

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

RECEIVED

MAY 14 2012

SC Court of Appeals

Case Nos. 2010-CP-21-1248 and 2011-CP-21-1034 (Consolidated)

Dean C. Fowler, Jr., in his capacity as Florence County
Treasurer, Appellant,

v.

Florence County, a body politic and subdivision of the
State of South Carolina, and Richard A. Starks, in his
capacity as Florence County Administrator Respondents.

and

Dean C. Fowler, Jr., in his capacity as Florence County
Treasurer, Appellant,

v.

Florence County, a body politic and subdivision of the
State of South Carolina, Richard A. Starks, in his
capacity as Florence County Administrator, and Kevin V.
Yokim, in his official capacity as Florence County
Finance Director Respondents.

NOTICE OF APPEAL

Appellant Dean C. Flower, Jr., in his official capacity as Florence County Treasurer, appeals the Order issued by the Honorable W. Jeffrey Young, Circuit Court Judge. This order was dated April 16, 2012; filed on April 18, 2012; and received by Appellant on April 18, 2012. Appellant also appeals the circuit court's interlocutory order of December 9, 2010, which was issued by the Honorable Michael G. Nettles and granted Respondents' motion to

amend their answer and counterclaim in Case No. 2010-CP-21-1248. Copies of both orders are attached.

Respectfully submitted,

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May 14, 2012
Columbia, South Carolina

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Carlyle Sandridge & Rice, LLP, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified by depositing a copy of it in the United States Mail, postage prepaid, to the following address(es):

PLEADING: Notice of Appeal

PARTIES SERVED: John C. Moylan, III
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May 14, 2012

The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Dean C. Fowler, Jr., in his capacity as Florence County Treasurer, v. Florence County, a body politic and subdivision of the State of South Carolina, and Richard A. Starks, in his capacity as Florence County Administrator and Dean C. Fowler, Jr., in his capacity as Florence County Treasurer, v. Florence County, a body politic and subdivision of the State of South Carolina, Richard A. Starks, in his capacity as Florence County Administrator, and Kevin V. Yokim, in his official capacity as Florence County Finance Director
Case Nos. 2010-CP-21-1248 and 2011-CP-21-1034 (Consolidated)

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondent.
2. Copy of the orders to be challenged on appeal.
3. Our check for \$100 for the filing fee.

Thank you.

Sincerely,

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership

M. Todd Carroll
Attorney

MTC/tm

cc: John C. Moylan, III
D. Malloy McEachin, Jr.

RECEIVED

MAY 14 2012

SC Court of Appeals

COPY

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Dean C. Fowler, Jr., in his capacity as Florence
County Treasurer,

Plaintiff(s),

CONSOLIDATED CASES:
C.A. NO. 2010-CP-21-1248
C.A. NO. 2011-CP-21-1034

vs.

Florence County, A Body Politic and
Subdivision of the State of South Carolina, and
Richard A. Starks, in his capacity as Florence
County Administrator,

Defendant(s).

ORDER

FILED
2012 APR 18 AM 10:36
FLORENCE COUNTY S.C.

Dean C. Fowler, Jr., in his capacity as Florence
County Treasurer,

Plaintiff(s),

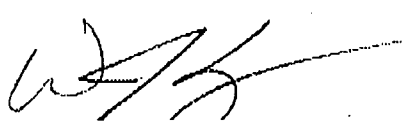
vs.

Florence County, A Body Politic and
Subdivision of the State of South Carolina, and
Richard A. Starks, in his official capacity as
Florence County Administrator, and Kevin V.
Yokim, in his official capacity as Florence
County Finance Director,

Defendant(s).

CERTIFIED: A TRUE COPY
Cynthia K. Shearin
CLERK OF COURT C.P & G.S.
FLORENCE COUNTY, S.C.

This matter comes before the Court on the parties' cross motions for summary judgment. The Defendants Florence County, Richard A. Starks, and Kevin V. Yokim ("Defendants" or "Florence County") moved for summary judgment on February 3, 2012 and the Plaintiff, Dean C. Fowler ("Fowler" or "Treasurer") moved for summary judgment on February 3, 2012. Oral argument was heard on March 8, 2012, and both parties agree that this case concerns purely legal



issues and that summary judgment is the appropriate mechanism for resolution of this case. For the reasons set forth below, the Court GRANTS Florence County's Motion for Summary Judgment and DENIES the Florence County Treasurer's Motion for Summary Judgment.

