1992 WL 12932507 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 23, 1992

*1 The Honorable Warren K. Giese
Senator
District No. 22
4627 Perry Court
Columbia, South Carolina 29206

Dear Senator Giese:
Referencing Act No. 319 of 1992, pertaining to the consolidation of political subdivisions, you have asked several questions about the mechanics of that act, as to appointment of members of the charter commission and as to exclusion of municipalities from the proposed charter of the consolidated political subdivision. Each of your questions will be addressed separately, as follows.

Question 1

When a charter commission is initiated and created pursuant to a resolution of the county governing body, who has the authority to appoint the municipalities' members if one or more of the municipalities either fails to respond or responds that they have chosen not to make appointments?

You have referenced two new statutes which seem, at first reading, to conflict; in our view, it is possible to reconcile the statutes.

By Act No. 319 of 1992, the General Assembly has provided a mechanism whereby counties, municipalities, special purpose districts, and such other political subdivisions may consolidate the governmental and corporate functions vested in those subdivisions. At the receipt of a petition calling for creation of a charter commission or at the initiative of county council, a charter commission is authorized to be created to study the matters and draft a proposed consolidated governmental charter. The commission is to be comprised of eighteen members, as outlined in S.C. Code Ann. § 4-8-20.

Six members of the commission are to be residents of incorporated municipalities within the county. § 4-8-20(A)(2)(a). An appointive index formula is found in § 4-8-20(A)(2)(b)and (c). Subsection (d) further provides:
When less than six members are selected to the commission in accordance with the prescribed appointive index method, the remaining member or members must be selected in a joint meeting of the charter commission appointees of the municipalities in the county. The member or members must be chosen from among the residents of the municipalities in the county which before this time have not provided a representative for the commission.

Then, § 4-8-20(B) provides in part as to the creation of the charter commission within the specified thirty days:
If within the thirty-day period one or more of the municipalities ... fails or refuses to appoint their proportionate number of members to the commission, the county governing body shall appoint an additional number of members equal to the number that any such municipality ... is entitled to appoint.

The two statutes seem to address different circumstances. Section 4-8-20(B) would be utilized in the instance in which a municipality, notified of the opportunity to make one or more appointments, fails or refuses to make the appointments. In that event, the county governing body would make the appointments which that municipality would have made. On the other hand, § 4-8-20(A)(2)(d) seems to apply to those instances in which fewer than six members have been selected to the commission in accordance with the prescribed appointive index method. If one municipality has been allowed four members and the remaining two have not been selected according to the index, then those two might be selected by § 4-8-20(A)(2)(d). An example of how § 4-8-20(A)(2)(d) might be followed, drawn up by the South Carolina Association of Counties, is enclosed. To determine which statute applies, it would be necessary to determine whether the index has been followed or whether a given municipality has failed or refused to appoint its proportionate number. In any event, if an irreconcilable conflict between the two statutes should occur, § 4-8-20(B) would be deemed the prevailing statute. Because it appears later in the act, it would be the later expression of the legislative will and thus would prevail. Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943).

*2 In response to your specific inquiry, § 4-8-20(B) would be the applicable statute in the event that a municipality fails to respond or responds that it has chosen not to make its appointments. The county governing body would make those appointments, in that instance, by the plain language of § 4-8-20(B). [1] A municipality's failure to appoint for whatever reason would not prevent the charter commission's work from proceeding according to the timetable in Act No. 319.

Question 2

If a municipality does not respond and does not make an appointment, may that municipality be included in the proposed charter for the consolidated political subdivision?

A review of Act No. 319 of 1992 shows that there is no penalty if a municipality should fail to appoint, or refrain from appointing, its allotted members on the charter commission, other than the municipality's loss of the opportunity to appoint and have its input into that part of the process. Failure to appoint, for whatever reason, would not, by itself, cause the municipality to be excluded from the proposed charter of the consolidated political subdivision.

Throughout the act are found references to "participating" municipalities; how a municipality located in more than one county may respond to a proposed consolidation; how a municipality may exclude itself by vote of its electorate or become a part of the consolidated political subdivision later; and the like. It is observed that the charter commission has a great deal of latitude in specifying the municipalities and/or special purpose districts to be included in the consolidation effort. A municipality's failure to respond or refusal to make its appointments might be among the factors which the charter commission might use to gauge that municipality's sentiments toward consolidation; however, the act does not specify that such municipality failing or refusing to make its allotted appointments will be excluded from the consolidation.

Question 3

Is the language of section 4-8-20(A)(2)(c) which provides that "each municipality in the county shall appoint" permissive or mandatory? In other words, once the county governing body creates a charter commission, do the officials of the municipality have the option of refusing to make an appointment in accordance with their appointive index?

As to whether the word "shall" should be viewed as mandatory or directory, the court in State v. Blair, 275 S.C. 529, 533, 273 S.E.2d 536 (1981), stated:

The word "shall" may be construed as permissive to effect legislative intent .... However, a statutory provision is generally regarded as mandatory where the power or duty to which it relates is for the security or protection of private rights ....

Because private (or individual, as opposed to public) rights are not involved in this instance, a court construing the term "shall" in § 4-8-20(A)(2)(c) would most probably view the term as directory. As has already been observed, no penalty attaches to a municipality which does not make its allotted appointments. Indeed, the General Assembly contemplated in § 4-8-20(B) that a municipality might fail or refuse to appoint its allotted members. In keeping with § 4-8-20(B), it would appear that a municipality might opt not to appoint its allotted members, the result being that county council would then appoint those members so that the charter commission's work will continue according to the statutory timetable.

*3 We trust that the foregoing has adequately responded to your inquiry. Please advise if clarification or additional assistance should be needed.

With kind regards, I am
Sincerely,

Patricia D. Petway
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 While your inquiry related to municipalities, we observe that the same issue could arise concerning commission members appointed to represent interests of the county's special purpose districts. See §§ 4-8-20(A)(3)(c) and 4-8-20(B).

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