

To: MAYOR & CITY COUNCIL

Note: City of Kennesaw, Ga.

From: R. RANDALL BENTLEY, SR./JAMIE WINGLER

Re: TERM LIMITS

Date: June 10, 2015

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### MEMORANDUM

We were asked to review an issue regarding the consideration of a resolution to call a Special Call Election for November 3, 2015 to include a ballot measure for term limits of elected officials, a "straw poll."

O.C.G.A. § 36-35-6 sets forth the limitations on home rule for municipalities and states in part that:

(a) **The power granted to municipal corporations** in subsections (a) and (b) of Code Section 36-35-3 **shall not be construed to extend to the following matters** or to any other matters which the General Assembly by general law has preempted or may hereafter preempt; **but such matters shall be the subject of general law or the subject of local Acts of the General Assembly** to the extent that the enactment of such local Acts is otherwise permitted under the Constitution:

**(1) Action affecting the composition and form of the municipal governing authority, the procedure for election or appointment of the members thereof, and the continuance in office and limitation thereon for such members . . .**

Under, the home rule provision, the City cannot enact an ordinance that imposes term limits on elected officials absent a general or local law enacted by the General Assembly. Therefore, to impose term limits on elected officials an amendment to the City Charter by the General Assembly would be necessary.

It is the opinion of the Attorney General that a "straw vote" or "public opinion poll" by a municipality is prohibited absent legislative authority. On September 4, 1990, the Attorney General issued the *Unofficial Opinion U90-20*. According to the Attorney General's website "The Attorney General does not generally provide legal advice, opinions or representation to county or municipal governments or officials, but will on request review the written legal opinions and conclusions of counsel for local governments. **Opinions issued to the Governor and the heads of the executive departments are classified as "Official Opinions." Those issued to other state officers (such as legislators, judges or district attorneys) are classified as "Unofficial Opinions."**"

**The City of Kennesaw looked at this issue and their City Attorney determined they could not impose term limits at the City level and that the only way they could was by an amendment to Kennesaw's Charter in the General Assembly.** (Page 1 of the 2 page opinion.)

Originally, the City [of MARIETTA] went to the State Legislature to have the change of term limits made as required under O.C.G.A. § 36-35-6. When that was not successful, the following (20170416) was placed on the Council Work Session Agenda on May 8, 2017.

**20170416 Judicial Relief Under Home Rule pursuant to Article IX, Paragraph II of Georgia Constitution**

Consideration of pursuing judicial relief under Home Rule pursuant to Article IX, Paragraph II of Georgia Constitution to mandate the Charter Amendment of Section 2.4 of City Charter which was unreasonably denied by the Georgia Legislature. Said provisions of the proposed City Charter Amendment dealt with Term Limits and clarification of election date of November rather than the incorrect October, both of which are Constitutional and Reasonable. OCGA § 36-35-6(1) should not bar the Georgia Constitution provision of Home Rule as the proposed amendments meet the ultimate of Home Rule based upon being mandated overwhelmingly by the Citizens directly (80% majority vote) and did not alter the composition or the makeup of Mayor and Council, thus reasonable and constitutional. Further, to deny by a lack of public and open action the right of the City to correctly state the election month which is statutorily provided should be done by judicial since not approved by the Georgia Legislature.

*Requested by Mayor Tumlin*

Then, apparently after deciding that was not a good avenue, decided to directly make the change, without authority, and force someone to fight the City on the issue.

The Mayor is an attorney and a former member of the Georgia House of Representatives. He knows the process and came up short in his desired result. Can term limits legally be enacted? Yes. **However, it requires the act of the Legislature as this is one of the items that the State Legislature reserved to itself and did not delegate to the individual cities.**

The enacting of term limits is on its face clearly an **action affecting the procedure for election of the members thereof, the continuance in office and limitation thereon for such members and such action is not otherwise allowed in State law.**

The proposed action prohibits a member that has served more than 12 years (three consecutive terms), after the effective date, from qualifying for the same office, continuing in office and is a limitation of serving further, continuously in said office in violation of State Law.

The City does not have the ability to amend its charter as a matter of right.

GA CONST Art. 9, § 2, ¶ II

Paragraph II. Home rule for municipalities

The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly.

It comes from the Ga. Constitution which, in essence, states the municipalities have the authority provided by the General Assembly. The General Assembly has delegated the following authority to Municipalities with some exceptions.

