ALAN WILSON
ATTORNEY GENERAL

June 11, 2012

Mr. Kenneth E. Gaines, Esquire
City of Columbia Office of the City Attorney
P.O. Box 667
Columbia, South Carolina 29202

Dear Mr. Gaines:

You have submitted to this Office a letter asking several questions regarding the implementation of a change in the form of municipal government.

Analysis

Prior opinions

Your first question proceeds on the premise that, contrary to the position taken in our letter dated March 17, 2010, section 5-5-60 of the South Carolina Code (2004) does not prevent such implementation from occurring as soon as preclearance from the Department of Justice can be obtained following the passage of a referendum adopting a change of form.

Section 5-5-60 provides:

> 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.

In a letter to you dated March 17, 2010, we stated as follows:

> On numerous occasions, we have opined 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) 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 May 1, 2008; August 9, 2004; November 12, 1981; April 17, 1979.
>
> If the referendum is passed prior to July 1, 2010, the terms of the current Mayor and all six current members of the City Council will have expired by July 1, 2012. However, if the referendum is passed on or after July 1, 2010, there will be a new mayor and three new council members. Hence, because of the two year staggered election for three of the six council members, the terms of those individuals will not expire until July 1, 2014. S.C. Code Ann. § 5-5-60 is clear that the terms of all members of the governing body must expire.

"It is the policy of this Office not to supersede or invalidate a prior opinion unless it is clearly erroneous or unless the applicable law has changed." Letter to Ronald W. McKinney, Op. S.C. Att'y Gen. (July 8, 1998). Nonetheless, in response to your inquiry we have conducted further research regarding the basis for the opinions referenced in our March 2010 letter. We have found that our position can be traced to an April 1979 opinion that included little analysis of the subject. However, this Office took the position you advocate—that the members of the present governing body should continue their service "under the new form of government that has been selected"—in a March 1976 opinion and in a September 1979 opinion. In the March 1976 opinion, we stated:

> If . . . [a town] elects members of its present governing body before the new form of municipal government becomes effective, those members will serve as members of the new governing body until their terms expire and their successors are elected and qualify. There will be no need for another election immediately after the adoption of a new form unless the new form specifies a larger number of members than comprise the present governing body . . . .

Letter to Mayor Charles Ross, Op. S.C. Att'y Gen. (Mar. 22, 1976) (emphasis added). Likewise, in September 1979 we advised:

> In response to your request for an opinion from this Office regarding the effective date of an anticipated change in the form of municipal government . . . I agree with your conclusion that Section 5-5-60 . . . keeps in office until the expiration of their respective terms those members of a municipal governing body who are in office at the time that a change in the form becomes effective . . . .
>
> Note should be taken of the fact, however, that, while the members of a governing body in office when a change in form becomes effective continue to serve out their respective terms of office, they exercise the powers and perform the duties as prescribed for the new form of government.

Letter to Edward P. Guerard, Jr., Op. S.C. Att'y Gen. (Sept. 4, 1979) (emphasis added). Unfortunately, many of our later opinions have overlooked this advice.

Plain language of section 5-5-60

Turning now to the plain language of the statute, we find that the position of the April 1979 letter—upon which many of our subsequent opinions relied—was clearly in error. As quoted above, section 5-5-60 provides that "[u]pon 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." At the time this language was enacted, a separate provision of the same act (the Home Rule Act, Act No. 283, 1975 S.C. Acts 692) set the effective date for initial adoption of a form. It stated:

> Within fifteen months of the effective date of this act, the governing body of each municipality in the State shall adopt by ordinance . . . one of the forms of municipal government provided for . . . or [it] shall be deemed to have forfeited [its] articles of incorporation. The form adopted shall become effective at the beginning of the fiscal year following adoption.

Id. § 6 (emphasis added); *see Colyer v. Thomas*, 268 S.C. 455, 234 S.E.2d 862 (1977) ("[T]he Act declares the effective date to be the beginning of the fiscal year following adoption of a specified form of government."). Thus, it is clear section 5-5-60 was not intended to delay the implementation of the initial adoption of one of the new forms of municipal government.

Certainly, one could contend that the effective date set forth above applied only to the initial adoption of form, and this point is discussed further below. Even so, nothing in the plain language of section 5-5-60 would justify a difference in treatment between initial adoption and subsequent change in form. Rather, as you have stated, section 5-5-60 is silent on the issue of an effective date.

