THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

James C. Williams, Jr., Circuit Court Judge

Case No. 2009-CP-04-00491

Erick L. Bradshaw, Sr., Doreen Montepara and Michael Montepara,..... Appellants,

vs.

Anderson County, and Edwin E. Moore, individually,
Thomas Allen, individually, and Robert E. Waldrep, Jr., individually, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

The County Council of Anderson County concluded that it should investigate the way the business and financial affairs of the County had been conducted. The investigation would necessarily include conduct of the county administrator. To carry out this decision, the County Council passed resolutions engaging the necessary professionals – lawyers and accountants. This appeal presents the following questions:

1. Does the South Carolina Home Rule Act, S.C. Code § 4-9-660, authorize a County Council in a council-administrator form of government to conduct an investigation or an inquiry into the County's business and financial affairs without acting through the county administrator, who oversees the County's business and financial affairs and therefore is a subject of such an investigation or inquiry, and to hire accountants and attorneys to assist with and defend the investigation or inquiry?
2. Does the Anderson County Code require the Anderson County Council to act through the county administrator, and through the procurement process under his direction, when conducting an investigation or inquiry into the County's business and financial affairs and when hiring professionals to assist in the investigation or inquiry?
3. Does the Anderson County Council have authority under the Home Rule Act and the Anderson County Code to hire attorneys to assist in an investigation or inquiry and to defend the investigation or inquiry, or must such attorneys be hired only by the Anderson county attorney, who in turn is hired by the county administrator?

STATEMENT OF THE CASE

Anderson County Council has seven members. They are all elected every two years. Anderson County has a council-administrator form of government. In 2008 and for some years prior, the Anderson county administrator was Joey Preston. In 2008, a number of new members were elected to Anderson County Council. March 9, 2009 Order at 2 (R. p. 2).

Following the 2008 elections but before the new Council was sworn in, the lame duck County Council declared an "anticipatory breach" of the county administrator's contract and awarded him $1.1 million. They then – before the new Council took office – hired Mr. Preston's deputy county administrator as the new county administrator under a three-year contract. *Id*. (R. p. 2); Amended Complaint ¶ 17 (R. pp. 48-49).

Upon taking office in early January, the new County Council voted to investigate the financial and business affairs of the County. Amended Complaint ¶ 16 (R. p. 48). The Council passed a resolution retaining William Wilkins, the former Chief Judge of the United States Court of Appeals for the Fourth Circuit, and his law firm, Nexsen Pruet LLC ("Nexsen Pruet"), as Special Legal and Investigative Counsel. The Council also passed a resolution hiring Mr. Bob Daniel, a Certified Public Accountant, to investigate the files and financial records of the County, and a resolution to hire an accounting firm, Greene & Company, LLP, to assist Mr. Daniel. Amended Complaint ¶¶ 18-19 (R. pp. 49-50); March 9, 2009 Order at 2 (R. p. 2).

One month later on February 9, 2009, the original complaint in this case was filed in the name of three plaintiffs: Erick L. Bradshaw, Sr., Fred L. Foster, and Cordes Seabrook. Complaint (R. pp. 30-42). They claimed an interest in the matter only as

business owners, citizens, residents, and taxpayers of Anderson County. Complaint ¶ 1 (R. p. 30). The complaint sought to enjoin the work of the Council's Special Legal and Investigative Counsel and of the accountants on the investigation, alleging that their hiring violated the South Carolina Home Rule Act and procurement provisions of the Anderson County Code. Complaint (R. pp. 30-42). The complaint also sought actual damages from the County and actual and punitive damages from Mr. Edwin E. Moore, the Council Chair, for proposing and voting for the resolutions. Complaint Prayer ¶¶ 2-3 (R. pp. 41-42).

After the complaint was filed, the County Council adopted two resolutions retaining Wyche, Burgess, Freeman & Parham, P.A. ("the Wyche Firm"), to represent the County and Mr. Moore in this action. March 26 Order at 3 (R. p. 15); March 9 Order at 3 (R. p. 3); Amended Complaint ¶¶ 23-29 (R. pp. 50-52). The county attorney had concluded that he could not represent the County in this action. March 9 Order at 3 (R. p. 3).

