



State of West Virginia
Office of the Attorney General

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The Honorable F. Cody Pancake, III
Mineral County Prosecuting Attorney
P.O. Drawer 458
Keyser, WV, 26726

Dear Prosecutor Pancake:

You have asked for an Opinion of the Attorney General concerning the requirements under state law to remove a city council member from office. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General “may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office.” To the extent this Opinion relies on facts, it is based solely on the factual assertions in your correspondence with the Office of the Attorney General.

In your letter, you indicate that the Keyser City Council (“City Council”) voted last year to remove a member from office. You explain that your office has received a complaint about whether the process used to remove this member complied with applicable law. As we understand from our communications with your office and publicly available information, the City Council adopted a resolution purporting to remove a member from office on the grounds of “conduct unbecoming an elected official, slanderous remarks, and creating a hostile work environment.” The City Council indicated that in taking these actions it relied on a provision in Keyser’s city charter governing removal of city council members.

Your letter raises the following legal question:

May a city council remove a member pursuant to the process set forth in the city’s charter if that process conflicts with the process for removing municipal officers established by state law?

We conclude that cities may set procedures by which a city council may remove one of its own members from office, provided that such process does not conflict with state law. Here, where it appears that the City Council purported to remove a member in a manner directly at odds with applicable state law—specifically, the process outlined in West Virginia Code § 6-6-7—the state law process controls.

Discussion

The West Virginia Constitution grants municipalities “home rule authority,” which empowers them to “pass all laws and ordinances relating to [their] municipal affairs.” W. Va. Const. art. VI, § 39(a). Broadly speaking, home rule gives cities “plenary power and authority . . . to provide for the government, regulation and control of the city’s municipal affairs” through charter provisions or ordinance. W. Va. Code § 8-12-2(a). Nevertheless, this power extends only to actions consistent with the Constitution and state law; any municipal “charter or amendment thereto, and any [city] law or ordinance” is “invalid and void if inconsistent or in conflict with the constitution or the general laws of the state.” W. Va. Const. art. VI, § 39(a); *see also* W. Va. Code § 8-12-2(a) (cities have plenary power “by charter provision [or] ordinance” “not inconsistent or in conflict” with the Constitution or general laws”).

The requirement that municipal charters and codes may not conflict with state law is generally interpreted to mean that any local law squarely contradicting state law is void. By contrast, a charter provision or municipal code will not be invalidated simply because it addresses the same general topic as a state statute or constitutional provision; the laws must actually be “inconsistent or in conflict.” W. Va. Const. art. VI, § 39(a). For example, the Supreme Court of Appeals invalidated a local provision that established a process by which voters could challenge municipal service fees that was more lenient than the process governing the same issue under the West Virginia Code. *Miller v. Palmer*, 175 W. Va. 565, 569, 336 S.E.2d 213, 217 (1985). The Court reached the opposite result when addressing a challenge to city charter procedures by which municipal officers who become ineligible to hold office are forced to forfeit their offices. *Stamm v. City of Salem*, 2013 WL 6604855, at *2 (W. Va. Dec. 16, 2013) (mem. decision). There, the Court found no direct conflict with state law: As discussed more below, West Virginia Code Section 6-6-7 sets forth the process for *removing* a municipal officer *for cause*. The challenged local provision involved “*forfeiture of office due to ineligibility*”—distinctions the Court found sufficient to deem the local law consistent with Section 6-6-7. *Id.* (emphases added).

Where a local ordinance or charter does, in fact, conflict with state law, that provision is “unenforceable.” *State ex rel. City of Charleston v. Hutchinson*, 154 W. Va. 585, 593, 176 S.E.2d 691, 696 (1970) (quoting Syl. pt. 2, *State ex rel. Constanzo v. Robinson, Judge*, 87 W. Va. 374, 104 S.E. 473 (1920)); *see also* Syl. pt. 2, *Miller* 175 W. Va. at 566, 336 S.E.2d at 214 (“In the event of an inconsistency or conflict between a provision of a city charter and a general law, the latter will prevail”); *Marra v. Zink*, 163 W. Va. 400, 404, 256 S.E. 2d 581, 584-85 (1979) (“If a city charter provision conflicts with either our Constitution or our general laws, the provision, being the inferior law, must fail.”). Similarly, any action a city council takes under color of an unenforceable ordinance or charter provision is void. *See State v. Robinson*, 87 W. Va. 374, 104

S.E. 473, 476-77 (1920) (writ of prohibition issued to prohibit prosecution under an ordinance that contradicted a state statute).

