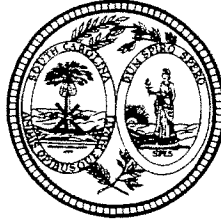


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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

January 6, 2005

The Honorable Jack L. Kindle
Chester County Treasurer
Post Office Drawer 686
Chester, South Carolina 29706

Dear Mr. Kindle:

You note that "[t]he November 2 Chester County ballot contained a referendum allowing the citizens the choice to either retain our present form of government, Council-Manager, or to change to the Council-Supervisor form." By way of background, you state the following:

The Council-Supervisor option won by a 5500+ to 4500+ vote. As you may know, the Council-Manager form came into being in Chester County as a result of a similar referendum on the 1998 ballot, but a Manager was not hired until the 2002 calendar year because the Supervisor was also on the 1998 ballot and had to be allowed to serve out his 4 year term.

As a result of the 2004 ballot vote to return to Supervisor form, it is my understanding that the local election commission is calling for a special election for early February in order to fill the new positions of Supervisor, Treasurer, and Auditor. The current Auditor and Treasurer are currently completing 4-year terms expiring June 30, 2005.

State law 4-9-10(e) states that "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". This indicates to me that the seventh "at-large" councilman, created by the Manager form, and who is only 2 years into his 4-year term, must be able to serve out his term.

Also, 1988 Op Atty. Gen No. 88-36, p 114 states, in part, "Any positions authorized by the referendum would be filled by special election".

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I, and many other people in Chester County, have some questions that have been brought up by some recent articles published in local newspapers quoting one or more of our councilmen, and concerning the official and legal starting point of the initiation of the Supervisor form of government. Statements made have indicated that the new form could not officially take place until the "at-large" councilman had completed his term, which constitutes a 2-year delay. It was indicated that this had come from the Assoc. of Counties. If this were the case, I would question the need for item (e) in the above referenced statute.

Your questions are as follows:

1. With the citizens voting to change to the Supervisor form of government, would this form take place immediately upon the results of a special election in February of 2005, or would there be a two-year delay?
2. If there were a 2-year delay, which statute would support this delay? Also, what would be the purpose of 4-9-10(e)?

Law / Analysis

S.C. Code Ann. Section 4-9-20 provides for the permissible forms of county government as follows:

[t]he alternate forms of government which may be adopted pursuant to § 4-9-10 shall be one of the following:

- (a) Council form as set forth in Article 3;
- (b) Council-supervisor form as set forth in Article 5;
- (c) Council-administrator form as set forth in Article 7;
- (d) Council-manager form as set forth in Article 9;

Section 4-9-10 requires a referendum to change the form of county government. Pursuant to § 4-9-10(c), the General Assembly has provided that

[a]fter the initial form of government, and the number and method of election of county council including the chairman has been adopted and selected, the adopted form, number, and method of election shall not be changed for a period of two years from the date such form becomes effective and then only as a result of a referendum as hereinafter provided for. Referendums may be called by the governing body or upon petition of not less than ten percent of the registered electors of the county. Petitions shall be certified as valid or rejected by the county board of registration within sixty days after they have been delivered to the board and, if certified, shall

be filed with the governing body which shall provide for a referendum not more than ninety days thereafter. If more than one petition is filed within the time allowed for such filing, the petition bearing the largest number of signatures of registered electors shall be the proposal presented, in the manner set forth hereinafter. Referendums shall be conducted by the county election commissioner and may be held in a general election or in a special election as determined by the governing body. No change to an alternate form of government, different number of council members, or method of election of council including the chairman as a result of a referendum shall become effective unless such proposed form receives a favorable vote of a majority of those persons voting in a referendum. In any referendum, the question voted upon, whether it be to change the form of government, number of council members, or methods of election, shall give the qualified electors an alternative to retain the existing form of government, number of council members, or method of election or change to one other designated form, number, or method of election. After a referendum has been held and whether or not a change in the form results therefrom, no additional referendums shall be held for a period of four years.

If the governing body of the county as initially or subsequently established pursuant to a referendum or otherwise shall be declared to be illegal and not in compliance with state and federal law by a court of competent jurisdiction, the General Assembly shall have the right to prescribe the form of government, the method of election, and the number and terms of council members but may submit to the qualified electors by referendum a question as to their wishes with respect to any element thereof which question shall include as an option the method of election in effect at the time of the referendum.

Pursuant to § 4-9-10(e), it is further provided that

- (e) [a]ll 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 and appointed and until their successors are elected or appointed and have qualified.

We addressed §§ 4-9-10(c) and (e) most recently in an opinion issued February 20, 1998. There, we stated the following:

[t]his Office has previously interpreted Section 4-9-10(c) and concluded that only two alternatives may be placed on the ballot. These alternatives being: retaining the present form of government, method of election, or number of council members, or changing to one designated form, number, or method of election. Op. Atty. Gen. dated November 10, 1986. Upon successful passage of the contemplated

referendum, the county council would adopt an ordinance to implement the changes approved by the electorate. Such changes would then be submitted to the United States Department of Justice to be approved under the Voting Rights Act prior to their becoming effective. Op. Atty. Gen. dated April 25, 1988.

