that if the internal auditor is subject to the personnel rules of [Anderson] County, that individual would be under the direction and control of the county administrator.” *Id.*

Finally and most recently in 2002, we considered whether the Beaufort County Council could hire an internal auditor as an independent contractor reporting directly to County Council rather than the county administrator. Op. S.C. Atty. Gen., August 16, 2002. We again reiterated the findings in our prior opinions that “such employment and discharge was ultimately the responsibility of county council but that the county administrator would actually perform the duties since council could deal with county employees only through the administrator.” *Id.* (quotations omitted). **In addition, we concluded that “the reasoning expressed in our prior opinions is applicable to the situation you describe regardless of the label attached to the . . . auditor.”** *Id.* **Therefore, it did not matter if a county council hired the auditor as an independent contractor. We also concluded that while a county council can create a position and proscribe the functions of an internal auditor, “[i]f a county council were to attempt to assume administrative duties statutorily assigned to the county administrator, such action could be viewed as an illegal alteration of the form of government without following the required statutory procedures.”** *Id.*

2008 S.C. AG LEXIS 68, pp. *2-*6 (emphasis added)

Despite the clear and unequivocal April 2008 opinion of the Attorney General, on January 6, 2009, immediately after Respondents Moore, Waldrep and Allen took office for that term, and Respondent Moore was elected as chair, Moore introduced surprise resolutions at the Council’s first meeting of the year, without proper notice to the other members or a proper amendment of the agenda for all resolutions. Then, a majority of council proceeded to pass the motion verbally read.

The resulting motion which was passed regarding the hiring of Mr. Daniel was as follows:

19 BOB WALDREP: Okay. All right. Again,
20 the second one is that Anderson County -- I would so
21 move that Anderson County resolves that it's in the
22 best interests of Anderson County in order to perform
23 the functions of government to hire Robert C. Daniels
24 as county budget analyst and chief financial
25 investigator and the firm of Greene & Company, LLP to
26 provide assistance to Mr. Daniel as he deems necessary.
27 Both Mr. Daniel and Greene & Company, LLP are to be
28 hired on a contractual basis and I think we've already
29 discussed what his fees are to be.

R.p. 53

In its Order, the Court held that:

“the Home Rule Act makes clear that in conducting investigations and inquiries, the County Council does not act through the county administrator but rather is authorized to conduct the investigation or inquiry directly. *See also* S.C. Code § 4-9-150 (providing that **‘[s]pecial audits may be provided for any agency receiving county funds as the county government body considers necessary’ and authorizing county council to select the accountant ‘without requiring competitive bids’**); *Brown v. County of Berkeley*, 366 S.C. 354, 359, 622 S.E.2d 533, 537 (2005) (**‘the plain language of the statute unequivocally allows a county government to order special audits whenever the county government considers the audit necessary’**).”

R.p. 21 (emphasis added).

However, nowhere in the resolution passed was an “audit” ever authorized by Council, let alone a “special audit.” Despite the forty day whirlwind between the filing of their suit and the Motion to Dismiss hearing, Appellants were able to take ONE deposition on March 13, 2009, but conduct no other discovery before their case was dismissed. At his deposition, Robert Daniel testified no less than three times that neither he nor Greene & Company, LLP were even doing an audit, nor did they intend to!

22 Q. *Is Greene and Company performing audit work for*
23 *Anderson County?*
24 A. *No.*

R.p. 158

- 18 A. *We're not doing a attest engagement here.*
19 EXAMINATION RESUMED BY MS. KERN-FULLER:
20 Q. *What is an attest engagement?*
21 A. *That'd be an audit.*
22 Q. *So you're not performing an audit?*
23 A. *No.*

Id.

- 21 *Did you ever prepare an audit plan before engaging*
22 *in this audit?*
23 A. *No.*
24 Q. *Did Greene and Company prepare an audit plan?*
25 A. *We're not doing an audit.*

Id.

