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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 2, 1997

The Honorable Douglas Jennings, Jr.
Member, House of Representatives
333-A Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Jennings:

Your letter of March 18, 1997 has been forwarded to me for reply. According to the information you have provided, the present Marlboro County Auditor was elected Marlboro County Treasurer in November of 1996 and will take office on July 1, 1997. As a result of this election, a vacancy will be created in the Auditor's office. You have stated that there will be approximately two years left on the term of office for the Auditor. Your question is whether a special election may be held to fill the unexpired term of office for the Auditor.

The office of auditor was established generally pursuant to Section 12-39-10 of the South Carolina Code of Laws, which provides for appointment of a county auditor by the governor with the advice and consent of the Senate. Legislative history following that section indicates that local laws were adopted for many counties with respect to the auditor. With the advent of home rule, auditors were required to be elected in counties governed by the council, council-supervisor, and council-administrator forms of government, by Section 4-9-60. Marlboro County is governed by the council-administrator form and thus has an elected auditor.

Should a vacancy occur in the office of county auditor, Section 12-39-10 provides: "When any auditor for any reason fails to complete his term of office, his successor shall be appointed initially for the unexpired portion of the term for which his predecessor was

appointed." Although Section 4-9-60 requires election of many county auditors rather than appointment, there is no provision in Section 4-9-60 or the Home Rule Act generally which would govern the filling of a vacancy in the office of county auditor for an unexpired term.

Since a county auditor is unquestionably a county officer, two other statutes relative to filling vacancies must also be considered. Section 1-3-220 provides in relevant part:

The following appointments shall be made by the Governor and are in addition to those appointments by the Governor authorized in other provisions in the Code:

....

(2) An appointment to fill any vacancy in a county office. The person so appointed shall hold office, in all cases in which the office is elective, until the next general election and until his successor shall qualify;

Similarly, Section 4-11-20 provides:

In the event of a vacancy at any time in any of the offices of any county of the State the Governor may appoint some suitable person, who shall be an elector of the county, and, upon duly qualifying according to law, he shall be entitled to enter upon and hold the office to which he has been appointed:

(1) If it be an elective office, until the next general election if the term of such office be fixed by the State Constitution or until the next general election if the term be not so fixed, in which latter case an election shall then be held to fill the unexpired term and in either such event such person shall hold office until his successor shall qualify;

....

Any officer so appointed shall be subject to all the duties and liabilities incident to his office during the term of his service therein. Any officer elected to fill an unexpired term under the provisions of this section shall hold office for such term and until his successor shall qualify.

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These Code sections would suggest that a gubernatorial appointee serve on an interim basis, until the next general election, at which time a successor would be elected to serve the unexpired portion of the term. As is readily apparent, this scheme to fill a vacancy would conflict with the scheme contemplated by Sections 12-39-10.

In April 1978, a quo warranto-type action was brought in Greenwood County to determine, essentially, the extent of the term of the interim appointee of the Governor serving as Greenwood County Auditor. In this case, the auditor-elect died approximately two weeks before his term was to begin. After reviewing the relevant statutes, the Honorable James E. Moore concluded that the interim gubernatorial appointee would serve only until the next general election, at which time a successor would be elected to serve the remainder of the unexpired term.

Judge Moore determined that Section 4-11-20 was the applicable statute, a result reinforced by the provisions of Section 1-3-220. Thus, the interim appointee would hold office until the next general election, at which time a successor would be elected to serve the remainder of the unexpired term. Judge Moore continued:

Furthermore, while the statutes, of course, control my decision, I am confident that my decision is supported by reasons of sound public policy. When an elective office is rendered vacant by death or other reasons, it seems apparent to me that the people should have the right to elect the successor as soon as possible, which the Legislature has determined to be at the next general election. Conversely, when the office was filled by appointment in the first instance, no reason appears why the replacement appointment should not be made to last as long as the original appointment. No reason appears why a replacement appointment for an elective office should be permitted to continue any longer than necessary.

Applying this court decision and the reasoning therein to the circumstances in Marlboro County mandates the conclusion that Sections 4-11-20 and 1-3-220 should prevail over Section 12-39-10 with respect to county auditors elected pursuant to Section 4-9-60. Therefore, consistent with Judge Moore's decision, the gubernatorial appointee would serve until a successor is elected in the next general election, the successor being elected to serve the remainder of the term for which the auditor was elected. In accordance with Judge Moore's decision and statutory law, since the time to elect a successor is the next general election, a special election would not be appropriate to fill a vacancy in the auditor's office. See Op. Atty. Gen. dated July 2, 1990.

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This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,



Paul M. Koch

Assistant Attorney General