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Office of the Attorney General

Opinion No 88-71
Pg. 206

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September 26, 1988

Stephen A. Kern, Esquire
Attorney, City of Greenville
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Dear Mr. Kern:

By your recent letter to this Office, you have advised that the Greenville City Code §1-3-7 limits the terms of city council members to eight consecutive years of service. Citing the provisions of Article I, Section 5 of the State Constitution, you have asked for the opinion of this Office as to the constitutionality of the Greenville City Code provision. Based on the following, we concur with your conclusion that the Greenville City Council would not have authority to impose this restriction on its members without specific statutory authority therefor.

The provision of the Greenville City Code provides in its entirety:

The mayor and members of the city council shall not be elected or serve for a period of more than eight (8) consecutive years.

You have advised that this provision was enacted by council in January 1970 and, strictly construed, would allow a council member filling an unexpired term with only six months remaining to run only one more time for a full four year term. No council member could be elected for more than two consecutive four-year terms.

As you point out, Article I, Section 5 of the State Constitution provides:

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All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.

The Supreme Court has construed this constitutional provision to be applicable to those offices created within the State Constitution in McLure v. McElroy, 211 S.C. 106, 44 S.E.2d 101 (1947), and as to offices created by the General Assembly, the Court further stated:

The distinction between offices of constitutional origin and those created by statute as to their control by the Legislature has been repeatedly recognized, and the rule has been often announced that an office created by legislative action is wholly within the control of the Legislature which can declare the manner of filling it, how, when, and by whom the incumbent shall be elected [I]t is held that; 'Constitutional provisions prescribing the qualifications of electors do not apply to any election for municipal offices, not provided for by the Constitution, but created by legislative enactment.'

Id., 211 S.C. at 117. The Court discussed much relevant material, including treatises by Throop and Mechem on public officers, as support for the foregoing. The Court concluded that

all officers, constitutional and statutory, and whether elected or appointed, must be qualified electors, and the legislature may not add other conditions for eligibility to those specified in the constitution for election or appointment to constitutional offices, that is, those offices created by the constitution; but as to offices established only by legislative acts, the General Assembly may prescribe other and additional qualifications which are reasonable in their requirements.

Id., 211 S.C. at 120.

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The General Assembly created the offices of mayor and members of a municipal governing body. Acting within its authority as provided above, the General Assembly has adopted Section 5-15-20, Code of Laws of South Carolina (1987 Cum. Supp.), to specify qualifications as to eligibility for election as a mayor or member of council:

Mayors and councilmen shall be qualified electors of the municipality and, if they are elected subject to residential or ward requirements as provided in this section, they shall be qualified electors of the ward prescribed for their election qualification.

Section 7-5-120 of the Code provides the requirements to be a qualified elector. Section 5-7-180 prohibits a mayor or councilman from holding any other office while serving the term for which he was elected, in keeping with Article XVII, Section 1A and Article VI, Section 3 of the State Constitution. No other statutory qualifications appear to have been adopted with respect to mayors and councilmembers.

You also point out that Section 5-15-40 of the Code sets the term of office for mayor or councilman at either two or four years. However, neither that Code section nor any other Code section specifies a limit as to the number of terms or number of years, consecutive or otherwise, that a mayor or councilman may serve. Thus, we concur with your conclusion that the General Assembly has not limited the length of service of a mayor or councilman.

A municipality generally "possess[es] and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the declared objects and purposes" of the municipality. McKenzie v. City of Florence, 234 S.C. 428, 437, 108 S.E.2d 825 (1959). We can locate no express authority to adopt such a limitation on service on a city council, nor can we identify a power granted to a municipality from which that authority could be necessarily or fairly implied.

Therefore, we concur with your conclusion that the Greenville City Council would not have the statutory authority to limit the number of consecutive terms or number of consecutive years which an

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individual may serve on the Greenville City Council. However, because Article I, Section 5 applies to offices created by the State Constitution, according to McLure v. McElroy, supra, the Greenville City Code §1-3-7 may not be violative of that constitutional provision.

With kindest regards, I am

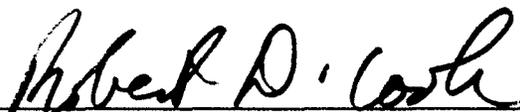
Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:sds

REVIEWED AND APPROVED BY:



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