Thereafter on February 17, 2009, an amended complaint was filed. The amended complaint added two plaintiffs, Doreen and Michael Montepara. Amended Complaint (R. pp. 43-65). Like the original three plaintiffs, they claimed an interest in the topics of the amended complaint only as business owners, citizens, residents, and taxpayers of Anderson County. Amended Complaint ¶ 1 (R. p. 43). The amended complaint added a challenge to the County Council's resolutions retaining the Wyche Firm to defend this action, and again contended that the Council violated the Home Rule Act and procurement provisions of the Anderson County Code. Amended Complaint ¶¶ 62-71 (R. pp. 59-61). In addition, the amended complaint named two other Council members,

Robert E. Waldrep, Jr., and Thomas Allen, as individual defendants. The amended complaint alleged that they committed fraud because of statements they made during the County Council meeting in connection with the adoption of the resolutions; the statements allegedly indicated that the proposed resolutions were lawful. Amended Complaint ¶¶ 23-27, 62-71 (R. pp. 50-52, 59-61). The plaintiffs sought actual and punitive damages against these individual Council members, as well as Mr. Moore. Amended Complaint Prayer ¶¶ 2-3 (R. p. 64).

The plaintiffs filed a motion for temporary restraining order, and the Court held a hearing on the motion on February 25, 2009. March 9, 2009 Order at 1 (R. p. 1). At the close of the hearing, the Court indicated that it would deny the motion and did so in an Order filed March 9, 2009. Transcript of February 25, 2009 Hearing at pp. 50 l. 14 -53 l. 17 (R. p. 182 line 14 –p. 185 line 17); March 9 Order (R. pp. 1-12).

Two of the three original plaintiffs, Mr. Seabrook and Mr. Foster, who had attended the February 25 hearing, left the lawsuit on March 4, 2009, after the hearing but prior to the Court's Order, by dismissing their claims pursuant to Rule 41 (a) of the South Carolina Rules of Civil Procedure.[1] Transcript of February 25, 2009 Hearing at pp. 3 l. 21-4 l. 1 (R. p. 180 line 21 –p. 181 line 1); Notice of Dismissal (March 4, 2009) (R. p. 122).

On February 24, 2009, prior to the hearing on the motion for temporary restraining order, the respondents Anderson County and Mr. Moore (the "County respondents") filed a motion to dismiss the amended complaint, and the County

[1] The appellants' Statement of the Case is thus mistaken when it states that "on February 9, 2009, these Plaintiffs brought suit." Appellants' Brief at 2. In fact, of the remaining plaintiffs, only Mr. Bradshaw was named as a plaintiff in the original complaint. Two of the three original plaintiffs left the case.

respondents filed an amended motion to dismiss on March 5, 2009. County Respondents' Motion to Dismiss; County Respondents' Amended Motion to Dismiss (R. pp. 119-121). On March 13, 2009, the respondents Thomas Allen and Robert E. Waldrep, Jr., filed a motion to dismiss the amended complaint. Allen & Waldrep Motion to Dismiss (R. pp. 174-176). On March 20, 2009, the Court held a hearing on the dismissal motions. In an Order filed March 26, 2009, the Court dismissed the appellants' amended complaint. March 26 Order (R. pp. 13-29). The Court found that under the South Carolina Home Rule Act, Anderson County Council had the authority to conduct an investigation into business and financial affairs of the County and to hire attorneys and accountants to assist with the investigation and to defend it. The Court also found that the Anderson County Code recognized the County Council's authority to take the action it took and that Council did not violate any of the procurement provisions of the Anderson County Code. *Id*. (R. pp. 13-29.)

On April 24, 2009, the appellants served a notice of appeal of the Court's Order denying the motion for temporary restraining order and the Court's Order dismissing the appellants' amended complaint. Notice of Appeal (R. p. 177). On May 26, 2009, the appellants served an amended notice of appeal, appealing only the Court's Order dismissing the appellants' amended complaint. Amended Notice of Appeal (R. p. 178).

ARGUMENT

I. The South Carolina Home Rule Act Authorizes Anderson County Council to Conduct an Investigation or an Inquiry without Acting Through the County Administrator.

When the new County Council came into office, it faced a truly remarkable situation. The previous County Council, after being ousted from office by the voters, had declared an "anticipatory breach" of the county administrator's contract and had awarded

him $1.1 million as a "settlement" of the claims the outgoing Council created by declaring that a breach would occur. In addition, anticipating that the new Council would want to bring change to county government, the old Council tried to cement in place the prior administration by hiring the county administrator's assistant as the new county administrator under a three-year contract.

Understandably, the new Council was concerned about these actions and in general about the management of Anderson County's business and financial affairs. The Council then exercised its most fundamental oversight responsibility as the elected representatives of the people of Anderson County and undertook to investigate the business and financial affairs of the County.