Despite this testimony, in their memorandum Respondents relied upon S.C. Code Ann. §4-9-150 arguing that Defendants could hire Daniel because “[s]pecial audits may be provided for any agency receiving county funds as the county governing body considers necessary. The audits must be made by a certified public accountant or public accountant or firm of these accountants who have no personal interest, direct or indirect, in the fiscal affairs of the county government or any of its officers.” R.p. 127-128. As Appellants countered in their memorandum in opposition, Mr. Daniel testified that he was not doing an audit and that he was not employed as a CPA in this engagement for Anderson County:

- 12 *So it's your testimony that your ethics*
13 *requirements don't say anything about your*
14 *independence being compromised when you're an*
15 *employee?*
16 A. *I am not acting as a CPA in this particular*
17 *engagement.*
18 Q. *You're not acting as a CPA?*
19 A. *No.*

R.p. 159.

As Appellants asserted, no audit was being conducted and since Respondents continued to rely on their right to conduct a “special audit,” the determination of whether a special audit was really occurring was a fact in controversy that was inappropriate for adjudication at a Motion to Dismiss. *Id.*

Further, as Appellants argued, Defendants had an absolute right to authorize a special audit, fund the special audit, or create a new position called a “Chief Budget Analyst,” what they did not have the authority to do and what appellants were challenging was the direct hiring of an employee for a position never validly created and then having that employee report only to a subset of Council (or solely to the Chair). As made clear at Daniel’s deposition, he reports directly to the Chairman¹ and does not appear at the Council or committees of Council. Daniel is not an employee of *Council*. The direct reporting of Mr. Daniel (as an employee of Anderson County) to only portions of the Council, rather than the County Administrator (or even the council as a whole for that matter) clearly indicates he not supervised by the *Council*. The Chair of Council is not empowered to independently supervise employees. Anderson County Code §2-39(b) states “county council will exercise its governing authority only through ordinances, resolutions, and policy statements and directives officially enacted by county

¹ When asked a series of questions about how Daniel was supervised as an employee, he testified as follows:

17 Q. *Who signs off on your time cards?*

18 A. *I believe Mr. Moore is.*

19 Q. *Who do you report to?*

20 A. *I report to the -- well, I report to whoever wants*

21 *to ask me a question, but primarily to -- I'm*

22 *doing most of my discussions with Mr. Moore and*

23 *Mr. Allen.*

24 Q. *Do you attend committee meetings of the Council?*

25 A. *No.*

Daniel depo, p. 31

council which will be promulgated through the chairperson. Officials, employees, or others requesting clarification of county council's intent will direct their inquiries to the chairperson, through the administrator when appropriate, as in the case of county employees”

B. The Court improperly relied on Anderson County Code §2-221 to support its position that it could directly hire employees

The resolution passed by Council to engage Daniel appears as if the Council majority was trying to rely upon Anderson County Code §2-221. Again, the motion was:

19 BOB WALDREP: Okay. All right. Again,
20 the second one is that Anderson County -- I would so
21 move that Anderson County resolves that it's in the
22 best interests of Anderson County in order to perform
23 the functions of government to hire Robert C. Daniels
24 as county budget analyst and chief financial
25 investigator and the firm of Greene & Company, LLP to
26 provide assistance to Mr. Daniel as he deems necessary.
27 Both Mr. Daniel and Greene & Company, LLP are to be
28 hired on a contractual basis and I think we've already
29 discussed what his fees are to be.

R.p. 53, 100.

In its Order, the Court found pursuant to Anderson County Code § 2-221, “[t]he county council is authorized to employ such persons as the council should determine is in the best interest of the county in order to perform the functions of government.” R.p. 25.

In the case of this ordinance, the portion of the code it was taken from was the authorization/creation of the position of “finance manager” back in 1987. The authorizing ordinance had five sections. The portion the Court and the Respondents focused upon was §1 (the preamble) of the ordinance. The ordinance, in context reads as follows:

DIVISION 5. FINANCE MANAGER*

***State law references:** Authority to create county positions, S.C. Code 1976, § 4-9-30(6).

Sec. 2-221. Authority to employ.