In an opinion dated August 18, 1982, this Office addressed the status of a county supervisor under the council-supervisor form of government when the form of government is changed. We stated:

[i]f the referendum to change the form of government passes and the United States Department of Justice approves the new form, the county council members elected in the November 1982, 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 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), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, as follows:

(e) 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.

Accordingly, the supervisor, being a member of the governing body, is authorized to serve out the remainder of his term notwithstanding the fact that the new form of government does not provide for a supervisor. The holdings in Hardy v. Francis, 273 S.C. 677, 259 S.E.2d 115 (1979), and Greenville County Council v. Ashmore, 274 S.C. 466, 265 S.E.2d 38 (1980), are inapplicable because those supervisors (whose office, the Supreme Court said, was rendered a nullity by the adoption of the council-administrator form) were pre-home rule supervisors whose office was not continued in any of the four forms of county government. They were not members of the

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governing body and, therefore, did not come within the protection of Section 4-9-10(c), CODE OF LAWS OF SOUTH CAROLINA, 1976 (Cum.Supp.).

Analyzing your question in accordance with the 1982 opinion, if the voters of Chester County were to approve a change in the County's form of government and, therefore, abandon the council-supervisor form, the county supervisor elected during the general election in November would serve the full term of office, in this case four years. (emphasis added).

In another opinion, Op. S.C. Atty. Gen., Op. No. 88-36 (April 25, 1988), we commented further as to the result of any change in the form of county government. There, we noted, among other things, that in order to fill additional elective offices created by the change in form, a special election would be required. We stated as follows:

[b]ased on the foregoing, it is the advice of this Office that upon successful passage of the contemplated referendum, the county council would adopt an ordinance to implement the changes approved by the electorate. Such changes would then be submitted to the United States Department of Justice to be approved under the Voting Rights Act of 1965, as amended, prior to their becoming effective. NAACP v. Hampton County Election Commission, 470 U.S. 166, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985).

Assuming that the referendum is successful and approval of the changes is received from the United States Department of Justice, we would advise that the incumbent council members, not subject to re-election in the election during which the referendum was held, would continue to serve until their respective terms expire. Council members elected in the election during which the referendum was held would serve until the expiration of their respective terms. If additional positions on county council should be authorized by the referendum, these additional positions would be filled by holding a special election.

This type of situation has arisen in other counties in their changes to different forms of government. Enclosed are opinions of this Office dated July 26, 1976 as to Greenville County and October 3, 1975 as to Pickens County.

See also, Op. S.C. Atty. Gen., Op. No. 93-64 (October 5, 1993) [reaffirming Op. No. 88-36]; Op. S.C. Atty. Gen., August 18, 1982, supra ["If the referendum to change the form of government passes and the United States Department of Justice approves the new form, the county council

members elected in the November 1982 general election will serve as the county council members in the new form of government." (emphasis added)].¹

We have consistently noted that in the council-supervisor form of government, "... the county supervisor (who is elected) serves as chairman of county council and is the chief administrative officer of the county." Op. S.C. Atty. Gen., Op. No. 91-31 (May 7, 1991). And in Op. S.C. Atty. Gen., Op. No. 87-27 (March 31, 1987), we stated:

[t]he council-supervisor form of county government is provided for in Section 4-9-410 et seq. Code of Laws of South Carolina (1976). The supervisor serves as the chairman of county council in those counties which have adopted that form of government; however, he votes only to break tie votes. Section 4-9-110 of the Code. His duties are specified in Section 4-9-420 of the Code and include, among others, serving as the council's presiding officer and official spokesman, voting in case of council ties, recommending measures for adoption by council, and many others

Conclusion

Thus, the foregoing opinions are dispositive of the questions raised by your letter. Accordingly, as indicated in those opinions,

1. Upon approval of the change in Chester's form of government by the Justice Department, and upon the necessary action being taken by County Council to effectuate the change in the form of government, the new form of government immediately goes into effect. Op. S.C. Atty. Gen., February 20, 1998. In our view, as expressed in previous opinions and by § 4-9-10(e), the General Assembly intended to implement the will of the voters in changing the form of government at the earliest possible date.

¹ It is true that there is language contained in an opinion, dated February 11, 1980 which states that "... if Greenwood County changes from its present form of county government, the change will become effective at the expiration of the terms of the members of that county's present governing body, assuming also that the pre-clearance of the United States Department of Justice pursuant to Section 5 of the 1965 Voting Rights Act is obtained." However, the subsequent opinions referenced above, make it clear that there is a major difference between the new form of government's becoming effective immediately upon Justice Department approval and action by county council to enact an ordinance to implement the new form of government and § 4-9-10(e)'s requirement that then-serving council members must be allowed to serve until their terms expire. We believe these subsequent opinions reflect the Legislature's intent that the new form of government becomes effective immediately upon Justice Department approval and county council's implementation of the voters' will to change the form of government.

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2. However, consistent with § 4-9-10(e) and Op. S.C. Atty. Gen., No. 88-36, council members, not subject to re-election in the election in which the referendum was held, would continue to serve until their respective terms expire.
3. Moreover, consistent with § 4-9-10(e) and Op. S.C. Atty. Gen., No. 88-36, council members elected in the election during which the referendum was held would serve until the expiration of their respective terms.
4. Additional positions on county council authorized by the referendum (here, supervisor) "would be filled by holding a special election." Op. S.C. Atty. Gen., Op. No. 88-36, supra.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an