A. The Clear Language of the Home Rule Act Authorizes County Council's Actions

In essence, the appellants contend that because Anderson County has a council-administrator form of government, its County Council is required by the South Carolina Home Rule Act to act through the county administrator in conducting its investigation. As they did in their amended complaint, *see* March 26 Order at 5 (R. p. 17), in their brief the appellants overlook entirely the controlling provision of the South Carolina Home Rule Act. Section 4-9-660 of the South Carolina Code provides (emphasis added):

> **Authority of council and its members over county officers and employees.**
>
> ***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, the Home Rule Act could not be clearer. Section 4-9-660 is the section that, under the council-administrator form of government, restricts the role of Council

and provides that normally the Council acts through the administrator in overseeing the administration of county government. However, the ***very first*** phrase of Section 4-9-660 contains a critical exception that decides this case. There, the Home Rule Act makes clear that the County Council does ***not*** act through the administrator when conducting "inquiries and investigations" and instead may itself investigate the business of the County.

In effect, the appellants seek to rewrite this fundamental provision of the Home Rule Act, by deleting the key phrase of Section 4-9-660 – "***Except for inquiries and investigations***." *See State v. Corey D.*, 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000) ("it is beyond this Court's power to effect a change in the statutes enacted by the Legislature"). The appellants would require the Council to act through the administrator in seeking legal and investigative counsel to advise concerning the investigation, to hire investigators and accountants, and even to retain counsel to defend this legal attack on the County Council's investigation. According to the appellants, all these professionals must either be hired directly by the administrator – as county employees subordinate and reporting to the administrator – or be obtained through a procurement process directed by the administrator.

The actual text of the Home Rule Act discredits appellants' contention. The Act expressly provides that County Council does not act through the county administrator in conducting investigations. It does not restrict County Council's authority in conducting investigations in the ways that the appellants would like; nowhere does the Home Rule Act require the County Council to act through the administrator in obtaining legal and

investigative counsel, in obtaining investigative and accounting assistance, or in defending an investigation.[2]

No other rule would make sense. Under the council-administrator form of government, the county administrator oversees the business and finances of the County. S.C. Code Ann. § 4-9-630. In an investigation, the County Council is inevitably examining the work of the administrator and the county department heads and employees for whom the administrator is responsible. If the County Council were required to investigate by acting through the county administrator, its ability to investigate the County's business and finances would be severely undercut.

If appellants were correct, the County Council would be required to turn the management of its investigation over to a county employee – the very county administrator whose management inevitably would be a subject of the investigation. Nothing in the Home Rule Act requires such an absurd result. *See State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("if possible [the Court] will construe the statute so as to escape . . . absurdity"). County Council consists of the elected representatives of the people, and, as a matter of accountability to the voters, the County's business and financial affairs must be subject to direct investigation by the Council itself. The Home Rule Act recognizes Council's role and so provides.

Here, County Council acted in a notably responsible manner in undertaking the investigation. It hired Special Legal and Investigative Counsel for the investigation, Nexsen Pruett, a highly respected and well known law firm, and one of its partners,

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[2] As we discuss below, the Anderson County Code is consistent with the Home Rule Act. Even if it were not, though, the provisions of the Home Rule Act would be decisive in this case, since a county enactment could not supersede state law.

William W. Wilkins. Mr. Wilkins is especially qualified to provide advice and direction for an investigation, in that he is a former Chief Judge of the United States Court of Appeals for the Fourth Circuit, a former United States District Judge, and, importantly, a former Circuit Solicitor. In addition, County Council hired a certified public accountant, Mr. Bob Daniel, to work on the investigation, and retained an accounting firm, Greene & Company, LLP, to assist him. In other words, County Council took action at the outset to ensure that the investigation would be handled in a proper and effective way by able, reputable, and qualified professionals.

Section 4-9-660 expressly provides that the County Council does ***not*** act "through the administrator" in conducting an inquiry or investigation like this one. Nor is there any provision of the Home Rule Act that restricts the County Council's discretion in conducting an investigation into the County's business and financial affairs. Specifically, there is no provision of the Home Rule Act that prevents the County Council from hiring legal and investigative counsel, accountants, or investigators to assist it in conducting an investigation. *See Theisen v. Theisen*, 382 S.C. 213, 219, 676 S.E.2d 133, 137 (2009) (holding that if Legislature had intended a restriction to be in a statute, it would have included it). Indeed, it is to be expected that a County Council would seek such professional assistance, because County Councils are made up of private citizens who serve part time as elected representatives and are not presumed to have the time, background, or expertise to investigate all aspects of a County's business and finances.