FACTUAL BACKGROUND

The following facts appear to be uncontested:

- 1) Plaintiff, Dean C. Fowler, Jr., is the Treasurer of Florence County.
- 2) Defendant, Florence County, is organized under the Council-Administrator form of government as provided by S.C. Code sections 4-9-20 and 4-9-610, *et seq.* Defendant Richard A. Starks was the County Administrator for Florence County until his retirement in 2011 and defendant Kevin V. Yokim is Florence County's Finance Director.
- 3) The Florence County budgeting and expenditure process is handled by Florence County Council and administered by the Florence County Administrator. County appropriations are made through the adoption of a line-item budget through majority vote by County Council. The County Administrator and the County Finance Director are tasked with ensuring that County money is spent according to the budget and consistent with State and County laws governing the expenditure of County funds.
- 4) On March 10, 2010, Fowler forwarded four Personnel Action Requests ("PARs") to the County Finance Director. Two of the four PARs included proposed salary increases for employees working in the Treasurer's Office and Fowler was informed by the County Administrator that the requests for salary increases would need approval by County Council.
- 5) After being informed that the proposed raises would require County Council approval, Fowler hired a private attorney and sued the County in the first lawsuit consolidated in this litigation, seeking a declaration that he has the discretionary authority to reallocate and expend County funds from any line item within the Treasurer's budget. The Treasurer also seeks

an affirmative injunction from this court to order Florence County Council to approve his salary increase requests.

6) County Council authorized the Administrator to approve the salary increases and the increases received final approval by the County Administrator and became effective on July 10, 2010.

7) On May 20, 2010, the Treasurer submitted an invoice dated May 11, 2010 from his attorney for bringing this lawsuit against the County, requesting County approval for payment from an expenditure line item in the Delinquent Tax Fund.

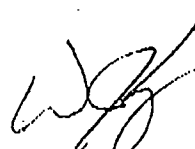
8) On May 28, 2010, the Florence County Finance Director informed the Treasurer that a warrant authorizing payment is required before any claim for payment can be processed.

9) On June 22, 2010, Fowler processed Florence County Treasurer check #226102 drawn on a Revenue (not Expenditure) Account, which is usually reserved for reimbursements to a person who has overpaid fees into the account. The Treasurer wrote the check in the amount of \$7,833.00 to pay the May 11, 2010 invoice for attorneys' fees.

10) The Treasurer paid these fees from a revenue account for Delinquent Tax Collection receipts even though the legal services for which the Treasurer was paying did not involve collecting delinquent taxes. All other checks drawn on this revenue account for the entire fiscal year were reimbursements to tax payers only.

11) The Treasurer never received approval from the County Council, the County Administrator, or the County Finance Director to disburse these funds.

12) On April 11, 2011 Fowler filed a second lawsuit against the County seeking a declaratory judgment that the County transferred money from the Delinquent Tax Account into the Florence County General Fund in violation of Title 12 of the South Carolina Code.



(Complaint, Civil Action No. 2011-CP-21-1034, at 4.) Both lawsuits were consolidated into this action by Order dated September 21, 2011.

In response to the two lawsuits filed by the Treasurer, Florence County filed a counterclaim for declaratory judgment and asks this Court to declare the following: 1) "Plaintiff does not have the authority to grant or direct pay raises to employees within the Treasurer's office without approval of County Council;" 2) "Plaintiff cannot enter into contracts without the permission of the County Council if that contract involves the appropriation or expenditure of county funds or other public funds;" and 3) "Plaintiff cannot expend funds from the Delinquent Tax Account or any other Florence County account, without a warrant from the County Administrator."

STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. S.C.R. Civ. P. 56; Pittman v. Grand Strand Entertainment, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).

Both parties have moved for summary judgment and agree that summary judgment is appropriate at this time.¹

¹ The Treasurer suggested at oral argument that since Council had subsequently approved the pay raises and since he had already entered into the contract for legal services and written a check without a warrant, that the issues in this lawsuit were now moot. The Court disagrees. First, as discussed below, the Court finds that the Treasurer's entry into a contract without Council approval and writing of a check without a warrant violate state and county law. In addition, these matters are certainly capable of repetition and should be resolved at this time. See e.g., Nelson v. Ozmint, 390 S.C. 432, 433, 702 S.E.2d 369, 370 (2010) ("If, however, an issue raised is capable of repetition but generally will evade review, the Court can address the issue.").

ORDER

I. The Treasurer Does Not Have The Authority To Alter Line Item Appropriations by Granting And Funding Pay Raises Without County Council Approval.

