

May 1, 2008

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Dear Mr. Tedder:

We understand from your letter that you are the attorney for the City of Hardeeville (the “City”) and wish to request an opinion on behalf of the City concerning a change in the form of the City’s government. You state that the City recently received a petition requesting a change in the form of government to a mayor-council form. You also informed us that: “Hardeeville is presently operating as a council-manager government, which selection was made pursuant to a special election held on May 9, 2006 pursuant to Section 5-5-10, et.seq., which changed the type of government from the council form.” You also state as follows:

I have examined the statutes in Section 5-5-10, et. seq., and it is my understanding that since the special election was held on May 9, 2006, the next available date which an election can be held to change the form of government is after May 9, 2010, four years after the last special election. The Mayor and Council have asked me to obtain an opinion stating whether the election can be held earlier than four years.

...

As there must be notice of the special election in any event, I am further of the opinion Title 7 places constraints on timing that would prevent this matter from being set for vote less than sixty days from the first notice of publication, as required under Section 7-13-35. This would prevent the special election being held as part of the regular scheduled general election, as requested by the citizens, should the answer to the initial question be two years must have elapsed. I do not believe the provisions for Section 5-5-20 override Title 7 to allow for an election in less than 60 days from the date of publication. Even if there can be no special election before May of

Mr. Tedder
Page 2
May 1, 2008

2010, an answer to this question would be helpful for guidance if another petition should be presented in 2010 pursuant to Title 5, Chapter 5.

Lastly, you ask if a special election is held and is successful in changing the City's form of government, "[w]ould the then mayor under the council-manager form automatically become the chief administrative officer, with duties not assigned to that office at the time of his or her election, or must there be a follow-up special election to become the 'strong' mayor, to use the common terminology." In addition, you ask "would it not be the case that until there was a general election at which two or more council members were elected, any increase in salary for the 'strong' mayor could not take effect as a result of the provisions of Section 5-7-170?"

Law/Analysis

As you mentioned in your letter, the provisions contained in chapter 5 of title 5 of the South Carolina Code govern the selection of forms of municipal government. Section 5-5-10 of the South Carolina Code (2004) provides for the initial selection of a form of government. After this initial section, section 5-5-20 of the South Carolina Code (2004) requires a referendum initiated either by a petition submitted by voters or the municipalities governing body. This provision specifies 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." S.C. Code Ann. § 5-5-20 (emphasis added). Thus, after the initial form of government is selected, the municipality must wait two years from the initial selection to change its form of government.

However, if the municipality wishes to change its form of government again, after a change pursuant to section 5-5-20, section 5-5-30 of the South Carolina Code (2004) appears to require the municipality to wait at least four years. This provision states:

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 (emphasis added). Based on this provision, if a municipality changes its initial form of government by an election pursuant to section 5-5-20 and that municipality wishes to again change its form of government, it must wait four years. See Op. S.C. Atty. Gen., October 23, 1985 (commenting that referendums to change the form of a municipal government are limited to every four years).

Mr. Tedder
Page 3
May 1, 2008

According to your letter, the City originally selected a council form of government. In May of 2006, the City held an election to change to a council-manger form of government under which it currently operates. We understand that voters have petitioned City Council to again change the form of the City's government to a mayor-council form of government. Based on our review of the statutory authority contained in chapter 5 of title 5, we agree with your assessment that the City is precluded from holding another election to change its form of government until four years after its selection of the council-manager form of government in May of 2006.

Next, assuming an election for a change in government is appropriate, you inquire as to whether the City may hold the election less than sixty days from the first notice of publication. In your letter, you point out that section 7-13-35 of the South Carolina Code (Supp. 2007) requires at least sixty-days notice of the election. This provision governs the notice requirement for general, municipal, special, and primary elections and provides as follows:

The authority charged by law with conducting an election must publish two notices of general, municipal, special, and primary elections held in the county in a newspaper of general circulation in the county or municipality, as appropriate. Included in each notice must be a reminder of the last day persons may register to be eligible to vote in the election for which notice is given, notification of the date, time, and location of the hearing on ballots challenged in the election, a list of the precincts involved in the election, the location of the polling places in each of the precincts, and notification that the process of examining the return-addressed envelopes containing absentee ballots may begin at 2:00 p.m. on election day at a place designated in the notice by the authority charged with conducting the election. The first notice must appear not later than sixty days before the election and the second notice must appear not later than two weeks after the first notice.

In an opinion of this Office issued in 1989, we determined that this provision applies to referendums as referendums are included in the definition of "special election" pursuant to section 7-1-20 of the South Carolina Code. Op. S.C. Atty. Gen., August 22, 1989. According to section 7-13-35, it appears that in order for the City's electorate to vote on a change in form of government, sixty-days notice of the election is required.