As relevant to your question, West Virginia Code Section 6-6-7 governs the removal process for individuals “holding any county, school district, or municipal office,” elected or appointed, where the office’s “term or tenure” is “fixed by law.” W. Va. Code § 6-6-7(a). The statute further provides that these officers may be removed “in the manner provided in this section for official misconduct, malfeasance in office, incompetence, neglect of duty or gross immorality or for any of the causes or on any of the grounds provided by any other statute.” *Id.* City council members are elected “municipal officers” subject to these procedures. *Papandreas v. Kawecki*, 2017 WL 383782, at *4 (W. Va. Jan. 27, 2017) (mem. decision) (applying the Section 6-6-7 framework to an appeal involving a petition to remove Morgantown City Council members); *see also* W. Va. Code §§ 8-5-7 (providing for election of council members), 8-5-9 (fixing term of office for municipal officers).

Because “[t]he remedy for the removal from office of a public officer is a drastic remedy,” Section 6-6-7 “is given strict construction.” Syl. pt. 2, *Smith v. Gooby*, 154 W. Va. 190, 190, 174 S.E.2d 165, 167 (1970) (reversing circuit court and ordering officer be reinstated). The removal process may be initiated only by “a duly enacted resolution of the governing body of the municipality,” “the prosecuting attorney of the county,” or a petition by a qualified number of citizens. W. Va. Code § 6-6-7(b)(2)(A)-(C). Once a removal is initiated through one of these means, it must be prosecuted. In cases where removal is initiated by resolution, a certified copy of the resolution must be “served by the clerk of the . . . municipal governing body upon the circuit court in whose jurisdiction the officer serves within five business days.” *Id.* § 6-6-7(c). The governing body is then responsible for prosecuting the removal before a three-judge panel. Only the court has authority to remove the officer: the court “shall remove” the individual from office “upon satisfactory proof of the charges by clear and convincing evidence.” *Id.* § 6-6-7(c), (g); *see also* Syl. pt. 3, *Smith*, 154 W. Va. at 190, 174 S.E.2d at 167 (“[Section 6-6-7] expressly requires that to remove a person from office the charge against him must be established by satisfactory proof.”).

It does not appear that the City Council complied with the Section 6-6-7 process. Even assuming that the vote to remove the member in question satisfied the requirement to initiate removal of an officer through a “duly enacted resolution of the governing body of the municipality,” there is no indication that the removal process was completed. The City Council does not appear to have served a copy of the resolution on the circuit court in Mineral County, nor proven the charges against the member in question before a three-judge panel. And because only the court may remove an officer pursuant to the statute, the removal process here was incomplete.¹

¹ We note that the Section 6-6-7 process applies only to involuntary removal; an individual may choose to resign from municipal office even in circumstances where removal proceedings do not comply with state law.

The critical question, then, is whether the City Council's alternate process for removing council members is "inconsistent or in conflict with" Section 6-6-7. We conclude that it is.

This situation is not like *Stamm*, where the local law related to a separate (albeit related) topic than that addressed under state law. There, the local process governing forfeiture of office due to ineligibility could coexist with the state-law process for removing an officer for cause. The same is not true here: Section 6-6-7 and Keyser's local code both govern removal of municipal officers for cause. Following the local process necessarily omits elements of the state-law process, creating a direct conflict with state law. And just as a local process for challenging municipal service fees could not stand in the face of a more stringent state law governing that same process in *Miller*, so too for a local provision for removing city council members that omits Section 6-6-7's evidentiary standards and judicial oversight. Thus, because municipalities' powers do not extend to specifying removal procedures for cause that are inconsistent with Section 6-6-7, the City Council cannot rely on local provisions allowing for removal of a council member solely by vote of the remaining members.

Sincerely,



Patrick Morrissey
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Lindsay See
Solicitor General

Thomas Lampman
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