The Treasurer couches the issue of who may grant pay raises as affecting "the Treasurer's ability to make personnel decisions within his own office." (Treasurer's Memorandum in Support of Motion for Summary Judgment at 2). In response, Florence County Council asks this Court to issue a declaratory judgment that the Treasurer "does not have the authority to grant or direct pay raises to employees within the Treasurer's office without approval of County Council." (Florence County's Amended Answer and Counterclaim at 5.)

Both the South Carolina Constitution and our Supreme Court make a clear distinction between personnel decisions such as the hiring, firing, and suspension of employees and issues that concern the appropriation of public funds. The former decisions clearly belong to the elected officials who are given the authority to hire their employees, fire their employees, and discipline their employees. It is equally clear that the appropriation of public funds is reserved solely for the legislative body. Article 1, section 8 of the South Carolina Constitution provides for the separation of powers, stating:

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Article X, section 8 then provides that "[m]oney shall be drawn from the treasury of the State or the treasury of any of its political subdivisions only in pursuance of appropriations made by law." Our Supreme Court has unequivocally ruled on this very issue: "The appropriation of public funds is a legislative function." Gilstrap v. S.C. Budget & Control Bd., 310 S.C.210, 216, 423 S.E.2d 101, 105 (1992) (citations omitted) (emphasis added). The legislative body "has,



beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent." State ex rel. McLeod v. McInnis, 278 S.C. 307, 314, 295 S.E.2d 633, 637 (1982) (emphasis added).

The South Carolina General Assembly has been equally explicit in granting budgeting authority solely to county councils. Code section 4-9-140 specifically grants exclusive authority and requires the county council to:

adopt annually and prior to the beginning of the fiscal year operating and capital budgets for the operation of county government and shall in such budgets identify the sources of anticipated revenue including taxes necessary to meet the financial requirements of the budgets adopted. Council shall further provide for the levy and collection of taxes necessary to meet all budget requirements except as provided for by other revenue sources.

Moreover, the South Carolina Code specifically grants to counties the power to appropriate funds, to develop and implement personnel policies, to determine the salaries of county employees, and to allocate funds for salaries of both elected officials and county employees. Only employment, discipline, and discharge authority is reserved for the elected officials, and the County is also prohibited from reducing the salary of elected officials during the terms for which they are elected. Under Code section 4-9-30, the County has the authority to:

(7) develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly by the people, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government. This employment and discharge authority does not extend to any personnel employed in departments or agencies under the direction of an elected official or an official appointed by an authority outside county government. . . .

The salary of those officials elected by the people may be increased but may not be reduced during the terms for which they are elected,

...
(8) to provide for an accounting and reporting system whereby funds are received, safely kept, allocated and disbursed.

(emphasis added).

The South Carolina Code also grants specific powers to the county administrator under a council-administrator form of government, including the power to:

(5) to supervise the expenditure of appropriated funds;

...
(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.

S.C. Code Ann. § 4-9-630 (emphasis added). Code section 4-9-650 also provides that “[w]ith the exception of organizational policies established by the governing body, the county administrator shall exercise no authority over any elected officials of the county whose offices were created either by the Constitution or by the general law of the State.”

Consistent with this legislation, our Supreme Court has clearly drawn the distinction between personnel decisions and appropriation decisions. For instance, in Eargle v. Horry County, 344 S.C. 449, 455, 545 S.E.2d 276, 280 (2001), the Court held that the County Administrator did not have “the power to suspend employees of elected officials.” But when the decision involves appropriations, our Supreme Court has held that “[i]t is fundamental that the appropriation of public funds is a legislative function . . . [courts] may not, by mandamus or otherwise, direct the appropriation of public funds, for to do so would be to trespass upon the legislative domain.” Gregory v. Rollins, 230 S.C. 269, 274-75, 95 S.E.2d 487, 490-91 (1956). This distinction between personnel decisions and appropriation decisions was drawn sharply in

Bales v. Aughtry, 302 S.C. 262, 395 S.E.2d 177 (1990), in which the South Carolina Supreme Court held that the plain language of section 4-9-30(7) "limits the county government's power to employ or discharge elected officials or those under their direction," but it "does not restrict the county government's ability to determine compensation for elected officials except to prohibit reduction of an elected official's salary during his term of office." Bales at 263-63, 395 S.E.2d at 178 (emphasis added).