The Home Rule Act's deference to the County Council in this regard is particularly appropriate. The County Council is the democratically elected body that represents the citizens of the County. For County government to be responsible to the

people, the people's elected representatives must have the ability to investigate the County's business and financial affairs directly, without relying upon the possible subject of the investigation to oversee it. This authority of County Councils to investigate County government directly is a most basic aspect of the democratic accountability of County government.

The Courts of our State have been careful to respect the discretionary choices made by elected representatives. "It is not the role of the courts to substitute their judgment for that of local legislative bodies . . . ." *Smith v. Georgetown County Council*, 292 S.C. 235, 239, 355 S.E.2d 864, 866 (1987). "In reviewing the discretionary decisions of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives." *Sloan v. Greenville County*, 356 S.C. 531, 555, 590 S.E.2d 338, 351 (Ct. App. 2003). The South Carolina Code also reflects this policy, by providing that Counties have the authority to act "respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them" and that "[t]he powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties." S.C. Code § 4-9-25. Here, the decisions of the elected Anderson County Council to hire lawyers and accountants to assist with and defend the Council's investigation were reasonable, are part and parcel of an investigation authorized by S.C. Code § 4-9-660, and are nowhere prohibited in the Home Rule Act.

B. Appellants Do Not Even Address the Governing Language of the Home Rule Act

It is noteworthy that in their brief the appellants do not even mention Section 4-9-660, much less try to explain how their position is consistent with the plain language of this controlling provision of the Home Rule Act. Section 4-9-660 is cited only once in the appellants' brief, in the body of a quotation from an inapplicable Attorney General's opinion. Appellants' Brief at 6. This omission is striking, in that Section 4-9-660 is the key Home Rule Act statute and it was the central statute on which the Circuit Court's Order relied. The reason for the omission is apparent; the appellants simply have no way to reconcile their position with the clear directive of the Home Rule Act. Their position is directly contrary to the straightforward language of the Act.

Instead of addressing the Council's authority under Section 4-9-660, the appellants make arguments that are beside the point. The appellants rely most heavily on an Attorney General's opinion regarding whether a County Council can hire an internal auditor who reports directly to County Council, an issue that has not been addressed by the South Carolina appellate courts. Appellants' Brief at 5-7; S.C. Attorney General's Opinion of April 4, 2008, 2008 WL 1960280 (S.C.A.G.). However, that Attorney General's opinion did ***not*** address a County Council investigation or a County Council's obtaining accounting or investigative services in connection with an investigation. The opinion did not involve or discuss the exception for "inquiries and investigations" that is critical to the instant case. Thus, the Attorney General's opinion that, pursuant to Section 4-9-660, "under a council-administrator form of county government, council must go through the county administrator with regard to matters of county personnel including internal auditors" is absolutely irrelevant to this case which involves the express exception to that rule. Under the plain terms of the statute, the Attorney General's

opinion's conclusion does not apply "for the purposes of inquiries and investigations" – the case before this Court and a situation that was ***not*** posed to the Attorney General in connection with the cited opinion. Thus, this Attorney General's opinion does not offer a view on the issue presented by this case.

The appellants go on to criticize the Circuit Court for citing S. C. Code § 4-9-150. Appellants' Brief at 8-11. That statute, also part of the Home Rule Act, provides that, without reference to an inquiry or an investigation, "[s]pecial audits may be provided for any agency receiving county funds as the county government body considers necessary" and that County Council may select the accountant "without requiring competitive bids." This statute underscores the authority of County Councils to examine directly the financial practices of County governments. The appellants' brief debates at considerable length (Appellants' Brief at 8-10) whether the accountants' investigative work in this instance could be characterized as a special "audit"; in pursuing this argument, appellants suggest the term "audit" should be taken in its technical accounting sense. In fact, the term "audit" is not defined in the Home Rule Act, and in common usage it includes "any thorough examination and evaluation of a problem" – a definition that would encompass the financial investigation at issue here. *See WEBSTER'S* NEW WORLD DICTIONARY (2D COLLEGIATE ED.) (1972).

This argument, too, is beside the point. The Circuit Court did not base its decision on Section 4-9-150. Instead, the Circuit Court based its decision on Section 4-9-660. After thoroughly reviewing Section 4-9-660 (March 26 Order at 5-9) (R. pp. 17-21), the Circuit Court concluded: "Thus, 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." *Id*. at 9 (R. p. 21). Thereafter, the Circuit Court's Order cites Section 4-9-150 only with the introductory phrase "See also" and a brief parenthetical summary of its contents. Thus, Section 4-9-150 is not a basis of the Circuit Court's Order but is cited by the Circuit Court's Order only as a further indication in the Home Rule Act, of the authority of County Councils to examine the financial affairs of the County directly. Section 4-9-660 is the basis of the Circuit Court's Order, and the appellants' brief does not even attempt to reconcile the statutory language with the appellants' position.

