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ATTORNEY GENERAL

April 9, 2012

The Honorable Raymond E. Cleary, III
Senator, District No. 34
Suite 501, Gressette Office Building
Columbia, SC 29202

Dear Senator Cleary:

We received your letter requesting an opinion of this office addressing the impact of reapportionment on the election of commissioners of the South Carolina Department of Transportation (the "DOT").

By way of background, we note that 2011 S.C. Acts No. 75, Part II, §2 (the "Act") established the new congressional district lines for South Carolina. The Act became effective upon approval by the Governor on August 1, 2011. The United States Department of Justice has approved the congressional redistricting plan pursuant to the Voting Rights Act. See 42 U.S.C. §1973c. On March 9, 2012, a federal district court approved the Act and dismissed litigation brought by several plaintiffs challenging the reapportionment plan. See Backus v. South Carolina, 2012 WL 786333 (D. S.C. 2012). Upon information and belief, these plaintiffs have appealed the decision of the district court, but they did not request a stay.

Title 57 of the South Carolina Code establishes the DOT. Pursuant to §57-1-310, transportation districts are set up in accord with State congressional districts. The DOT Commission shall be composed of one member from each transportation district elected by the delegations of the congressional district and one member appointed by the Governor, upon the advice and consent of the Senate, from the State at large. Id. If a county is divided among two or more DOT districts, for purposes of electing a commission member, the county is deemed to be considered in the district which contains the largest number of residents from that county. See §57-1-320(A). The procedure for selecting commissioners from each congressional district is found in §57-1-325. Legislators residing in the congressional district shall meet upon written call of a majority of the members of the delegation of each district for the purpose of electing a commissioner to represent the district. Id. A majority present, either in person or by written proxy, of the delegation from a given congressional district constitute a quorum for the purpose of electing a district commissioner. Id. No person may be elected commissioner who fails to receive a majority vote of the members of the delegation. Id. The delegation must be organized by the election of a chairman and a secretary, and the delegations of each congressional district shall adopt rules as they consider proper to govern the election. Id. Under §57-1-330, commissioners must be elected by the legislative delegation of each congressional district. For the purposes of electing a commission member, a legislator shall vote only in the congressional district in which he resides. Id. The statute further provides that no county within a DOT district shall have a resident commission member for more than one

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consecutive term, and in no event shall any two persons from the same county serve as a commission member simultaneously, except as provided by the statute. See §57-1-320(B).

Your inquiry addresses the application of the Act, which is codified in §7-19-35, concerning the election of DOT commissioners whose terms expired in February, 2012 (representing the First, Third, and Fifth Congressional Districts) and specifically, the election of a DOT commissioner for the new Seventh Congressional District, before the November, 2012, general election.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). All rules of statutory construction are subservient to the one that legislative intent must prevail if it reasonably can be discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. Media General Communications, Inc. v. South Carolina Dept. of Revenue, 388 S.C. 138, 694 S.E.2d 525 (2010); Wade v. State, 348 S.C. 255, 559 S.E.2d 843 (2002); see also Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E. 2d 166, 168 (1966) ["There is no safer nor better rule of interpretation than when language is clear and unambiguous it must be held to mean what it plainly states"]. The determination of legislative intent is a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995).

Significantly, §3 of the Act addresses the current election of those DOT commissioners whose terms recently expired. This provision specifically states:

Section 7-19-40 of the 1976 Code is repealed effective with the 2012 general election, provided that until the members of the congressional districts elected in the 2012 general election from the districts enumerated in Section 7-19-35 qualify and take office, the districts now provided by law continue to apply for purposes of vacancies in office for members of the congressional districts. [Emphasis added].

The intent of the Legislature is clear. These vacancies presently exist rather than occurring after the new congressional district lines have become fully operational. Thus, until such time that the newly-elected members of Congress take office after the November, 2012, general election, applicants for DOT commissioner should be elected from the congressional districts as they presently exist in accordance with the procedures established in §57-1-310 *et seq.* set forth above.

We note an opinion of this office dated May 29, 1992, wherein we addressed the effect of redesignated congressional districts on the terms of commissioners of the South Carolina Wildlife and Marine Resources Commission who were appointed by the Governor from each congressional district. The terms of several commissioners expired in July, 1992. We concluded that the reapportionment plan would not be fully operational until the new members of Congress, elected in the November, 1992, general election, began to exercise their congressional duties.¹ We thus stated:

¹U.S. Const. amd. XX, §1, provides that the terms of office of members of Congress begin on January 3.

