ALAN WILSON
ATTORNEY GENERAL

July 13, 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 information concerning your options for addressing the following issue:

> Aiken County Council has received information that the Aiken County Auditor will be retiring effective June 30, 2012. His current term of office would normally expire June 30, 2013. The Auditor's race is already on the November 2012 ballot for the term to commence July 1, 2013. Since the Auditor's term commences in July, we find ourselves in a difficult situation with regard to an election to fill out the remainder of the unexpired term.

You clarify the difficulty with which you are presented as follows:

> As we read the [prior opinions of the South Carolina Attorney General], following them in our circumstances will result in us having two elections for Auditor on the same ballot—one to serve out the unexpired term, from the time the election is certified until June 30, 2013, and another to take office for the next full term on July 1, 2013.
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> [S]ince this is not to be considered a special election, the deadline for primaries has passed. However, following the model of SC Code Section 7-13-190, as suggested in the 1990 opinion [of the South Carolina Attorney General], the primary election would be . . . after the deadline for preparation of the November ballot.[1]

For the reasons set forth herein, we conclude that section 7-13-190 of South Carolina Code (Supp. 2011)—though potentially useful as a model—does not provide a statutory minimum in terms of the time required to prepare for an election to fill a vacancy in the office of county auditor. Rather, if the Governor makes an appointment to fill such vacancy, a successor to the appointee must be selected at the next general election absent some circumstance making such an election a practical impossibility.

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[1] The1990 opinion to which you refer is the Letter to The Honorable Edward E. Saleeby, Op. S.C. Att'y Gen. No. 90-43 (July 2, 1990).

Nonetheless, if the Governor does not make an appointment to fill the vacancy, section 12-39-40 of the South Carolina Code (2000 & Supp. 2011) provides a mechanism by which a deputy auditor may fulfill the duties of the auditor until a successor is chosen. In the circumstances you have described, in the absence of a gubernatorial appointment, the deputy auditor would continue to fulfill the duties of the auditor until the auditor-elect chosen in November 2012 qualifies on or after July 1, 2013.

Analysis

Election following gubernatorial appointment – general rule

The prior opinions of this Office to which you refer concluded that a gubernatorial appointee filling a vacancy in the office of county auditor would "serve on an interim basis, until the next general election, at which time a successor would be elected to serve the unexpired portion of the term." Letter to The Honorable Edward E. Saleeby, *supra*; *accord* Letter to The Honorable Douglas Jennings, Jr., Op. S.C. Att'y Gen. (Apr. 2, 1997). As a general matter, we find no reason to vary from these opinions.

Pursuant to section 4-9-60 of the South Carolina Code (1986), the county auditor is an elective office in all forms of county government except the council-manager form, in which the office may be either elected or appointed. Section 1-3-220 of the South Carolina Code (2005) provides, in relevant part:

> The following appointments shall be made by the Governor and are in addition to those appointments by the Governor authorized in other provisions in the Code:
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> . . . .
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> (2) An appointment to fill any vacancy in a county office. The person so appointed shall hold office, in all cases in which the office is elective, until the next general election and until his successor shall qualify; and in the case of offices originally filled by appointment and not by election, until the adjournment of the session of the General Assembly next after such vacancy has occurred. The Governor may remove for cause any person so appointed by him under the provisions of this paragraph to fill any such vacancy.

(Emphasis added). Similarly, section 4-11-20 of the South Carolina Code (1986) provides:

> In the event of a vacancy at any time in any of the offices of any county of the State the Governor may appoint some suitable person, who shall be an elector of the county, and, upon duly qualifying according to law, he shall be entitled to enter upon and hold the office to which he has been appointed:
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> (1) If it be an elective office, until the next general election for such office if the term of such office be fixed by the State Constitution or until the next general election if the term be not so fixed, in which latter case an election shall then be held to fill the unexpired term and in either such event such person shall hold office until his successor shall

> qualify; and
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> . . . .
>
> Any officer so appointed shall be subject to all the duties and liabilities incident to his office during the term of his service therein. Any officer elected to fill an unexpired term under the provisions of this section shall hold office for such term and until his successor shall qualify.

