May 21, 2007

Suni McMath, Chair
Steven Teague, Vice Chair
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City of Woodruff Planning and Zoning Commission
Post Office Box 310
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Dear Commission Members:

We understand from your letter to this Office that you, as members of the Woodruff City Planning Commission (the "Planning Commission"), desire an opinion primarily concerning a recent ordinance passed by the City Council for the City of Woodruff ("City Council"). In your letter, you noted numerous concerns regarding this ordinance. However, in our discussion with Suni McMath, we understand your primarily concern is with the requirement that members of the Planning Commission must be both residents of the City of Woodruff (the "City") and own land in the City. Furthermore, we understand from Ms. McMath you are also concerned the passage of this ordinance effectively shortened the Planning Commission members' terms of office. Finally, you also mention in your letter your desire for an opinion as to the legality under the South Carolina Freedom of Information Act of City Council's actions in destroying tapes containing recorded minutes of its public meetings.

Law/Analysis

Residency and Land Ownership Requirement

Section 5-1-2 of the ordinance, which you attached to your letter, describes the membership of the Planning Commission and states, in pertinent part: "The members shall at the time of appointment and at all times during their term of service, be residents of the City of Woodruff and shall own real property located within the Woodruff City Limits." Furthermore, this provision also states: "Any appointed member who subsequently moves out of the City or establishes residence outside the Woodruff City Limits, and any appointed member who subsequently ceases to own property within the Woodruff City Limits, shall be deemed to have resigned his or her appointment, and the Woodruff City Council shall as soon thereafter as possible appoint a replacement for such member who shall meet all of the requirements of this Ordinance, as amended."

In general, chapter 29 of title 6 of the South Carolina Code governs the operation of local planning commissions. Section 6-29-320 of the South Carolina Code (2004) in particular authorizes city councils to create municipal planning commissions. Section 6-29-350 of the South Carolina Code (2004) describes membership and certain qualifications for membership on local planning commissions as follows:

> (A) A local planning commission serving not more than two political jurisdictions may not have less than five nor more than twelve members. A local planning commission serving three or more political jurisdictions shall have a membership not greater than four times the number of jurisdictions it serves. In the case of a joint city-county planning commission the membership must be proportional to the population inside and outside the corporate limits of municipalities.
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> (B) No member of a planning commission may hold an elected public office in the municipality or county from which appointed. Members of the commission first to serve must be appointed for staggered terms as described in the agreement of organization and shall serve until their successors are appointed and qualified. The compensation of the members, if any, must be determined by the governing authority or authorities creating the commission. A vacancy in the membership of a planning commission must be filled for the unexpired term in the same manner as the original appointment. The governing authority or authorities creating the commission may remove any member of the commission for cause.
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> (C) In the appointment of planning commission members the appointing authority shall consider their professional expertise, knowledge of the community, and concern for the future welfare of the total community and its citizens. Members shall represent a broad cross section of the interests and concerns within the jurisdiction.

Section 6-29-350 does not contain a residency or property ownership requirement. In fact, the only qualification set forth in this provision is contained in subsection (C), which consists of a suggestion that appointing bodies consider certain characteristics in appointing members to planning commissions. Given the limited guidance provided by the Legislature with regard to qualifications and the fact that the Legislature in section 6-29-320 affords municipalities the ability to establish planning commission, we infer the Legislature did not intend for appointing bodies to be precluded from establishing additional qualifications for those serving on planning commissions.