The county council is authorized to employ such persons as the council should determine is in the best interest of the county in order to perform the functions of government. (Ord. No. 236, § 1, 12-1-87)

Sec. 2-222. Appointment.

It is hereby the decision of the county council **to authorize and direct that the county administrator hire and appoint a qualified person**, not a member of the council, to serve as the finance manager. (Ord. No. 236, § 2, 12-1-87)

Sec. 2-223. Compensation; conditions of employment; qualifications.

The salary and other conditions of employment of the finance manager shall be in accordance with the approved county personnel classification and compensation plan, after due advertisement has been made in publications of sufficient circulation to attract the best qualified persons for the position and there shall be a submission of resumes and interviews to review in detail the qualification of candidates for such position. (Ord. No. 236, § 3, 12-1-87)

Sec. 2-224. Duties, responsibilities.

The finance manager shall report to and be responsible to the innovation and financial planning division director and shall have the following duties and responsibilities as the same may be supplemented from time to time by the innovation and financial planning division director:

- (1) Attend all regular meetings of the county council.
- (2) Assist in the preparation of all ordinances and resolutions with financial impact.
- (3) Prepare an annual budget presentation by the county administrator to the council.
- (4) Keep the county administrator and council advised of the financial conditions of the county.
- (5) Examine on a regular basis all accounts.
- (6) Direct and personally participate in the maintenance of a central accounting system for the county in a manner consistent with established and accepted county governmental accounting principles in sufficient detail to produce adequate financial and statistical data for management purposes for all funds covered by the annual county audit.
- (7) Coordinate with the county treasurer and auditor in the levy and accounting upon collection of property and other taxes, both current and delinquent.

- (8) Maintain an adequate system of control to ensure that expenditures do not exceed budgetary appropriations.
 - (9) Review vouchers, requests for payment, and payroll documents.
 - (10) Prepare special financial statements, cost reports and statements of receipts and expenditures at regular intervals.
 - (11) Supervise and approve work of consultant accountants in preparation of annual audits.
 - (12) Maintain a current inventory of all county equipment, indicating make, model, serial number, location and condition.
 - (13) Provide financial and accounting assistance to boards and authorities which have been created by the county council.
 - (14) Perform such other duties as may from time to time be assigned to him by the county innovation and financial planning division director.
 - (15) Perform random internal audits on all departments and funds covered by the annual county audit.
- (Ord. No. 236, § 4, 12-1-87)

Sec. 2-225. Scope of duties.

The duties of the finance manager shall not infringe upon nor hinder in any manner duties, responsibilities and rights of any elected official.
(Ord. No. 236, § 5, 12-1-87)

As stated, this County Ordinance derives its authority from S.C. Code Ann. § 4-9-30(6) that Councils may “establish such agencies, departments, boards, commissions **and positions in the county** as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title.” (emphasis added).

Anderson County has a position of Finance Director and it is filled by an employee - Gina Humphries. Mr. Daniel was hired for a position (County Budget Analyst and Chief Financial Investigator) that does not exist and has never been validly created by council. A Council’s legal ability to create a position does not equate to its ability to hire an employee to fill a position in a council-administrator form of government, assuming that position was ever validly created. Appellants have never

questioned or challenged the Respondents' right to create and fund a new position known as the "County Budget Analyst and Chief Financial Investigator." R.p. 161.

"[T]he primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. [A] statute should not be construed by focusing on an isolated phrase." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 43 (2008) (internal citations omitted). Specifically, "[t]he goal of statutory construction is ... to prevent an interpretation that would lead to a result that is plainly absurd. *Hodges v. Rainey*, 341 S.C. 79, 91 (2000). Finding that a County's preamble paragraph in an ordinance that creates a specific position is blanket authority to directly hire employees is an absurd result and is in conflict with S.C. Code Ann. §4-9-30. Anderson County Code §2-221 does not apply to the ability of the Council to directly hire Daniel as an employee because it is taken out of context of the rest of the statute.

