ALAN WILSON
ATTORNEY GENERAL

September 7, 2011

The Honorable Michael L. Fair
Senator District No. 6
P. O. Box 14632
Greenville, South Carolina 29610

Dear Senator Fair:

You have asked whether the Greenville Legislative Delegation must "use the weighted vote of the entire Delegation, or may we use the weighted vote of a quorum, present and voting, to determine the outcome of a motion." You note, by way of background, that "there were two elections that were contested based on a point of order raised by Senator Shane Martin (District 13) who is a member of the Greenville Delegation." You have attached Senator Martin's point of order.

In your letter, you reference several Rules of the Greenville County Legislative Delegation. You cite the following:

> Rule 1B of the Greenville County Legislative Delegation states that a majority of the members constitutes a quorum. We have 19 members so a quorum (a minimum of 10) must be present to conduct business.
>
> Rule III L states a member must be present to vote. Rule III says that if our rules do not cover a specific point then the Delegation's practice or precedent will rule ... .
>
> 3. Rule 3F says to make State or regional appointments as required by law. (All State appointments shall be according to the Act establishing the same and appointments state "including the Senator" or language of similar import shall require a majority of the "weighted vote" of House members and a majority of the "weighted vote" of Senators.)
>
> 4. Finally, Rule IIIM says that prior conduct of the body governs procedure when the rule is not specific to a point. Traditionally, we have used the weighted vote of those present and voting to determine the winners or losers.

Senator Martin's point of order states as follows:

> [d]uring the meeting of the Greenville County Legislative delegation on July 11th, 2011, I raised a point of order. We had 14 members present (a quorum) to conduct the meeting. Under our rules we used weighted voting to determine all nominations/appointments to boards, commissions, etc. The purpose of weighted voting ensures the "one man one vote" principle to make sure everyone is represented equally. In Columbia, we all

represent the same amount of people, therefore our votes count as one and the majority of votes wins. On the delegation level, each member represents a different number of people within a county and therefore has a different weighted vote. The weighted vote is determined by giving the House of Representatives members 50% and the Senate members 50%. Each Senator or House member is given a portion of that 50% based on the number of people he represents. Each member has a weighted percentage that is assigned as their vote. In order to get a majority to declare a winner, at least 50.001% must be achieved. When paperwork is sent to the Governor's office for appointments, the weighted vote sheet must be signed by at least 50.001% of weighted vote. Weighted vote is based on the body – NOT those present and voting.

On the vote for Greenville Delegation Transportation Committee two candidates received votes. One candidate received 48.??% of the vote and the other candidate received 28.??% of the vote. Since neither candidate received a weighted majority of at least 50.001%, I raised the point that a winner could not be declared. We could either take another vote to see if votes changed or we would have to hold another election when more members were present. If my point of order is not sustained, then we set a dangerous precedent and will not be following the weighted vote rules. If not sustained, we will actually be voting by another method since weighted voting is based off of the entire body – NOT those present and voting. If a winner is declared without at least 50.001% of the weighted vote, then the weighted votes of members will be effectively changed. You would be creating a new weighted system based off of those present and voting which would totally change the concept of the weighted vote. Whoever was present and voting would be given a higher percentage of representation for those that they represent. This might be considered an extreme advantage for the four precincts that I represent, but that wouldn't make it right. I make this point of order out of respect for principle and to follow the rule of law. I urge you to sustain this point of order and apply the weighted vote correctly to follow the "one man one vote" principle.

On the vote for the Greenville County Board of Registration, two candidates received votes from the Greenville County Senatorial Delegation. Neither candidate received at least 50.001% of the weighted vote of the Senatorial Delegation, so I raised the same point of order as before.

