



HENRY McMASTER
ATTORNEY GENERAL

July 21, 2009

Grant Duffield, City Manager
City of Tega Cay
Post Office Box 3399
Tega Cay, South Carolina 29708

Dear Mr. Duffield:

We received your letter requesting an opinion of this Office on behalf of the City of Tega Cay (the "City") concerning the legality of a proposed ordinance requiring "a City council member duly elected and currently serving on City Council, to resign his position as Council member, such resignation effective upon such Council member's filing to run for Mayor of the City."

Law/Analysis

We must begin with the presumption that the ordinance is presumed valid and enforceable and will not be struck down by a court unless it is "palpably arbitrary, capricious or unreasonable." U.S. Fidelity & Guar. Co. v. City of Newberry, 257 S.C. 433, 438-39, 186 S.E.2d 239, 241 (1972) (citations omitted). Moreover, only a court, not this Office, may declare an ordinance invalid. Op. S.C. Atty. Gen., January 22, 2008. To determine whether a local ordinance is valid, our courts employ a two-step process. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. If, however, the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State.

Id. (citations omitted).

Included with your request, you provided a copy of an opinion issued by this Office in 1993 addressing whether the electors of a county have the power by initiative and referendum to institute a term limit and recall provisions for county council members. Op. S.C. Atty. Gen., June 24, 1993.

The opinion initially explained that the “electorate may not propose and adopt an ordinance which the governing body could not itself adopt.” Id. We cited article I, section 5 of the South Carolina Constitution (2009), which provides: “All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.” As we noted in our opinion, the Supreme Court in McLure v. McElroy, 211 S.C. 106, 44 S.E.2d 101(1947) determined that this constitutional provision only applies to constitutionally created offices. However, we noted that McLure stated as follows with regard to offices created by the Legislature:

The distinction between offices of constitutional origin and those created by statute as to their control by the Legislature has been repeatedly recognized, and the rule has been often announced that an office created by legislative action is wholly within the control of the Legislature which can declare the manner of filling it, how, when, and by whom the incumbent shall be elected or appointed, and to change from time to time the mode of election or appointment.

Id. (quoting McLure, 211 S.C. at 117, 44 S.E.2d at 106). Because of our determination that county councils were created by the Legislature and the Legislature did not provide for term limits or recall provisions, county council did not have the authority to impose term limits or recall provisions. Id. You also included an opinion issued in 1995 reiterating that a county council does not have the authority to set term limits based on our findings in the 1993 opinion. Op. S.C. Atty. Gen., August 14, 1995.

Article VIII, section 8 of the South Carolina Constitution (2009) states: “The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law; provided, that not more than five alternative forms of government shall be authorized.” Section 5-7-160 of the South Carolina Code (2004) vests the powers of municipalities in their councils. Thus, like county councils, the general assembly also established city councils through general law.

Article XVII, section 1 of the South Carolina Constitution (2009) requires elected or appointed officers in this State to “possess the qualifications of an elector” Section 7-5-120 of the South Carolina Code (Supp. 2008) sets forth these qualifications, which include citizenship, age, and residency requirements. Moreover, section 5-15-20 of the South Carolina Code (2004) provides specific qualifications necessary to serve as a mayor or city council member. This provision states: “Mayors and councilmen shall be qualified electors of the municipality and, if they are elected subject to residential or ward requirements as provided in this section, they shall be qualified electors of the ward prescribed for their election qualification.” S.C. Code Ann. § 5-15-20.

Requiring council members to resign in order to run for mayor essentially places an additional qualification on candidates for mayor. In our review of the qualifications of mayor as set

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forth by the Legislature, we did not find a provision placing such a limitation on mayoral candidates. In addition, while the Legislature in enacting section 5-7-180 of the South Carolina Code (2004) specifically prohibits mayors and members of city councils from holding other municipal offices or employment, it did not enact a provision requiring city council members to resign from service before running for mayor. Moreover, we did not find any provision in the municipal code authorizing city councils to impose such a restriction. Accordingly, we are of the opinion that just as term limits were not authorized by the Legislature for members of county councils, the Legislature did not authorize city councils to enact ordinances requiring members of their councils to resign before seeking a mayoral position.

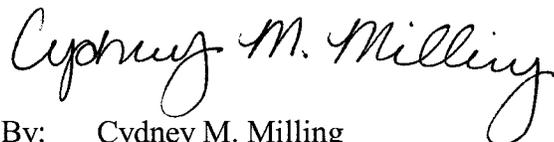
Because the City does not have the authority to enact such an ordinance, we believe a court would find such an ordinance to be invalid. However, as we previously stated, only a court may declare an ordinance invalid. Therefore, if passed, the ordinance must be treated as if it has full force and effect unless or until a court rules otherwise.

Conclusion

Based on the reasoning presented in prior opinions of this Office, we believe that because city councils were created by the Legislature, only the Legislature may set forth the qualifications of their members, including their mayors. As the Legislature did not set forth a provision requiring council members to resign their positions to become candidates for mayor or give municipalities the authority to impose such a requirement, we do not believe that city councils have such authority. Therefore, if the City passes an ordinance establishing this requirement on mayoral candidates, a court would likely find such an ordinance invalid.

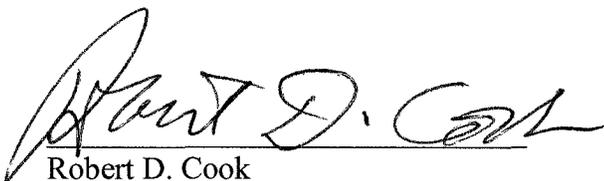
Very truly yours,

Henry McMaster
Attorney General



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REVIEWED AND APPROVED BY:



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