For these reasons, we hereby overrule our opinion of March 17, 2010, and decline to follow those previous opinions of this Office that have interpreted section 5-5-60 to require a delay in the implementation of a new form of municipal government. By its plain language, section 5-5-60 merely preserves the terms of office of the members of the existing governing body.[1]

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[1] This view of section 5-5-60 aligns with analogous provisions regarding county changes in form. Specifically, section 4-9-10(e) of the South Carolina Code (1986) provides:

> All members of the governing bodies of the respective counties serving terms of office on the date on which a particular form of county government becomes effective shall continue to serve the terms for which they were elected or appointed and until their successors are elected or appointed and have qualified.

We have interpreted section 4-9-10(e) as follows:

> If [a] referendum to change the form of government passes [before the next general election] and the United States Department of Justice approves the new form, the county

We turn now to the specific questions presented in your letter.

Effective date of change in form

You have suggested "that a change in the form of government would occur immediately upon a favorable vote upon a referendum held pursuant to" section 5-5-20 of the South Carolina Code. However, by supplemental request, you have inquired whether South Carolina Code section 5-7-170 (2004) would affect the date of implementation of a change in form. In this regard, you have concluded that a change from the council-manager form to the mayor-council form "would not logically implement until the next general election in which the office of [m]ayor is open for election." Finally, you have asked whether an ordinance calling for a referendum could specify the date a change would become effective. We address these three questions as one.

Setting aside for the moment any concerns regarding preclearance by the Department of Justice—which we discuss below—we begin with the general rule that an ordinance may not conflict with the general law of the state. *E.g.*, *Colyer*, 268 S.C. at 457-58, 234 S.E.2d at 863 (rejecting based on "the supremacy of State Law" the argument that an ordinance adopting a new form of government made the change effective prior to the date fixed for that purpose by the Home Rule Act). In the previous section of this opinion, we determined that section 5-5-60 does not prevent immediate implementation of the new form of government. However, as quoted above, section six of the Home Rule Act set the effective date for the adoption of a new municipal form at the "beginning of the fiscal year following adoption." Act No. 283 § 6, 1975 S.C. Acts 692, 742. Thus, we must determine whether section six of the Home Rule Act continues to control.

Section six of the Home Rule Act provided in relevant part as follows:

> Within fifteen months of the effective date of this act, the governing body of each municipality in the State shall adopt by ordinance . . . one of the forms of municipal government provided for . . . or [it] shall be deemed to have forfeited [its] articles of incorporation. The form adopted shall become effective at the beginning of the fiscal year following adoption.

> council members elected in the . . . general election will serve as the county council members in the new form of government. The new form of government can go into effect as soon as Justice Department approval is obtained and the county council takes the necessary actions to implement the change (*e.g.*, enactment of [an] ordinance adopting the new form of government). If, however, there are members of the county council in the present form of government who are not provided for in the new form (*e.g.*, if the county presently operates under the council-supervisor form and changes to a non-supervisor form), those members are to serve out the remainder of their terms pursuant to Section 4-9-10(e) . . . .

Letter to The Honorable Robert A. Kohn, Op. S.C. Att'y Gen. (Aug. 18, 1982) (emphasis added).

In 1976, this paragraph was amended to read:

> Within fifteen months of the effective date of this act, the governing body of each municipality in the State shall adopt by ordinance . . . one of the forms of municipal government provided for . . . or [it] shall be deemed to have forfeited [its] articles of incorporation. The form adopted shall become effective upon the issuance of a certificate of incorporation as provided for in [section 5-5-30] of the . . . Code.

Act No. 623 § 7, 1976 S.C. Acts 1659, 1663 (emphasis added). The first sentence of this paragraph specifically addresses the initial adoption of form. Therefore, it is reasonable to read the second sentence of the same paragraph to refer to the same event. Moreover, when the Home Rule Act was codified, this section was treated as an Editor's note, *see* note to S.C. Code Ann. § 5-5-10 (1976), and it does not appear in the current version of the Code. Accordingly, we find it reasonable to conclude that the intent of this paragraph was to set a deadline and effective date for the initial adoption of one of the forms of municipal government provided for by the Home Rule Act. The effective date for a subsequent change in form remained uncertain. *Accord* Letter to The Honorable Ronald P. Townsend, Op. S.C. Att'y Gen. No. 88-40 (May 10, 1988) ("The Home Rule Act, Act No. 283 of 1975, as amended by Act No. 623 of 1976, does not expressly address the issue of when a change to a new form of municipal government becomes effective.").

