ALAN WILSON
ATTORNEY GENERAL

September 17, 2019

The Honorable J. Todd Rutherford
Member
South Carolina House of Representatives
P.O. Box 142
Columbia, South Carolina 29202

Dear Representative Rutherford:

We received your letter addressed to Attorney General Alan Wilson requesting an opinion of this Office concerning the validity of a North Charleston ordinance. You quoted the ordinance as follows:

> Sec. 2-21- Eligibility of office.
>
> To be eligible for the position of mayor or council member, a person shall be a duly qualified elector of the state and of the county and shall have resided within the city at least six (6) months immediately preceding the day of the election.

You ask

> [s]ince Article VIII, Section 9 of the Constitution provides that the "structure and organization" of municipalities is authorized by general law, and further § 5-15-20 of the Code of Laws does not authorize municipal governments to provide for further residency requirements, is the North Charleston ordinance preempted by state law?

Law/Analysis

We begin with the presumption that "[a] municipal ordinance is a legislative enactment and is presumed to be constitutional." Aakjer v. City of Myrtle Beach, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010). In accordance with section 17 of article VIII of the South Carolina Constitution (2009), "all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution

and by law shall include those fairly implied and not prohibited by this Constitution." Section 5-7-30 of the South Carolina Code (Supp. 2018) confers upon municipalities the power to "enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State . . . ." In addition, section 5-7-10 of the South Carolina Code (2004) states "[t]he powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities."

The South Carolina Supreme Court explained the two-step process used to determine the validity of an ordinance in Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008).

> First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. If, however, 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, 660 S.E.2d at 267 (citations omitted).

Section 1 of Article VI of the South Carolina Constitution (2009) sets forth the requirements to hold office in South Carolina. This provision does not contain a residency requirement, but simply requires any person serving in any office in this State or its political subdivisions must "possess the qualifications of an elector." S.C. Const. art. VI, § 1 (2009). Section 3 of Article II of the South Carolina Constitution (2009) states "[e]very citizen possessing the qualifications required by this Constitution and not laboring under the disabilities named in or authorized by it shall be an elector."

The Legislature enacted section 5-15-20 of the South Carolina Code (2004), which discusses the methods for election of mayors and city council members. This provision provides:

> Each municipality in this State shall provide by ordinance for the election of its council. Councils shall select any one of the following methods of election of council:
>
> (1) Members of the council elected from the municipality at large.
>
> (2) One member elected from each ward of the municipality by the qualified electors of the ward. Candidates seeking office from a particular ward shall be residents of the ward during their entire terms of office.

> (3) Some members elected from wards as provided for in (2) and the remainder elected from the municipality at large.
>
> (4) Members required to be residents of particular wards but be elected from the municipality at large.
>
> (5) Some members may be required to be residents of particular wards and others may be residents of the municipality without regard to a particular ward and all members shall be elected from the municipality at large.
>
> Regardless of the form adopted by the municipality, the mayor shall be elected at large.
>
> Mayors and councilmen shall be qualified electors of the municipality and, if they are elected subject to residential or ward requirements as provided in this section, they shall be qualified electors of the ward prescribed for their election qualification.

S.C. Code Ann. § 5-15-20 (emphasis added).

Section 5-15-20 gives municipalities the authority to provide for the election of its council members. This statute, in addition to the South Carolina Constitution, requires these officers qualify as electors of the municipality. Section 5 of Article II of the South Carolina Constitution (2009) provides the qualifications for municipal electors. "Municipal electors shall possess the qualifications prescribed in this Constitution, but each such elector must have resided in the municipality in which he offers to vote for thirty days next preceding the election." S.C. Const. art. II, § 5.

Our courts have recognized that when qualifications for office are set forth by the Constitution, the Legislature is precluded from adding additional qualifications. Article 1 section 5 of the South Carolina Constitution (2009) states: "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." In McLure v. McElroy, 211 S.C. 106, 119, 44 S.E.2d 101, 108 (1947), overruled in part by Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997), our Supreme Court interpreted this provision as meaning

> 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 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.