Law / Analysis

In an opinion, dated March 16, 2009, we addressed the effect of *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999), upon the ordinary requirements concerning determination of a quorum for meetings of legislative delegations. In *Vander Linden*, the Fourth Circuit recognized that the Supreme Court had concluded that "'the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly or equal population as is practicable.'" 193 F.3d at 272 (quoting *Reynolds v. Sims,* 377 U.S. 533, 577 (1964)). Based upon *Reynolds* and other Supreme Court decisions, *Vander Linden* held that the "one person, one vote" mandate of the Equal Protection Clause is also applicable to South Carolina's legislative delegations. In

the Court's opinion, based upon the parties' stipulation, county legislative delegations in South Carolina "actually 'perform numerous and various general county governmental functions,'" which include

> ... approving or recommending expenditures for various activities, approving local school district budgets, initiating referenda regarding special-purpose governing bodies in public service districts, approving reimbursement of expenses for county planning commissioners, approving county planning commission contracts, altering or dividing county school, reducing special school levies, submitting grant applications for park and recreation facilities, and making or recommending appointments.

193 F.3d at 276. The Court also referenced numerous statutes empowering legislative delegations to perform various governmental functions, *Id.* at 276-277, and thus concluded:

> [g]iven the array of state statutes empowering the delegation to perform fiscal, regulatory and appointive functions and the parties' stipulation that the delegations do "perform" such functions, we have little difficulty concluding that the legislative delegations exercise "governmental functions" and so fall within the scope of the one person, one vote mandate.

Id. at 277-278. The Fourth Circuit outlined the system to be cured as follows:

> South Carolina legislators are elected from districts that contain parts of more than one county. Upon election to the General Assembly, each legislator automatically becomes a member of the legislative delegation of every county containing territory that falls within the legislators' district. Generally, each member of a delegation has one vote in delegation decisions regardless of the number of constituents he or she has in the county. The voters presented uncontroverted evidence that some legislators are members of the legislative delegation of a county in which they have relatively few constituents, and that some are even members of delegations for which they have no constituents at all.

193 F.3d at 271.

In our 2009 Opinion, referenced above, we analyzed the Court's decision in *Vander Linden*, as well as other authorities, finding that:

> ... we cannot conclude that *Vander Linden* has set aside the method of determination of a quorum recognized by the common law and codified in the Freedom of Information Act. See, S.C. Code Ann. § 30-4-20(d). While this conclusion is not free from doubt, we believe there is sufficient distinction between the purposes of the quorum for purposes of determining whether a meeting may proceed, and the "one person, one vote" constitutional requirements imposed by *Vander Linden*.

Moreover, in *Mitchell v. Spartanburg Co. Legislative Delegation*, 385 S.C. 621, 685 S.E.2d 812 (2009), our Supreme Court also applied *Vander Linden.* The Court concluded that the "one person, one vote" requirements of *Vander Linden* were inapplicable to the election of county legislative delegation

officers and that such election could constitutionally be conducted by a simple majority vote. Quoting the *Vander Linden* opinion, the Court reasoned as follows:

> [i]n determining that the one person, one vote rule applied to the election of legislative delegations, the Fourth Circuit stated, "Focusing on whether the delegations exercise governmental functions seems to us entirely appropriate." .... *Id.* at 275. "Surely it is fair to infer ... that the one person, one vote rule does not apply to the election of officials who do *not* 'perform governmental functions.'" *Id.* (emphasis in original).
>
> Respondent admits that the offices of Chairman and Vice-Chairman are ceremonial, *pro forma* positions. Furthermore, the Chairman and Vice-Chairman: (a) cannot take any action on behalf of the delegation save for calling a meeting to order and other procedural matters, (b) cannot independently exercise any of the substantive functions of the delegation except by virtue of their roles as voting members, and (c) are not accorded greater weight when voting by virtue of their positions as delegation officers. Thus, these officers do not perform substantive duties and perform no governmental functions that raise the concerns at issue in *Vander Linden.* Therefore, *Vander Linden's* weighted voting remedy does not apply to the election of Chairman and Vice-Chairman, and these officers can be elected by a simple majority vote of the delegation.