We have discovered no other provision fixing an effective date for subsequent changes in municipal form. Accordingly, it is our opinion that a court likely would find a municipality may fill that gap by ordinance. *Accord* Letter to The Honorable Ronald P. Townsend, *supra* (concluding that an ordinance setting an effective date employed "the most reasonable approach possible" and that, in light of the "lack of legislative guidance, this Office [could not] say with any degree of certainty that the approach . . . [was] erroneous").[2] If the change in form was sought using the petition method, however, a court likely would find that any effective date specified by ordinance must not conflict with the terms of the petition.[3] *See*

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[2] See generally *Hospitality Association of South Carolina, Inc. v. County of Charleston*, 320 S.C. 219, 226-27, 464 S.E.2d 113, 118 (1995), which provides:

> As for municipalities, S.C. Code Ann. § 5-7-30 (Supp. 1994) grants every municipality in the State the power to "enact regulations, resolutions, and ordinances . . . respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it." Like the broad grant of power to counties in § 4-9-25, the only limitation on the broad grant of power to municipalities in § 5-7-30 is that the regulation, resolution, or ordinance may not be inconsistent with the Constitution and general law of this State.

[3] Of course, the terms of the petition may not conflict with any relevant statutory provision. *Cf. Infinger v. Edwards*, 268 S.C. 375, 380, 234 S.E.2d 214, 216 (1977) ("There is no constitutional right to a referendum to select a form of county government . . . . The statutory right to a referendum was clearly

Letter to The Honorable Joyce C. Hearn, Op. S.C. Att'y Gen. No. 83-9 (Apr. 4, 1983) (opining that a county council, following a successful referendum, could not reduce the number of its members according to a time schedule different from the schedule expressly stated in the petition that called for the referendum).

Section 5-7-170 does not, in our opinion, affect the analysis. Section 5-7-170 provides:

> The council may determine the annual salary of its members by ordinance; *provided*, that an ordinance establishing or increasing such salaries shall not become effective until the commencement date of the terms of two or more members elected at the next general election following the adoption of the ordinance, at which time it will become effective for all members whether or not they were elected in such election. The mayor and council members may also receive payment for actual expenses incurred in the performance of their official duties within limitations prescribed by ordinance.

Like section 5-5-60, nothing in the plain language of this statute demands a delay in the implementation of a change in the form of government. Further, this provision was part of the Home Rule Act, Act No. 283 § 5, 1975 S.C. Acts 692, 728, meaning that as to the initial adoption of form any additional duties imposed on the incumbents would have become effective on the date set by that Act, or as soon thereafter as possible in light of a need for preclearance by the Department of Justice. Thus, for the same reasons we agree with your conclusion that section 5-5-60 does not delay implementation, we disagree with your conclusion that section 5-7-170 does delay implementation.[4] Nevertheless, subject to the caveats noted above regarding preclearance and the terms of any relevant petition, it would seem that a municipality could specify by ordinance that a change in form would not become effective until some later date.

Form of government ordinance

Next, you have asked whether an ordinance calling for a referendum could "include language to amend the City's current form of government ordinance if there is a favorable vote upon the question." With respect to acts of the General Assembly, our Supreme Court has provided the following guidance:

> The fact that the Legislature saw fit to make the Act effective only on the happening of a certain contingency does not affect the validity of the Act. The applicable rule is stated in 11 Am.Jur., p. 926, § 216, as follows: "The rule is well settled that while the Legislature may not delegate its power to make a law, it may make a law to become operative on the happening of a certain contingency or future event. Moreover, in general it makes no essential difference what is the nature of the contingency if it is essentially just and legal. The reason for this rule is that it is not always essential that a

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circumscribed" by the terms of statute).

[4] Moreover, one cannot assume that an increase in salary will accompany a change in form simply because the new form might alter the duties of the mayor and/or councilpersons. Rather, section 5-7-170 commits the matter of whether to change these salaries to the discretion of council.

