ALAN WILSON
ATTORNEY GENERAL

October 8, 2019

Daniel S. McQueeney, Jr., Esq.
Assistant Corporation Counsel
City of Charleston
50 Broad Street
Charleston, South Carolina 29401

Dear Mr. McQueeney:

We received your letter addressed to Attorney General Alan Wilson requesting an opinion of this Office regarding the City of Charleston's Zoning Ordinance (CZO). You stated the CZO "governs the procedure for amending the City's zoning regulations or maps." On behalf of the Charleston City Council (City Council), you ask us to point you to "any authority supporting the proposition that City Council must follow the procedure outlined in section 54-943.c to amend the requirement in section 54-943.c that 'a favorable vote of three-fourths (3/4) of all members of the City Council' is required when the City's Planning Commission recommends disapproval of the amendment."

Law/Analysis

You explained as part of the CZO, City Council adopted section 54-943, which provides procedures for changes or amendments to zoning regulations, restrictions, and boundaries. Section 54-943.a allows City Council on its own or by petition of a specified group of property owners to initiate a change or amendment to the CZO. This provision states:

> The City Council may from time to time on its own initiative or on petition, signed by a majority of the property owners according to the frontage in any district or portion thereof as large as one city block between two intersecting streets, amend, supplement or change the regulations, restrictions or the district boundaries herein established or subsequently established. This shall be done only after reference to and report by the Planning Commission; and after public hearing by City Council, official notice of the time and place of which shall be given in a newspaper of general circulation in the city at least fifteen (15) days prior to such hearing, except in the case of adoption or amendment of land development regulations in which case official notice of

> the time and place of the public hearing before City Council shall be given in a newspaper of general circulation in the city at least thirty (30) days prior to such hearing.

Charleston, S.C., Code § 54-943.a (2019). Section 54-943.c sets forth the procedure for amending or changing the CZO should the Planning Commission disapprove the amendment, supplement, or change or if a property owner protests such a change or an amendment. This provision states:

> In case the proposed amendment, supplement or change be disapproved by the Planning Commission, or a protest be presented duly signed and acknowledged by the owners of twenty percent or more either of the area of the lots included in such change, or of those immediately adjacent in the rear and on the side or sides thereof or of those directly opposite thereto, such amendment, supplement or change shall not become effective except by the favorable vote of three-fourths (¾) of all members of the City Council.

(emphasis added).

We understand from your letter, City Council desires an opinion on the procedure to amend section 54-943 and specifically, whether a three-fourths majority vote is required. Section 54-943 does not specifically state it applies to amendments to this provision. Thus, we must employ the rules of statutory interpretation. Just as a statute, "[w]hen interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used." Mikell v. Cty. of Charleston, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009). "The legislature's intent should be ascertained primarily from the plain language of the statute. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 622, 611 S.E.2d 297, 301–02 (Ct. App. 2005) (citations omitted).

Section 6-7-10 of the South Carolina Code (2004) states the purposes of zoning is

> to enable municipalities and counties acting individually or in concert to preserve and enhance their present advantages, to overcome their present handicaps, and to prevent or minimize such future problems as may be foreseen. To accomplish this intent local governments are encouraged to plan for future development; to prepare, adopt, and from time to time revise, a comprehensive plan to guide future local development; and to participate in a regional planning organization to coordinate local planning and development with that of the surrounding region. As aids in the implementation of the comprehensive plan local governments are encouraged to adopt and enforce appropriate land use controls, and cooperate with other governmental authorities.

> The provisions of this chapter are declared to be necessary for the promotion, protection, and improvement of the public health, safety, comfort, good order, appearance, convenience, prosperity, morals, and general welfare.
> Any county or municipality may, but shall not be required to, exercise any of the powers granted by this chapter. Whenever such a governing authority shall elect to exercise any of the powers granted by this chapter, such powers shall be exercised in the manner hereinafter prescribed.

Reading section 54-943 as whole in concert with the other provisions in the CZO and the purpose of zoning as provided by the Legislature, we believe it pertains to amendments and changes to the zoning map rather than amendments and changes to section 54-943. Section 54-943.a provides a method to "amend, supplement or change the regulations, restrictions or the district boundaries herein established or subsequently established." This provision indicates the amendments and changes relate to the actual use and location of the property, not a change in the procedures governing such restrictions and regulations.