While decisions of other circuit court judges are not binding on this Court, the issues at hand have previously been addressed in a very similar Florence County case filed by the Florence County auditor against Florence County Council. Waddell v. Florence County Council, CA No. 83-CP-21-1387 (filed Jan. 23, 1984). In Waddell, the Florence County auditor asked the court to issue a writ of mandamus against Florence County council to require the council to appropriate funds sufficient to satisfy the staffing requirements requested by the auditor. Id. at 1. The court closely examined the law and held "there is no ordinance, regulation, statute, or constitutional provision requiring County Council to employ a specific number of people" in the auditor's office. Id. at 2. The court recognized that -- just as the Treasurer does here -- the auditor sought to have the court appropriate funds, "thereby trespassing upon the domain of the County Council which body has the discretion to determine what amount of money will be appropriated for the operation of the county offices and for the amount of compensation paid to each employee and the number of employees in its departments." Id. at 3 (emphasis added). The court further concluded "that the precise amount appropriated for the salaries of officials in South Carolina is left to the discretion of the County Council in each county and there is no statute or regulation setting specific amounts which are to be appropriated to compensate county officials." Id. (emphasis added) The court concluded that the auditor "improperly seeks to have



the court, in effect, substitute its judgment for the judgment of County Council and appropriate funds from the County Treasury, thereby trespassing upon the domain of the County Council, which request I am constrained to deny.” *Id.* at 4. The logic and legal analysis of that decision remain sound and persuasive.

These lawsuits began because the Treasurer claims that he has discretion to reallocate county funds as raises to his employees, so long as the reallocation is “budget-neutral.” The Treasurer cites no law to support this conclusion. On the contrary, as demonstrated above, courts, including our Supreme Court, have held that only the County Council has the authority to allocate and reallocate County funds. Although it did not do so here, the County Council even has the authority to reduce the operating budget of that office, so long as it does not prevent the proper functioning of the Treasurer’s office. The Treasurer testified in his partial deposition in this matter that neither he nor his employees were prevented from performing any of the functions of his office. (Fowler Partial Deposition, January 27, 2012, at 44, ll. 6-10; 74, ll. 11-14.) The County is entitled to a declaratory judgment that only the County Council, and not the Treasurer, may reallocate County funds in the form of pay raises to County employees.

Further, to the extent the Treasurer argues that he wishes only to make revenue neutral “transfers,” the result is the same. Florence County engages in line item budgeting and our legislature has mandated that County Council approve budgetary transfers: “The provisions of this section shall not be construed to prohibit the transfer of funds appropriated in the annual budget for purposes other than as specified in such annual budget when such transfers are approved by the council.” South Carolina Code §4-9-140(emphasis added). The law is clear: transfers must be “approved by council,” and the Treasurer must follow that law.



II. The Treasurer May Not Commit County Funds By Entering Into Contracts That Bind The Taxpayers of Florence County.

In its Counterclaim for Declaratory Judgment, the County Council asks this Court to declare that the Treasurer "cannot enter into contracts without the permission of the County Council if that contract involves the appropriation or expenditure of county funds or other public funds."

South Carolina law is clear that the Treasurer lacks the authority to enter into contracts that bind the taxpayers of Florence County. The South Carolina legislature has explicitly provided that the authority "to make and execute contracts" belongs to County Council, not to the Treasurer. S.C. Code Ann. § 4-9-30(3). This authority naturally stems from the legislature's plenary power over the County treasury, as only the body charged with allocating County funds can commit those funds, contractually or otherwise.

In addition, Florence County Ordinance section 11-32 explicitly prohibits the hiring of legal counsel without approval from the county attorney and the county administrator:

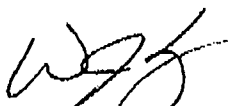
The office of the county attorney provides all legal services to Florence County, its departments and agencies. No contract for other legal services shall be entered into without the prior written approval of the county attorney and the county administrator.

(emphasis added).

Ordinance section 11-32(3) also provides that:

No officer, board, commission, committee, or agency in the county receiving any county funds or appointed in whole or in part by the Florence County Council may enter into a contract for professional services to obligate Florence County in any way without the prior written consent of the county administrator. Any contract executed without such approval is expressly unauthorized, constitutes an ultra vires act, and shall not be binding in any way as an obligation of Florence County.

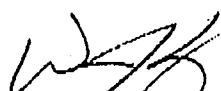
(emphasis added).



The facts giving rise to this issue are not in dispute. In both of the above-captioned lawsuits, Fowler engaged legal services without seeking or securing approval from County Council, the County Attorney, or the County Administrator. Rather, he made the unilateral decision that he would hire outside counsel and hopefully bind the taxpayers to pay those bills without limit. The Treasurer claims that he does not need approval from anyone in order to engage outside counsel at taxpayer expense for this or other lawsuits that he has brought. Yet his only justification for ignoring the applicable laws is that he "doesn't trust" the County Attorney or "his people." (Fowler Dep. 1/27/12, at 93, ll. 10-11; 95, ll. 12-19; 102, ll. 6-7.) The law is clear. Fowler cannot take for himself discretionary authority over County funds and, as the South Carolina General Assembly has made clear, only the County Council can enter into contracts that bind the county and its taxpayers. See S.C. Code Ann. § 4-9-30(3).

