HENRY MCMASTER
ATTORNEY GENERAL

March 16, 2010

The Honorable James E. Smith
Member, House of Representatives
335C Blatt Building
Columbia, South Carolina 29201

Dear Representative Smith:

You have requested an opinion regarding S.C. Code Ann. § 5-7-200(b) and its applicability to the current vacancy on the Columbia City Council. Such provision states:

> [a] vacancy in the office of mayor or council shall be filled for the remainder of the unexpired term at the next regular election or at a special election if the vacancy occurs one hundred eighty days or more prior to the next general election.

It has been the consistent and long-standing opinion of this Office, dating at least back to 1979, that if any vacancy occurs less than 180 days before the next "regular" or "general" election, the vacancy must be filled at that general election. We are advised that Columbia's general election is to be held on April 6. Thus, the vacancy, which occurred on March 9, 2010, occurred less than 180 days prior to April 6.

A prior opinion of this Office, dated May 24, 1994, and referencing Section 5-7-200(b), states that "[t]he word 'shall' in a statute connotes that the legislature intended to mandate the event occur." That opinion cited a previous opinion of this Office dated June 1, 1979 stating "[i]t has been the prior opinion of this office that the language in Section 5-7-200(b) is clearly mandatory and cannot be waived." The June 1, 1979 opinion specifically stated as to the language of Section 5-7-200(b) "[t]his language is unequivocal and is clearly intended to be mandatory. Therefore, it cannot be waived." See also: Ops. Atty. Gen. dated May 11, 1994 [referencing Section 5-7-200(b), "...a special election must be held if the vacancy occurs one hundred eighty days or more prior to the next election. If the resignation occurs less than one hundred eighty days prior to the general election, the office will be filled at the general election."]; May 19, 1983 ["...general election law as set out at Section 5-7-200(b) would require a special election to be held if the vacancy occurs one hundred eighty (180) days or more prior to the next general election."]; February 8, 1982 ["If a vacancy occurs on a city council one hundred eighty (180) days or more prior to a general election, that vacancy is filled by a special election. If the vacancy occurs less than one hundred eighty (180) days before a general election, the vacancy is filled at the general election."].

It has been argued by the City Attorney that S.C. Code Ann. Section 5-15-50 must be read in conjunction with Section 5-7-200 so that the notice requirements of that statute must be met with respect to any election held for filling the vacancy pursuant to Section 5-7-200. Section 5-15-50 allows municipal bodies to establish by ordinance the time for general and special elections. Section 5-15-50 further provides that "[p]ublic notice of the elections shall be given at least sixty days prior to such elections."

Our Supreme Court has recognized that when courts are confronted with an apparent conflict between a specific statute on a subject and a more general one of the same subject, the Court is obligated to examine the statutes carefully and harmonize any apparent conflicts. *Criterion Insurance Company v. Hoffman*, 258 S.C. 282, 188 S.E.2d 459 (1972). Repeals by implication are not favored and thus there must be a true conflict between the two statutes. *Opin. S.C. Atty. Gen.* August 5, 1986. Where, however, conflicts may not be reconciled, a specific statute will prevail over a general one. *Id.*

Thus, the question here is whether Section 5-7-200 may stand alone, thereby requiring that the vacancy be filled on April 6, pursuant to the literal language of Section 5-7-200, as well as our previous opinions, or whether Section 5-7-200 must instead be modified to the extent that Section 5-15-50's sixty day notice requirement must also be fulfilled. The result of this latter interpretation is that Section 5-7-200 would be repealed, at least in part, by Section 5-15-50.

Sections 5-7-200 and 5-15-50 were originally enacted as part of the same statute. These two provisions are contained in different parts of Act No. 283 of 1975, one dealing with the requirements for scheduling and holding a municipal election (now Section 5-15-50) and the other encompassing vacancies in the offices of mayor and council (now Section 5-17-200). Thus, it does not appear that the General Assembly intended to treat these two provisions as one. Moreover, consistent with this, Section 5-15-50 appears to relate to the scheduling of and notice for municipal elections generally. Accordingly, in our view, Section 5-7-200, the specific statute, would likely prevail over the more general provision contained in Section 5-15-50.

Thus, based upon the literal requirements of Section 5-7-200, as well as our long-standing opinions interpreting this provision, the City Council of Columbia, which has scheduled the election to fill the vacancy for April 6, would be within its right to do so. Based upon the face of the statute, therefore, we cannot conclude that the election to fill the vacancy for Councilman Cromartie cannot be held on that date.

However, a statute may be constitutional on its face, but unconstitutional in its application. *McIntyre v. Ohio Election Comm.*, 514 U.S. 334, 356, n. 21 (1995). Moreover, the right to vote is fundamental, and must be afforded the fullest constitutional protection. *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). As the United States Supreme Court recognized in *Burdick*, "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Id.* As part of the fundamental right to vote's guarantee, due process

requires that the state or, in this case, the municipality must "give the voters sufficient notice" of what is being voted upon. *Jones v. Bates*, 127 F.3d 839, 863 (9th Cir. 1997). And, as has been stated generally,

> [i]t is essential ... to the validity of an election that the electors have notice of the election in some form either actual or constructive. The test for determining whether an election is invalid for want of notice prescribed by a statute is whether, on the one hand, the voters generally had knowledge of the election and a full opportunity to express their will, or whether, on the other hand, the omission resulted in depriving a sufficient number of the electors the opportunity to exercise their franchise to change the result of the election.

29 C.J.S. *Elections*, § 138. As one court has stated, the primary purpose of giving notice of an election is "to ensure that the public is aware" of the election. *Bd. of Ed. of Indian Prairie Sch. Dist. No. 204 v. DuPage Co. Election Comm.* 793 N.E.2d 954, 958 (Ill. 2003).

In this instance, Section 5-7-200 provides for no notice. Thus, a constitutional issue is raised in the application of the statute. By way of example, had a vacancy occurred 179 days prior to the next regular or general election, there would be no constitutional issue because adequate notice to the public could be given in order to inform voters fully. However, on the other hand, if the vacancy occurred a day or two prior to the election, Section 5-7-200 makes no provision to insure that voters are adequately and sufficiently informed of the issues prior to filling the vacancy at the "next regular" or "general election" pursuant to the express terms of Section 5-7-200. The General Assembly did not address the question of how much time is sufficient to conduct the election pursuant to Section 5-7-200. We believe it should do so in the future to insure that the situation raised here is not repeated. Moreover, our previous opinions do not deal with a situation, such as here, where there is such a short period of time before Columbia is to hold its municipal elections.

Thus, in this situation, a legitimate constitutional question of timing is apparent. If the election is conducted on April 6, as the City Council has a right to do, pursuant to the literal terms of Section 5-7-200, a court challenge will likely ensue. Such a challenge would likely be based upon the fundamental right to vote and whether Section 5-7-200 is unconstitutional as applied in this instance. Such a judicial challenge may well prevail, but any determination of unconstitutionality must be made by a court. Accordingly, in our opinion, this question should thus be addressed by a court as quickly as possible.

Yours very truly,

Henry McMaster

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