The simple and direct language of the Home Rule Act itself directly contradicts the central premise of the appellants' suit – that the Home Rule Act required County Council to conduct its investigation by acting through the administrator. Section 4-9-660 – which the appellants do not even discuss – expressly states that "for purposes of inquiries and investigations" County Councils may act directly and are not required to act through county administrators. The Circuit Court was correct in dismissing appellants' suit on the basis of the clear language of the Home Rule Act.

II. The Anderson County Code Also Authorizes County Council to Conduct Inquiries and Investigations without Acting Through the County Administrator.

The Home Rule Act is the end of this case. The Anderson County Code cannot take away County Council authority expressly granted by the Home Rule Act. *See Parker v. Bates*, 216 S.C. 52, 59-60, 56 S.E.2d 723, 726 (1950) (counties are "subject to the plenary control of the legislature" and "subordinate and subject to legislative control"). Indeed, the appellants' counsel conceded as much before the Circuit Court during argument on the motion to dismiss. Transcript March 20, 2009 Hearing at 33 ll. 2-15 (R. p. 188 lines 2-15).

A. The County Code Exempts Inquiries and Investigations, Just Like the Home Rule Act

However, there is no conflict between the Home Rule Act and the Anderson County Code. The Anderson County Code recognizes and reinforces the authority the Home Rule Act gives County Council to conduct inquiries and investigations without acting through the county administrator. In language very similar to that of S.C. Code § 4-9-660, the Anderson County Code provides in Section 2-39(a) (R. p. 143) (emphasis added):

> **Conduct of county council.**
>
> (a) *County council members*. ***Except for the purposes of inquiries and official investigations***, neither the county council nor its members shall give direct orders to any county officer or employee, other than the county administrator and the clerk to county council, either publicly or privately.

Continuing its pattern of simply ignoring controlling provisions of law for which it has no argument, appellants' brief nowhere either cites or discusses this essential provision of the Anderson County Code. The Anderson County Code explicitly incorporates the authority the Home Rule Act gives County Council to conduct inquiries and investigations without acting through the county administrator. Just as South Carolina Code § 4-9-660 demolishes appellants' reading of the Home Rule Act, Anderson County Code § 2-39(a) demolishes their interpretation of the Anderson County Code. Appellants do not address either provision, effectively admitting that each is fatal to their arguments.

Thus, remarkably, the appellants' discussion of the Anderson County Code proceeds entirely without reference to this critical provision. None of the provisions cited by the appellants – which describe processes overseen by the county administrator –

apply to this case, which challenges a County Council investigation. The Home Rule Act and Anderson County Code § 2-39(a) – and the opinion of the Circuit Court dismissing this case – make it clear that investigations are not subject to control by the county administrator. By talking only about rules that do not apply to investigations, appellants entirely dodge the questions presented by this appeal.

Section 4-9-660 of the Home Rule Act is conclusive as to this entire case. Similarly, if one proceeds to consider the remainder of the appellants' arguments, Anderson County Code § 2-39(a) is conclusive as to the appellants' effort to read the Anderson County procurement provisions to prevent the County Council from obtaining professional services for its investigation without acting through the county administrator. Both the Home Rule Act and the Anderson County Code § 2-39(a) make clear that the County Council does not act through the administrator in conducting an investigation. Pursuant to those laws, procurement provisions overseen by the county administrator are not applicable to this case.

B. The Anderson County Procurement Code Cannot be Used to Place an Investigation by County Council into the Hands of the County Administrator

In those circumstances in which the Anderson County procurement code applies to the procurement of professional services, the county administrator either makes the selection or oversees the selection process in conjunction with two of the administrator's subordinates.[3] Thus, the purpose of the appellants' suit is clear. The goal was to place

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[3] Anderson County Code § 2-637 is the procurement provision dealing with professional services. It provides that the county administrator may in some situations make the selection for professional services: "The county administrator may, as he deems appropriate, engage the services of professionals, particularly in matters that require confidentiality, or in situations where specialized expertise is required and not otherwise available with existing personnel." Anderson County Code § 2-637(a) (R. p. 203). In

control of the investigation into the hands of the county administrator. At the time the lawsuit was filed, the county administrator was Mr. Preston's former assistant, who had been hired by the previous County Council to be the county administrator for a three-year term.[4] If appellants were to succeed, the result would be to place the selection of investigators under the control of the administrator, when it was his work and that of his predecessor (and former supervisor) that would be subjects of examination. But regardless of the circumstances of this particular case, both the Home Rule Act and the Anderson County Code make clear that, as an institutional matter, the County Council does not act through the administrator in conducting an investigation. Pursuant to the Home Rule Act and Anderson County Code § 2-39(a), procurement provisions overseen by the county administrator are not applicable to this case.