(Emphasis added).

Section 4-11-20 highlights a distinction between appointments to fill a vacancy in an office for which the term is set by the constitution and appointments to fill a vacancy in other elective offices.[2] In the case of offices the terms of which are fixed by the constitution, the gubernatorial appointee will hold office "until the next general election for such office." *Id.* (emphasis added); *see, e.g.*, Letter to Ladson F. Howell, Op. S.C. Att'y Gen. (Aug. 25, 2009) (opining "the person appointed by the Governor shall serve the remainder of the clerk of court's unexpired term and a new clerk of court shall be elected at the next general election at which clerks of court are elected"). By contrast, for other elective offices, the appointee holds office "until the next general election," at which time section 4-11-20 requires an election for the unexpired term. As a result, an election will be held to replace the gubernatorial appointee even if elections for the office at issue normally would not have been held for two more years.[3]

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[2] Though section 4-11-20 differs from section 1-3-220 in this respect, our Supreme Court has construed other similar provisions as in harmony with one another, one provision simply making more definite the application of the rule to a particular set of facts. *Privette v. Grinnell*, 191 S.C. 376, 4 S.E.2d 305, 307 (1939) ("[T]here is no conflict . . . the phrase, 'next general election,' in [the predecessor to section 1-3-220], as applied to the office of sheriff for Darlington County, is merely definitized by the additional words, 'for county sheriffs' . . . .").

Another notable difference between sections 1-3-220 and 4-11-20 is that section 1-3-220 uses the mandatory word "shall," whereas section 4-11-20 states only that the Governor "may" make an appointment. As noted in the final section of this opinion, it appears the Governor has determined she has discretion whether to make an appointment. *See generally, e.g.*, Letter to The Honorable Peden B. McLeod, Op. S.C. Att'y Gen. (Jan. 24, 1991) ("[T]his Office is constrained to consider the question in the manner that we believe a court would. When a statute is ambiguous and inconclusive as to legislative intent, the courts will defer to the administrative interpretation of the statute by the specific governmental agency or official charged with its administration.").

[3] Pursuant to section 7-1-20(1) of the South Carolina Code (1976 & Supp. 2011), a general election is "the election to be held for the election of officers to the regular terms of office provided by law," but such definition will not apply if "plainly inconsistent with the context." Here, such a reading of the phrase "until the next general election" would be inconsistent with the context to the extent the election explicitly is for the unexpired term, not for a full regular term. Plainly, section 4-11-20 calls for an election at the next biennial election, and the person so elected will serve for the unexpired portion of the regular term. *See* S.C. Code Ann. § 7-13-10 (1976) ("General elections for . . . county officers . . . shall

Section 12-39-10 of the South Carolina Code (2000) likewise provides for a gubernatorial appointment to fill a vacancy in the office of county auditor, but it does not provide for the replacement of such appointee at the next general election.[4] To the extent section 12-39-10 conflicts with sections 1-3-220 and 4-11-20, we have opined that sections 1-3-220 and 4-11-20 would control. *E.g.*, Letter to The Honorable Edward E. Saleeby, *supra*.

Following a review of these statutes, it remains our opinion that, if the Governor chooses to make an appointment to fill a vacancy in the office of county auditor, sections 1-3-220 and 4-11-20 of the South Carolina Code would require an election for the unexpired term.

Election following gubernatorial appointment – impossibility

Despite the force of the authorities above, if a vacancy occurs too late in an election year, compliance with the requirement for an election at the "next general election" might be impossible. Our Supreme Court spoke to this issue in the recent case of *Denman v. City of Columbia*, 387 S.C. 131, 691 S.E.2d 465 (2010). The statute at issue in that case, section 5-7-200 of the South Carolina Code (2004), provided in relevant part: "[a] vacancy in the office of mayor or council shall be filled for the remainder of the unexpired term at the next regular election . . . ." The Court determined that this was the more specific provision by comparison to statutes concerning the regular procedure for general elections, and therefore, statutes such as section 7-13-35 of the South Carolina Code (Supp. 2011) that required sixty days notice prior to a primary or general election were not applicable to an election to fill a vacancy. 387 S.C. at 138-39, 691 S.E.2d at 468-69. However, the *Denman* Court did not foreclose the possibility that a vacancy could occur so late in an election year that it would be impossible to provide sufficient notice of an election to fill the vacancy. *Id.* at 139-40, 691 S.E.2d at 469. It declined to speculate about the time at which such impossibility might arise. *Id.* Rather, based on the circumstances with which it was presented and the lack of evidence that any absentee or unregistered voters had been disenfranchised by lack of notice, the Court allowed an election for the vacant city council seat to go forward upon less than