In an opinion of this Office issued in 1981, we considered the validity of a bill prohibiting persons convicted of disclosing records of the State Reorganization Commission and the Legislative Audit Council from holding public office for five years after the conviction. Op. S.C. Att'y Gen., 1981 WL 158233 (S.C.A.G. Apr. 10, 1981). Citing to McLure, we stated "[t]hat case holds that the Legislature may not add qualifications for constitutional office in addition to those set forth in the Constitution. Thus, the bill in question would be unconstitutional if sought to be applied to constitutional officers . . . ." Id.

While McLure and our 1981 opinion dealt with constitutionally created offices, we applied the same reasoning to legislatively created offices in a 1988 opinion. Op. S.C. Att'y Gen., 1988 WL 383554 (S.C.A.G. Sept. 26, 1988). Addressing the validity of an ordinance adding term limits for city council members, we considered a municipality's ability to add qualifications with respect to mayors and council members. Id. Referring to section 5-15-20, we stated

> [t]he General Assembly created the offices of mayor and members of a municipal governing body. Acting within its authority as provided above, the General Assembly has adopted Section 5–15–20, Code of Laws of South Carolina (1987 Cum.Supp.), to specify qualifications as to eligibility for election as a mayor or member of council . . . .

Id. We noted section 5-15-40 of the South Carolina Code addressed the term of office for mayors and councilmen, but did not impose a term limit. Id. As such, we determined

> the General Assembly has not limited the length of service of a mayor or councilman.
>
> A municipality generally "possess[es] and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the declared objects and purposes" of the municipality. McKenzie v. City of Florence, 234 S.C. 428, 437, 108 S.E.2d 825 (1959). We can locate no express authority to adopt such a limitation on service on a city council, nor can we identify a power granted to a municipality from which that authority could be necessarily or fairly implied.

Id.

We found no express or implied authority given to municipalities from the Legislature allowing the imposition of a durational residency requirement. Thus, in keeping with our prior opinions,

we do not believe the City of North Charleston has the ability to impose a six-month residency requirement for candidates for mayor or city council without legislative authority.

In addition, section 5 of article II of the South Carolina Constitution places a thirty-day residency requirement on municipal electors. Both section 1 of article VI of the South Carolina Constitution and section 5-15-20 of the South Carolina Code require candidates for mayor and city council to meet the qualifications of a municipal elector. Accordingly, we believe the thirty-day residency requirement applies to mayors and council members. As such, we believe an ordinance requiring a sixth-month residency requirement contravenes of both the South Carolina Constitution and state law.

We are also concerned as to the constitutionality of imposing a duration on the residency requirement. While our courts have not addressed this issue, other jurisdictions have found durational residency requirements violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

In Antonio v. Kirkpatrick, 579 F.2d 1147 (8th Cir. 1978), the Eighth Circuit Court of Appeals found Missouri's ten-year residency requirement for the office of state auditor denied candidate's equal protection. The Eighth Circuit rejected arguments that the durational residency requirement infringed upon fundamental rights to vote and interstate travel. Finding no suspect classification, the Court employed a traditional reasonable basis standard. The Court determined "[t]he durational residency requirement discriminates between old residents and new residents. In reviewing state classifications, judicial restraint generally compels adherence to the long-established rule that a State does not deny equal protection if the classification is rationally related to a legitimate government objective." Id. at 1148. The Eighth Circuit acknowledged

> [t]he durational requirements give some assurance that candidates are acquainted with the problems of the State and that voters have had some opportunity to observe the candidates as fellow citizens in their local areas. A State does have a recognized interest in obtaining knowledgeable and qualified candidates for high office. A State's own opinion of its durational residency requirements is entitled to considerable weight, particularly as set forth in a State constitution. As noted in McDonald, supra, 394 U.S. at 809, 89 S.Ct. at 1408, "statutory classifications will be set aside only if no grounds can be conceived to justify them." We think, therefore, there are sufficient legitimate, rational objectives for State-imposed durational residency requirements for office and particularly for statewide office. However, the question here is whether the requirement so imposed violates constitutional standards as being arbitrary or so restrictive as to erase any rational relationship to the legitimate State interest of having qualified and knowledgeable candidates.

Id. at 1150. Using this standard, the Court determined the ten-year residency requirement was not reasonably related to any of the asserted state interests or to any of the requirements of the office of State Auditor. Id.