As explained above, S.C. Code § 4-9-660 conclusively resolves this case; the authority it gives County Council is determinative, regardless of any provision of the Anderson County Code. Even without regard to the Home Rule Act, Anderson County Code § 2-39(a) is determinative as to the Anderson County Code; it makes clear that the Anderson County Code also authorizes County Council to investigate without acting through the county administrator or the procurement provisions under his control.

But even ignoring Anderson County Code § 2-39(a) for the sake of argument, by their own terms the procurement provisions of the Anderson County Code do not apply in this case, where County Council – which acts in open session and is fully accountable to the public – itself obtains professional services. The County Code recognizes and

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other situations, the administrator oversees the selection, through a committee consisting of the administrator or his designee and two of the administrator's subordinates. Anderson County Code § 2-637(b) (R. p. 203).

[4] Mr. Preston's assistant has since been replaced as county administrator.

preserves the County Council's authority to act directly in such circumstances, without going through the administrator.

The Anderson County Code separately defines County Council, on the one hand, and a "county agency" or a "using agency", on the other. Section 1-2 provides that "[t]he words 'the council' or 'the county council' shall mean the county council for Anderson County, South Carolina." (R. p. 189.) In Article V, the Purchasing article of the Anderson County Code, Section 2-601 defines "[a]gency and using agency" to mean "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." (R. p. 199.) Thus, an "agency" or a "using agency" is ***not*** County Council itself, but one of the units of county government that is "under the control of" County Council.

The procurement provisions of the Anderson County Code relied upon by appellants govern purchasing by county agencies or using agencies, and ***not*** by the County Council itself. The selection process for certain professional services contemplated by Section 2-637(b) are those services sought by "the head of ***a using agency*** in need of the . . . professional services" (R. p. 203) (emphasis added). Thus, because by definition the Council is not a "using agency," Section 2-637 – upon which the plaintiffs rely – has no application to selection of professionals by County Council itself.

The appellants emphasize Anderson County Code § 2-631, which starts the Division of Article V regarding competitive bidding and sets out the County's general policy. Appellants' Brief at 15-16. Section 2-631 by its own terms sets out a policy that

"goods and services required by ***county agencies***" (emphasis added) be procured through competitive bidding or proposals (R. p. 200). 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."

As the Circuit Court pointed out: "Of course, in the usual situation when the procurement provisions overseen by the county administrator apply, the County Council does not select the winning bidder. Anderson County Code § 2-634(f) (R. p. 201). But when the County Council acts for itself to carry out an investigation, the procurement provisions of the Anderson County Code do not apply, according to the Anderson County Code's own terms." March 26 Order at 13 (R. p. 25).

If there could be any doubt, in its first section, the Anderson County Code provides in Section 1-10 (R. p. 192):

> Nothing in this Code or the ordinance adopting this Code shall be construed to repeal or to otherwise affect the validity of any of the following ordinances or resolutions, which are not included in this Code:
>
> . . . .
>
> (4) Any ordinance or resolution approving, authorizing or otherwise relating to any contract, agreement, lease, deed or other instruction.

The appellants have argued that this provision is just a savings clause, to protect resolutions and ordinances already in place when the Anderson County Code was adopted. However, Section 1-10 is not so limited, and the Anderson County Code is of course a continuing and changing set of county laws, which can be amended. Anderson County Code § 1-8 (R. p. 191). Section 1-10 does not provide that the Anderson County Code preserves only ordinances or resolutions approving a contract that pre-existed the enactment of the Code; instead, it provides that "[n]othing in this Code" shall be

construed to "affect the validity" of ***"[a]ny*** ordinance or resolution approving, authorizing, or otherwise relating to ***any*** contract" (R. p. 192) (emphasis added). Once more, the Anderson County Code makes clear that County Council – which acts in open session and is fully accountable to the voting public – has the authority to make decisions regarding a contract or agreement if it decides to do so, without reference to the limitations set out elsewhere in the Anderson County Code.