We believe this reading of section 54-943 is constant with the authority granted to municipalities by the Legislature. Section 5-7-250 of the South Carolina Code (2004) provides that municipal councils determine their own rules. In addition, section 5-7-160 of the South Carolina Code (2004) states:

> All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law.
>
> A majority of the total membership of the council shall constitute a quorum for the purpose of transacting council business.

Thus, unless the Legislature provided otherwise, municipal councils are free to conduct municipal business how they see fit.

In prior opinions, this Office opined that a sitting council is not bound by the ordinances passed by previous councils. Op. Att'y Gen., 2006 WL 1376907 (S.C.A.G May 4, 2006); Op. Att'y Gen.,. 1997 WL 783377 (S.C.A.G Oct. 24, 1997). In our 1997 opinion, we addressed whether a city council could amend an ordinance to extend the time a city manager has to submit a budget to the council. Op. Att'y Gen.,. 1997 WL 783377 (S.C.A.G Oct. 24, 1997). Discussing the United States Supreme Court's ruling in Manigault v. Springs, 199 U.S. 473, 50 L.Ed.2d 274 (1905), we stated:

> An act, ordinance, or rule, once adopted, is not necessarily binding upon future legislative bodies, which bodies are free to amend or modify previous

> actions taken. See Manigault v. Springs, 199 U.S. 473, 50 L.Ed.2d 274 (1905); Op. Atty. gen. dated March 31, 1988. This is particularly true where, as here, such requirement relates to a time limit established by a prior council regarding submission of an item to future councils.
> In Manigault, a statute required the South Carolina legislature to follow certain procedures, including the necessity of a petition, prior to enacting private legislation. A subsequent legislature refused to follow the statutory procedure in enacting such legislation. The Supreme Court deemed the statutory procedure as having been amended by a subsequent legislature. The Court concluded:
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> > This law was doubtless intended as a guide to persons desiring to petition the legislature for special privileges, and it would be a good answer to any petition for the granting of such privileges that the required notice had not been given; but it is not binding upon any subsequent legislature, nor does the noncompliance with it impair or nullify the provisions of an act passed without the requirement of such notice. (Emphasis added.)
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> 199 U.S. at 487.

Id. Accordingly, not only are municipalities free to conduct business as they see fit, but they are also not bound by acts of prior councils.

Moreover, we did not find any state law requiring a three-fourths majority vote to change or amend the CZO. The Local Government Comprehensive Planning Enabling Act of 1994 is contained in chapter 29 of title 6. Section 6-29-760 of the South Carolina Code (2004), included in this act, governs the procedures for the enactment or amendment of zoning regulations or maps. In our review of this provision, we did not find a requirement that any such amendments be made by three-fourths or any other specified majority of the governing authority. Accordingly, we do not find a legislative mandate that amendments to zoning ordinances must be by a three-fourths majority of a city council. Pursuant to section 5-7-250, cited above, a municipality could adopt such a requirement, but we do not believe it is required.

Furthermore, we believe a municipality that adopts a super majority requirement to amend a zoning ordinance, as City Council did here, is not required to remove such a requirement by the vote of a super majority. As we explained in a 2012 opinion:

> The general rule was stated by the Court in Wright v. City of Florence, 229 S.C. 419, 93 S.E.2d 215 (1956), citing 6 McQuillin Municipal Corporations, § 21.10 as follows:

> 'Specific grant of power to repeal ordinances, however, ordinarily is not necessary since it is the general rule that power to enact ordinances implies power, unless otherwise provided in the grant, to repeal them. It is patently obvious that the effectiveness of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it.' The following is also quoted from the cited section of McQuillin: 'The power of repeal extends, generally speaking, to all ordinances. Indeed, a municipal corporation cannot abridge its own legislative powers by the passage of irrevocable ordinances. The members of its legislative body are trustees for the public, and the nature and limited tenure of their office impress the ordinances enacted by them with liability to change. One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government. Accordingly, in the absence of a valid provision to the contrary, a municipal council or assembly, having the power to legislate on, or exercise discretionary or regulatory authority over, any given subject may exercise that power at will by enacting or repealing an ordinance in relation to the subject . . .
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> Wright, 93 S.E.2d at 218; see Ops. S.C. Atty. Gen., March 14, 1991; July 3, 1984; February 14, 1978.

Op. Att'y Gen., 2012 WL 3057451 (S.C.A.G. July 11, 2012).