[a]s to acts of the General Assembly reapportioning congressional district lines, our Office has concluded that "congressional redistricting acts should be construed as to allow existing districts to continue intact until the end of the Congress in which they are represented." [quoting Op. S.C. Atty. Gen., June 7, 1966]. . . . We believe the more preferable approach to be that . . . commission members continue as appointed until their terms expire.

Moreover, in an opinion of this office dated September 17, 1992, we addressed whether a vacancy on the South Carolina Coastal Council representing the First Congressional District, for a term that expired in July, 1993, should be sought from the old district or the newly apportioned district. Referring to the above opinion, we observed that had there not been a vacancy due to the resignation, the member would have served his entire term under the old apportionment plan. We concluded that, because the vacancy then existed rather than occurring after the new congressional district lines became fully operational, the applicant should be sought from the First Congressional District as it then existed.

In a follow-up opinion dated October 21, 1992, we discussed the inability of the legislative delegation comprising the present First Congressional District to reach a consensus on the appointment to fill the vacancy on the Coastal Council before the general election, and whether the appointment would then be made from the current First Congressional District or from the newly-elected district. We concluded that, in the event the appointment process was not completed by the November, 1992, general election, the delegation comprising the congressional district would remain intact until at least January, 3, 1993, when the new members of Congress took office; after new State legislators would assume office in November, 1992, and certain participants in the appointment process would change, but the district's geographic boundaries would not change.

However, we note it is important for the congressional district delegations to bear in mind the following advice from our May, 1992, opinion, which stated:

. . . in keeping with the spirit of the newly-adopted plan, it would be advisable to make future appointments with the redrawn lines in mind. For those appointments expiring on July 1, 1992, in the present third and fifth districts, those new appointments should most probably be made for six-year terms from the newly constituted districts. As appointments expire or vacancies occur after the new members of congress are elected and take office, replacements would be made for new terms or the unexpired term of the vacated officer as appropriate under the new plan.

This advice is relevant today. Because the existing congressional district lines remain intact until after the November, 2012, general election, it would be advisable for the legislative delegations of these congressional districts to elect DOT commissioners with the redesignated congressional districts in mind. Those commissioners whose terms expire after January, 2013, would be replaced according to the new congressional district lines (except, of course, the commissioner appointed by the Governor from the State at large who is unaffected by the redrawn lines).

In addition, we are of the view that the DOT commissioners presently serving, and those who are elected now because their terms have expired, and who are affected by the redrawn congressional district lines under the Act, would complete their appointed terms.² The Act clearly provides for contingencies with respect to shifting congressional districts. Specifically, §5 of the Act states:

[n]otwithstanding any other provision of law to the contrary, any person elected or appointed to serve, or serving, as a member of any board, commission, or committee to represent a Congressional district, whose residency is transferred to another district by a change in the composition of the district, may serve, or continue to serve, the term of office for which he was elected or appointed; however, the appointing or electing authority shall appoint or elect an additional member on that board, commission, or committee from the district which loses a resident member on it as a result of the transfer to serve until the term of the transferred member expires. When a vacancy occurs in the district to which a member has been transferred, the vacancy must not be filled until the full term of the transferred member expires. [Emphasis added].

Thus, if the residency of any DOT commissioner is relocated into another congressional district by virtue of the Act, the commissioner's former congressional district is no longer represented and the legislative delegation of that congressional district may then elect another commissioner for that district for the remainder of the term of the former commissioner.

We next address the election of a DOT commissioner for the newly-designated Seventh Congressional District during the current legislative session. Pursuant to §57-1-310(B)(1), candidates for commissioner vacancies must be screened by the Joint Transportation Review Committee (the "Committee") as provided in Article 7 of Title 57, provided the candidates meet certain qualifications for eligibility to serve. See §57-1-310(C). Article 7 sets forth the powers and duties of the Committee to fill vacancies for commissioner, and it provides a procedure for the Committee to select qualified candidates. Significantly, we note that §57-1-740(A) provides:

[f]or purposes of this section, a vacancy is created on the commission when a term expires, a new congressional district is created, or a commission member resigns, dies, or is removed from office as provided in Section 57-1-330(C). If known in advance, the review committee may provide notice of a vacancy and begin screening prior to the actual date of the vacancy. [Emphasis added].

