ALAN WILSON
ATTORNEY GENERAL

November 1, 2016

The Honorable Paul Thurmond, Member
South Carolina Senate, District No. 41
P.O. Box 142
Columbia, SC 29202

Dear Senator Thurmond,

Attorney General Alan Wilson has referred your letter dated September 12, 2016 to the Opinions section regarding the implementation date contained in an ordinance for a change in the form of government for the Town of Summerville should such an action be approved by a favorable majority vote of the qualified electors in the election. In a letter attached to your opinion request, Wiley Johnson, Mayor for the Town of Summerville, described the circumstances relevant to the ordinance as follows:

> On July 25, 2016, over 6,000 Summerville voters, representing more than 15 percent of the electorate, submitted a petition for a referendum to the Town of Summerville and the Dorchester County Election Commission to include on the ballot this question: "Should the municipality of Summerville change its form of government from 'council' to 'mayor-council'?"
>
> On August 10, 2016, the Dorchester County Board of Elections and Registration reported that valid signatures of more than 15 percent of the electorate had been certified on the petition.
>
> On August 11, 2016, four members of the seven-member Town Council voted to pass the first reading of an ordinance intended to implement the change of government, should the referendum pass. The ordinance provides: (1) The question posed by the referendum shall appear on the November 8, 2016 ballot; and (2) If a majority of the votes cast are in favor of the change, the change shall take effect on the 8th day of January 2020. The effective date of the change, coinciding with the end of my four-year term, was said to be based on your prior opinions, which were overruled in [an opinion] dated June 11, 2012...

As stated in Mayor Johnson's letter, the question presented by this opinion request is "whether an ordinance setting an implementation date for a change in the form of the Town's government almost four years hence is consistent with the Constitution and general law of this State, and whether such an implementation date thwarts the will of the electors."

## Short Answer

It is this Office's opinion that a court would likely find the ordinance invalid as a violation of Section 6 of the Home Rule Act because the ordinance passed by the Town of Summerville implements a change in the form of government more than a year after the date of the election.

## Law/Analysis

In determining the legality of the subject ordinance, we first note that the courts have consistently recognized the basic principle that a local ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. See McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional."), citing Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984); Op. S.C. Atty. Gen., 2003 WL 21471503 (June 4, 2003). Only the courts, and not this Office, possess the authority to declare such an ordinance invalid. Therefore, any ordinance would have to be followed until a court sets it aside. However, we will give this Office's interpretation of relevant legal authorities and how we believe our State courts would rule regarding the subject ordinance.

In Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), the Supreme Court of South Carolina described the two-step process to determine the validity of a local ordinance. "First, the Court must consider whether the municipality had the power to enact the ordinance. ... [Second], if the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State." Id. at 361.

Before turning to the municipality's authority, we identify some rules of statutory interpretation which will guide the analysis. Statutory interpretation of the South Carolina Code of Laws requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where the statutes' language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), reh'g denied (Aug. 5, 2015). However, the Supreme Court of South Carolina has stated that where the plain meaning of the words in a statute "would lead to a result so plainly absurd that it could not have been intended by the General Assembly... the Court will construe a statute to escape the absurdity and carry the [legislative] intention into effect." Duke Energy Corp. v. S. Carolina Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[C]ourts are not confined to the literal meaning of a statute where the literal import of the words contradicts the real purpose and intent of the lawmakers.").

### 1. Municipal Council's power to enact an ordinance regarding a change in the form of government

Under the first prong of the test set forth in Foothills Brewing, it must be determined whether municipal councils have the power to enact an ordinance calling for a change in the form of the municipality's government following an affirmative majority vote of qualified electors. It is this Office's opinion that municipal councils were granted such authority by the General Assembly's mandate that such a change in the form of government occurs by ordinance. Section 6 of Act 283 of 1975.

As noted in our prior opinions, local government autonomy has increased significantly since the passage of the Home Rule Act. Ops. S.C. Atty. Gen., 2013 WL 861300 (February 22, 2013); 2011 WL 1740752 (April 7, 2011); 2005 WL 1983356 (August 8, 2005). The State Constitution requires the General Assembly to establish by general law for "structure and organization, powers, duties, functions, and responsibilities of the municipalities ..." S.C. Const. Art. VIII, § 9. Accordingly, the General Assembly passed the Home Rule Act, 1975 Act No. 283. As part of Home Rule, the General Assembly passed S.C. Code. Ann. §§ 5-7-30 *et seq.*, which provides the governing bodies of each municipality with enumerated powers while remaining subject to the general laws of the State. S.C. Code Ann. § 5-7-30 (1976 Code, as amended). The Supreme Court of South Carolina has liberally construed municipal authority "so long as such [actions] are not inconsistent with the Constitution and general law of the state." Williams v. Town of Hilton Head, 311 S.C. 417, 429, 429 S.E.2d 802, 805 (1993); accord Eargle v. Horry County, 335 S.C. 425, 432, 517 S.E.2d 3, 7 (1999); Op. S.C. Atty. Gen., 2013 WL 861300 (February 22, 2013).