In sum, the Court erred in finding that the Council was authorized to hire Robert Daniel as an employee and in dismissing Appellants' claims relating thereto.

II. THE COURT ERRED IN DISMISSING APPELLANT'S CASE AND FINDING AS A MATTER OF LAW THAT A COUNTY'S COUNCIL IN A COUNCIL-ADMINISTRATOR FORM OF GOVERNMENT CAN DIRECTLY CONTRACT WITH ACCOUNTANTS TO ASSIST A DIRECTLY HIRED EMPLOYEE WHEN NEITHER IS CONDUCTING A SPECIAL AUDIT AND THE ENGAGEMENT WAS DONE WITHOUT ANY KIND OF COMPETITIVE BIDDING PROCESS

The Court erred by determining as a matter of law that Council could directly hire Greene & Company to perform internal auditing services and without the necessity of a competitive bid.

As an initial matter, Anderson County never authorized a "special audit" and as outlined above, neither Mr. Daniel nor Greene & Company was engaged to nor was

conducting an audit of any kind. (See Argument I *Supra*). Rather, under the motion passed, Greene & Company was engaged solely to assist Mr. Daniel. R. So, logically, if Mr. Daniel was inappropriately, directly hired by Council, then Greene & Company would not be needed to assist him.

Further, the engagement of Greene & Company was not exempt from the procurement policy of Anderson County. Indisputably, Greene & Company's services are "professional services." The Court erred in dismissing the complaint and determining that the retention of Greene & Company's services did not mandate a competitive bid process. R.p. 151-152.

In 1981, South Carolina first passed laws requiring that all political subdivisions pass procurement codes for public expenditure of monies. It was then mandated that "[a]ll political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983." S.C. Code Ann. §11-35-50.

In compliance with this mandate, Anderson County passed its procurement code.

The Court found that:

Section 2-637 – upon which the plaintiffs rely – has no application to selection of professionals by County Council itself.

The plaintiffs have also cited Section 2-631 regarding competitive bidding. As set out above, Section 2-637(b) is the procurement provision of the Anderson County Code dealing specifically with professional services, and, as shown above, it does not restrict the hiring of professional services by County Council itself. In any event, Section 2-631 by its own terms sets out a policy that "goods and services required by county agencies" be procured through competitive bidding or proposals. Thus, Section 2-631 does not address or apply to services retained by County Council, which the Anderson County Code makes clear is not an "agency."

R.p. 24.

The Court’s reasoning misses an important mandate of the Procurement Code that militates against the technical argument that somehow a County Council is not a “using agency.” Specifically, it is the policy of Anderson County that

[a]ll public purchases shall be made in a manner which provides for the greatest economy for the taxpayer, the fairest selection of vendor and the prevention of conflicts of interest. Toward this end, it shall be policy of the county that, whenever practical, and except as otherwise noted in this article, goods and services required by county agencies **shall be** procured through competitive bidding or proposals when the expected cost exceeds \$10,000.00. The open market procedures of request for quotation will be used when the expected cost is less than \$10,000.00.

Anderson County Code §2-631 (emphasis added).

Further, said ordinances also state:

Sec. 2-634. Formal contract procedure.

(a) Generally. **All purchases of supplies, materials, equipment or contractual services, when the estimated cost thereof shall exceed \$10,000.00 shall be made according to prescribed procedures from the lowest responsive, responsible bidder after due notice inviting bids.**

At the beginning of the procurement code, Anderson County Code §2-601, the ordinance asserts that “[t]he following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, **except where the context clearly indicates a different meaning.**”