§ 36-35-3. Home rule for municipalities

(a) The governing authority of each municipal corporation shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which are not inconsistent with the Constitution or any charter provision applicable thereto. Any such charter provision shall remain in force and effect until amended or repealed as provided in subsection (b) of this Code section. This Code section, however, shall not restrict the authority of the General Assembly, by general law, to define this home rule power further or to broaden, limit, or otherwise regulate the exercise thereof. The General Assembly shall not pass any local law to repeal, modify, or supersede any action taken by a municipal governing authority under this Code section, except as authorized under [Code Section 36-35-6](#).

Doug highlighted the first part of 36-35-3 (a) in his presentation but neglected to highlight the exception in 36-35-3 (b) which limits the ability of a municipality to act under Home Rule.

(b) Except as provided in [Code Section 36-35-6](#), a municipal corporation may, as an incident of its home rule power, amend its charter by following either of the following procedures:

§ 36-35-6. Limitations on home rule for municipalities

Effective: July 1, 2015

(a) The power granted to municipal corporations in subsections (a) and (b) of [Code Section 36-35-3](#) **shall not be construed to extend to the following matters** or to any other matters which the General Assembly by general law has preempted or may hereafter preempt; but such matters shall be the subject of general law or the subject of local Acts of the General Assembly to the extent that the enactment of such local Acts is otherwise permitted under the Constitution:

(1) **Action affecting the composition and form of the municipal governing authority, the procedure for election or appointment of the members thereof, and the continuance in office and limitation thereon for such members**, except as authorized in Chapter 2 of Title 21 or as provided in [Code Section 36-35-4.1](#);

**What are the exceptions?**

[Code Section 36-35-4.1](#) deals with reapportionment and is not at issue here.

[Chapter 2 of Title 21](#) is what Doug is hanging his hat on, but is not an issue here.

§ 21-2-541.1. Term of municipal offices

All municipal offices elected at general municipal elections shall be for terms of four years unless otherwise provided by local law in accordance with [Code Section 21-2-541.2](#). Unless otherwise provided for by the municipal charter, municipal officeholders shall be sworn in at their first organizational meeting of the new year and will hold office until their successors are duly elected and qualified and take said oath of office.

§ 21-2-541.1. only deal with defining a single term of office. It does not deal with term limits, the continuation in office of an elected official. The word term is not even used in the paragraph. **It refers only to “the continuation in office and limitation thereon for such members.....”**

LEE  
v.  
CITY OF VILLA RICA et al.

No. S94A0885.  
|  
Nov. 7, 1994.

Appellant argues that, **because of the residency requirement, the de-annexation statute, a local act, shortened his term as a local elected official during the term to which he was elected, without the approval of the citizenry as expressed in a local referendum.**<sup>6</sup>

[7] “To abolish an office means to abrogate, annihilate, destroy, extinguish, or put an end to it. [Cits.]” *Webb v. Echols*, 211 Ga. 724, 726, 88 S.E.2d 625 (1955). To shorten or lengthen the term of the office means to modify the statutorily-set, definite extent of time an elective office may be held. The contested legislation at bar neither extinguished the office of mayor of Villa Rica nor modified the term of the office; rather, it, in conjunction with the city charter, only created a vacancy in the office of mayor. See *Smith v. Abercrombie*, 235 Ga. 741, 748, 221 S.E.2d 802 (1975). Compare *Manning v. Upshaw*, 204 Ga. 324(3), 49 S.E.2d 874 (1948). We conclude that OCGA § 1–3–11 and its requirement of a local referendum is not applicable because the de-annexation act neither abolished the office of mayor of Villa Rica nor shortened or lengthened the term of office.

[8] 3. Lastly, appellant argues that he was removed from office by a procedure other than one listed in the city charter for **\*\*299** the removal of elective officers. Ga.L.1975, p. 4575, § 5.31. At the commencement of the hearing on Lee’s petition for declaratory judgment and the defendants’ counterclaim for declaratory judgment, counsel for Lee informed the court that the parties were “prepared to submit this case to your honor and let it rest in the breast of the court on the stipulated facts and on the briefs....” At no time before the trial court did Lee contest the procedure that he had initiated. Lee’s failure to raise an objection to the procedure before the trial court and his acquiescence in the procedure used, preclude him from asserting on appeal that improper procedure was followed.

