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HENRY McMASTER
ATTORNEY GENERAL

August 29, 2006

Aaron Pope, Zoning Administrator
City of Folly Beach
Post Office Box 48
Folly Beach, South Carolina 29439

Dear Mr. Pope:

We received your letter requesting an opinion of this Office concerning amendments to an ordinance enacted by a referendum. In your letter, you informed us:

In the April elections, Folly Beach voters were asked to vote on a binding referendum (attachment A) that would create a new section in our Fire Prevention Code. The referendum passed overwhelmingly. Unfortunately, the language of the proposed ordinance had never been cleaned up. After the election, City Council voted to enact the ordinance in accordance with the yes vote on the referendum. However, we would like to amend the ordinance in order to remove unnecessary wording from the language of the proposed new law.

The proposed amendments would result in a new ordinance that follows the spirit of the vote and keeps intact the main provision while eliminating the extraneous verbiage of the referendum (attachment B).

Thus, you ask; "can the language of an ordinance put forth in a binding referendum be changed?"

Law/Analysis

Section 5-17-10 of the South Carolina Code (2004) allows the electors of a municipality to propose ordinances. This section provides as follows:

The electors of a municipality may propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes. Any initiated ordinance may be submitted to the council by a petition

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signed by qualified electors of the municipality equal in number to at least fifteen percent of the registered voters at the last regular municipal election and certified by the municipal election commission as being in accordance with the provisions of this section.

S.C. Code Ann. § 5-17-10. Section 5-17-30 of the South Carolina Code (2004) requires an election be held, if the municipality's council does not pass or adopt an ordinance properly petitioned per section 5-17-10.

If the council shall fail to pass an ordinance proposed by initiative petition or shall pass it in a form substantially different from that set forth in the petition therefor or if the council fail to repeal an ordinance for which a petition has been presented, the adoption or repeal of the ordinance concerned shall be submitted to the electors not less than thirty days nor more than one year from the date the council takes its final vote thereon. The council may, in its discretion, and if no regular election is to be held within such period, provide for a special election.

S.C. Code Ann. § 5-17-30. Presuming the results of an election provided for under this provision are favorable to the enactment of the ordinance, the ordinance is enacted upon the favorable vote. Op. S.C. Atty. Gen., July 11, 1978 ("If the results of the referendum are favorable to the proposed ordinance then it would become a valid enactment.").

In addition to your request, you included a copy of the referendum submitted of a referendum to the Folly Beach voters. The ordinance per the referendum states as follows:

90.09 BUILDING HEIGHT LIMITS.

(A) The maximum height of all occupiable structures in the City of Folly Beach shall be fifty feet (50') above the elevation of the centerline of the nearest public street existing as of the date of this ordinance. This ordinance shall not be construed to relax more restrictive provisions found elsewhere in the Folly Beach Code of Ordinances. For the pupose of this ordinance, occupiable structures shall include all artificial structures except chimneys, flues, flagpoles, antennae, lighthouses, land public utility towers.

(B) The purpose of the building height limits is to preempt the threat of fire, to preserve the heritage of Folly Beach, and to

retain the environmental benefits of the existing tree canopy.

(1) The Folly Beach Fire Department is without the necessary equipment to fight fires above fifty feet or prevent their spread to adjacent structures or forest. Serving a small, primarily residential community, the Folly Beach Fire Department is not able to accommodate intense or mid-rise commercial and multi-unit residential development.

(2) The City of Folly Beach owes its name to the founders of Folly Island, who declared it "well follied" for the dense foliage of the indigenous maritime forest. A building height limit of 50 feet mitigates the incursion of artificial improvements into the tree canopy of lands in the city.

(3) The maritime forest tree canopy provides wildlife habitat. The building height limit preserves canopy, which ranges from 45 to 55 feet above grade in a maritime forest, thus reducing habitat elimination. Moreover the tree canopy provides shade for small structures, residents, pedestrians, and shade plants.

According to your letter, the Folly Beach voters passed the referendum containing this proposed ordinance. Thus, in our opinion, the ordinance was enacted upon the favorable referendum.