However, in our review of chapter 5 of title 5, we discovered section 5-5-50, which provides a notice provision. This statute states:

Notice of all special elections relating to a change in form of government shall be published at least three weeks in advance in a

Mr. Tedder
Page 4
May 1, 2008

newspaper of general circulation in the municipality in which such election is to be held. The municipality shall pay all expenses incurred in the conduct of any election. Elections shall be conducted in accordance with the provisions of general law regulating special elections as they apply to referendums in this State, *mutatis mutandi*.

S.C. Code Ann. § 5-5-50. According to this provision, notice of the election must be provided only three weeks prior to the election.

Thus, we find a conflict between the notice requirements as provided in section 7-13-35 and those in section 5-5-50. As our Supreme Court stated in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000) (citations omitted):

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Statutes in apparent conflict should, if reasonably possible, be construed to allow both to stand and to give effect to each. Generally, specific laws prevail over general laws, and later legislation takes precedence over earlier legislation.

Section 7-13-35 provides the general law applicable to all municipal elections. Section 5-5-50 on the other hand is specific and provides the notice requirement pertaining particularly to elections deciding a change in the form of government. Thus, we are of the opinion that the notice requirement contained in section 5-5-50 applies under these circumstances. Accordingly, we believe the City must provide notice of the election at least three weeks prior to the date of the election.

Lastly, you inquire as to the mayor's status presuming the election is successful in changing the City's form of government to a mayor-council form of government. Specifically, you inquire as to whether the current mayor automatically becomes the chief administrative officer and if so, whether the mayor is eligible for a pay increase due to the increase in responsibility under the "strong" mayor form of government. Initially, we note that section 5-5-60 of the South Carolina Code (2004) provides guidance as to the service of existing members of the City's governing body. This provision states: "Upon initial adoption of or on any change to one of the alternate forms of government, all members of the existing governing body shall continue to serve their elected terms and until their successors are elected and qualify." S.C. Code Ann. § 5-5-60.

In 1979, this Office addressed the related question of when a City should hold elections after a successful referendum pursuant to section 5-5-20. *Op. S.C. Atty. Gen.*, April 17, 1979. We ultimately concluded that the election shall be held at the City's next general election. *Id.* In reaching this opinion, we considered section 5-5-60 and stated:

Mr. Tedder
Page 5
May 1, 2008

In view of this language, the results of a referendum changing a form of government would not be immediately implemented by means of any type of special election. Instead, the change becomes effective upon the expiration of the terms of the council members serving at the time the referendum is held.

Id. We also determined that manager, when a council-manager form of government changes to another form of government, would continue to perform his or her statutory duties until the next election. Id.

Similarly, in 2004, we provided guidance as to when the change in form of government takes place upon the completion of a successful referendum. Op. S.C. Atty. Gen., August 9, 2004. We again looked to section 5-5-60 and determined:

Pursuant to Section 5-5-60, we advise that changing the form of municipal government would not be immediately implemented upon favorable passage of the referendum. Instead, the change in form becomes effective (assuming all pre-clearance requirements have been met-see discussion below) upon the expiration of the terms of the council members serving at the time the referendum is held. See Ops. S.C. Atty. Gen. dated November 12, 1981; April 17, 1979. Accordingly, the change in form of municipal government would be implemented upon commencement of the terms of the city council members elected at the next general election, held after the referendum which authorizes the change.

Id.

According to these opinions, the council, mayor, and manager will remain in their position and perform such duties as are required of them under the council-manager form of government until the next general election. Thus, to answer your question, the mayor would remain in his original capacity until the next election. Furthermore, as you alluded to in your letter, the mayor's compensation would not change until after the general election as described in section 5-7-170 of the South Carolina Code (2004).

Conclusion

As explained in our analysis above, we are of the opinion that once a city holds an election to change its form of municipal government pursuant to section 5-5-20 of the South Carolina Code, section 5-5-30 prohibits the city from holding another election to change the form of its government for four years. According to your letter, the City held an election pursuant to section 5-5-20 in 2006.

Mr. Tedder
Page 6
May 1, 2008

Therefore, the City may not hold another election to change its form of government until 2010. However, presuming the City may hold such an election, we do not believe the City must comply with the notice requirements contained in section 7-13-35. Rather, we find the notice provisions stated in section 5-5-50 apply under these circumstances. Thus, the City must provide notice of the election at least three weeks, rather than sixty days, in advance of the election. Finally, because we are of the opinion that a referendum changing the form of a municipal government does not take effect until the next general election, we do not believe that the mayor under council-manager form of government would assume the duties and responsibilities of a mayor under the mayor-council form of government until after the next general election. Moreover, pursuant to section 5-7-170 of the South Carolina Code, we do not believe the mayor is eligible for an increase in pay until after the next general election.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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