The appellants contend that S.C. Code § 11-35-50 of the South Carolina Consolidated Procurement Code requires that County Councils act through competitive bidding when they make purchases or sales. Appellants' Brief at 17-18. However, that section only generally requires that local governments "shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement." It does not mandate that competitive bidding requirements reach beyond county agencies, which do not act in open session and are not the public's elected representatives. It certainly does not expressly require that County Councils themselves must employ competitive bidding when they procure professional services.

This Court has already made clear that County Councils are not required by Section 11-35-50 to utilize competitive bidding when the Council itself makes a procurement decision. *Glasscock Company, Inc. v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004). As the Court explained, the appellants' position "would effectively strip our state's local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt" and "runs wholly contrary to the home rule authority vested in local government by our constitution." 361 S.C. at 491, 604 S.E.2d at 722. This choice "is a function of County

Council's discretion, the exercise of which they are accountable for as publicly elected officials," and, for that reason, "[i]n reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives." *Id.* (internal quotations omitted).

Thus, even apart from the Home Rule Act and Anderson County Code § 2-39(a), the Anderson County Code does not require that County Council act through the county administrator in obtaining professional services in connection with its investigation.

C. Various Other Arguments by Appellants Are Beside the Point

The appellants' remaining argument under the Anderson County Code (apart from their contention concerning the county attorney discussed below) is their assertion that the Circuit Court "improperly relied on Anderson County Code § 2-221" in finding that the County Council could obtain accounting services for the investigation without acting through the county administrator. Appellants' Brief at 11-14. In fact, the Circuit Court's Order does not base its interpretation of the Anderson County Code on that provision.

The Circuit Court cites that section only once, at the conclusion of its analysis of the procurement provisions of the Anderson County Code. March 26 Order at 13 (R. p. 25). The Court introduces its reference to that section with only a "*see also*" citation and includes only a parenthetical direct quotation of the language of the section: "*See also* . . . Anderson County Code § 2-221 ("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")." *Id*. (R. p. 25.) Thus, the Circuit Court simply cited this section as further evidence of the general authority of County Council under the Anderson County Code, but did not rest its decision on that section of the Anderson County Code.

Just like the appellants' discussion of S.C. Code § 4-9-150, this section of the appellants' brief is entirely beside the point.[5] It debates the meaning of a provision of the Anderson County Code on which the Court did not base its decision. At the same time, this discussion, like the rest of the appellants' brief, omits any citation of the key provision of the Anderson County Code, Section 2-39(a). The appellants are doing their best to debate provisions that are not the foundations of the Circuit Court's decision, while ignoring the critical provisions – S.C. Code § 4-9-660 and Anderson County Code § 2-39(a).

Finally, there are scattered suggestions in the appellants' brief that internal Council procedures may not have been followed in the presentation of some resolutions, Appellants' Brief at 7, and that Mr. Daniel should be supervised differently, Appellants' Brief at 10. These suggestions are nothing more than asides; none of the causes of action in the amended complaint state claims based on such supposed violations, and the appellants' Statement of Issues on Appeal do not set out these points as issues for the appeal. Amended Complaint (R. pp. 43-65); Appellants' Brief at 1. Further, as the Circuit Court pointed out, County Council in fact complied with its own procedural rules in passing the resolutions; nothing in the Home Rule Act dictates how County Council

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[5] It is also mistaken. The appellants contend that Anderson County Code § 2-221 (R. p. 198) relates only to the creation of the position of county Finance Manager, because of its grouping under a heading relating to that position and because of the history note in parentheses after the section. Appellants' Brief at 11-14. However, the language of the Section is not so limited, and, like many codifications, the Anderson County Code provides: "The catchlines of the several sections of this Code are intended as mere catchwords to indicate the contents of the section and shall not be deemed or taken to be titles of such sections nor as any part of the section" and "The history notes appearing in parentheses after each section and the references and notes scattered throughout the Code are for the benefit of the user of the Code and shall have no legal effect." Anderson County Code § 1-5 (R. p. 191). Thus, Section 2-221 has the general meaning that its text provides, not limited by a heading or a history note.

will oversee an investigation or a professional helping it conduct an investigation, and normally a court does not act as a parliamentarian overseeing every detail of a County Council's parliamentary procedures and committee operations. March 26 Order at 15-16 (R. pp. 27-28).

III. The County Attorney Does Not Have Exclusive Authority to Hire Attorneys to Assist with or Defend a County Council Investigation.

As a final argument, the appellants contend that only the Anderson county attorney has the authority to retain counsel to assist with or defend the County Council's investigation, under Anderson County Code § 2-178.

