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The State of South Carolina



Office of the Attorney General

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ATTORNEY GENERAL

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response to #1 superseded  
see opinion of 11/10/86  
reference OS-2523.  
PJ

December 17, 1985

Roy McBee Smith, Esquire  
Spartanburg County Attorney  
Post Office Box 5306  
Spartanburg, South Carolina 29304

Dear Mr. Smith:

Attorney General Medlock has referred your letter and memorandum of October 30, 1985, to the Opinion Section for response. You have asked for the opinion of this Office as to several portions of Section 4-9-10 (c), Code of Laws of South Carolina (1984 Cum. Supp.), as those portions relate to a referendum on the issue of changing the form of government or number or election method of county council members. Your first three questions will be discussed together, and the remaining questions, separately.

Questions 1, 2, and 3

You have asked this Office to construe the language from Section 4-9-10 (c), as follows:

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. ...

At the outset, several rules of statutory construction must be considered. The primary objective in construing statutes is to ascertain and give effect to legislative intent if at all possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). Absent ambiguity, words of a statute

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must be given their plain and ordinary meanings. Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980). These rules will be used in responding to each of your questions.

After the initial form of county government, number of council members, and method of election have been selected, changes may be made by the calling of a referendum by county council, by their own initiative or upon petition of not less than ten percent of the registered voters of the county. Your first three questions concern the number of choices to be offered in the referendum and who makes the choices.

Your questions have been basically answered by prior opinions of this Office dated May 12, 1980, and March 17, 1980. From these opinions it appears that at the least, the referendum must present alternatives to keep the existing form of government, method of election, or number of council members as well as whatever may be proposed by petition. These prior opinions interpreting Section 4-9-10 (c) do not seem to limit the alternatives to only those two choices. County Council would not be required to add more choices, nor would it apparently be prohibited from doing so.

Copies of these prior opinions are enclosed for your use.

As we discussed by telephone on November 26, the interpretation of Section 4-9-10 (c) is not entirely clear. One interpretation or argument is that presented by prior opinions of this Office. We have reviewed those opinions and do not find them to be clearly erroneous under our standard of review; thus, those opinions continue to represent the views of this Office. However, an alternate interpretation or argument may be made; you requested that I present that point of view even though we are following the prior opinions.

From the language of the statute, it could be argued that only two proposals would appear on the ballot in one referendum. The most basic form of the portion cited above would be:

In any referendum, the question voted upon, ... shall give the qualified electors an alternative to retain the existing form [etc.] ... or change to one other designated form [etc.] ... .

(Emphasis added.) The language arguably appears to contemplate two choices for the electorate: the existing form and one other form.

We also note that according to the terms of Section 4-9-10 (c), if more than one petition is received within the time

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allowed for such filing, the petition containing the largest number of signatures is the proposal to be submitted to the electorate. See also Guide to S. C. State Government, discussion following Section 14-3701 (c) [now Section 4-9-10 (c)]. The statute does not appear to take into account that a county council may wish to offer a proposal in addition to one submitted by petition. Thus, the "one other designated form," etc. would arguably be that form or other change proposed by the petition.

If this argument were adopted, the responses to your second and third questions would be covered by the fact that only two alternatives would appear on the ballot: the present form of government and the form, method, or number proposed by petition. However, as stated above, the prior opinions of this Office, which are not clearly erroneous, would permit any number of alternatives to appear on the ballot.

#### Question 4

Your fourth question concerned the time frame for scheduling the referendum. The pertinent portions of Section 4-9-10 (c) state:

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. ... 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. ...

Your question is whether council must act within ninety days, or whether the referendum must be held within the ninety days. Your concern is that if council must hold the referendum within the ninety days, council may be deprived of the choice to schedule the referendum with a general election if one is not to be held within the ninety-day period.

We must advise that the answer is not entirely clear in this instance. While the question is a close one, and arguments can be made either way, we would suggest that a county council act upon the receipt of the petition within ninety days rather than schedule the referendum within the ninety days. When the Home Rule Act was passed, South Carolina and its political

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subdivisions, including counties, were already subject to the requirements of the Voting Rights Act of 1965, as amended. Any of the changes contemplated by Section 4-9-10 (c) would require preclearance from the United States Department of Justice, as well as preclearing the date of the referendum. The Department of Justice must respond within sixty days when submission is made to the United States Attorney General for his statement of no objection; further, the sixty days may be tolled at any time if the Department of Justice requests additional information. By interpreting the language of Section 4-9-10 (c) as requiring council to act within ninety days, the requirement of preclearance could be accommodated.

A consideration of economy may also be present. It is well-known that the election process is expensive; giving council the option to hold the referendum at the time a general election is scheduled may permit the county to save a considerable amount of money.

On the other hand, it could be argued that failure to hold the referendum within ninety days could circumvent the speedy disposition of the petition. In effect, a county council could delay the referendum indefinitely or until the next general election, which could be many months away. As noted above, preclearance must still be obtained and such may not be possible within the ninety days. If this argument is adopted and the referendum held without first obtaining preclearance, the results of the referendum will most probably be voided. See N.A.A.C.P. V. Hampton County Election Commission, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985). Thus, we concur with your conclusion that scheduling, rather than actually holding, the referendum within ninety days of receipt of the petition by county council is contemplated by Section 4-9-10 (c).

#### Question 5

Your final question is whether the method of election of the chairman of a county council may be changed by the procedure outlined in Section 4-9-10 (c), in light of language contained in Section 4-9-90 as to a chairman of council being elected at large as a separate office.

Section 4-9-10 (c) provides the following:

After 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

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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 . . .

As to the chairman of county council, Section 4-9-90 provides in pertinent part:

In those counties in which the chairman of the governing body was elected at large as a separate office prior to the adoption of one of the alternate forms of government provided for in this chapter, the chairman shall continue to be so elected. . . .  
[Emphasis added.]

See also Section 4-9-110, "The council shall select one of its members as chairman, except where the chairman is elected as a separate office . . . ."

Use of the term "shall" is generally regarded as mandatory. South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118 (D.S.C. 1978). Thus, where the chairman of a county council was elected at large prior to adoption of an alternate form of government under the Home Rule Act, Section 4-9-90 would continue to be followed. We do not find another provision of law permitting this statute to be altered by a county council. We concur with your conclusion that the statute would require amendment by the General Assembly or clarification by a court to reach another conclusion. But see Op. Atty. Gen. dated June 22, 1982.

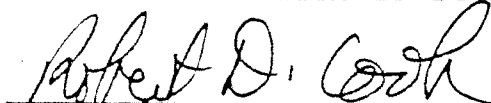
We trust that the foregoing will satisfactorily resolve your inquiries. Please advise if you need clarification or additional assistance. We are also enclosing information on preclearance under the Voting Rights Act.

Sincerely,

*Patricia D. Petway*  
Patricia D. Petway  
Assistant Attorney General

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Enclosures

REVIEWED AND APPROVED BY:

  
Robert D. Cook  
Executive Assistant for Opinions