



ALAN WILSON  
ATTORNEY GENERAL

May 24, 2011

Robert C. Lake, III, Esquire  
Lake and Lake Attorneys, LLC  
1325 Main Street  
Newberry, South Carolina 29108

Dear Mr. Lake:

We understand you represent the Town of Whitmire (the "Town") and wish to request an opinion of this Office on behalf of the Town concerning the status of the Town's form of municipal government. In your letter, you provided us with the following information:

The Town of Whitmire has always functioned under the Mayor-Council form of government as contemplated in Chapter 9 of SC Code Title 5. On August 27, 1990 however an Ordinance was passed which called for a Referendum on the issue as to the form of government the Town would operate under. Specifically, the question was whether or not the Town would change its form of government from Mayor-Council to a Council form as authorized by SC Code Title 5, Chapter 11 . . .

Apparently the December 11, 1990 election was held. The results of the election are today unknown however. The Town Clerk has no official results of the election. I have checked with the County Election Commission and the SC Election Commission and can also find no official results. I have also checked with the office of the Secretary of State and it has no official results of this election. That office advises that it also asked for research on the results from the state archives. I was advised that no such results are available there either.

In reviewing the August 27, 1990 Ordinance establishing the Referendum and special election, it does not appear to be in conformity with the time constraints established by SC Code

Section 5-5-20. That code section requires that the special election be conducted not later than ninety (90) days nor earlier than (30) days after the passage of the Ordinance. By my calculation, the special election was held one hundred six (106) days after the passage of the Ordinance establishing the special election.

Further, I am mindful that the election must receive pre-clearance from the United States Justice Department before the election is held. This was recently set forth in your Opinion No. 08-232. I have contacted the Justice Department (Voting Rights Section) and been advised that there was no pre-clearance in 1990 for this special election.

Further, it is my understanding that the Town of Whitmire has operated under the Mayor-Council form of government since the December 11, 1990 election. This, together with the lack of certified results, the failure to abide by the statutory time frame and the lack of pre-clearance by the US Department of Justice has led me to believe the Town of Whitmire still has a Mayor-Council form of government rather than a Council form of Government.

#### **Law/Analysis**

Section 5-5-30 of the South Carolina Code (2004) provides that a municipality shall retain its original form of municipal government.

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.

S.C. Code Ann. § 5-5-30. Furthermore, section 5-5-40 of the South Carolina Code (2004) provides the procedure by which a municipal form of government can be changed. This provision requires “a majority of the votes cast by the qualified electors of the municipality in the election” to change the form of government.

Mr. Lake  
Page 3  
May 24, 2011

In your letter, you explained that the Town Council passed an ordinance calling for a change in the form of the Town's municipal government in December of 1990. Thus, if this election was properly conducted, we generally would advise that the results of the election stand. However, you indicated first that the results of the election are unknown and that after checking with several governmental agencies, the results of the election do not appear to be recorded. Therefore, we do not believe that a court would order a change in the form of the Town's government if the results are unknown.

Additionally, you informed us that the election did not appear to be conducted in accordance with South Carolina law regarding changes in municipal forms of government. As you mentioned in your letter, section 5-5-20 of the South Carolina Code (2004) requires that a special election to change the form of a municipal government must occur "not later than ninety days nor earlier than thirty days after the receipt of the certified petition or the passage of the council ordinance . . . ." As our Supreme Court explained in Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010):

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will. See id. "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." Strickland v. Strickland, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007) (citation omitted).

Section 5-5-20 does not appear to provide any discretion with regard to when the election can be held. As we stated in a 1990 opinion,

[i]n the absence of such authorization, holding the election on a date other than that authorized by statute will void the election. 29 C.J.S. Elections § 77; Davis v. Page, 217 Ga. 751, 125 S.E.2d 60 (1962); Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952); McCoy v. Fisher, 136 W.Va. 447, 67 S.E.2d 543 (1951).

Op. S.C. Atty. Gen., August 31, 1990. See also, McCoy v. Story, 417 S.W.2d 954 (Ark. 1967) (finding that elections held at the time and place provided by law is essential to the validity of an election). Therefore, we believe that if the provisions of section 5-5-20 were not followed, a court would likely invalidate the election.

Mr. Lake  
Page 4  
May 24, 2011

In your letter, you also informed us that preclearance was not obtained for the change in form of the Town's government from the United State Department of Justice. As you mentioned, this Office recognizes that the Voting Rights Act of 1965 requires preclearance be sought from the Department of Justice prior to a change in the form of municipal government. Ops. S.C. Atty. Gen., November 20, 1996; May 10, 1988. Thus, if the Town did not gain preclearance from the Department of Justice, we would advise that even if the election resulted in a change of the Town's form of government, this change could not be implemented without preclearance from the Department of Justice.

### Conclusion

We agree with your assessment that although the Town may have conducted an election to change its form of government, a court would likely find that the Town retains its original mayor-council form of government prior to the election. Whether or not the Town actually changed its form of government during the election is unclear. Furthermore, given the information provided by you, the Town failed to follow section 5-5-20 by not conducting the election during the time specified by the Legislature. In addition, the Town failed to gain preclearance from the Department of Justice. Based on this information, we believe a court would find the Town legally continued to operate under the mayor-council form of government and should continue to operate under this form of government unless the Town holds another election resulting in a change.

Very truly yours,



Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General