In addition to South Carolina state law, Florence County ordinances expressly provide: "No contract for other legal services shall be entered into without the prior written approval of the county attorney and the county administrator." Florence County Ordinance 11-32. Both state law and county law are clear that Fowler cannot bind the taxpayers of Florence County to a contract -- for legal services or otherwise -- or demand that the taxpayers fund his litigation efforts without the prior written approval of County Council. This has been the law in Florence County for over 10 years, and the Treasurer cites to no authority to justify his failure to follow this binding law.

Instead, the Treasurer argues that he has "the power to sue and be sued" and must, therefore, have the power to retain counsel. The Court agrees and would note that the Treasurer and other elected officials have a myriad of ways to retain counsel when necessary. For instance, if the Treasurer is a defendant in a tort case, a defense will be provided under the county's insurance policy, which the county is required to provide by statute (S.C. Code §15-78-140). If,



as here, the Treasurer wishes to initiate litigation as a plaintiff, he has several ways to do that properly. Elected officials may seek representation by the county attorney. If that is not practicable, the ordinances above provide that the elected official may request county council to provide outside counsel. In addition, the Treasurer has been represented in other litigation by South Carolina's Attorney General. Also, the Treasurer may retain a private attorney and pay him with private funds, as he did in this litigation. Finally, if successful, the Treasurer may seek attorneys' fees from the County pursuant to South Carolina Code section 15-77-300 as was done by the Horry County Auditor in Eargle and the Aiken County Sheriff in Heath v. Aiken County, 368 S.E.2d 904, 295 S.C. 416 (S.C. 1988). What the Treasurer may not do is undertake himself the power to appropriate funds and bind the taxpayers of Florence County to pay for any litigation he may choose to pursue.

The County is entitled to a declaratory judgment that the Treasurer must seek approval from the County Attorney and County Administrator prior to entering into a contract that would bind the taxpayers of Florence County, and his failure to do so in this instance violates state and county law.

III. The Treasurer Violated the Constitution, State Law, and County Ordinances By Disbursing County Funds Without an Appropriation or Warrant from the County.

Florence County asks this Court to issue a declaratory judgment that the Treasurer "cannot expend funds, from the Delinquent Tax Account or any other Florence County account, without a warrant from the County Administrator." This Court finds that by writing a check without a warrant, the Treasurer has violated the South Carolina Constitution, South Carolina state law, and Florence County ordinances.

The South Carolina Constitution establishes a separation of powers and explicitly provides that "Money shall be drawn from the treasury of the State or the treasury of any of its



political subdivisions only in pursuance of appropriations made by law." South Carolina Constitution Article X, Section 8. Here, by writing a check without a warrant or other appropriation, the Treasurer has taken unto himself the authority both to appropriate funds and to disburse money from the treasury.

The General Assembly, through Code section 4-9-30(8), grants to the County the exclusive power "to provide for an accounting and reporting system whereby County funds are received, safely kept, allocated and disbursed." In addition, Code section 4-9-30(14) allows the County "to enact ordinances for the implementation and enforcement of the powers granted in this section." In furtherance of the powers granted under sections 4-9-30(8) and (14), the County adopted the following controls providing for line item budgeting of County funds:

Sec. 11-142 - Transfers and internal controls.

(a) Expenditures. The council budgets all fund recipients on a line item account basis, which represents the maximum amount to be expended in each account. . . . Accounts in each budget area shall be assigned annually by the finance director. No purchase order shall be written, and no check shall be drawn or signed in any amounts singly or in the aggregate, for more than has been appropriated for the specific purpose for which the expenditure is requested.

Sec. 11-144 - Financial reporting and accounting procedures. . . .

(1) Designation of funds and line item accounts. The council shall designate the various funds and line item accounts in the budget and any amendments thereto. The treasurer and his personnel shall be familiar with and follow the fund designations. . . . All rents and fees received by the county from any source are to be credited to the general fund of the county.

(emphasis added.)

The Florence County Code of Ordinances clearly establishes a budgeting process by which the Council allocates funds to specific line item accounts, and the Treasurer collects and distributes the funds to those accounts. Importantly, the County mandates that payment of



County funds may only be disbursed by the Treasurer pursuant to a warrant from the County Administrator:

Sec. 11-144. - Financial reporting and accounting procedures.

