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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

August 9, 2004

William E. Whitney, Jr., Esquire
City of Union
Post Office Box 266
Union, South Carolina 29379

Dear Mr. Whitney:

You have requested an opinion from this Office on behalf of the Mayor and City Administrator of the City of Union regarding the statutory procedure for a change in the form of municipal government, found in S.C. Code Section 5-5-10 et seq. You have indicated that the City of Union currently operates under the council form of government (weak mayor form), and there is a petition that is now circulating that proposes a change to the mayor-council form of municipal government (strong mayor form). You have specifically asked the following questions:

(1) Section 5-5-20 of the Code of Laws provides that if a petition executed by fifteen percent of the qualified electors and certified by the County Election Commission that calls for a change in the municipal form of government is presented to the municipal governing body, the municipal governing body shall conduct a special election not later than ninety days nor earlier than thirty days after the receipt of the certified petition to determine whether a change shall be made. If the petitioners get the required fifteen percent of qualified electors on a petition and certification by the County Election Commission, and subsequently the referendum passes favorably, when does the change in form of government actually take place? Would it be immediately or would it follow the next set of elections?

(2) Does the Municipal Election Commission have any input into the certification that is given by the County Election Commission?

Law/Analysis

Your first question is answered directly by Section 5-5-60 of the Code, which provides that, "Upon initial adoption of or on any change to one of the alternate forms of government, all members

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of the existing governing body shall continue to serve their elected terms and until their successors are elected and qualify." Pursuant to Section 5-5-60, we advise 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--see discussion below) 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 November 12, 1981; April 17, 1979. Accordingly, the change in form of municipal government would be implemented upon commencement of the terms of the city council members elected at the next general election, held after the referendum which authorizes the change.

As you recognize in your request, however, pre-clearance must be obtained from the United States Justice Department pursuant to Section 5 of the 1965 Voting Rights Act before any move is made by the City of Union in regards to a change in the current election procedure. In N.A.A.C.P. v. Hampton County Election Commission, 470 U.S. 166, 105 S.Ct. 1128 (1985) [copy enclosed], the United States Supreme Court held that the use of an August filing period in conjunction with a March election, and the setting of the March election itself, were changes that should have been submitted to the U.S. Attorney General under § 5 of the Voting Rights Act. Accordingly, we further advise that the City of Union must comply with all required pre-clearance procedures before a date is set for any special election or referendum which relates to a change in the form of government.

As to your second question, we are aware of no provision in the statute that would allow for involvement by the Municipal Election Commission in the certification process for a petition arising under 5-5-20. In interpreting Section 5-5-20, this Office concluded in an opinion dated May 27, 1998 that:

Use of the word "shall" in a statute generally connotes mandatory compliance. S.C. Dept. of Highways and Public Transportation v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986). Applying the previously stated rules of statutory construction in conjunction with the mandatory nature of the word "shall", it is safe to conclude that when a petition executed by fifteen percent of the qualified electors is presented to the municipal governing body, certified by the county election commission, for an election to determine or change the form of government, the municipal governing body does not have discretion in determining whether to hold a special election; the municipal governing body is required to hold a special election.

Based on the mandatory compliance language in Section 5-5-20, it is our opinion that the Municipal Election Commission has no authority to determine the validity of a petition for a change in the form of municipal government if it has been properly certified by the County Election Commission.

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Conclusion

Based on the foregoing authorities, we advise that, if a change in the form of municipal government referendum is passed favorably under S.C. Code Section 5-5-10 et seq., the change in form would be implemented upon commencement of the terms of the council members elected at the next general election held after the referendum which authorizes the change. However, we strongly caution the City of Union to ensure compliance with the pre-clearance procedures required by the United States Department of Justice before any changes are made to the current election dates and procedures. We further advise that the provisions of Section 5-5-20 demand mandatory compliance upon a presentment of a petition signed by at least fifteen percent of the registered municipal voters and certified by the County Election Commission. The Municipal Election Commission is therefore prohibited from rejecting the certified petition, and the municipal governing body is required by Section 5-5-20 to conduct a special election not later than ninety-days from date which the certified petition is presented.

Very truly yours,

A handwritten signature in black ink, appearing to be 'R. D. Cook', written over a horizontal line.

Robert D. Cook
Assistant Deputy Attorney General