Furthermore, with regard to the residency requirement, we believe such a requirement is implied by the South Carolina Constitution even if City Council did not provide for it in the ordinance. Article XVII, section 1 of the South Carolina Constitution (1976) specifically imposes a residency requirement on all officers. This provision states: "No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector . . . ." Section 7-5-120 of the South Carolina Code (Supp. 2006) provides the requirements of a qualified elector. Among these is the requirement that the elector be "a resident in the county and in the polling precinct in which the elector offers to vote." S.C. Code Ann. § 7-5-120. This constitutional provision not only reiterates the residency requirement set forth in statutory provisions specifically mandating residency as a qualification for office, but our Supreme Court interpreted article XVII, section to imply a residency requirement even when one is not specified by the Legislature. McLure v. McElroy, 211 S.C. 106, 120, 44 S.E.2d 101, 108 (1947), overruled on other grounds by Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997). In numerous opinions, this Office opined that members of local planning commissioners are officers. See, e.g., Ops. S.C. Atty. Gen., December 1, 2006; September 6, 2005; July 8, 2003; August 24, 1992. Given our Supreme Court's interpretation of this provision, a court would likely read this requirement into membership on the Planning Commission if City Council had not specifically stated such as a requirement.

The property ownership requirement, on the other hand, poses a more complex issue than the residency requirement. On several occasions, the United States Supreme Court considered the constitutionality of the requirement that a public official own property as a qualification of office. In these cases, the Court considered whether such a requirement violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. For example, in Turner v. Fouche, 396 U.S. 346 (1970), the Court considered the constitutionality of a provision in the Georgia Constitution requiring members of county boards of education own land. First, the Court discussed the standard by which to judge whether such a provision is constitutional. Id. at 362. The appellants argued Georgia is required to demonstrate a "compelling" interest in support of the property ownership requirement rather than the traditional requirement that it demonstrate the requirement be relevant "to the achievement of a valid state objective." Id. However, the Court explained "the freeholder requirement must fall even when measured by the traditional test for a denial of equal protection . . . ." Id. The Court noted: "The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." Id. at 362-63. According to the opinion, Georgia did not set forth the interest which it believed to be served by the property ownership requirement, but simply argued the requirement did not place a minimum on the amount of land one needs to own to meet the landownership requirement allowing anyone seeking a position on a board of education to acquire a very small portion of land to become eligible for the office. Id. at 363. The Court, unpersuaded by this argument, stated

> it seems impossible to discern any interest the qualification can serve. It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is

> to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budget derived from sources other than the board of education's own levy on real property.
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> Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold. Whatever objectives Georgia seeks to obtain by its 'freeholder' requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal. Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny, we cannot say, on the record before us, that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination.

Id. at 363-64.

The Supreme Court came to a similar conclusion in Quinn v. Millsap, 491 U.S. 95 (1989) with regard to a Missouri law requiring members of a board charged with governmental restructuring to own property as a qualification for membership. The Court cited to its decision in Turner reiterating the Equal Protection Clause protects an individual's right to be considered for appointment on a board without invidious discrimination. Id. at 105. The Court considered two justifications asserted by the appellees for upholding the property ownership requirement.

> First, they contend that owners of real estate have a "first-hand knowledge of the value of good schools, sewer systems and the other problems and amenities of urban life." Brief for Appellees 41 (footnote omitted). Second, they assert that a real-property owner "has a tangible stake in the long term future of his area." Ibid.

Id. at 107.

The Court in Quinn rejected these arguments finding they "were precisely the ones that this Court rejected in Turner itself." Id.

> As to the first, the Court explained that an ability to understand the issues concerning one's community does not depend on ownership of real property. "It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions." 396 U.S., at 363-364, 90 S.Ct., at 542. Similarly indefensible is the proposition that someone otherwise qualified to sit on the board that proposes a reorganization of St. Louis government must be removed from consideration just because he does not own real property.
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> The Court in Turner also squarely rejected appellees' second argument by recognizing that persons can be attached to their community without owning real property. "However reasonable the assumption that those who own realty do possess such an attachment, [the State] may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold." Id., at 364, 90 S.Ct., at 542. Thus, Turner plainly forecloses Missouri's reliance on this justification for a land-ownership requirement.

Id. at 108.