(6) Disbursement of funds pursuant to warrant.

a. **The treasurer shall disburse funds for purposes only pursuant to warrant** from the Florence County Administrator or chief executive officer(s) of entities receiving funds from the direct levy of tax millage other than municipalities. All funds shall only be disbursed on like warrants with like requirements regardless of agency. (emphasis added).

In addition to the clear authority of the Constitution, state law, and county law, the Local Government Procedures Manual that the Treasurer claims to follow, makes absolutely clear that the Treasurer must have a warrant before issuing a check and cannot exercise discretion in the fulfillment of his duties:

The South Carolina Constitution (ref. Article X, Section 8) states "Money shall be drawn from the treasury at the state or the treasury of any of its political subdivisions only in pursuance of appropriations made by law." , , , Because public funds must first be appropriated before the treasurer can expend them, the appropriation are established in the budget. . . The chief administrative officer, or his designee, directs when, to whom and in what amount the various expenditures will be made. This is done through orders to the county treasurer to make such disbursements. This separation of "spending decisions" from "the custody of cash" is to provide a system of control. . . . At the county level the treasurer issues checks upon orders of the chief administrative officer of the county. In such cases the official certifies that such payments ordered are valid and verifies such in writing on signed orders (warrants) to the county treasurer who has custody of all county funds. The treasurer is obligated to make such payments and cannot exercise discretion."

SCATT, Local Government Procedures Manual, page 6.2 (emphasis added).

The facts of this case are disturbing. On May 21, 2010, the Treasurer submitted a Claim for Payment requesting a check for \$7,833.00 payable to his attorneys from the delinquent tax



expenditure budget. On May 28, 2010, the Florence County Finance Director informed the Treasurer that County Council approval was required before the claim for payment could be processed. Unbeknownst to the County, Fowler had already made a \$7,833.00 payment to his attorneys on May 11, 2011, apparently from private sources through a "transfer from a trust account." Despite having been told that County Council approval was required and despite having already paid his attorney through a private source, the Treasurer nonetheless personally approved, personally wrote, personally signed, and personally delivered a County check in the amount of \$7,833.00 payable to his attorneys -- without any authorization from anyone in county government. It is undisputed that the Treasurer disbursed the funds for the check without a warrant or any other authorization from the County or the County Administrator. Instead -- with no checks or balances -- he took the funds directly from a revenue account in the County's General Fund so that it would not even show as a typical expense disbursement with an expenditure line item.

In taking it upon himself to write a check spending taxpayer funds without a warrant, the Treasurer violated South Carolina's Constitution, state law, and at least two county ordinances, including County Ordinance 11-144 by disbursing taxpayer funds without a warrant, and Ordinance 11-142(a) by disbursing funds that had not been allocated by the County Council for payment of legal fees.

The Treasurer acknowledges that he made the payment at issue, and inexplicably claims that "the authority and discretion to expend these funds is vested by law in the Office of the Treasurer." Despite this claim, the Treasurer has cited no authority to support his claim that he may spend taxpayers' dollars without a warrant or any authorization from the County. On the contrary, South Carolina's Constitution, state law, county ordinances, and the Local Government Procedures Manual all make clear that he does not have this authority.

A handwritten signature in black ink, appearing to be 'W. A. H.', is located at the bottom left of the page.

As there is no genuine issue of material fact regarding Fowler's June 22 payment, and there is no authority allowing him to process a check without a warrant, Defendants are entitled to a declaratory judgment that the Treasurer is not permitted to disburse County funds without a warrant from the County.

IV. The Treasurer May Not Expend Funds from the Delinquent Tax Expenditure Account at his Discretion.

In his second lawsuit consolidated into this litigation, the Treasurer claims he has the discretionary authority to expend funds from the County's Delinquent Tax Expenditure Fund without a warrant or a purpose relating to delinquent tax collection. Among other proposed uses for the funds, the Treasurer has requested a \$20,000 salary increase for himself.

In his second Complaint, the Treasurer cites South Carolina code section 12-51-40(d) that allows for the expenses of a delinquent tax sale to be collected as costs: "All expenses of the levy, seizure, and sale must be added and collected as additional costs." From that language, he asks the Court to rule that he should have sole discretion over the expenditure of all costs collected and that money remaining in the account should not be returned to the County's General Fund. He points to no authority for that position other than the language of the statute quoted above.

