



ALAN WILSON
ATTORNEY GENERAL

May 25, 2012

W. Lawrence Brown, Esquire
Aiken County Office of the County Attorney
828 Richland Avenue West
Aiken, South Carolina 29801

Dear Mr. Brown:

You have requested an expedited opinion of this Office regarding the implementation of a change in the form of county government from the council-administrator to the council-manager form. Specifically, you have inquired whether a treasurer and auditor elected at the same election in which a referendum is passed adopting this change would be entitled to assume office and serve out their elected term.

Pursuant to section 4-9-60 of the South Carolina Code (1986), county treasurers and county auditors are elected officials in the council-administrator form of government, but they may be either elected or appointed in the council-manager form. "If such officials are appointed, they shall be subject to control by council and the manager in the same manner as other appointed county department heads." S.C. Code Ann. § 4-9-860 (1986).

Analysis

Our Supreme Court has affirmed the authority of the General Assembly to alter the law in a manner that cuts elected terms of local government office short. *Garey v. City of Myrtle Beach*, 263 S.C. 247, 209 S.E.2d 893 (1974) ("While it would be drastic action to terminate the terms of existing municipal officers on the adoption of a new form of municipal government, such action could be required by legislative mandate."). Likewise, this Office has opined that, assuming preclearance and a proper public purpose, municipal governments may change their election dates even if the effect would be to reduce the terms of the incumbents. *E.g.*, Letter to R. Allen Young, Op. S.C. Att'y Gen. (Oct. 10, 2006). Consequently, we find no constitutional reason to imply a protection for officers-elect if such protection is not manifest in the statutory language.

Turning to the plain language of the relevant statute, section 4-9-60 protects auditors and treasurers who are "serving unexpired terms when a [change in form] is adopted." Specifically, it provides:

Under the council, council-supervisor and council-administrator forms of government provided for in this chapter the county treasurer and the county auditor shall be elected. Officials serving unexpired terms when a form of government provided for in this chapter is adopted by a particular county shall continue to serve until successors are elected and qualify. Under the council-manager form the county treasurer and county auditor shall

serve out their unexpired terms but shall thereafter be elected or appointed as council shall by ordinance prescribe.

(Emphasis added). Thus, in order to fall within the plain language of the second sentence of section 4-9-60, a treasurer or auditor must be “serving” his or her term on the date the new form “is adopted.” As relevant here, the plain meaning of the term “serve” is “[t]o act in a particular capacity.” *The American Heritage College Dictionary* 1246 (3d ed.1997). Clearly, a treasurer- and auditor-elect may not act in the capacity of those offices until their elected terms commence. *See Florence County v. Moore*, 344 S.C. 596, 545 S.E.2d 507 (2001). You have represented that the referendum currently under discussion in Aiken County would be complete and the change enacted by ordinance “well before” the date on which the treasurer- and auditor-elect would take office. Assuming these facts, we conclude that the treasurer- and auditor-elect would not be “serving” on the date of adoption of the new form, and therefore, would not be protected by the plain language of the second sentence of section 4-9-60. *See, e.g., Greenville County Council v. Ashmore*, 274 S.C. 466, 265 S.E.2d 38 (1980) (distinguishing the adoption date of a new form from its effective date).¹

One point of distinction merits discussion. Where a change in form does not alter the method by which the offices of auditor and treasurer are filled, nothing in section 4-9-60 suggests that there should be a special election upon implementation of the new form.² Rather, it appears the treasurer- and auditor-elect would take office in the regular course of affairs as prescribed by section 4-11-10 (1986 & Supp. 2011) (“[T]he terms of the county auditors and county treasurers shall commence on the first day of July next following their election.”). However, in the situation you have set forth, in which the change to a council-

¹ We note, however, that if the need for preclearance delays the effective date of the new form of government beyond July 1, the treasurer- and auditor-elect would be entitled to assume office according to the regular schedule, pursuant to the law applicable to the existing form. The final sentence of section 4-9-60 would entitle those new officers, who would be serving at the time the change becomes effective, to serve out their unexpired terms.

² In other words, section 4-9-60 does not appear to require a special election the results of which would supersede the results of a previous election filling the same elected offices. Statutory provisions in effect prior to the Home Rule Act— of which sections 4-9-10 and 4-9-60 were a part—specified when a special election of this kind was required, and our Supreme Court, adopting a circuit court order, found that fact “of great significance” when it determined that such an election was not warranted where the legislature had not so specified. *Garey*, 263 S.C. at 254-56, 209 S.E.2d at 897. In *Garey*, the Court found the legislature did not intend to “terminate the terms of those persons elected to office before the [new] form of government took effect.” 263 S.C. at 253, 209 S.E.2d at 896. It is against this backdrop that the Home Rule Act was formed, and therefore, we believe the General Assembly would have made express provision for a special election if that had been its intent.

An opinion of this Office dated June 15, 2005, implies a different conclusion. The question at issue in that opinion concerned who should serve as treasurer and auditor while litigation over a change in form proceeded, and this Office concluded that the incumbent elected treasurer and auditor should hold over. The opinion does not indicate why there were not elected successors available to assume office on July 1, even though both forms of government at issue in the litigation involved elected treasurers and auditors, nor does it indicate why such regular succession would not have been a suitable alternative. *See* Letter to Mr. William A. Frick, Op. S.C. Att’y Gen. (June 15, 2005).

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manager form with an ordinance requiring an appointed treasurer and auditor is complete prior to the commencement of the new terms, the third sentence of section 4-9-60 appears to be the more specific provision. It states that once the "county treasurer and county auditor . . . serve out their unexpired terms," those offices "shall thereafter be elected or appointed as council shall by ordinance prescribe." The treasurer and auditor protected by this sentence appear to be those serving unexpired terms at the time of the change.

Conclusion

We concur in your conclusion that section 4-9-60 does not protect a treasurer- or auditor-elect in the event a change to a council-manager form of government with an ordinance providing for these offices to be filled by appointment is complete before he or she assumes office. The second sentence of section 4-9-60 protects only the county treasurer and auditor in office at the time a change in form is "adopted." Under the circumstances set forth in your letter, this plain language would afford no protection to the treasurer- or auditor-elect. However, if the implementation of the change in form is delayed and the treasurer- and auditor-elect assume office before the council-manager form becomes effective, the third sentence of section 4-9-60 would entitle them to serve out their unexpired terms.

Very truly yours,



Dana E. Hofferber
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General