We also observe that the "one person, one vote" requirement of the Equal Protection Clause does not mandate a particular portion or percentage of a vote necessary to take action by a state or local legislative body. It was held by the United States Supreme Court in *Fortson v. Morris*, 385 U.S. 231 (1967) that the Georgia Constitution, which provided that if no candidate for Governor received a majority of votes at the general election, then a majority of members of the General Assembly could elect the Governor from two persons having the highest number of votes, did not contravene the Equal Protection Clause. The constitutional provision in question in *Fortson* provided that "in all cases of election of a Governor by the General Assembly, *a majority of the members present* shall be necessary to a choice." (emphasis added). Reversing the three judge court, the Supreme Court stated:

> [t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor ... .

385 U.S. at 234. In the Court's view, Georgia's duty under its Constitution was

> ... to proceed to have the General Assembly elect its Governor from the two highest candidates in the election, unless as some of the parties contend, the entire legislative body is incapable of performing its responsibility of electing a Governor because it is malapportioned. But this is not correct. In *Toombs v. Fortson*, 384 U.S. 210, 86 S.Ct. 1464, 16 L.Ed.2d 482, affirming 241 F.Supp. 65, we held that with certain exceptions, not here material, the General Assembly could continue to function until May 1, 1968. Consequently, the Georgia Assembly is not disqualified to elect a Governor as required by Article V of the State's Constitution.

Id. at 235. The dissent of Justice Douglas focused upon the argument that "the substitution of the Georgia Legislature for a runoff vote is an unconstitutional weighting of votes, having all the vices of the county unit system that we invalidated in *Gray v. Sanders* [372 U.S. 368 (1963)]."

Fortson indicates, among other things, that a properly apportioned legislative body may, consistent with the principles of "one person, one vote," appoint a person to an office, based upon a vote of a majority of those present. Thus, the constitutional principle of "one person, one vote" does not dictate that decisions be based upon a majority of the entire body. In other words, in the words of one court, the "apportionment cases did not incorporate the political principle of majority rule into the Constitution." *Brenner v. School Dist. of Kansas* City, 315 F.Supp. 627, 630 (W.D. Mo. 1970). *Brenner* involved the question of whether a "super majority" requirement for a school bond and school levy elections violated the principle of "one person, one vote." The Court in *Brenner* found that such a provision does not violate the Equal Protection Clause, explaining that under various methods for picking winners and losers in an election or appointment process (i.e. plurality, majority, supermajority), the "selected decisional rule permits the selection of a winner who has in fact received less than a majority vote." 315 F.Supp. at 632. Indeed, the Court discussed at some length the "fact of life that many, many elections are decided in the United States by far less than the majority of eligible voters." *Id.* As the *Brenner* Court stated,

> Lord Mansfield's convenient presumption, created in *Rex v. Foxcraft*, 2 Burr. 1017, that all eligible persons who failed to vote in a particular election are presumed to have acquiesced in the result has long provided a practical answer to actual complaints concerning actual minority rule.

Id. at 632-633. Further, in this same regard, we note that , in *Hadley v. Junior College Dist.*, 397 U.S. 50, 57 (1970), a case relied upon by the Fourth Circuit in *Vander Linden*, to support its application of "one person, one vote" principles to legislative delegations, the United States Supreme Court emphasized that the "one person, one vote" requirement seeks to insure a fair process, rather than guaranteeing a particular outcome. The *Hadley* Court stated that:

> ... the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given *an equal opportunity to participate in that election*, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

397 U.S. at 55. (emphasis added).

We add also that the Court in *Vander Linden* did not "dictate any remedy." 193 F.3d at 281, In the Fourth Circuit's view, it is constitutionally acceptable for the legislative delegations to "keep their current territorial configurations and adopt a system of weighted voting." *Id.* Tellingly, the Court said nothing about what method the Delegation should choose for determining a prevailing vote. Indeed, the *Vander Linden* Court held that "'legislative reapportionment is primarily a matter for legislative determination ... .'" *Id.*, quoting *Reynolds*, 377 U.S. at 586. On remand, the District Court, in fact, did

prescribe a system of weighted voting for each legislative delegation to follow. As we stated in the March 16, 2009 opinion,