This Court is aware of no law to support the Treasurer's request to allow him to use the Delinquent Tax Expenditure Fund as a discretionary spending account. The statutory language cited above relates only to the fees that should be charged to delinquent tax payers. Nowhere does the statute provide that fees remaining in the account should be treated differently than any other funds that remain in any other County revenue account at the end of the fiscal year. Indeed, the County submitted an affidavit from its Finance Director that the fees turned over to the County from the delinquent tax account have not covered the indirect expenses such as rent,



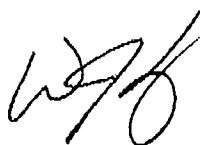
utilities, and payroll services provided by the County to the Delinquent Tax Office. The County is entitled to a declaratory judgment that the Treasurer may not use Delinquent Tax Expenditure Fund for purposes other than to cover the costs of delinquent tax collection as specified in the statute.

CONCLUSION AND ORDERS

The Treasurer asks this Court to grant him the most fundamental legislative power — the appropriation of public funds. He does this by asking the Court to allow him to give pay raises without Council approval, to enter into binding contracts without authority, to write checks without authority, and to retain delinquent tax funds without authority. The South Carolina Constitution, the South Carolina Code, the South Carolina Supreme Court, and Florence County ordinances, as well as the controls and protocols necessary for the protection of the public treasury, all prevent the Treasurer from usurping the County's authority and responsibility for appropriations.

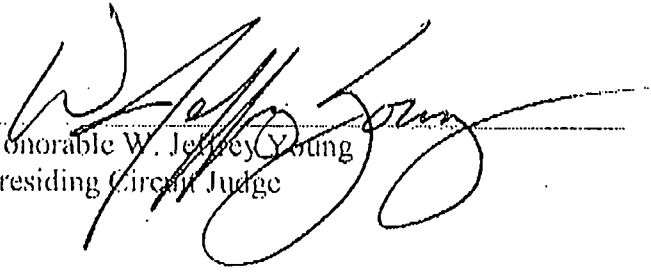
For the foregoing reasons, the Court orders and declares the following by way of final judgment and disposition of all claims:

- a. The Treasurer cannot expend Florence County funds without a warrant from the County Administrator pursuant to Florence County Code § 11-144(6), State law, and the State Constitution;
- b. The Treasurer cannot enter into contracts without the approval of County Council if that contract involves the appropriation or expenditure of county funds or other public funds collected on behalf of the citizens of Florence County;



- c. The Treasurer cannot obligate Florence County tax dollars by granting salary increases without the approval of County Council or the appropriation of funds for such raises by County Council.
- d. The Treasurer cannot use delinquent tax funds for purposes other than the costs of delinquent tax collection.

AND IT IS SO ORDERED.



Honorable W. Jeffrey Young
Presiding Circuit Judge

16 April, 2012

FILED

STATE OF SOUTH CAROLINA

2010 DEC -9 PM 3:06

COUNTY OF FLORENCE

CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

C.A. NO. 2010-CP-21-1248

Dean C. Fowler, Jr., in his capacity as Florence
County Treasurer,

Plaintiff,

vs.

Florence County and Richard A. Starks, in his
capacity as Florence County Administrator,

Defendants.

ORDER

**GRANTING LEAVE TO FILE AN
AMENDED ANSWER AND
COUNTERCLAIM**

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

This matter comes before the court on Defendants' Motion for Leave to File an Amended Answer and Counterclaim for Declaratory Judgment. Plaintiff opposes the motion and argued the underlying complaint should be dismissed as moot. A hearing was held on November 15, 2010. For the reasons below, the Motion is GRANTED, and the Amended Answer and Counterclaim shall be filed and served on counsel for Plaintiff.

“[A] party may amend his pleading only by leave of court . . .; and leave shall be freely given when justice so requires and does not prejudice any other party.” Rule 15(a), SCRCP. This rule strongly favors amendments, and the decision to allow an amended or supplemental pleading is left to the discretion of the trial judge. Tanner v. Florence County Treasurer, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999). The party opposing an amendment or supplemental complaint must establish prejudice by showing a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Id. (internal quotation omitted).

This case is a dispute over the authority of the Florence County Treasurer to make changes in personnel actions involving non-budgeted expenditure of county funds without approval by Florence County Council or the County Administrator. The complaint asked for an

injunction and declaratory relief as well as a statutory award of attorneys' fees and costs for the action. Specifically, the Treasurer requested the court:

- (1) Determine the construction of the relevant statutory provisions as they relate to the County or its Administrator's ability to obstruct the budget-neutral personnel actions of the Treasurer;
- (2) Issue an injunction against Florence County and its Administrator, ordering them to implement the challenged personnel actions and to cease further interference with the Treasurer's budget-neutral personnel and staffing decisions; and
- (3) Require Defendants to pay for the costs of this action, including attorneys' fees.