In part relevant to municipalities, the Home Rule Act required municipal governments to adopt one of three forms of government contained in Title 5 of the South Carolina Code of Laws. S.C. Code Ann. § 5-5-10 (Supp. 2015). The General Assembly listed the following forms: "mayor-council", "council," and "council-manager." Id. Municipal councils were in fact required to make an initial selection of form by ordinance. Id.

Section 5-5-20 describes the requirements to determine or change a municipality's form of government after the municipality initially selected one of the three forms listed in Section 5-5-10. Section 5-5-20 reads as follows:

> After the date of official council action if a petition executed by fifteen percent of the qualified electors is presented to the municipal governing body, certified by the county election commission, for an election to determine or change the form of government or if the municipal governing body shall by ordinance call for such an election, the municipal governing body shall conduct a special election not later than ninety days nor earlier than thirty days after the receipt of the certified petition or the passage of the council ordinance; provided, however, that no referendum shall be held pursuant to ordinance of the municipal council sooner than two years following the date the form of municipal government is initially selected pursuant to the provisions of this chapter.

S.C. Code Ann. § 5-5-20 (Supp. 2015).

Section 5-5-30 is listed under the heading "Determination of form of government by governing body effective until changed by election; subsequent election," and reads as follows:

> Until changed by an election, the selection of the form of government as initially determined by the governing body by ordinance shall remain effective. The ordinance selecting the form of government shall be filed in the office of the Secretary of State who shall issue an appropriate certificate of incorporation to the municipality. No other such election shall be held for a period of four years after an election is held pursuant to § 5-5-20.

S.C. Code Ann. § 5-5-30 (Supp. 2015) (emphasis added). This Office has previously opined that the Section 5-5-30 filing with the Secretary of State's Office requirement applies to both the initial selection and subsequent changes in form. Ops. S.C. Atty. Gen., 1993 WL 494577 (October 5, 1993); 1983 WL 181747 (February 14, 1983). Therefore, the General Assembly has not only granted municipal councils the authority to change the municipal form of government by ordinance, but in fact required the municipal council to take such action following the majority of the votes cast by the qualified electors being in favor of such a change. S.C. Code Ann. § 5-5-40 (Supp. 2015).

### 2. Ordinance consistency with the Constitution and general law of the State

Under the second prong of the Foothills Brewing test, it must be determined whether the ordinance passed by the municipal council is consistent with the Constitution and the general law of the State. It is this Office's opinion that a court is likely to find the subject ordinance violates the Home Rule Act's, Section 6 of Act 283 of 1975, mandate to municipal councils to "as soon as practicable... take action by ordinance to implement the requirements of the form adopted" because the subject ordinance sets the effective date for the change in the form of government nearly four years after the date of the ballot referendum.

Mayor Johnson correctly notes in his letter that this Office overruled our prior opinions which interpreted Section 5-5-60 to require a delay in the implementation of a new form of municipal government. Op. S.C. Atty. Gen., 2012 WL 2364242 (June 11, 2012). In that opinion we stated:

> [T]he Home Rule Act, Act No. 283, 1975 S.C. Acts 692[,] set the effective date for initial adoption of a form. It stated:
>
> > Within fifteen months of the effective date of this act, the governing body of each municipality in the State shall adopt by ordinance ... one of the forms of municipal government provided for ... or [it] shall be deemed to have forfeited [its] articles of incorporation. The form adopted shall become effective at the beginning of the fiscal year following adoption.
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> Id. § 6 (emphasis added); see Colyer v. Thomas, 268 S.C. 455, 234 S.E.2d 862 (1977) ("[T]he Act declares the effective date to be the beginning of the fiscal year following adoption of a specified form of government."). Thus, it is clear section 5-5-60 was not intended to delay the implementation of the initial adoption of one of the new forms of municipal government.

Id. at *3. In researching this opinion request, this Office has identified what appears to be the most recent amendment to Section 6 was adopted in 1977. The amendment reads as follows:

> Section 6 of Act 283 of 1975, as last amended by Act 623 of 1976,[1] is further amended to read:
>
> > "Section 6. Not later than December 31, 1977, the governing body of each municipality in the State shall adopt by ordinance, pursuant to Article 2.1 of Chapter 1 of Title 47 of the 1962 Code [Chapter 5 of Title 5 of the 1976 Code], one of the forms of municipal government provided for in Articles 4, 5 and 6 [Chapters 9, 11 or 13] or they shall be deemed to have forfeited their articles of incorporation. The form adopted shall become effective upon the issuance of a certificate of incorporation as provided for in Section 47-28 of the 1962 Code [Section 5-5-30 of the 1976 Code].
> >
> > Municipal councils shall, as soon as practicable following the final adoption of a form of government provided for in Chapter 1 of Title 47 [Chapters 1 through 17 of Title 5 of the 1976 Code], take action by ordinance to implement the requirements of the form adopted.
> >
> > All powers, rights, liabilities, obligations, contracts and duties of the municipality shall continue under the new form adopted.