You also included a copy of the ordinance the Folly Beach City Council ("City Council") desires to enact. This ordinance is, for the most part, the same as the one included in the referendum. However, City Council's ordinance deletes "and to retain the environmental benefits of the existing tree canopy" in subsection (B), "or forest" in the first sentence of subsection (B)(1), and subsections (B)(2) and (B)(3) in their entirety. You state these deletions were made to "remove unnecessary wording from the language of the proposed new law." Thus, you ask whether City Council may enact its ordinance reflecting these changes.

In our research, we were unable to find case law addressing a municipal council's authority to amend an ordinance enacted by voter initiative and referendum. However, our Supreme Court, in Townsend v. City of Dillon, 326 S.C. 244, 486 S.E.2d 95 1997, addressed the similar issue of a municipal council's authority to repeal a voter initiated ordinance. That case dealt with an ordinance initiated by a petition of the voters in the City of Dillon. Id. at 245, 486 S.E.2d at 96. Dillon's City Council passed the initiative, thus precluding the necessity of a referendum. Id. Subsequent to its passage, the Dillon City Council voted to repeal the ordinance without submitting the issue to its

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voters in a referendum. Id. at 245-46, 486 S.E.2d at 96. In its opinion, the Court decided a municipal council has authority to repeal a voter initiated ordinance without a referendum. Id. at 246-47, 486 S.E.2d at 97.

Neither the South Carolina Constitution, § 5-7-30, nor §§ 5-17-10 to -30 impose any limitation on the ability of a municipality to repeal a voter initiated ordinance. Accordingly, in South Carolina, there is no explicit restraint on a municipality's ability to repeal a voter initiated ordinance.

Although some states impose a restraint on the legislative body's right to repeal a voter initiated provision even where no explicit restraint exists, the majority of jurisdictions conclude, where there are no explicit constitutional or statutory restraints, a voter initiated ordinance may be repealed by the same procedure as non-initiated ordinances. We agree and hold an ordinance which repeals a voter initiated ordinance need not be submitted to the electorate for approval. If dissatisfied with the municipal council's repeal of a voter initiated ordinance, the electorate's immediate remedy is to initiate a petition to reenact the original ordinance and, ultimately, to refuse to reelect those members of council who passed the ordinance repealing the voter initiated ordinance.

Id. at 246-47, 486 S.E.2d at 96-97.

The scenario presented in your letter is somewhat different from that presented in Townsend. First, the ordinance under consideration in your letter does not repeal, but amends, the ordinance enacted via a referendum. Like the Court in Townsend, we find no constitutional or statutory provision limiting a municipality's ability to amend ordinances enacted by a voter referendum. In addition, because the Court allows a municipal council to repeal a voter initiated ordinance, we believe it similarly would allow a municipal council to amend such an ordinance.

Second, the ordinance under consideration in Townsend, although initiated by a voter petition pursuant to section 5-17-10 of the South Carolina Code, was enacted by a vote of Dillon's City Council. Thus, no referendum was required. In the situation described in your letter, it appears City Council either failed or refused to enact the voters' initiative, allowing voters to consider the ordinance, which they ultimately enacted. One could argue Townsend is distinguishable from your situation and that because the voters, rather than City Council, enacted the ordinance. Therefore, one could take the position that Townsend does not apply. However, we believe the Court's analysis in Townsend may be applied to voter enacted ordinances, as well as, voter initiated ordinances. As we noted, the fact remains that no provision, constitutional or otherwise, appears to limit a municipal

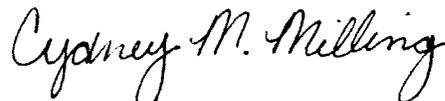
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council's authority to amend an ordinance enacted by referendum. Therefore, we believe a court would also conclude City Council has authority to amend an ordinance enacted by referendum.

Conclusion

Although we were unable to locate case law specifically addressing a municipal council's authority to amend a voter enacted ordinance, we believe a court following the Supreme Court's decision in Townsend, would find a municipal council has such authority. Thus, we believe City Council may enact an ordinance removing provisions from a previously enacted ordinance.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General