> legislative act must in any event take effect as law after it leaves the hands of the Legislature. If the law is in its provisions a complete statute in other respects, its taking effect may be made conditional upon some subsequent event. When that event happens, the statute takes effect and becomes the law by force of legislative action as fully as if the time when it should take effect had been unconditionally fixed."

Beaufort County v. Jasper County, 220 S.C. 469, 486-87, 68 S.E.2d 421, 430 (1951). By analogy and in light of the broad legislative powers of municipalities, a court likely would find that an ordinance could make the amendment of the municipal form of government contingent upon a favorable vote of the electors.

Preclearance by the Department of Justice

You also have asked whether Department of Justice preclearance would be required for the ordinance implementing the change in form. Federal regulations distinguish between preclearance of a procedure for making a change and preclearance of the change itself. *See* 28 C.F.R. § 51.16 (2011) ("The failure of the Attorney General to interpose an objection to a procedure for instituting a change affecting voting does not exempt the substantive change from the preclearance requirement."). "For any change requiring approval by referendum . . . the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken." 28 C.F.R. § 51.22(b) (2011). Whether a particular change in municipal form would require preclearance is an issue of federal law, subject to interpretation by the United States Attorney General and/or the Department of Justice. The Department of Justice previously "has taken the position that any change in the form of municipal government must be submitted to it for pre-clearance." Letter to The Honorable Francis X. Archibald, Op. S.C. Att'y Gen. (Nov. 12, 1981). Any questions regarding the continued applicability of that position should be addressed to an appropriate federal official, or to a court of competent jurisdiction.

Filing with Secretary of State

Finally, you have asked whether, pursuant to section 5-5-30 of the South Carolina Code (2004), when an election that results in a change in the form of government is called by petition rather than by ordinance, the governing body of the municipality must enact and file an ordinance reflecting the change in form. As an alternative, you suggest filing the certified results of the election might be sufficient to comply with section 5-5-30.

Section 5-5-30 provides:

> 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.

This Office has opined previously that section 5-5-30 applies with equal force to the initial adoption of form and to subsequent changes. *See* Letter to Hubbard W. McDonald, Jr., Op. S.C. Att'y Gen. No. 93-64 (Oct. 5, 1993); Letter to The Honorable Clifton J. Jefferson, Op. S.C. Att'y Gen. (Feb. 14, 1983). While not demanded by the plain language of the statute, this interpretation is not clearly erroneous, and therefore, we adhere to it. *See* Letter to Ronald W. McKinney, *supra*. Assuming this position is correct, we would adhere as closely as possible to the plain language of the statute concerning the mechanism to be employed in notifying the Secretary of State of the change. Therefore, we advise that an ordinance reflecting the change in form of government should be adopted and filed with the Secretary of State.

You have further questioned what should be done if an implementing ordinance is not adopted. Reading the relevant chapter as a whole, we find no evidence that a referendum concerning a change in form is advisory in nature. Rather, the referendum is referred to as the mechanism by which the question of whether to change forms is resolved. *See* S.C. Code Ann. § 5-5-20 (allowing electors to petition for an election "to determine or change the form of government" and providing the municipal governing body "shall conduct" such election); *id.* § 5-5-30 (referring to changes in form "by an election"); *id.* § 5-5-40 ("To effect a change in the form of government a proposed form must receive a majority of the votes cast . . . ."). Thus, municipal council may not thwart the will of the electors. For these reasons, assuming an ordinance is necessary to implement the change of form, adoption of such ordinance would be a mandatory duty.

Conclusion

In sum, our answers to your questions are as follows:

1. We overrule our previous opinions to the extent they determined that section 5-5-60 of the South Carolina Code prevents immediate implementation of a change in the form of municipal government.

2. As we have found no other statutory guidance regarding the effective date of such change, it is our opinion that a court likely would find a municipality may set the effective date by ordinance.

3. A court likely would find that a municipality could "include language to amend the . . . current form of government ordinance if there is a favorable vote upon the question" within an ordinance calling for a referendum.

4. Questions concerning the need for preclearance should be addressed to an appropriate federal official, or to a court of competent jurisdiction.

5. We adhere to our prior opinion that an ordinance reflecting a successful change in the form of municipal government must be filed with the Secretary of State pursuant to section 5-5-30 of the South Carolina Code.

Very truly yours,

Dana E. Hofferber

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REVIEWED AND APPROVED BY:

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