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be held on the first Tuesday following the first Monday in November in each even-numbered year . . . ."); Letter to The Honorable Douglas Jennings, Jr., *supra*; Letter to The Honorable Edward E. Saleeby, *supra*.

[4] Section 12-39-10 provides:

> The Governor may, by and with the advice and consent of the Senate, appoint for each county in the State a county auditor, who shall hold his office for a term of four years and until his successor is appointed and qualified, and the Governor may require such bond from each such officer as he may deem necessary. When any auditor for any reason fails to complete his term of office, his successor shall be appointed initially for the unexpired portion of the term for which his predecessor was appointed.

To the extent this section conflicts with section 4-9-60—providing for the election of county auditors—section 4-9-60 is the latter legislative expression. Act No. 283 § 2, 1975 S.C. Acts 692, 701 (section 4-9-60); Act No. 113 § 1, 1955 S.C. Acts 155, 156 (section 12-39-10).

one month's notice. *Id.* at 134, 141, 691 S.E.2d at 466, 470 (councilman resigned March 9, 2010; city council ordered an election for the vacant seat to be held at the general election scheduled for April 6, 2010).

Here, the vacancy has occurred several months prior to the next general election. However, if a primary or other such process is necessary to select candidates for the general election, that fact might make *Denman* distinguishable. As noted, the *Denman* Court left open the possibility that it would reach a different result if presented with a scenario in which significantly less time would elapse between the vacancy and the election. *Id.* at 140, 691 S.E.2d at 469 ("[W]hile Denman has raised the issue of an election with substantially less notice than the one at issue in the present case, such a situation is not before the Court."). Moreover, the *Denman* scenario highlights the need for preclearance for any change in ordinary voting practices. Subsequent to the state court's decision in *Denman*, the United States District Court for the District of South Carolina enjoined the election for the vacant seat because the city had not yet obtained preclearance for the changes to the regular schedule of notice and time to file as a candidate that resulted from the application of section 5-7-200 to the circumstances of that case. *Butler v. City of Columbia*, No. 3:10-CV-794-CMC-CHH-JFA (D.S.C. Apr. 5, 2010), *available at* 2010 WL 1372299. Thus, depending on the circumstances, a need for preclearance might make it impossible to comply with the requirements of section 4-11-20.[5] For these reasons, we cannot say with certainty whether the circumstances presented here would result in a practical impossibility not at issue in *Denman*. *See generally* Letter to Marci Andino, Op. S.C. Att'y Gen. (June 27, 2011) ("[a]ny statute must be interpreted with common sense" and "[a] sensible construction, rather than one which leads to irrational results, is always warranted"). Nonetheless, *Denman* makes clear that lengthy procedures such as those suggested by our 1990 letter to The Honorable Edward E. Saleeby are not required where a more specific statute requires an election at the "next" general election.

