

The State of South Carolina



Office of the Attorney General

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June 24, 1993

The Honorable G. Ralph Davenport
Member, House of Representatives
105 Ashland Terrace
Spartanburg, South Carolina 29303

Dear Representative Davenport:

By your letter of March 31, 1993, you have asked to be advised whether the State Constitution and the initiative and referendum provisions of the Home Rule Act, S.C. Code Ann. § 4-9-1210 et seq., would permit:

1. Electors to propose and adopt term limitations by ordinance for members of a county council; and
2. Electors to propose and adopt recall provisions by ordinance for members of a county council.

Section 4-9-1210 provides in part that "The qualified electors of any county may propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes, and adopt or reject such ordinance at the polls." As broad as this statutory language appears to be, there are additional, implied limitations inherent therein. For instance, such ordinance would be required to be constitutionally permissible and consistent with the general laws of the State. § 4-9-30. In addition, the electorate may not propose and adopt an ordinance which the governing body could not itself adopt. In Town of Hilton Head Island v. Coalition of Expressway Opponents, _____ S.C. _____, 415 S.E.2d 801 (1992), the Supreme Court stated as to an ordinance proposed by initiative in the municipality of Hilton Head Island,

When a municipality enacts an ordinance which conflicts with state law, the ordinance is invalid. [Cite omitted.] An electorate has no greater power to legislate than the municipality itself. [Cite omitted.] An initiated ordinance

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which is facially defective cannot be cured by adoption by the electorate. [Cite omitted.]

415 S.E.2d at 805. The Court held that where an initiated ordinance is facially defective in its entirety, the political subdivision has no obligation to hold a referendum on the initiated ordinance. Thus, the starting point is to determine whether a county council could adopt the ordinances which you have described.¹

Term Limitation

Article I, Section 5 of the State Constitution provide that "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 of 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

¹No proposed ordinances have been presented to this Office for review. Thus, we are commenting only on the general legal principles involved.

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.

The General Assembly created the offices of county council members and county supervisors pursuant to the Home Rule Act, Act No. 283 of 1975. The General Assembly has adopted § 4-9-90 which requires that where county council members are required to be elected from single-member districts, council members "must be elected by the qualified electors of the district in which they reside." Thus, § 4-9-90 contains a qualification respecting residency in some cases. Article XVII, § 1 of the State Constitution requires all public officers to meet the qualifications of an elector; those qualifications are found in § 7-5-120. Section 4-9-100 prohibits the council members' holding "any other office of honor or profit in government," except military and notary public commissions, during their elected terms, in keeping with Art. XVII, § 1A and Art. VI, § 3 of the State Constitution. No other statutory qualifications appear to have been adopted with respect to county council members.

Section 4-9-90 sets the term of office for county council members at either two or four years. However, neither § 4-9-90 nor any other Code section specifies a limit on the number of terms or number of years which a county council member may serve. Thus, we conclude that the General Assembly has not limited the length of service of a county council member. We can locate no express authority for a county council (and, by extension, the electorate by the initiative and referendum process) to adopt such a limitation on service on a county council.²

Thus, we must conclude that a county council would not have the statutory authority to limit the number of terms or number of years which a county council member

²See also Art. VIII, § 14, which provides in part:

In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside:

... (2) election and suffrage qualifications; ... (6) the structure and the administration of any governmental service or function, ... which requires statewide uniformity.

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might serve. Because a council would not have that authority, and further because the electorate, by initiative and referendum, would have no greater power, such an initiated ordinance would most probably be facially defective and thus invalid. If a county council should be presented with such an initiated ordinance, it would have no obligation to call for a referendum, in our view. Of course, should the General Assembly so choose, nothing would prevent enactment of statutory authority limiting the terms of council members.

Recall

There are currently no provisions for recall of elected officers in this State. Prior to adoption of the Home Rule Act, certain municipalities had statutory authority to conduct a recall election; these statutes were repealed by the Home Rule Act, however. We can locate no express authority for a county council (and, by extension, the electorate by the initiative and referendum process) to adopt an ordinance permitting a recall referendum. See also Art. VIII, § 14 of the State Constitution (as to not setting aside general laws relative to matters requiring statewide uniformity).

Based on the same legal principles discussed as to limiting service of county council members, we would conclude that a county council most likely would not have the statutory authority to conduct a recall referendum. Because a council would not have that authority, and further because the electorate, by initiative and referendum, would have no greater power than council, such an initiated ordinance would most probably be facially defective and thus invalid. If a county council should be presented with such an initiated ordinance, it would have no obligation to call for a referendum, in our view. Of course, should the General Assembly so choose, nothing would prevent enactment of statutory authority for a council to conduct a recall referendum.

Sincerely,

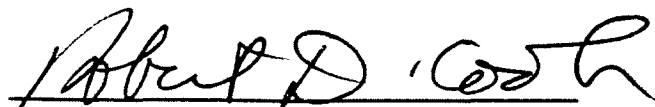
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