Act No. 212, § 1, 1977 S.C. Acts 540, 540-541 (emphasis added).[2]

The plain language of the second paragraph of Section 6 establishes the municipal council's non-discretionary duty to implement the new form of government "as soon as practicable." The General Assembly's use of the word "shall" indicates that the duties assigned are mandatory. Johnston v. S.C. Dep't of Labor, Licensing, & Regulation, S.C. Real Estate Appraisers Bd., 365 S.C. 293, 296–97, 617 S.E.2d 363, 364 (2005) ("The term 'shall' in a statute means that the action is mandatory."). This duty is "to take action by ordinance to implement the requirements of the form adopted" following final adoption as provided for in Chapter 1 of Title 47 in the 1962 Code. These 1962 Code sections are now codified at Chapters 1 through 17 of Title 5 of the 1976 Code and outline the requirements for both the initial selection of a municipal form of government as well as subsequent changes in form. Therefore, Section 6 establishes that a municipal government's change in form must be passed by ordinance as soon as practicable.

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[1] In 1976, Section 6 of the Home Rule Act was amended to strike the last sentence of the paragraph quoted above and insert: "The form adopted shall become effective upon the issuance of a certificate of incorporation as provided for in [Section 5-5-30 of the 1976 Code]." Act No. 623 § 7, 1976 S.C. Acts 1659, 1663.

[2] When the Home Rule Act was codified, Section 6 remained uncodified and was instead included as an Editor's note to S.C. Code Ann. § 5-5-10 in the 1976 Code. While Section 6 is no longer included in the current version of the Code, this Office is unaware of subsequent legislation repealing it. In fact, the Supreme Court of South Carolina continued to apply another uncodified portion of Home Rule Act in Graham v. Creel, 289 S.C. 165, 345 S.E.2d 717 (1986). Thus, it appears that Section 6 of Act No. 283 of 1975 continues to be followed, in spite of its failure to be codified in the 1976 Code of Laws. See Ops. S.C. Atty. Gen., 1988 WL 485361 (December 22, 1988) (citing with approval to uncodified Section 3 of Act No. 283 of 1975); 2002 WL 31728843 (October 31, 2002) (citing with approval to uncodified portion of Act No. 31 of 1981).

Similarly, the last sentence in the first paragraph of Section 6 establishes a mandatory action where it states "[t]he form adopted shall become effective upon the issuance of a certificate of incorporation as provided for in Section 47-28 of the 1962 Code [Section 5-5-30 of the 1976 Code]." Section 5-5-30 states that the ordinance selecting the form of government "shall be filed in the Office of the Secretary of State who shall issue an appropriate certificate of incorporation to the municipality." We again emphasize that this Office has consistently interpreted Section 5-5-30 to apply to both the initial selection as well as to subsequent changes in form of municipal government. When such a change in form of government is filed with the Office of the Secretary of State, the municipality is issued an amended certificate of incorporation. The issuance of the amended certificate of incorporation is the mechanism which effectuates the change in form in government as stated in the first paragraph of Section 6. Interpreting the Section 6 in conjunction with Section 5-5-30, it is this Office's opinion that a municipality's change in the form of government must be filed with the Office of the Secretary of State "as soon as practicable… to implement the required form adopted." This filing concludes the municipal council's actions to implement the form adopted.

Yet, we must still determine whether a court will find the municipal council, by delaying the effective date until January 2020, violates the statutory requirement to implement the form adopted "as soon as practicable." Based on the design of Section 6 the Home Rule Act and Section 5-5-30, it is this Office's opinion that an ordinance which establishes an implementation date for a change in form of government nearly four years after the electors have voted would not comply with Section 6. As discussed above, Section 6 originally declared that the form would be "effective at the beginning of the fiscal year following adoption." Although this provision of Section 6 has since been amended, it provides some insight into the General Assembly's intent regarding the outer limits of what "as soon as practicable" can fairly be interpreted to mean. A reasonable and fair interpretation of the two provisions read together would indicate that because the General Assembly intended for municipal council to implement the requirements of the form adopted before the new form of government became effective. Therefore, to avoid an absurd result, it is reasonable to conclude that the General Assembly intended for a change in form to be implemented within a fiscal year. This Office believes that a court would interpret "as soon as practicable" to mean that a municipality complies with Section 6 by implementing a change in form between the date of election and a year hence.