> [a]ccording to the District Court, "[a]n interim imposition of a weighted voting scheme would allocate voting to delegation members in the proportion to the population of the county that resides in each district." Order of the District Court in *Vander [Linden] v. Hodges*, June 22, 2000. Thus, the District Court, like the Fourth Circuit, concerned itself with "the allocat[ion of] voting to delegation members." The District Court's order contained no discussion of the application of the "weighted voting" remedy to procedural matters such as presence of a quorum. Instead, the District Court's interim order determined the "percent of the vote assigned to the district based upon the district's share of the population of the county." We note that the District Court would have easily addressed these procedural issues if the Court had considered these issues to be part of the Fourth Circuit's opinion.

Thus, based upon the foregoing authorities, we find that there is nothing in either the Fourth Circuit's *Vander Linden* decision, nor in the Supreme Court's "one person, one vote" decisions, which prohibit the Delegation using a majority vote of those "present and voting" to determine the outcome of a motion. Presuming the Delegation's votes are properly weighted to comply with *Vander Linden*, and all members of the Delegation are provided notice and the opportunity to attend a Delegation meeting and cast their weighted vote, we find no authority that the use of the "present and voting" method to determine the outcome of a matter conflicts with *Vander Linden* or the "one person, one vote" principle. In our view, if a particular method for determining whether a vote or motion prevailed was constitutionally required, the Fourth Circuit would have said so.

We gather that Senator Martin's underlying question is whether, using the majority of those "present and voting" (based upon weighted votes) to determine the outcome of an issue, rather than use of the weighted vote of a majority of the entire body, somehow undermines the "one person, one vote" requirement mandated by *Vander Linden*. Senator Martin uses as an example, an election in which one candidate obtained 48% of the weighted vote and another candidate who received 22%, but neither garnered more that 50% of the weighted vote. His concern appears to be that these percentages are not more than half of the weighted vote of the entire body. ["Weighted vote is based on the body – NOT those present and voting."]

Our Supreme Court long ago stated the common law rule for determining the vote of a public body which is required to prevail. As the Court stated in *State v. Deliesseline*, 1 McCord (12 S.C.L.) 52 (1821):

> [t]he constitutions of this State and of the United States, declare that a majority shall be a *quorum* to do business; but a majority of that *quorum* are sufficient to decide the most important question. It has already been stated that eleven [by virtue of Act] constitute a quorum of the Trustees of the College, which is composed of twenty-nine members. Six constitute a majority of that *quorum,* and the concurrence of that number, when only eleven are present, has always been held conclusive on the whole body.

(emphasis in original). See also, *U.S. v. Ballin*, 144 U.S. 1, 6 (1892) ["here the general rule of all parliamentary bodies is that, when a quorum is present, the act of the majority of quorum is the act of the body."]. And, in *Smith v. Jennings*, 67 S.C. 324, 45 S.E. 821, 823 (1903), the Court explained the "present and voting" rule:

> [w]hile the Constitution, in article 3, §3 declares that the House of Representatives shall consist of 124 members, it also declares, in section 11, art. 3, that a majority of each house shall constitute a quorum to do business. A quorum, therefore, possesses the power of the whole body in all matters of business wherein, the action of a larger proportion of the entire membership is not clearly and expressly required. So, ordinarily, when a quorum is present acting, the House is present, acting in all its potentiality. When the Constitution speaks of "two-thirds of that house" as the vote required to pass a bill or joint resolution over the veto of the Governor, it means two-thirds of the house as then legally constituted, and acting upon the matter. Whenever the framers of the Constitution intended otherwise, the purpose was expressly declared, as in article 15, § 1, "a vote of two-thirds of all members elected shall be required for an impeachment" and in article 16, § 1, where, in proposing amendments to the Constitution, "two-thirds of the members elected to each house" must agree thereto .... As the house at the time of the passage of the joint resolution was lawfully constituted with 85 members present, and, as 60 of these voted for its passage, the vote was "two-thirds of that house," in the sense of section 23, art. 4, of the constitution.