The Court noted the fact that the members of the board consider land-use issues, but because the board's authority encompasses more than just land-use issues, its decisions affect all of the city's residents, not solely those who own land. Id. at 109. Accordingly, the Court concluded: "Missouri cannot entirely exclude from eligibility for appointment to this board all persons who do not own real property, regardless of their other qualifications and their demonstrated commitment to their community." Id.

We are unaware of what justification City Council may advance in support of the landownership requirement. Furthermore, the consideration as to whether the justification asserted by City Council serves a relevant or possibly a compelling governmental interest requires a determination of factual issues, which is beyond the jurisdiction of this Office. January 07, 2004 (finding only a court of competent jurisdiction may serve as the finder of fact and make conclusive factual determinations).

The Court in Turner specifically acknowledged that circumstances may exist in which a property ownership requirement can withstand constitutional scrutiny. However, the Supreme Court's opinions in Turner and Quinn clarify the ability to understand community issues does not solely arise from property ownership. Furthermore, those decisions also explain that property ownership does not give rise to a higher level of community attachment. Thus, if these two arguments are advanced by City Council as support of the landownership requirement, we believe

a court, in keeping with the decisions of the Supreme Court, would likely find the landownership requirement is not properly supported under of the Equal Protection Clause of the Fourteenth Amendment. However, as we previously noted, we cannot speculate as to the rationales City Council may set forth in support of such a requirement and even if we could, we are not in a position to evaluate and make the factual determinations necessary to resolve this issue. Thus, while the landownership requirement certainly raises questions with regard to its constitutionality, we must leave the final determination of its validity to a court.

Terms of Office

Next, you voice your concern regarding the impact the ordinance may have on the terms of Planning Commission members. Specifically, you question whether the change in the length of the members' terms under the ordinance is valid due to its effect of shortening the members' terms of office. According to section 5-1-2 of the ordinance, members of the Planning Commission shall serve two-year terms. Section 6-29-350 of the South Carolina Code, governing membership on local planning commissions, states: "Members of the commission first to serve must be appointed for staggered terms as described in the agreement of organization and shall serve until their successors are appointed and qualified." Although this provision does not specify a term of office for members of planning commissions, it appears to give authority to the appointing body to establish such terms.

From our discussions with Ms. McMath, we understand members' terms of office were longer prior to City Council's enactment of the ordinance. Thus, you are concerned the change in members' terms of office inappropriately shortens the terms of those currently serving on the Planning Commission. In our research, we were unable to locate any case law particularly dealing with this situation. However, in an opinion of this Office issued on February 10, 1986, we considered the Legislature's repeal and reenactment of statutory provisions governing local foster care review boards. Op. S.C. Atty. Gen., February 10, 1986. In that opinion, we noted the main difference between the repealed legislation and the recently enacted legislation was a decrease in the terms of office for local review board members. Id. We ultimately concluded the Legislature intended to continue the operation of the local review boards despite the repeal of the prior legislation establishing such boards. Id. We found this conclusion "is consistent with the general law which provides that when the legislature has authority to create an office, the legislature also has authority to abolish the office, change the terms of office, or otherwise impose limitations or conditions upon a statutory office." Id. In several other opinions, we also recognized the general principle that the Legislature, when it creates an office, has authority to change the term of the office. See Ops. S.C. Atty. Gen., April 27, 1977 ("[w]hen the legislature has established a term of office, it may change the term of office or postpone the election in the interest of the public policy."); July 11, 1980 ("There is no doubt that the authority that creates an office may change the term of that office at any time.").

Through the provisions in chapter 29 of title 6, the Legislature provides for the creation of local planning commissions and establishes the basic terms of their operations and authority.

However, as noted above, section 6-29-320 of the South Carolina Code places the responsibility for the creation of these bodies with local governmental bodies. Thus, unlike the opinions cited above, in this instance City Council, rather than the Legislature, created the Planning Commission. Nonetheless, we believe the principle that applies to the Legislature regarding its authority over the offices it creates is applicable to the City Council and its authority over the offices it creates. Thus, we are of the opinion that because City Council established the Planning Commission and has authority to proscribe its members' terms of office, it also has authority to change that term of office by taking appropriate action.

