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HENRY McMASTER
ATTORNEY GENERAL

Grant Duffield, City Manager
City of Tega Cay
Post Office Box 3399
Tega Cay, SC 29708

March 13, 2006

Dear Mr. Duffield:

We received your letter in which you informed us the City Council of Tega Cay (the "City Council") wishes to transfer its responsibility for holding elections for its councilmembers and mayor from the City of Tega Cay (the "City") to York County (the "County"). You stated, the County informed the City Council that elections for councilmembers and the mayor "must be held in November of odd calendar years for the County to assume responsibility for conducting City Council elections." Your letter indicates elections for councilmembers and the mayor currently are held in June of even calendar years. Thus, you present the following question to our office: "In order to comply with York County requirements for the transfer of responsibility for City elections from the City to York County, may the City's Council, by duly passed ordinance, extend the termination of the terms of its Councilmen and Mayor now in office?" You also provided the following information:

The City does not wish to change the length of Councilmembers' terms from 4 years, but instead wishes to consider extending the termination of the terms of particular councilmen now serving, to accomplish the transfer fo the responsibility for City elections to York County . . . If such ordinance is enacted, the position of two Councilmen and the Mayor, now serving, would continue as holdovers until elections are held for such positions in November of 2007 (rather than June 2006) and the two positions of the other two councilmen now serving would be scheduled for election in November of 2009 (rather than June 2008) . . . The City of Tega Cay's Municipal Election Commission believes this proposed conversion of the responsibility of the City's election to York County is for a public purpose and not for the personal benefit of the Councilmembers and/or Mayor. We understand that numerous municipalities in South Carolina have extended certain council positions to accomplish a conversion to county run city elections.

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Based on our review of the pertinent constitutional and statutory authority and our continued recognition of the principle that we will not overrule our prior opinions unless clearly erroneous or unless applicable law has changed, we find the City Council may, subject to the stated limitations, duly pass an ordinance changing the date of the election its councilmembers and mayor, despite the fact that such change will result in an extension of their terms of office.

Law/Analysis

Initially, we note the statutory authority governing the mayor and councilmembers terms of office. Section 5-15-40 of the South Carolina Code (2004) provides:

The mayor and councilmen of each municipality shall be elected for terms of two or four years. Unless otherwise provided by ordinance, four-year terms shall be set so that not more than one-half of the council and mayor shall be elected in the same general election; provided, that in the first election after incorporation of a new municipality or adoption of a form of government pursuant to § 5-5-10, one-half of the councilmen may be elected for terms of two years and one-half of the councilmen and mayor may be elected for terms of four years if necessary to establish staggered terms. Two-year terms shall not be staggered.

However, numerous opinions of this Office indicate a municipality may pass an ordinance changing the date of elections even though such change has the effect of changing the term of the councilmembers and the mayor currently in office. Attached to your letter your included several opinions of this Office, which you believed to be pertinent to this issue. We agree with your conclusion and find these opinions, as well as two more recent opinions of this Office, specifically address the issue of whether the City may change the date of its elections.

“[W]e have long recognized that we will not overrule our prior opinions unless clearly erroneous or unless applicable law has changed.” Op. S.C. Atty. Gen., September 8, 2005. In an opinion of this Office dated July 11, 1980, we determined the City of Mauldin had authority pursuant to Article VIII, section 9 of the South Carolina Constitution and section 5-15-50 of the South Carolina Code to change the date of its municipal elections “in order to comply with the request of the Greenville County Council that elections within Greenville County be held on a uniform date.” Article VIII, section 9 of the South Carolina Constitution (1976) provides: “The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law” Moreover, section 5-15-50 of the South Carolina Code (2004) states: “Each municipal governing body may by ordinance establish municipal ward lines and the time for general and special elections within the municipality.” In our July 11, 1980 opinion, we concluded: “It is apparent that the Legislature has delegated [the power to determine the date of its election] to the

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municipalities and that under the new Home Rule Provisions the municipalities would now be the only body that could change the term of office.” Op. S.C. Atty. Gen., July 11, 1980.

