



HENRY McMASTER  
ATTORNEY GENERAL

August 4, 2009

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

Dear Mr. Duffield:

We understand that you desire an opinion of this Office addressing the legality of a proposed ordinance being considered by the City of Tega Cay (the "City"). You ask as follows:

Can a City Council legally amend a duly passed, existing City Ordinance, to provide that newly elected Council members shall be sworn into office at the City council meeting next occurring after the election results have been certified (after a November election), if the existing ordinance provides that the newly elected Council members shall be sworn into office at the City council meeting first occurring in January after a November election?

In addition, you provided us with the following background information:

1. The City council is composed of four councilpersons and a Mayor. The Council members' terms are staggered so that in a City election, either the Mayor's position and two Council seats are up for election, or in alternate elections, just two Council seats are up for election.
2. In May of 2007, the City council and the York County Council transferred the responsibility of holding elections for the City's councilpersons from the City to York County. The City received the approval of the US Department of Justice for such transfer of election responsibility.

3. The two councilpersons, and the mayor, up for election in November, 2009, began their current terms on July 4, 2006 and but for the change over to York County would have served until July of 2010. Instead, to accomplish the changeover, their positions are up for election in November, 2009, and the individuals elected for such positions will begin their service at the next regular occurring City Council meeting in January, 2010 under the current ordinance. (See the last sentence of Section 6 of attached Ordinance No. 273)
4. The proposed amendment would delete the last sentence of Ordinance No. 273, which now provides: "Newly elected members of council shall be sworn into office at the City Council meeting first occurring in the following January" and said sentence would be replaced with the following sentence: "Newly elected members of council shall be sworn into office at the City Council meeting first occurring after the certification of the election results."
5. The City hold regularly scheduled City council meetings each month, usually on the third Monday of each month.
6. Only the council members currently serving have the potential of the "lame duck" portion of their terms shortened by the proposed amendment; i.e. once the council terms cycle through the amended term period, the terms thereafter will be full four year terms.
7. The public purpose in the proposed amendment is to shorten the period of the "lame duck" period in which a departing council member serves. Given the local nature of issues before City Council, and the general knowledge of those running for office, it is unlikely that transition time in addition to the period of time between the certification of the election results, and the next occurring regular council meeting, (which is anticipated to be about two weeks) is necessary.

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### **Law/Analysis**

Included with your letter are several prior opinions of this Office concluding that municipalities have the authority to shorten or lengthen the terms of office of their council members. Indeed, numerous opinions of this Office determined that section 5-15-40 of the South Carolina Code (2004) gives municipalities the authority to set the terms of office of their mayors and council members. Op. S.C. Atty. Gen., October 23, 1985; March 16, 1984. This provision states: “The mayor and councilmen of each municipality shall be elected for terms of two or four years. Unless otherwise provided by ordinance, four-year terms shall be set so that not more than one-half of the council and mayor shall be elected in the same general election . . . .” S.C. Code Ann. § 5-15-40 (emphasis added). Based on this provision, we determined:

There is no requirement of a referendum to change the terms of office of a mayor and members of a city council. Further, there is no statutory limitation as to when or how often the terms of office may be changed, unlike the limitations of one election (referendum) every four years to change the form of municipal government, pursuant to Section 5-5-30 of the Code.

Op. S.C. Atty. Gen., October 23, 1985.

In addition to addressing a municipality’s ability to change the terms of its mayor and council members, we specifically addressed a municipality’s ability to change the date its council members take office in an opinion of this Office issued in 1989. Op. S.C. Atty. Gen., November 30, 1989. In that opinion, we addressed the City of Beaufort’s ability “to change the date council members assume office following their election on the first Tuesday in May to the second Tuesday in May.” We explained that “[p]resently the elected members assume office on the first Tuesday in July.” Id. We cited to a prior opinion of this Office determining that cities could change the dates of their elections, which in turn would change the terms of office of the elected officials and surmised that “[t]he reasoning of this opinion would be equally applicable to the shortening of a term of office in that the city would have the general authority to implement the change.” Id.

However, as you indicated in your letter, we do not believe a municipality’s authority to change the terms of office of its council members and mayor is unlimited. As we stated in an opinion issued by this Office in 2000, addressing the extension of a term of office:

First, a municipality’s use of this power must be reasonable. See Weber v. Pryor, 531 S.W.2d 708 (1976); 63C Am.Jur.2d Public Officers and Employees § 141 (1997). I have been unable to locate

Mr. Duffield  
Page 4  
August 4, 2009

any South Carolina cases discussing what might be a reasonable or unreasonable extension of a term of office. However, a court may look at factors such as the length of the extension and the reasons for the extension. It is likely a court would conclude that the extension must be for a public purpose and not for the personal benefit of the council members and the mayor. Second, any changes to term length and the election date would require Justice Department preclearance before the changes could be implemented.

Op. S.C. Atty. Gen., March 9, 2000 (footnotes omitted). We reiterated these requirements in a subsequent opinion issued by this Office. Op. S.C. Atty. Gen., June 6, 2003.

In accordance with our previous opinions, we believe the City has the authority to change the terms of its mayor and council members so long as the change is reasonable and precleared by the Justice Department. In your letter, you specified that the City wishes to change the date that council members take office in order to shorten the “lame duck” period that outgoing members serve. You state that the reason for the City’s desire to shorten this period is because the transition time provided under the previous ordinance is unnecessary. Based on the information you provided as to the City’s current schedule for council meetings, it appears that if the proposed change takes place, newly elected council members will assume office approximately two months prior to date they would assume office under the current ordinance. Based on these facts, we would presume that a court would find the change in the date reasonable because the change is for a purported public purpose and not for the benefit of the council members. In addition, the length appears relatively short as compared with council members’ four-year terms of office. However, to determine whether shortening a council member’s term by two months is reasonable, would require us to consider all facts surrounding this change and make a determination as to whether the reasons stated are valid. We commented in numerous opinions, this Office does not have the authority to investigate and determine factual issues. Op. S.C. Atty. Gen., May 8, 2009. Only a court can make such determinations. Id. As such, we believe only a court may ultimately determine whether such a change is reasonable.

### **Conclusion**

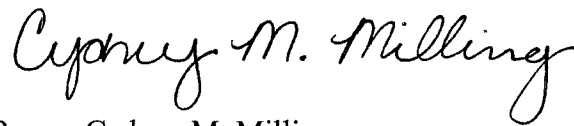
As explained in numerous opinions of this Office, we remain of the opinion that municipalities have authority to shorten or lengthen the terms of office of their mayors and council members. Additionally, we specifically recognize a municipality’s ability to change the date its council members assume office. Thus, we believe that the City has such authority. However, we believe the City’s exercise of this authority must be reasonable and must be precleared by the Justice Department before any such change may be implemented. Based on the information you provided

Mr. Duffield  
Page 5  
August 4, 2009

in your letter, we would presume that the change in this instance is reasonable. However, because the determination of reasonableness is a factual question, only a court, not this Office may make a final determination as the reasonableness of this change.

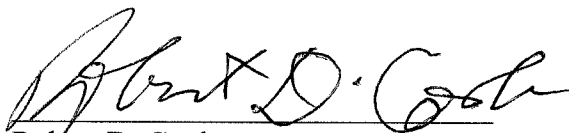
Very truly yours,

Henry McMaster  
Attorney General



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REVIEWED AND APPROVED BY:



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