The amendments to Section 6 do not change this Office's opinion in this regard because replacing when the change in form is effective from "the beginning of the fiscal year" to "the issuance of a certificate of incorporation" does not evidence an intention to extend the implementation period beyond a fiscal year. Section 5-5-20 requires the municipality to conduct a special election within a thirty to ninety day period following a petition or ordinance calling for an election to determine or change the form of government. Under the prior version of Section 6 which mandated a change at the beginning of the following fiscal year, the presentation of such a petition could result in a significantly shortened time period within which to implement the change in form required. For example, if a petition was presented on April 1, the municipality would be required to conduct a special election between May 1 and June 29. Because the fiscal year for the State begins on July 1, a municipal government could have less than a week to implement the change in form. In amending Section 6, it is likely that the General Assembly intended to prevent such an abbreviated time to comply rather than to extend its outer limits.

This interpretation is consistent with the public statements of the Municipal Association of South Carolina ("the Association") concerning change in form. After speaking with the Association, we understand its position to be as follows:

> [A] city council needs time after a change in the form of government to adjust existing ordinances to comply with a new form. <u>However, we also believe that a city can make those adjustments well within a year after a change.</u> We have stated publicly that we believe an implementation date beyond a year could be viewed as an attempt to thwart the will of the voters who favored a change in the form of government.

The Association's statements advising municipalities on change in form demonstrates that this Office's opinion regarding the outer limit of time for implementation could in fact be longer than compelled by Section 6's "as soon as practicable" requirement. As this Office is unaware of case law interpreting this provision of Section 6, we look to our State court's interpretations of the phrase in other context. In <u>Vermont Mut. Ins. Co. v. Singleton By & Through Singleton</u>, 316 S.C. 5, 12, 446 S.E.2d 417, 422 (1994), the South Carolina Supreme Court interpreted an insurance policy's use of the term "as soon as practicable" to mean "within a reasonable time frame." In <u>Smith v. Spratt Mach. Co.</u>, 46 S.C. 511, 24 S.E. 376, 377 (1896) the Court held that in "determining what a reasonable time for the performance of a given contract regard should be had to the situation and circumstances of the parties, for a time which would be reasonable in one case would not be in another." While these cases do not definitely state a time period within which a municipality would exceed the "as soon as practicable" requirement, they do provide guidance that courts will likely consider such a finding would depend on the facts of the case.

As this Office is not empowered to determine factual questions, we cannot decisively state if prior to one year after an election held to change the form of a municipal government a particular municipality would exceed the "as soon as practicable" requirement in Section 6. <u>See</u> <u>Op. S.C. Atty. Gen.</u>, 2015 WL 4497734 (July 2, 2015) ("[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts."). However, we do not need to engage in such a factual determination because the ordinance passed by the Town of Summerville implements a change in the form of government more than a year after the date of the election. It is this Office's opinion that a court would likely find the ordinance invalid as a violation of Section 6 of the Home Rule Act because it set the effective date for the change in form of government for nearly four years after the election.

Further, a court would likely find the ordinance passed by the Town Council is invalid because the four year delay in implementation would make the Section 5-5-30 prohibition on holding another election for four years futile. Arguably, the General Assembly intended the prohibition on further elections to allow the change in form of government to go into effect and provide a period of time for citizens to evaluate how the newly elected form served as a method of governance for the municipality. However, by the time the Summerville ordinance would become effective, less than a year would elapse before the next election for a change in form of government could take place. In such a scenario, it would be difficult for citizens to appraise whether the change in form of government in the first election better met the needs of the municipality than the one it replaced. It is unclear what purpose the four year prohibition in Section 5-5-30 would serve if the change in form could be delayed by ordinance until the prohibition had nearly run its course. <u>Prot. & Advocacy for People with Disabilities, Inc. v. Buscemi</u>, 417 S.C. 267, 789 S.E.2d 756, 760 (Ct. App. 2016), reh'g denied (Aug. 22, 2016) ("When interpreting a statute, courts must presume the legislature did not intend to do a futile act."). It is, therefore, this Office's opinion that a court would likely find the ordinance invalid as the delayed implementation of the change in form would render the four year prohibition on further elections for a change in form of government in Section 5-5-30 futile.

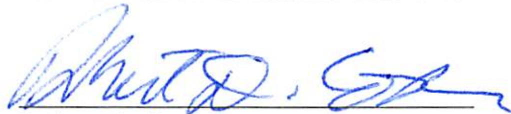
**Conclusion**

For the reasons discussed above, it is this Office's opinion that a court would likely find an ordinance which sets an implementation date for nearly four years after a majority of qualified electors vote to change a municipal form of government violates Section 6 of the Home Rule Act. To the extent that this opinion conflicts with this Office's prior opinions, they are hereby superseded. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General