Appellants argued below and continue to assert that the words “using agency” do not clearly contextually denote a meaning that would preclude County Council from being considered a “using agency.” Specifically, “Agency and using agency means and includes any department, office, board, commission or other organizational unit **for which the council has line-item budgetary authority and whose affairs or funds are under the control of the council.**” (Emphasis added). Clearly, the Council as a whole

has line item budgetary authority over its own affairs and the council's funds ARE under the control of council. Thus, considering Council an "agency" or "using agency" is not inconsistent with the procurement code. Further, there is no separate definition for "council" in the definitions at §2-601. Also, "[i]t shall be the policy of the county council that goods and services required by county agencies shall be procured by the use of centralized purchasing procedures unless specifically exempted by county council." Anderson County Code, §2-603. Council never specifically exempted its own purchases from the Code nor could it under state law. S.C. Code Ann, §11-35-50.

Anderson County Code §2-634(f) further requires that all "[b]ids exceeding \$15,000.00, and not specifically "line-item" budgeted, shall be subject to review and approval by county council, solely for the purpose of approval of expenditure of funds. **It is specifically not the intent of this section that the county council shall have any role in the selection of successful bids, but only that the county council approve such ultimate selection publicly.**"

So, Council was never envisioned to be the selector of the ultimately successful bidder. Rather, they were to set the parameters for the jobs to be bid and provide funding for the same.

The goals of the state procurement code adopted by the legislature were:

(e) to require the adoption of competitive procurement laws and practices by units of state and local governments;

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement;

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process; and

(h) to develop an efficient and effective means of delegating roles and responsibilities to the various government procurement officers.

S.C. Code Ann. § 11-35-20

As County Councils decide the majority of public contracts throughout the state, it be illogical to permit them to exempt themselves from the public procurement process especially in light of the fact that all County entities were covered by the State Procurement Code, pursuant to S.C. Code Ann. §11-35-50, and were required to “adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983.” Appellants do not believe there is a conflict between Anderson County Procurement Code and the mandates of the state procurement code that there be “clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process.” If there were, an interpretation that exempts the major player in those processes (the County Councils themselves) would run counter to the state procurement code. Given that the state procurement code would supercede the county code, as dictated by S.C. Code Ann. §11-35-25, the Court was required to construe the County Procurement Code in a manner that would harmonize it with the State procurement code because “the primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature.” *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 43 (2008) (internal citations omitted). Accordingly, the Court’s finding that “when the County Council acts for itself to carry out an investigation, the procurement provisions of the Anderson County Code do not apply” was erroneous. R.p. 25.

III. THE COURT ERRED IN DISMISSING APPELLANT’S CASE AND FINDING AS A MATTER OF LAW THAT A COUNTY COUNCIL IN A COUNCIL-ADMINISTRATOR FORM OF GOVERNMENT CAN DIRECTLY HIRE ATTORNEYS TO WORK FOR IT WITHOUT PERFORMING ANY KIND OF COMPETITIVE BIDDING PROCESS AND CONTRARY TO ITS OWN COUNTY ATTORNEY STATUTE

The Court found that the mandates under the County Procurement Code, notably Anderson County Code §2-637, have “no application to the situation here, where the County Council is conducting its own investigation. As the South Carolina Code and the Anderson County Code (of which Section 2-637 is just one part) make clear, when the County Council conducts an investigation, it does not act through the county administrator or through a ‘using agency’.” R.p. 23. As argued *Supra*, the clear and unequivocal language of these ordinances states that all purchases shall fall subject to this competitive bidding process, especially when over \$10,000.00 – which all of the contractual services are. Further, pursuant to Anderson County Code §2-178, only the County Attorney can “[p]rocur[e] the services of, assist[], supervis[e] and monitor[] the work of other attorneys as needed for county matters.”

Specifically, Anderson County Code §2-178 sets forth the authority and duties of the County Attorney. Adam Artigliere of the McNair Law Firm was the interim County Attorney at the time of these actions. Michael Cunningham, Anderson’s County Attorney ordinance states:

(a) The county attorney is hereby authorized to represent and to render professional legal services to the county and all agencies, departments, boards and commissions established pursuant to S.C. Code 1976, § 4-9-30(6) in the performance of the duties prescribed in this Code.