A. This Claim Is Not Part of the Case

As an initial matter, the appellants were barred from making this argument in resisting the motion to dismiss and are barred from making it here to challenge the Circuit Court's Order granting the motion to dismiss. This contention is not contained anywhere in their amended complaint. *See* Amended Complaint (R. pp. 43-65). The appellants cannot challenge the County Council's actions on appeal based on a ground that they did not even mention in their amended complaint. "Generally, claims or defenses not presented in the pleadings will not be considered on appeal." *Fraternal Order of Police v. S.C. Department of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) (ruling that First Amendment issue may not be presented on appeal when it was not alleged in the complaint).

B. This Argument Is Directly Contrary to Appellants' Own Theories, the Anderson County Code, and the Home Rule Act

In fact, this argument directly contradicts the appellants' amended complaint. The amended complaint alleges that *only the county administrator* can hire legal counsel for the county. Amended Complaint ¶¶ 57, 67 (R. pp. 58-59, 61). Before this Court and

in litigating a motion to dismiss, the appellants cannot contradict the allegations of their own amended complaint.

Further, the appellants' contention is contradicted by the Anderson County Code itself. Anderson County Code § 2-637(a) provides that in certain circumstances the county administrator may select legal counsel, and Anderson County Code § 2-637(b) provides that in other circumstances legal counsel may be selected by a three person committee (R. p. 203). Moreover, as explained above, the Anderson County Code also allows the County Council to make its own contracting decisions, and, under S.C. Code § 4-9-660 and Anderson County Code § 2-39(a), the County Council can select its own counsel in connection with an investigation. Thus, while Anderson County Code § 2-178(b)(9) provides that the Anderson county attorney has the authority to procure the services of other attorneys for County matters, it does not provide that the Anderson county attorney has the *exclusive* such authority (R. pp. 197-198). Indeed, while a client, like Anderson County, may authorize its general counsel to hire counsel to represent the client in various matters, the client always retains the authority to decide for itself whom its attorneys will be. *See generally* 7A CORPUS JURIS SECUNDUM *Attorney & Client* § 195 at p. 185 ("In general, a litigant is entitled to be represented by an attorney of the litigant's own choice or selection").

Finally, the Circuit Court explained why it makes no sense to argue that the Anderson county attorney must have the exclusive authority to hire counsel to advise County Council concerning its investigation or defend the County Council's investigation:

> Moreover, it would make no sense to require that the county attorney hire counsel to conduct or defend a County Council investigation.

> Under the Anderson County Code, the county administrator selects the county attorney. Anderson County Code § 2-177(a) (R. p. 197). Under the plaintiffs' interpretation, the Anderson County Code would require that legal counsel for the County Council's investigation would have to be selected by the attorney hired by the county administrator, whose actions may be the subject of the investigation. As set out above, the Home Rule Act and the Anderson County Code actually provide to the contrary and authorize the County Council to act directly in investigating the County's business and finances.

March 26 Order at 15 (R. p. 27).[6]

CONCLUSION

The Anderson County Council carried out one of the most basic responsibilities of a democratically elected government, its authority to investigate the business and financial affairs of the governmental entity it was elected to oversee. The Supreme Court has warned that courts are reluctant to intervene in a pending investigation:

> The inconvenience of a government investigation does not constitute irreparable injury; it is merely part of the burden of living under government; it is not the kind of impending danger for which declaratory and injunctive relief are intended and is not an appropriate question for judicial determination.

Orr v. Clyburn, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982).

This observation is even more applicable here, where the investigation is expressly authorized by the Home Rule Act and has been undertaken by the people's elected representatives to look into the use of the public's facilities and funds. As this Court stated in *Glascock*: "In reviewing the discretionary decision of a legislative body,

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[6] The appellants speculate that this case could have been turned over to the Insurance Reserve Fund. Appellants' Brief at 21. The Insurance Reserve Fund is not mentioned in the amended complaint. Further, there is nothing to indicate that the Insurance Reserve Fund would have accepted this case to defend, nor is there any claim that County Council is bound to accept as legal counsel only those attorneys chosen by the Insurance Reserve Fund.

our courts have been loath to substitute their judgment for that of elected representatives." 361 S.C. at 491, 604 S.E.2d at 722.

Here, the appellants' suit would stymie the investigation by Anderson County's democratically elected representatives into a situation that calls out for investigation. The appellants' suit is contrary to both the Home Rule Act and the Anderson County Code. Respondents respectfully ask that the Court affirm the Circuit Court's decision.

Respectfully submitted,

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