



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

June 6, 2003

R. Allen Young, Esquire
Mount Pleasant Town Attorney
Post Office Box 745
Mount Pleasant, South Carolina 29465

Dear Mr. Young:

You have requested an advisory opinion from this Office regarding the "... possible change of election date by the Town of Mount Pleasant along with a possible 14-month extension of term" for certain municipal officers. With your request, you included a letter written by you to the Municipal Association of South Carolina requesting their opinion of the proposed change in election date. That letter provides as follows:

Currently our Code sets the Town Council and Waterworks election for the third Tuesday in September. Our next election is scheduled for 2004. Town Council is considering changing the election date to November in the odd year (not the general election year). Can the current Council change the upcoming election date to November of 2005? The effect of this would be to extend the term of the Mayor and 4 councilmembers from September of 2004 to November of 2005: 14 months. This would also extend 4 Waterworks Commissioners terms by 14 months.

By way of telephone call and follow-up letter, you have also indicated that Town Council is considering an alternative plan for accomplishing the change in election date. You provide the following information on that alternative plan:

Additionally, there has been some discussion about possibly changing the terms of our Mayor and Councilmembers at the next regular election on September 21, 2004 from 4 years to 4 years plus 14 months (November 2009). The idea is to let the voters weigh in on this issue and avoid the issue of councilmembers extending their own term. The ultimate goal is still the same: change our election date to November in the odd years to increase voter turnout.

You indicate that this plan causes you concern based on S.C. Code Ann. § 5-15-40 which authorizes only terms of two or four years for mayors and municipal council members. You ask this Office's opinion "... on this method to change our election date"

The issues raised in your initial request and follow-up letter will be addressed as separate questions and each will be addressed in turn.

LAW / ANALYSIS

Question 1

As you are aware, this Office has issued previous opinions addressing the question of whether municipalities are authorized to change election dates when the effect would be to extend (or reduce) the terms of office of incumbent officials. We have concluded that, as long as the exercise of this power is reasonable, for a public purpose (not for the benefit of council members and the mayor) and is precleared with the Department of Justice before the changes are implemented, municipalities generally possess this authority. I have enclosed these prior opinions for your review. See Ops. S.C. Atty. Gen., dated July 11, 1980, November 30, 1989 and two opinions dated March 9, 2000. These opinions remain the opinion of this Office. There is also an additional opinion dated November 8, 1993 which appears to contradict the findings of those previously mentioned. Upon a closer review, however, the November 1993 opinion does not necessarily reach a different conclusion. Rather, it appears to address a situation more closely related to the issue presented in your second question. Because of the potential confusion created, I will set forth the basis for our opinion that, generally, a municipality possesses the authority to change the date of elections even though an extension of the terms of some officers may result.

Article VIII, Section 9 of the State Constitution provides that “[t]he structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law” The General Assembly, through the enactment of S.C. Code Ann. § 5-15-50, has given municipalities the authority to establish by ordinance the time for general and special elections within the municipality. A statute’s words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). As Section 5-15-50 is not limited to the initial setting of election dates, it appears clear that the Section would authorize a municipality to change the date of its elections by ordinance. To interpret Section 5-15-50 otherwise would impose a limitation not provided for by the General Assembly.

It is obvious that a municipality cannot exercise its authority to change the date of an election without also effecting the terms of some of the incumbent municipal officers. Article XVII, Section 11 of the South Carolina Constitution provides that

All officers, State, executive, legislative, judicial, circuit, district, County, township and municipal, who may be in office at the adoption of this Constitution, or who may be elected before the election of their successors as herein provided, *shall hold their respective offices until their terms have expired and until their successors are elected or appointed and qualified* as provided in this Constitution, unless sooner removed

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as may be provided by law; and shall receive the compensation now fixed by the Statute Laws in force at the adoption of this Constitution (emphasis added).

With reference to the status of public officers whose set terms have expired, the Supreme Court in State ex rel. Lyon v. Bowden, 92 S.C. 393 at 400, 75 S.E. 866 (1912), stated that "... when a term of office is fixed by law at a term of years and until the appointment or election and qualification of a successor, the term of the incumbent does not end and there is no vacancy until the expiration of the time named and the appointment or election and qualification of his successor." In recognizing a constitutional provision consistent with that now found in Article 17, Section 11, the Court also noted that

Unless the words "until their successors have been appointed and qualified" are to be erased from the Constitution, the time which may elapse between the expiration of the [term] and the actual [election] ... of the successor is as much a part of the specific term of office fixed by the Constitution as the [set term itself].

Id. Accordingly, even though in this matter a council member's (or mayor's) set term may expire at the end of four years, he or she continues to legally hold office until his or her successor is elected and qualified. Given that municipalities such as Mount Pleasant have the authority provided by general law to change the date of municipal elections (subject to the reservations noted above and expressed below), the terms of incumbent municipal officials would continue until the new date of the election and the qualification of the person elected.

As expressed in our opinions of March 9, 2000, the power of a municipality to change the date of an election and consequently change the terms of incumbent officials is not unlimited. There we stated that "... a municipality's use of this power must be reasonable" and that to determine whether such was reasonable "... a court may look at factors such as the length of the extension and the reasons for the extension." Noting that such conduct may be in violation of the State Ethics Act, we also stated that "[i]t is likely a court would conclude that the extension must be for a public purpose and not for the personal benefit of the council members and the mayor." Finally, we advised, as you have recognized, that "... any changes to term length and the election date would require Justice Department preclearance before the changes could be implemented."

Question 2

In the question presented in your follow-up letter, you inquire as to the propriety of Council attempting to change the date of the municipal elections by passing an ordinance which would expressly change "... the terms of our Mayor and Councilmembers at the next regular election on September 21, 2004 from 4 years to 4 years plus 14 months." This question is also answered in the March 9, 2000 opinion addressed to Roger P. Roy, Jr., Esquire. There we were asked if a municipality could establish "... three-year terms for city council members and the mayor for the next two elections in order to achieve odd year elections in a five-year period ..." We concluded that a municipality would not have this authority based on the provisions S.C. Code Ann. §5-15-40.

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Section 5-15-40 provides in part that “[t]he mayor and councilmen of each municipality shall be elected for terms of two or four years.” In Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848, 850 (1976), our Supreme Court stated that “[a] municipality being a creature of the legislature, may exercise only such authority as is granted to it.” Accordingly, as the General Assembly has provided only that mayors and municipal council members shall have terms of two or four years, a municipality would not be authorized to set by ordinance a term of office other than two or four years. Legislative action would be necessary to give the Town of Mount Pleasant the authority to change the terms of office of mayor and council members from four years to “4 years plus 14 months.” In reaching this conclusion, this Office is mindful that the authority of a municipality to change the date of elections has the possible effect of extending the terms of office of some incumbents beyond four years. However, there is a distinction between the natural consequences of an authorized act and an act which is unauthorized.

CONCLUSION

S.C. Code Ann. §5-15-50 provides authority for a municipality to change the date of its election. This authority may be exercised despite the fact that the action may have the effect of extending the terms of some incumbent officers. The exercise of this authority must be reasonable, for public purpose (not for the benefit of council members and the mayor) and be precleared with the Department of Justice before the changes are implemented. A municipality may not, however, change the terms of office of the mayor and council members to some period of time other than two or four years.¹

Sincerely,



David K. Avant
Assistant Attorney General

Enclosures

¹ As the terms for commissioners of municipal waterworks are set by statute and their elections tied to the general municipal elections, the conclusions reached in this opinion are applicable to the portions of your request to the Waterworks Commissioners for the Town of Mount Pleasant. See S.C. Code Ann. §5-31-210.