(b) The county attorney is authorized to and shall perform the following duties in such manner as he deems appropriate, subject to the Rules of Professional Conduct and Lawyer Competence as promulgated by the Supreme Court of South Carolina in Rule 407 et seq. of the South Carolina Appellate Court Rules:

- (1) Representation of the county, its departments, employees, boards, commissions and agencies, in all legal matters, whether or not an action has been commenced.
 - (2) Rendering of legal services and counsel to the county administrator, county staff, **and members of the county council.**
 - (3) Preparation of resolutions, ordinances and legal documents as needed or requested by the county administrator **and members of the county council.**
 - (4) Attendance at county council meetings.**
 - (5) Rendering of legal services and counsel relating to bond issues.
 - (6) Rendering of legal services and counsel to the established departments, employees, boards, commissions, and agencies of the county, and to the sheriff of the county or his authorized representatives.
 - (7) Rendering legal services and counsel that may be required in emergency situations.
 - (8) Organizing, managing and supervising the office of the county attorney and the affairs thereof.
 - (9) Procuring the services of, assisting, supervising and monitoring the work of other attorneys as needed for county matters.**
- (c) The county attorney shall also **perform such other duties as the office may require** or as the county administrator may require, **or as may be prescribed by the county council in meeting duly assembled.”**

Anderson County Code §2-178 (emphasis added)

The Court found that making the County follow its own ordinance regarding County Attorneys and the retention of the services of other attorneys by and through the County Attorney requires a County Council to “act through the administrator.” R.p. 18. Respondents further argued that in the case of the retention of the Wyche law firm that Mr. Artigliere indicated he could not handle the matter because he was potentially a witness and, therefore, would be conflicted out of litigating the matter.

A County Attorney's client is the County itself, not the County Administrator. This concept was made patently clear in a case involving this same county - *Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580 (S.C. 2008). In that case, the South Carolina Supreme Court found that the County Attorney (from the same firm - McNair) had ethical responsibilities to the Council as an entire legal body. Despite the fact that Defendants argued Mr. Artigliere was a potential witness, this did not ethically prevent Mr. Artigliere from selecting or associating other counsel or, better yet, turning this matter over to the Insurance Reserve Fund (IRF) whereby the County would have had a more than adequate defense with the defense costs covered by the IRF, rather than from county coffers.

Second, Mr. Artigliere and his firm (the McNair law firm) are fine attorneys with the highest ethical standards. Respondents could point to no legal position or factual evidence that would support a contention that Mr. Artigliere was unable to fully and ethically perform his statutory duty of “[p]rocur[ing] the services of . . . of other attorneys as needed for county matters.” Anderson County Code §2-178(9). Respondents simply acted in an *ultra vires* manner and stripped Mr. Artigliere of the statutory right to perform his duties.

An attorney's obligation is solely to his client, regardless of who hires him or who pays him. Specifically, South Carolina Rule of Appellate Procedure 407, Rule 2.1 requires that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.” Further, when an attorney has an organization

as a client (such as a County) the attorney has specific obligations to the organization itself:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if,

(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer

reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

South Carolina Rule of Appellate Procedure 407, Rule 1.13: Organization as Client

Mr. Waldrep, one of the sitting members of council, is an attorney and current member of the South Carolina Bar. He should be well aware of Mr. Artigliere's professional obligations. Therefore, any assertion that Council was not aware of Mr. Artigliere's professional obligations of loyalty to the County are spurious. Mr. Artigliere was fully and ethically able to perform his statutorily required functions. Defendants violated their own County Ordinances by circumventing these established ordinances and directly selecting attorneys, in an *ultra vires* manner. As a result, they unnecessarily cost the Appellants, and other similarly situated taxpayers, an unnecessary amount of money for legal expenses which could have been covered by the IRF.

CONCLUSION

Accordingly, the dismissal of Appellants' claims should be reversed with instructions that this matter be permitted to proceed on the merits.

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