In Green v. McKeon, 468 F.2d 883 (6th Cir. 1972), the Sixth Circuit Court of Appeals considered whether a provision in a city charter requiring two years' residency for elected city officials was unconstitutional. Declining to address whether the rights of voters were inextricably intertwined with the rights of potential candidates requiring strict scrutiny of the requirement, the Sixth Circuit found the durational residency requirement imposed by the city charter classified the city's residents "on the basis of travel." Id. at 884. Therefore, the Court opined "[t]hat classification alone requires that the requirement be strictly scrutinized because it operates to penalize the exercise of the basic constitutional right to travel." Id. The city asserted the requirement "is justified because every candidate for City office needs to become familiar with the local form of government and the problems peculiar to the municipality." Id. at 885. However, the Court held "the two year residence requirement is too broad for the achievement of that objective." Id. Quoting the United State Supreme Court in Dunn v. Blumstein, 405 U.S. 330, 343 (1972), addressing a voter durational residency requirement, the Sixth Circuit explained:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve their legitimate objectives . . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"

Id. The Sixth Circuit determined:

> The restriction is in no way "tailored" to achieve the stated municipal goal. It permits a two year resident of Plymouth to hold public office regardless of his lack of knowledge of the governmental problems of the city. On the other hand, it excludes more recent arrivals who have had experience in local government elsewhere or who have made diligent efforts to become well acquainted with the municipality. Further, in our representative form of government, the voters are the arbiters of the suitability of candidates for public office. Whether a candidate has the ability to carry out the duties of a particular city office, even though he arrived in Plymouth less than two years prior to election day, is a matter for consideration by the voters in choosing between candidates running for that office. Opposing candidates undoubtedly

> will bring this deficiency, if it be one, to the attention of the electorate in the course of campaigning.

Id.

These cases are just two examples of many cases finding durational requirements violate the Fourteenth Amendment. See also, Wellford v. Battaglia, 343 F. Supp. 143, 144 (D. Del. 1972), aff'd, 485 F.2d 1151 (3d Cir. 1973) (holding a city charter requiring the mayor to be a resident of the city for five years prior to election violated equal protection applying the compelling interest test); Bolanowski v. Raich, 330 F. Supp. 724, 727 (E.D. Mich. 1971) (stating absent a showing of a compelling municipal interest, a three-year residency requirement for mayor violated equal protection). We acknowledge other jurisdictions, especially those employing a rational basis standard, upheld durational residency requirements challenged under the Fourteenth Amendment. See e.g., Fleak v. Allman, 420 F. Supp. 822, 825 (W.D. Okla. 1976) (finding an Oklahoma statute "which requires that 'in order to file as a candidate for the House of Representatives in any of the representative districts, the candidate must have been a qualified registered elector in such district for at least six (6) months immediately preceding the filing period prescribed by law,' is a valid statutory enactment of the Legislature of Oklahoma and complies fully with the Equal Protection of the Law clause of the Fourteenth Amendment of the Constitution of the United States."); Walker v. Yucht, 352 F. Supp. 85, 99 (D. Del. 1972) (finding a three-year state residency requirement for candidates for the state legislature "neither arbitrary nor lacking in rational justification, does not violate the equal protection clause of the fourteenth amendment."); Scavo v. Albany Cty. Bd. of Elections, 131 A.D.3d 796, 798, (N.Y. App. Div. 2015) (finding "the one-year durational residency requirement imposes a reasonable, nondiscriminatory restriction on prospective candidates and voters that is supported by a rational basis."). We also acknowledge North Charleston's durational residency requirement is shorter than those considered by other courts. Nonetheless, a court could find the same constitutional impediments discussed by the Sixth and Eighth Circuits also apply to the North Charleston ordinance.

Conclusion

Only a court, not this Office, is authorized to declare an ordinance invalid. Op. S.C. Att'y Gen., 1989 WL 508503 (S.C.A.G. Feb. 15, 1989). However, consistent with our prior opinions, we continue to hold the opinion that municipalities are without authority to impose additional conditions on candidates for municipal office without specific legislative authority. In addition, both state law and the South Carolina Constitution provide that mayors and council members must meet to the qualifications of a municipal elector. Because the Constitution specifies a residency requirement for municipal electors, we believe an ordinance requiring an alternative residency requirement would run afoul of the Constitution and state law.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General