See also, *Bd. of Trustees, Fairfield Co. v. State,* Op. No. 27035 (August 29, 2011); *Morton, Bliss & Co. v. Comptroller General*, 4 S.C. 430 (1873). Moreover, the phrase "by a majority vote of the delegates voting at a regular convention" includes weighted voting. *American Federation of Musicians v. Wittstein*, 379 U.S. 172, 176, (1964).

Courts have addressed the use of a majority of those "present and voting" requirement in a variety of contexts. For example, in *Shaughnessy v. Met. Dade Co.*, 238 So.2d 466, 468 (Fla. 1970), the Florida Court noted that while "it is true that less than a majority of the Board voted to approve the unusual or special use," the requirement "of the rules of the Board is that a majority of the Board constitutes a quorum ..." and "it is necessary only that a majority of those present and voting concur in the action." And, in *State ex rel. Keyes v. Ohio Pub. Employees Retirement System*, 913 N.E.2d 972, 976 (Ohio, 2009), it was emphasized that "'a majority of those members present and voting' has a markedly different meaning from 'a majority of those members present.'" In *James v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 564, 569, 660 S.E.2d 288, 291 (Ct. App. 2008), our Court of Appeals rejected the argument that a determination by the Parole Board which "conducted its hearing with only five of the seven members present and voting ... denied ... a right to a hearing altogether."

Moreover, in *Birmingham-Jefferson Civic Center Auth. v. Birmingham*, 912 So.2d 204 (Ala. 2005), the Alabama Supreme Court refused to intercede in a lawsuit attacking the constitutionality of Alabama's long-standing interpretation by both houses of the Legislature that a majority of each house present and voting was sufficient to enact legislation. In a concurring opinion, Justice Parker stated that:

> [a]ssuming a quorum of each house is present, a majority of those present and voting in each house must vote in favor of the bill (e.g., if 53 House members are present and 10 vote "yes" and five vote "no") the remaining 38 do not vote, the bill passes the House; similarly, if 18 Senators are present of which 5 vote "yes" and 3 vote "no" and the remaining 10 do not vote, the bill passes the Senate).

Of course, there must be a majority of those present and voting in order to prevail. In *Marshall v. Walker*, 183 Ga. 44, 187 S.E. 81, 83 (1936), the Georgia Supreme Court stated:

> [s]ince all five of the members were present and voting, and less than a majority voted in favor of the relator, the relator was not elected at such meeting ... .

Finally, the United States Supreme Court, in *Federal Trade Commission v. Flotill Products, Inc.*, 389 U.S. 179 (1967), concluded that 2 of 5 members of the Federal Trade Commission constituted a majority of those present and voting and, therefore, was valid. In that case, three members of the Commission constituted a quorum. One member abstained from voting on a particular matter. Thus, the Supreme Court rejected "[t]he rationale of the Court of Appeals ... that the FTC could act on the concurrence of a majority of the full Commission 'absent statutory authority or instruction to the contrary.'" 389 U.S. at 182. In the Supreme Court's view, "[t]he almost universally accepted common law rule is the precise converse – that is, in the absence of a contrary statutory provision, a majority of a quorum constituted a simple majority of a collective body is empowered to act for the body." *Id.* at 183.

Conclusion

Legal authorities agree that "[w]here a legal quorum is present, the general rule, in the absence of a provision to the contrary, is that a proposition is carried by a majority of the legal votes cast." 67A C.J.S. *Parliamentary Law*, § 7. This rule thus concludes that it is unnecessary that a majority of the full body concur in an action to be binding, but that a majority of a quorum which participate in the decision is sufficient to take action.

