



ALAN WILSON  
ATTORNEY GENERAL

March 27, 2014

The Honorable Joseph W. Owens  
Mayor, City of West Columbia  
P. O. Box 4044  
West Columbia, South Carolina 29171-4044

Dear Mayor Owens:

Attorney General Alan Wilson has referred your letter dated March 19, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

**Issue:** May a city council in a council form of municipal government vote the mayor pro tempore instead of the mayor as the presiding officer at city council meetings?

**Short Answer:** No, a city ordinance may not violate statutory law.

**Law/Analysis:**

By way of background, it is this Office's understanding that the City of West Columbia currently has a proposed ordinance that, among other things, would authorize the mayor pro tempore to preside at city council meetings in the place of the mayor without the absence or disability of a city's mayor. It is also this Office's understanding from your letter and from the City of West Columbia's ordinances that the City of West Columbia is structured as a council form of municipal government, pursuant to South Carolina Code Section 5-11-10. City of West Columbia, S.C, Ordin. 1-1-1. In a council form of municipal government, the mayor is a member of the municipal council and has the same voting power (one vote) as each of the other councilman. S.C. Code § 5-11-30. The legislative and administrative powers of the municipality are vested in the municipal council. S.C. Code § 5-11-30. Additionally, a city council may create municipal departments, offices or agencies and prescribe their functions, hire an administrator and hire an officer under a council form of government. S.C. Code § 5-11-40. However, a city council should not delegate legislative or policy-making powers but may delegate administrative and ministerial powers. See Op. S.C. Atty. Gen., 1985 WL 259106 (January 7, 1985). Under South Carolina law in a council form of government all municipal powers not otherwise proscribed statutorily belong to the municipal council. S.C. Code § 5-7-160. Additionally, a city council is required to meet monthly and is authorized to "determine its own rules and order of business and shall provide for keeping minutes of its proceedings which shall be a public record." S.C. Code § 5-7-250.

This Office was asked a similar question concerning a municipal council's attempt to pass an ordinance that removed powers from the mayor and gave them to the mayor pro tempore in a council form of municipal government. In that opinion we stated:

This Office has consistently held a council cannot usurp duties that are specifically granted statutorily to a mayor. Op. S.C. Atty. Gen., 2012 WL 440544 (January 13, 2012) (citing Op. S.C. Atty. Gen., 1979 WL 43108 (October 12, 1979)). Additionally, “departmental powers conferred by statute cannot be overridden by local ordinance, taken away or limited by the municipal council or governing body, or overridden by an officer acting beyond his or her authority...” Op. S.C. Atty. Gen., 2012 WL 440544 (January 13, 2012) (citing 62 C.J.S. Municipal Corporations § 568). As we further explained in a prior opinion:

“[I]t is well established that a municipal council may not delegate discretionary duties to individual members of council. It has thus been recognized as the governing rule” that

[a] municipal governing body cannot delegate to a municipal officer or even to one of its own committees the power to decide legislative matters properly resting in the judgment and discretion of that body or to one member of the governing body. Thus, acts by individual members of a public body cannot bind the municipality unless officially sanctioned in accordance with a statute. The members of the governing body are chosen by the people to represent the municipality and they are charged with a public trust and the faithful performance of their duties and the public is entitled to the judgment and secretion of each member although the governing body may refer matters coming before it to a committee for examination and fact-finding.

Op. S.C. Atty. Gen., 2003 WL 22862787 (November 13, 2003) (citing 56 Am.Jur.2d, Municipal Corporations, § 134).

Op. S.C. Atty. Gen., 2013 WL 204787 (January 3, 2013). This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). Furthermore, “[t]he absence of any legislative amendment following the issuance of an opinion of the Attorney General strongly suggests that the views [ex]pressed therein were consistent with the legislative intent.” Op. S.C. Atty. Gen., 2005 WL 2250210 (September 8, 2005) (citing Scheff v. Township of Maple Shade, 149 N.J.Super. 448, 374 A.2d 43 (1977)).

Thus, let us address your specific question. It is this Office’s understanding the City of West Columbia currently has an ordinance in place that states:

A majority of the council members serving shall constitute a quorum for the conduct of business at any meeting. **The major or mayor pro tempore shall preside**, except that in the absence of both, the members present shall elect a presiding member. **Except as otherwise required by state law or ordinance, all proceedings of council shall be governed by “Robert’s Rules of Order.”**

City of West Columbia, S.C, Ordin. 1-3-3 (emphasis added). While the language of the ordinance may appear ambiguous in allowing either the mayor or the mayor pro tempore to preside, South Carolina law

makes a clear distinction. **South Carolina Code § 5-7-190 specifies that a mayor pro tempore should be elected for a term of not more than two years and shall act as mayor “during the absence or disability of the mayor” and is authorized to serve as mayor only when there is a vacancy until a successor mayor is elected.** S.C. Code § 5-7-190 (1976 Code, as amended) (emphasis added). This State’s Supreme Court has upheld that a mayor pro tempore may only serve and vote on behalf of a mayor during the absence or disability of the mayor. See, e.g. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984). Moreover, South Carolina Code § 5-7-200 specifies the grounds for forfeiture of the office of a mayor or a councilman under one of three circumstances:

- 1) if he lacks at any time during his term of office any qualification for the office prescribed by the general law and the Constitution;
- 2) if he violates any express prohibition of Chapters 1 to 17 [of Title 5]; or
- 3) if he is convicted of a crime involving moral turpitude.

Furthermore, the City of West Columbia’s Ordinance 1-2-5 also directs that the mayor pro tempore to act as mayor “during the absence or disability of the mayor, or in the case of a vacancy of mayor.” City of West Columbia, S.C, Ordin. 1-2-5(b). As mayor, if you have neither forfeited the office, nor are absent or disabled, then the mayor pro tempore would not have authority (either by statute or ordinance) to take over any of your powers and duties.

Generally, the purpose of ordinances passed by a city council will be presumed to be constitutional as opposed to unconstitutional. City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961). In determining whether a local ordinance is valid, it must pass a two-part test. The first prong of the test is to determine if the municipality was authorized to adopt the ordinance. The second prong is if the municipality had the power to adopt the ordinance whether it is consistent with the South Carolina Constitution and laws. Denene v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (citing Bugsy’s v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000)). While a municipal council may attempt to pass an ordinance, no such ordinance may violate state law.

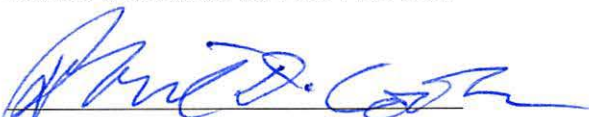
**Conclusion:** Therefore, this Office believes a court will find without the absence or disability of a city’s mayor any ordinance that places a mayor pro tempore instead of a mayor as the presiding officer at city council meetings violates South Carolina Code § 5-7-190. However, this Office is only issuing a legal opinion based on the current law at this time. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General