

November 30, 2007

The Honorable Bill Herbkersman
Member, House of Representatives
15 Gascoigne Bluff
Bluffton, South Carolina 29910

Dear Representative Herbkersman:

We understand from your recent letter that you wish this Office to address the following question:

In regard to the home rule act, once a municipality enacts one form of government, i.e. § 5-11-20, specifically the Council form of government can a later council by ordinance give the Mayor the strong Mayor powers of § 5-9-20, et seq. Or must this have to be done by referendum where it is voted on the citizens.

Law/Analysis

Chapter 5 of title 5 of the South Carolina Code (2004) governs the selection of municipal forms of government. Section 5-5-10 of the South Carolina Code (2004), as part of the Home Rule legislation, called for the selection of one of three forms government by each municipality. This statute requires municipalities to select their form of government by March 1, 1974, and if they do not, they must hold a referendum to select their form of government. S.C. Code Ann. § 5-5-10.

With regard to a change in a municipality's form of government, section 5-5-30 of the South Carolina Code (2004) provides as follows:

Until changed by an election, the selection of the form of government as initially determined by the governing body by

ordinance shall remain effective. The ordinance selecting the form of government shall be filed in the office of the Secretary of State who shall issue an appropriate certificate of incorporation to the municipality. No other such election shall be held for a period of four years after an election is held pursuant to § 5-5-20.

We read this provision to require an election in order for a municipality to change its established form of government. Section 5-5-20 of the South Carolina Code (2004) provides further support for this interpretation and states as follows:

After the date of official council action if a petition executed by fifteen percent of the qualified electors is presented to the municipal governing body, certified by the county election commission, for an election to determine or change the form of government or if the municipal governing body shall by ordinance call for such an election, the municipal governing body shall conduct a special election not later than ninety days nor earlier than thirty days after the receipt of the certified petition or the passage of the council ordinance; provided, however, that no referendum shall be held pursuant to ordinance of the municipal council sooner than two years following the date the form of municipal government is initially selected pursuant to the provisions of this chapter.

(emphasis added). Section 5-5-40 of the South Carolina Code (2004) also indicates the necessity of a referendum for a change in municipal form as it requires certain language to be used in the referendum.

These provisions clearly indicate that in order to change the form of a municipal government from one form to another, the procedures as set forth in chapter 5 of title 5 must be complied with. Accordingly, we agree with your assessment that if a municipality desires to change its form of government, a referendum must be conducted either upon the governing body's receipt of a qualifying petition or upon a call for such a change by the municipality's governing body via an ordinance. We note that this interpretation conforms to a prior opinion of this Office in which we noted "[t]o change to either the mayor-council or council form of government, Sections 5-5-20 through 5-5-60 would be followed; a referendum would be necessary." Op. S.C. Atty. Gen., October 23, 1985.

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Very truly yours,

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