We find no suggestion in either *Vander Linden* decision, nor in the Supreme Court's "one person, one vote" cases, that the Delegation cannot reach decisions by a majority of the weighted vote of a quorum, present and voting. In our view, if such a method was not in conformity with the principles of "one person, one vote," the Fourth Circuit would have said so, or at least suggested such a reservation. Moreover, we have found no case questioning such a vote, based upon "one person, one vote" principles.[1] Presuming the Delegation's votes are properly "weighted" to comply with *Vander Linden,* and all members of the Delegation are provided notice and an opportunity to attend Delegation meetings and cast

[1] We do not deem the Supreme Court's recent decision in *Bd. of Trustees of Fairfield Co. v. State, supra* to alter our conclusion herein. This decision is based upon the constitutional requirement of two-thirds of each House to override the Governor's veto. See Art. IV, § 21 of the S.C. Constitution. The Court interpreted this provision as necessitating "two-thirds of a quorum." The Court made clear, however, that "absent a constitutional mandate providing otherwise, the General Assembly determines its rule of procedure free from interference from the judicial and executive branches."

their weighted vote, a majority of a quorum, present and voting, may thus reach decisions. Cf. *Fortson v. Morris, supra* [Supreme Court concludes that appointment of Governor by majority of members of General Assembly who are present does not contravene "one person, one vote"]; *Hadley v. Junior College Dist. supra* ["the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given *an equal opportunity* to participate in that election ...."]. (emphasis added). Thus, the law has never required, absent a statutory provision or rule otherwise, that there be a concurrence of a majority of all members in order for that body to take action. *Fed. Trade Commission v. Flotill Products, Inc.;* Cf. *Bd. of Trustees of Fairfield Co. v. State, supra.*

The fact that the system of voting relies upon a weighted vote majority of a quorum, or a weighted vote majority of those present and voting, might result in a minority of the total membership dictating the outcome is viewed by the courts as not controlling. Whether there is weighted voting or voting based upon each member casting one vote, it is often the case that a majority of a quorum or a majority of those present and voting constitutes a minority of the total membership. As the United States Supreme Court has stated, "'[i]f all the members of the select body or committee, or if all the agents are assembled, or if all have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number.'" *U.S. v. Ballin*, 144 U.S. at 7, quoting 1 *Dill Mun. Corp.* (4th ed.) § 283.

Of course, action may be taken by the Delegation only if there is a weighted vote *majority* of those present and voting. *See Marshall v. Walker*, 187 S.E. 81 (Ga. 1936) ["since all five of the members were present and voting, and less than a majority voted in favor of the relator, the relator was not elected at such meeting ...."]. From the information provided, we assume such is the case here.

Thus, it is our opinion that the Delegation may use the weighted vote of a quorum, present and voting, rather than the weighted vote of the entire Delegation, to select appointees. In our opinion, such a procedure is constitutional. As the Fourth Circuit noted in *Vander Linden*, the constitutional principle of one person, one vote guarantees the equality of the "opportunity" to vote. ["'Whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election ....'"] 193 F.3d at 272, quoting *Hadley v. Jr. College Dist., supra.* The Constitution cannot, however, guarantee, nor does it require, that once the membership of such a body is properly apportioned, that each member will attend a meeting of the body and vote. As the Court stated in *Bremer, supra,* "that all eligible persons who failed to vote in a particular election are presumed to have acquiesced in the result has long provided a practical political answer to complaints concerning actual minority rule."

We note that there is authority which concludes that the use of proxies by those who attend and vote does dilute the votes of those present and voting. In *Atkins v. Monahan*, 399 N.Y.S. 166, 167 (1977), aff'd on other grounds, 398 N.Y.S.2nd 456 (1977), the Court stated that "the use of proxies in a town caucus for the nomination of candidates for town office violates the constitutional concept of 'one man, one vote'. Such a practice dilutes the votes of the qualified voters who attend the caucus in person." This reasoning strongly suggests both that the, "present and voting" method is constitutionally valid, but that use of proxies to obtain a majority of those present and voting is constitutionally infirm.

Finally, we emphasize, of course, that the Delegation may change its rules to employ some other valid method of selection, such as a majority of a quorum or even a majority of the entire Delegation. The Delegation may make any rule not inconsistent with a statute. See *Moore v. Wilson*, 296 S.C. 321, 324, 372 S.E.2d 357, 358 (1988) [Delegation's rule which conflicted with statute is invalid].

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an