4. In light of our opinion set forth above, appellees' motion for supersedeas or an order clarifying the scope of supersedeas under OCGA § 5-6-46(a) is dismissed as moot.

*Judgment affirmed.*

All the Justices concur.

### All Citations

264 Ga. 606, 449 S.E.2d 295

### Footnotes

<sup>1</sup> Municipal boundaries may be changed only by local legislation of the General Assembly "or by such methods as may be provided by general law." OCGA § 36-35-2(a). While an entire chapter of Title 36 is devoted to the means by which a municipality's boundaries may be changed by *annexation*, methods of de-annexation have not been similarly enacted. Thus, de-annexation may only be accomplished by passage of local legislation in the General Assembly. See Sentell, "Municipal De-Annexation: The Ins and the Outs," *Georgia State Bar Journal*, Vol. 27, pp. 118, 128.

This case deals with deannexation and the effect of someone no longer be eligible to serve in the office for not meeting residency requirements. The yellow highlighted portion by Doug only deals with if the individual Statutory term the person is currently serving is shortened. It is not a term limit for successive terms or continuing to serve in office after that particular term is up while meeting the other requirements of office and is irrelevant to the issue of term limits or the continuation in office due to term limits.

The footnote at the bottom is interesting to note as specific authority had not been statutorily give to deannex, it took an act of the State Legislature to do. Not different here on the issue of term limits.

Section 2.16 - Powers of council enumerated; not deemed exclusive.

The corporate powers of the city, to be exercised by the city council, shall include, but shall not be limited to, the following:

(59) Additional powers generally. To have all powers possible for a city to have under the present or future constitution and laws of this state as fully and completely as though they were specifically enumerated in this charter; to exercise and enjoy all other powers, functions, rights, privileges and immunities necessary or desirable to promote or protect the safety, health, peace, security, good order, comfort, convenience, morals and general welfare of the city and its inhabitants; and to exercise all implied powers necessary to carry into execution all powers granted in this charter as fully and completely as if such powers were fully enumerated herein; and to exercise all powers now or in the future authorized to be exercised by municipal governments under the constitution and other laws of the state. No enumeration of particular powers in this charter shall be held to be exclusive of others nor restrictive of general words and phrases granting powers; but shall be held to be in addition to such powers **unless expressly prohibited to municipalities under the constitution or applicable public acts of the state.**

Section 2.17 - Liberal construction of powers.

The powers of the city shall be construed liberally and in favor of the city. The specific mention or failure to mention particular powers in this charter shall not be construed as limiting in any way the general power of the city as stated in this charter. It is the intention hereof to grant the city full power and right to exercise all governmental authority necessary for the effective operation and conduct of the city and all of its affairs.

**Again, see § 36-35-6. Limitations on home rule for municipalities.**

§ 36-35-6. Limitations on home rule for municipalities

Effective: July 1, 2015

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(1) **Action affecting** the composition and form of the municipal governing authority, **the procedure for election or appointment of the members thereof, and the continuance in office and limitation thereon for such members**, except as authorized in Chapter 2 of Title 21 or as provided in [Code Section 36-35-4.1](#);

§ 1-3-11. deals with abolishing an office or shortening or lengthening the term of office. It does not deal with term limits.

Ga. Code Ann., § 1-3-11

§ 1-3-11. No office to be abolished nor term shortened or lengthened by local Act during term to which person has been elected

No office to which a person has been elected shall be abolished nor the term of the office shortened or lengthened by local or special Act during the term for which such person was elected unless the same shall be approved by the people of the jurisdiction affected in a referendum on the question.

§ 36-35-3 (b) (2) was mentioned as a crutch to claim that the City could amend the Charter after a referendum. However, it is not applicable for two likely reasons. 1) the exception at the end of the paragraph “**No amendment under this subparagraph shall be valid if provision has been made therefor by general law.**” And 2) even if it were applicable, the steps required therein were not followed.