(Compl. 4.) Florence County and the County Administrator answered and subsequently made this motion for leave to amend to add a counterclaim for declaratory judgment that:

- a. Plaintiff cannot expend funds, from the Delinquent Tax Account or any other Florence County Account, without a warrant from the County Administrator
- b. Plaintiff cannot enter into contracts without the permission of County Council if that contract involves the appropriation or expenditure of county funds
- c. Plaintiff does not have the authority to grant or direct pay raises to employees within the Treasurer's office without approval of County Council and appropriation of funds for such raises by County Council, whether or not the budget for the Treasurer's office or any function thereof is otherwise in surplus.

(Amended Answer and Counterclaim ¶ 40) With the proposed counterclaim, both sides are now requesting the court "declare rights, status and other legal relations," S.C. Code Ann. section 15-53-20, relating to budget-neutral personnel actions of the Treasurer and the expenditure of county funds for non-budgeted items without permission or prior approval by County Council or the County Administrator.

This is sufficient reason to find justice requires allowing the amendment, but the amendment should also not prejudice another party. The burden of proving prejudice is on the Plaintiff as the non-moving party. Instead of presenting any reason for prejudice, the Plaintiff argued the complaint was now moot and should be dismissed. Without arguing prejudice, this

court is constrained to allow the amendment. See Tanner v. Florence County Treasurer, 336 S.C. 552, 559-60, 521 S.E.2d 153, 156-57 (1999) (reversing the trial court's denial of a supplemental pleading where the opposing party did not establish prejudice and only argued futility). Thus, the standard in Rule 15(a) has been satisfied to grant leave to amend.

In addition, the complaint is not moot. Although the requested personnel actions were approved by County Council and implemented by the County after the lawsuit was commenced, this implementation affected only the first part of the requested injunction in the prayer for relief. See supra, at 2. No decision has been made on the Plaintiff's requests in the complaint for declaratory judgment and an award of attorneys' fees and costs. Therefore, the Plaintiff's complaint is not moot and should not be dismissed.

Moreover, the Plaintiff's actions are capable of repetition yet evading review. This doctrine allows the court to decide a case or claim that may be moot. See, e.g., Byrd v. Irmo High Sch., 321 S.C. 426, 432, 468 S.E. 2d 861, 864 (1996) (holding that a court has jurisdiction, even if the case is moot, "if [] the challenged action in its duration was too short to be fully litigated prior to its cessation or expiration" and "clarify[ing] that this less restrictive approach is the appropriate standard in determining the applicability of the evading review exception of the mootness doctrine"). The Plaintiff's request for an injunction implementing the personnel actions may be moot because the actions were implemented through the county's governmental functioning and processes after the complaint was filed and before this court had an opportunity to rule on this specific request. The duration between the Plaintiff's request and implementation was too short for the dispute to be fully litigated, but it is also obvious the Plaintiff believes he is entitled to implementation without the county's approval. Thus, even this part of the Plaintiff's complaint is not moot. If the Plaintiff's request for an injunction implementing his personnel changes were moot at this time, then the Supreme Court's less restrictive approach to the evading

review exception to mootness applies, and the court still has jurisdiction over the complaint. Therefore, no part of the Plaintiff's complaint is dismissed as moot.

The Plaintiff also suggested that the alignment of the parties may be misleading. This is not the type of prejudice that would affect a court's discretion on allowing amendment of pleadings. The Plaintiff commenced this action raising the same issues that the Defendants now seek to address in the counterclaim. The parties have chosen to present these issues non-jury, and they will be decided by a judge. Thus, there is no prejudice based on the current alignment of the parties in allowing the counterclaim to be filed and decided by a judge.

The issues raised in the complaint and the proposed counterclaim need to be resolved. There is no reason to require the County to bring a new action with additional and unnecessary costs to the parties and the court system. The proposed counterclaim for declaratory judgment requests a declaration of rights directly related to the conduct, transactions, and occurrences set forth in the Plaintiff's pending complaint and prayer for relief. The Plaintiff had clear notice of these issues and did not argue any prejudice that affects a decision under Rule 15, SCRPC.

CONCLUSION

Therefore, leave is GRANTED for Defendants to file the Amended Answer and Counterclaim for Declaratory Judgment and serve it on counsel for the Treasurer. And it is so ORDERED.

Dec 9, 2010

Michael G. Nettles
The Honorable Michael G. Nettles
Presiding Circuit Judge

CONNIE REEL-SHEARIN
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

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FILED

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.