Destruction of City Council Meeting Tapes

Lastly, you inquire as to the propriety of City Council's decision to destroy recorded minutes of its meetings. In your letter, you explain as follows: "We understand that by pushing FOIA and every other such law to its breaking point, it is not exactly illegal for the city to declare that only the 'approved' written minutes are all that they need to protect, however, since the written minutes most often reduce a two hour meeting to no more than 4 pages (and more often less), how does this truly reflect the veracity of the public record, especially when citizens become proactive through the courts?"

As we stated in a prior opinion, the public policy of this State is "to preserve, rather than destroy public records." Op. S.C. Atty. Gen., August 25, 1997. Section 30-1-10 et seq. of the South Carolina Code, the Public Records Act, governs the custody and preservation of public records. The Public Records Act defines a "public record" by referencing the definition of a public record found in section 30-4-20(c) of the South Carolina Code contained in the South Carolina Freedom of Information Act. S.C. Code Ann. § 30-1-10(A). Section 30-4-20(c) of the South Carolina Code (2007) defines a public record as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20(c) (2007). City Council clearly is a public body. Accordingly, because City Council creates and retains possession of such tapes, they appear to meet the definition of a public record under the Public Records Act.

Section 30-1-70 of the South Carolina Code (2007) places the responsibility of protecting public records on the custodian of those records.

> The legal custodian of public records shall protect them against deterioration, mutilation, theft, loss, or destruction and shall keep them secure in vaults or rooms having proper ventilation and fire protection in such arrangement as to be easily accessible for convenient use.

S.C. Code Ann. § 30-1-70. Section 30-1-20 of the South Carolina Code (2007) names the chief administrative officer of each agency, subdivision, or public body as the custodian of records in their possession.

In addition to the responsibility placed on custodians of public records under section 3-1-20, section 30-1-30 of the South Carolina Code (2007) specifically prohibits the destruction of public records in stating:

> A person who unlawfully removes a public record from the office where it usually is kept or alters, defaces, mutilates, secretes, or destroys it is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars nor more than five thousand dollars or imprisoned not more than thirty days. Magistrates and municipal courts have jurisdiction to try violations of this section.

In past opinions, we interpreted this provision as preventing the destruction of public records in the absence of specific guidance from the Legislature authorizing the destruction of such records. Op. S.C. Atty. Gen., May 30, 1990. We are unaware of any legislative act allowing for the destruction of the tapes referenced in your letter. Thus, we caution that City Council must comply with the Public Records Act in its handling of the tapes of its meetings.

Conclusion

In our review of the provisions contained in chapter 29 of title 6, we believe the Legislature intended to allow local appointing bodies the freedom of prescribing qualifications for members of the local planning commissions they create. Furthermore, because the South Carolina Constitution requires public officials meet the requirements of an elector, we believe the requirement that members of the Planning Commission be residents of the area they serve is implied even if City Council chose not to include this requirement in its stated qualifications for membership on the Planning Commission. However, the property ownership requirement also imposed on members of the Planning Commission is not an implied requirement to hold office and depending on the justification offered by City Council for the inclusion of this requirement, it may run afoul of the Equal Protection Clause of the Fourteenth Amendment. Nonetheless, as we explained above, the determination of whether the inclusion of such a requirement is justified by a relevant or compelling governmental interest is a question of fact, which only a court ultimately may decide.

As for whether City Council may amend the terms of Planning Commission members, we believe the Legislature left the establishment of terms for local planning commission members up to each appointing body. Furthermore, because City Council is charged with creating the Planning Commission, we believe it has authority to change the terms of the Planning Commission's members. Lastly, in addressing City Council's decision to destroy tape recordings of its meetings,

we believe these tapes constitute public records under the provisions of the Public Records Act. Thus, City Council must comply with the provisions of this act when destroying these tapes.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General