If it is impossible to hold an election to fill a vacancy at the next general election, it appears a gubernatorial appointee may continue to hold office until a successor can be elected and qualify. In *Florence County v. Moore*, when presented with circumstances in which no election for the unexpired term of a county treasurer was held, our Supreme Court determined: "[c]onstruing these statutes in a common-sense manner so as to provide for the orderly transfer of office, we hold [the gubernatorial appointee] will serve as treasurer until [the treasurer-elect] qualifies on or after July 1, 2001." 344 S.C. 596, 604, 545 S.E.2d 507, 511 (2001); *id.* at 601, 545 S.E.2d at 510 ("In order to prevent a vacancy in the office, the legislature provided, in § 1-3-220(2), that appointees remain in office until a successor has qualified."); *see also* S.C. Code Ann. § 4-11-20(1) ("[S]uch [appointee] shall hold office until his successor shall qualify . . . ."). Adhering to the *Moore* decision, as there already is an election for the auditor's office on the November 2012 ballot, in the face of an impossibility of the kind discussed above the gubernatorial appointee's successor would "qualify" as of the beginning of his or her elected term, and the appointee would hold office until then. The auditor-elect could <u>not</u> take office early to replace the gubernatorial appointee for the duration of the unexpired term. 344 S.C. at 601, 545 S.E.2d at 510 ("[O]ne cannot qualify for a term of office to which he was not elected.").

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[5] *Cf.* Letter to The Honorable Peden McLeod, Op. S.C. Att'y Gen. (June 29, 1987) ("[A]s a practical matter if the preclearance [came] significantly later than an event required to be performed [could] actually be performed, it [might] be impossible to comply with the provisions of the Act.").

Performance of duties by deputy auditor

Via telephone, you have informed us that the Governor has indicated she does not intend to appoint anyone to fill the auditor's vacancy, in light of the limited time remaining until the next election for that office. In addition, you have informed us that Aiken County has a deputy auditor who presently is carrying out the duties of the auditor. In these circumstances, section 12-39-40 appears to be the applicable provision. It provides:

> (A) A county auditor may appoint an employee in his office to be his deputy. The appointment must be filed with the Comptroller General and the governing body of that county. When the appointment is filed, the deputy may act for and on behalf of the county auditor when the auditor is incapacitated by reason of a physical or mental disability or during a temporary absence.
>
> (B) If there is a vacancy in the office of county auditor by reason of death, resignation, or disqualification, <u>the appointed deputy shall carry out the duties of the office until a successor is appointed or elected and qualified</u>.

Id. (emphasis added). In the absence of a gubernatorial appointee, the portion of section 4-11-20 requiring an election for the unexpired term does not appear to be triggered. However, section 12-39-40 provides for the deputy auditor to serve until such time as the successor chosen in the upcoming general election qualifies, which would be on or after July 1 of next year. *Cf.* Letter to The Honorable Richard Eckstrom, Op. S.C. Att'y Gen. (Sept. 22, 2006) (opining that where a county auditor passed away in September of an election year and the Governor declined to make an appointment to fill the vacancy, the deputy auditor could serve until the auditor-elect chosen at the November election took office the following July).

<u>Conclusion</u>

Pursuant to sections 1-3-220 and 4-11-20 of the South Carolina Code, in a county where auditors are elected, a gubernatorial appointee filling a vacancy in the office of county auditor holds office "until the next general election and until his successor shall qualify." In general, an election for the unexpired term must be held at the next general election, and the gubernatorial appointee serves only on an interim basis.

Nonetheless, in limited circumstances, it might be impossible as a practical matter to hold an election for the unexpired term at the "next general election" following the vacancy. In those circumstances, *Florence County v. Moore* suggests the gubernatorial appointee should hold office until his or her successor qualifies. If an election already is on the ballot for a term to begin the following July 1, the candidate selected would become the successor to the gubernatorial appointee, but the auditor-elect may not take office early to fulfill the unexpired term.

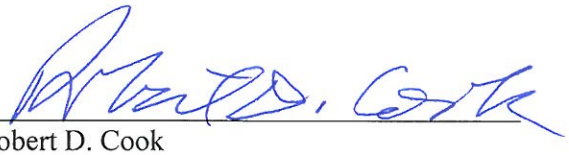
In the alternative, pursuant to section 12-39-40, a deputy auditor must perform the duties of the auditor until a successor is chosen—either by appointment or by general election—and qualifies. In the absence

of a gubernatorial appointee, the deputy auditor should serve until such time as the successor chosen in the upcoming general election qualifies, which would be on or after July 1 of next year.

Very truly yours,

Dana E. Hofferber
Assistant Attorney General

REVIEWED AND APPROVED BY:



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