We found the same principles to be applicable in an opinion of this Office dated November 30, 1989, involving a situation in which a municipality desired to change the date its council members assume office even though such change would have the effect of shortening their terms. Op. S.C. Atty. Gen., November 30, 1989. Again, in two identical opinions issued on March 9, 2000, this Office addressed the more specific question of whether “a municipality may legally extend terms of office” due to a change in the election date. Citing our July 11, 1980 and November 30, 1989 opinions, we concluded the city had authority to change the election date, regardless of its effect of extending the terms of office for the mayor and members of city council. However, we noted such authority is not unlimited. Op. S.C. Atty. Gen., March 9, 2000.

Although a municipality may extend the terms of office of council members and the mayor, such power is not unlimited. First, a municipality’s use of this power must be reasonable. I have been unable to locate any South Carolina cases discussing what might be a reasonable or unreasonable extension of a term of office. However, a court may look at factors such as the length of the extension and the reasons for the extension. It 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. Second, any changes to term length and the election date would require Justice Department preclearance before the changes could be implemented.

Id. (citations omitted).

More recently, in an opinion of this Office dated June 6, 2003, we reaffirmed our prior opinions. Op. S.C. Atty. Gen., June 6, 2003. Based on Article VIII, section 9 of the South Carolina Constitution and section 5-15-50 of the South Carolina Code, we determined “generally, a municipality possesses the authority to change the date of elections even though an extension of the terms of some officers may result.” Id. Furthermore, we added: “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.” Id. In addition, citing Article XVII, section 11 of the South Carolina Constitution and the Supreme Court’s holding State ex rel. Lyon v. Bowden, 92 S.C. 393 at 400, 75 S.E. 866 (1912), we stated:

[E]ven 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 . . . 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

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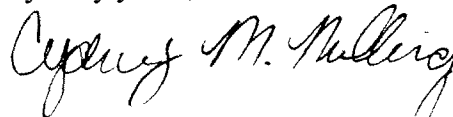
incumbent municipal officials would continue until the new date of the election and the qualification of the person elected.

Id. Our opinion also cited the limitations as set forth in our March 9, 2000 opinions requiring the municipality's use of its authority to change the date of an election be reasonable, in furtherance of a public purpose, and the change must be preapproved by the Justice Department before any changes may be implemented. Op. S.C. Atty. Gen., June 6, 2003. However, in that opinion, we found "a municipality would not be authorized to set by ordinance a term of office other than the two or four years" as required in section 5-15-40 of the South Carolina Code. Id. Most recently, on December 8, 2005 we issued an opinion maintaining we were unaware of any changes in the law affecting our opinion dated June 6, 2003.

Based on our prior opinions and because the City Council seeks to pass an ordinance changing the date of the election of the councilmembers and the mayor, rather than changing the term of their offices, we find such action permissible. However, in enacting such an ordinance, the City Council must determine the ordinance is reasonable and satisfies the public purpose requirement. The determination as to whether the change in election dates, which extends the terms of the mayor and council members by eighteen months, is reasonable and satisfies a public purpose is a question of fact, which we cannot determine in an opinion of this Office. Op. S.C. Atty. Gen., March 10, 2004 (stating "questions of fact can only be determined by a court of competent jurisdiction and not this Office"). You noted in your letter, "[t]he City of Tega Cay's Municipal Election Commission believes this proposed conversion of the responsibility of the City's election to York County is for a public purpose and not for the personal benefit of the Councilmembers and/or the Mayor." However, the City Council, subject to review by the courts, is charged with the duty of determining whether or not the conversion meets the public purpose requirement. Caldwell v. McMillan, 224 S.C. 150, 158, 77 S.E.2d 798, 801 (1953) ("[T]he question of whether or not an act is for a public purpose is primarily one for determination by the legislative body rather than the Courts and the Courts will not interfere unless it appears that the legislative body was clearly wrong."). Additionally, as you mentioned in your letter, the City also must obtain preclearance by the United States Department of Justice prior to changing its election dates.

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Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



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