

1975 S.C. Op. Atty. Gen. 201 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4132, 1975 WL 22428

Office of the Attorney General

State of South Carolina

Opinion No. 4132

September 25, 1975

\*1 For purposes of Article 2 of the Municipal Government Home Rule Act, a municipal council may initially select that form of government that was in effect de facto on March 1, 1974.

TO: Executive Vice President  
Municipal Association of South Carolina

QUESTIONS PRESENTED:

You have referred to this office inquiries directed to you by municipal attorneys and officials regarding the selection of the council-manager form of municipal government as provided for in Article 6 of the Act. You inquire whether a municipal council may determine that the council-manager form most nearly corresponds to the form in effect in that particular municipality on March 1, 1974, where that municipality has adopted the council-manager form by ordinance instead of by election.

STATUTES AND OTHER AUTHORITY:

Act No. 283, 1975 Acts 692 (Home Rule)

Section 47-694, Code of Laws of South Carolina 1962

Green v. City of Rock Hill, 149 SC 234, 147 SE2d 346 (1929)

Article 2 of the Municipal Government Home Rule Act is set forth below:

ARTICLE 2

SELECTION OF FORMS OF MUNICIPAL GOVERNMENT

Section 47-20. The forms of municipal government in this State shall be as follows:

- (a) the mayor-council form prescribed for in Article 4;
- (b) the council form provided for in Article 5;
- (c) the council-manager form provided for in Article 6.

All municipalities shall adopt one of these forms in the manner prescribed in this article.

The selection shall be made by ordinance of the municipal council after at least one public meeting. The form selected shall be the form most nearly corresponding to the form in effect in the particular municipality on March 1, 1974, as determined by the municipal governing body.

Section 47–21. 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, the municipal governing body shall conduct a special election not later than ninety days nor earlier than thirty days after receipt of the certified petition and pursuant to the questions proposed in the petition.

Section 47–22. 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 Section 47–21.

Section 47–23. In any election to determine a change of a form of government of a municipality, the question shall be framed by the governing body and printed on the prepared ballot in the following form, to wit: ‘Shall the municipality of (name of municipality) change its form of government from (form selected by council or by prior election) to (form or forms requested by petition)? YES NO (strike one)’ To effect a change in the form of government a proposed form shall receive a majority of the votes cast by the qualified electors of the municipality in the election.

\*2 Section 47–24. Notice of all special elections relating to a change in form of government shall be published at least three weeks in advance in a 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*.

Section 47–25. 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.

#### DISCUSSION:

The Act clearly designates the municipal council's selection of a form of government as an initial determination, and sets forth procedures by which 15% of the qualified voters may later initiate a special election to ‘determine or change the form of 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.’ [§ 47–22]

It is the opinion of this office that a municipal council may, in making its initial determination, select the form of government ‘in effect’ de facto in that particular municipality on March 1, 1974. This opinion is reached in light of the fact that the Act affords latitude to council in making the initial determination, while providing the electorate with the means to change council's initial determination. Even though a municipality's adoption prior to March 1, 1974, of the council-manager form was by ordinance and not by the election procedure required by Code § 47–694, if the council-manager form was actually in use on that date this would constitute a de facto form sufficient to justify council's determination that the council-manager form ‘most nearly correspond[s] to the form in effect in the particular municipality on March 1, 1974 . . .’ The legal authority supporting existence of a de facto council-manager form in this limited context of Article 2 is drawn by analogy from *Green v. City of Rock Hill*, which held that a municipal corporation de facto may exist although organized under a void statute or unconstitutional charter and that its officers are de facto officers.

#### CONCLUSION:

The opinion of this office is therefore, as set forth in the syllabus hereinabove.

Edward E. Poliakoff  
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