(2) (A) **Amendments to charters or amendments to or repeals of ordinances, resolutions, or regulations adopted pursuant to subsection (a) of this Code section may be initiated by a petition, filed with the governing authority of the municipal corporation, containing, in cases of municipal corporations with a population of 5,000 or less, the signatures of at least 25 percent of the electors registered to vote in the last general municipal election; in cases of municipal corporations with a population of more than 5,000 but not more than 100,000, at least 20 percent of the electors registered to vote in the last general municipal election; and in cases of municipal corporations with a population of more than 100,000, at least 15 percent of the electors registered to vote in the last general municipal election. The petition shall specifically set forth the exact language of the proposed amendment or repeal. The governing authority shall determine the validity of such petition within 50 days of its filing with the governing authority.** In the event that the governing authority determines that such petition is valid, it shall be the duty of such authority to issue the call for an election for the purpose of submitting such amendment or repeal to the registered electors of the municipal corporation for their approval or rejection. **Such call shall be issued within one week after the determination of the validity of the petition.** The governing authority shall set the date of the election as provided in Code Section 21-2-540. The governing authority shall cause a notice of the date of the election to be published in the official organ of the county of the legal situs of the municipal corporation or in a newspaper of general circulation in the municipal corporation once a week for two weeks immediately preceding such date. The notice shall also contain a synopsis of the proposed amendment or repeal and shall state that a copy thereof is on file in the office of the clerk or the recording officer of the municipal governing authority and in the office of the clerk of the superior court of the county of the legal situs of the municipal corporation, for the purpose of examination and inspection by the public. The recording officer of the municipal governing authority shall furnish anyone, upon written request, a copy of the proposed amendment. **If more than one-half of the votes cast on the question are for approval of the amendment or the repeal, the same shall become of full force and effect;** otherwise it shall be void and of no force and effect. The expense of the election shall be borne by the municipal corporation. It shall be the duty of the governing authority to hold and conduct such election. The election shall be held under the same laws and rules and regulations as govern special elections of the municipal corporation, except as otherwise provided in this subparagraph. It shall be the duty of the governing authority to canvass the returns and to declare and certify the result of the election. It shall be the further duty of the governing authority to certify the result thereof to the Secretary of State. A referendum on any such amendment or repeal shall not be held more often than once each year. **No amendment under this subparagraph shall be valid if provision has been made therefor by general law.**

(C) The sponsor of a petition authorized by this paragraph shall obtain copies of all official petitions from the clerk of the governing authority. The clerk of the governing authority shall approve all petitions as to form. The clerk of the governing authority shall provide a place on each form for the person collecting signatures to provide his or her name, street address, city, county, state, ZIP Code, and telephone number and to swear that he or she is a resident of the municipality affected by the petition and that the signatures were collected inside the boundaries of the affected municipality. The collection of signatures for the petition shall begin on the day the clerk of the governing authority provides official copies to the sponsor of the petition. A petition authorized by subparagraph (A) of this paragraph shall not be accepted by the governing authority for verification if more than 60 days have elapsed since the date the sponsor of the petition first obtained copies of the petition from the clerk of the governing authority. Any petition being circulated pursuant to subparagraph (A) of this paragraph on July 1, 1989, shall be filed with the clerk of the governing authority by not later than July 11, 1989. The clerk of the governing authority shall, within seven days, provide the sponsor with official petitions. The sponsor shall have 60 additional days after obtaining official petitions to collect the remaining number of required signatures. Nothing in this subparagraph shall invalidate otherwise valid signatures collected on or before July 1, 1989.

Attempting to take a right away to run for office that is not done through the correct process may result in a violation of the following:

## **42 U.S. Code § 1983 - Civil action for deprivation of rights**

**Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.**

(R.S. § 1979; [Pub. L. 96-170](#), § 1, Dec. 29, 1979, [93 Stat. 1284](#); [Pub. L. 104-317](#), title III, § 309(c), Oct. 19, 1996, [110 Stat. 3853](#).)

# 42 U.S. Code § 1988 - Proceedings in vindication of civil rights

## (b) Attorney's fees

In any action or proceeding to enforce a provision of sections [1981](#), [1981a](#), [1982](#), [1983](#), [1985](#), and [1986](#) of this title, title IX of [Public Law 92-318](#) [[20 U.S.C. 1681](#) et seq.], the Religious Freedom Restoration Act of 1993 [[42 U.S.C. 2000bb](#) et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [[42 U.S.C. 2000cc](#) et seq.], title VI of the Civil Rights Act of 1964 [[42 U.S.C. 2000d](#) et seq.], or [section 13981 of this title](#), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

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**Based upon the above 12 pages, I disagree with the Motion approving term limits, it is the reason I will vote against the Motion and I file this as part of the minutes as the explanation for my vote.**

**Philip M. Goldstein  
Councilman, Ward 7**