City Council's power to enact section 54-943 also entails the power to repeal, or in this case amend, it. Presumably, City Council enacted 54-943 via a simple majority vote. As such, we are of the opinion City Council would not be precluded from amending section 56-943 by the vote of a simple majority.

In our research, we did not find South Carolina case law specifically addressing the whether a super-majority vote is required to amend an act of legislative body imposing a super-majority vote requirement. However, other jurisdictions addressing this issue found such provisions may be repealed or amended by the same authority required to enact them. The Appellate Court of Illinois considered whether a city council rule requiring a two-thirds vote of the city council to change a city council rule could be changed by a the vote of a simple majority of the city council. Roti v. Washington, 500 N.E.2d 463 (Ill. App. Ct. 1986). The court considered other jurisdictions addressing this issue.

> In State ex rel. Kiel v. Riechmann (1911), 239 Mo. 81, 142 S.W. 304, the defendants, members of the Republican City Committee of the City of St. Louis, voted to change certain committee rules in the middle of its officers' term of office. Rule 1 stated that no officer could be removed without the vote

> of 18 committee members; rule 15 provided that the rules could not be "repealed or altered unless by a three-fourths majority vote of all the members * * *." (142 S.W. 304, 305–06.) A committee member proposed a resolution to amend rule 15 to require only a majority vote to amend the rules. The committee members voted 14 to 12 in favor of the motion, and by the same vote they amended rule 1 to require only a majority vote to change the committee's officers. The court addressed the question:
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> > "[D]oes a rule requiring a three-fourths vote to change the rules prevent a majority vote from changing that rule? Can a majority vote restrict its own power by such a rule, so that after such restriction the majority loses its potentiality? * * * [T]he power to make carries with it the right and power to unmake. The same power which can make rules in the first instance can directly attack and unmake or repeal such rules. * * * [If] by a bare majority rules are adopted, and among them is a rule saying that no change shall be made therein, except upon a three fourths vote of the members, then in such case, before the majority could proceed to enact new rules, it must first directly attack this rule which limited the power of the bare majority."
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> (142 S.W. 304, 309.) Similarly, the supreme courts of New Hampshire, Pennsylvania and Maryland have held that if the majority of a public body can make a rule imposing a supermajority requirement for the alteration of rules, a majority may also amend that rule. (Richardson, 58 N.H. 187; Commonwealth v. Mayor of Lancaster (Penn.1836), 5 Watts 152, 155–56; Zeiler v. Central Ry. Co. (Md.1896), 84 Md. 304, 35 A. 932.) Plaintiffs have cited no case which holds that an assembly's rule imposing a supermajority requirement for various actions may not itself be changed by the vote of a simple majority.

Id. at 467-68. The Appellate Court of Illinois affirmed the trial court's decision that a simple majority of the city council had the power to amend the rule requiring a super majority vote. Id.

Other jurisdictions made similar determinations. See Roosevelt v. City of Englewood, 492 P.2d 65, 67 (Colo. 1971) (recognizing a municipality's ability to amend an ordinance calling for a three-fourth's majority by a simple majority); S. Nevada Homebuilders Ass'n v. Clark Cty., 117 P.3d 171 (2005) (holding a "county zoning ordinance's supermajority approval requirement for nonconforming zone change applications violated its enabling statute and, thus, was invalid."); Homeowners For Fair Zoning v. City of Tulsa, 123 P.3d 67, 70 (Okla. Civ. App. 2005) (holding a "city ordinance requiring approval of protested zoning changes by three-fourths of the city council was superseded by city's amended charter, which recognized zoning authority and provided for adoption of new ordinances by simple majority.").

We are not positive our courts would come to the same conclusion as the jurisdictions referenced above. However, our courts recognize that along with the power to enact comes the power to repeal. As such, we believe if City Council enacted section 54-943 by a majority vote, a court would similarly find the City Council can change or amend it by a majority vote.

Conclusion

Reading the CZO as a whole and in light of its intended purpose, we are of the opinion that section 54-943.c does not impose a three-fourths majority voting requirement for amendments to section 54-943. In addition, we believe this interpretation is in accordance with the authority given to municipal councils by the Legislature and prior opinions of this Office finding if a municipality has the power to enact an ordinance, it also has the implied power to repeal such an ordinance and is not bound by the acts of prior councils.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General