²In the May, 1992, opinion, we rejected the argument that a person has vacated the office if he no longer resides in his numbered district and thus becomes a *de facto* officer who could serve until a successor is selected. In concluding that commission members would continue as appointed until their terms expire, we explained that "once selected, a commission member represents the interests and general welfare of all the State's inhabitants, rather than only those of a portion of the State."

As noted above, the Act took effect upon approval by the Governor on August 1, 2011. Because the Act became immediately effective, under the express terms of the above statute as set forth by the Legislature there is now a vacancy for the DOT commissioner in the newly-created Seventh Congressional District. It is the opinion of this office that the Committee may screen eligible candidates for commissioner who may then be elected by the legislative delegation, pursuant to the procedures established under Title 57.

We find support for our position in the decision of the South Carolina Supreme Court in Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952). In Byrnes, the Court discussed whether, in the absence of pertinent statutory or constitutional provision, public officers hold over *de facto* until their successors are appointed or elected and qualify. In deciding the issue, the Court stated that a vacancy nevertheless existed in the sense that successors may be appointed or elected as may be provided by law, qualify and take the offices; but meanwhile the “hold-overs” were entitled to retain the offices. Relevant to the existing vacancy for DOT commissioner in the Seventh Congressional District, we note the Byrnes Court approved the language of 42 Am. Jur., Public Officers, §134, which read in part as follows:

[a] vacancy may arise in an office newly created. The general rule governing the matter seems to be that when a law establishing an office takes effect a vacancy in the office at once exists, unless the language of the law imports futurity of selection, or unless other restrictions are imposed. Hence the term ‘vacancy’ applies to an existing office without an incumbent, although it has never been filled; for example, when a new county is created, the county offices, before they are filled, are considered as being technically vacant.

Id., 70 S.E.2d at 232.

In an opinion of this office dated March 18, 1964, we also addressed whether an appointment could be made by the Governor to fill a recently created office of Industrial Commissioner after the 1964 Legislature adjourned, subject to confirmation when the 1965 Legislature convened. We opined that, because the legislation increasing the number of commissioners from five to six took effect immediately upon approval by the Governor, a commissioner could be appointed to fill the vacancy for the newly-created position. However, we concluded that no recess appointment could be made by the Governor, without the advice and consent of the Senate.

We also find support in Maner v. Maner, 278 S.C. 377, 296 S.E.2d 533 (1982). In Maner, the Supreme Court of South Carolina addressed the right to a speedy appeal for appellants who had moved for speedy remedy on account of a considerable backlog of civil appeals. The Court discussed several remedies to resolve the backlog, including whether the Court of Appeals should be put into operation. The Court of Appeals was created on July 1, 1979. The Court referred to its earlier ruling in State ex rel. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980), where it declared several provisions of the act creating the Court of Appeals unconstitutional, but left other provisions in full force and effect. The Court also declared four of the five judges elected by the legislature ineligible to serve on the Court of Appeals. Id., 262 S.E.2d at 410. In the end, the Court of Appeals, although existing at the time of the Maner decision, was effectively inoperable because it was unable to function with just one judge. The issue

before the Court, then, was whether the other four judgeships could be filled to deal with the backlog of appeals. Maner, 296 S.E.2d at 535-37. Relevant to our discussion here, we note that the Court recognized:

[g]enerally, an office created by statute comes into existence immediately upon the statute taking effect. 67 C.J.S. Officers §13 (1978). Hence the offices of the judges of the Court of Appeals came into existence upon creation of the court on July 1, 1979.

Maner, 296 S.E.2d at 537.

In other contexts we have previously noted that prospective appointments to fill vacancies which had not yet occurred were not necessarily invalid. See Ops. S.C. Atty. Gen., October 3, 1968; July 27, 1960. However, you should be aware that there may be a limitation as to appointments by a group or other governmental body making appointments, which will take effect after the expiration of the term of office of such group or body. The rule in this State is that an appointing board cannot bind its successor board by making appointments extending beyond the term of the appointing body, unless there is specific permissive statutory authority authorizing appointments for definite terms of years. This rule was affirmed by the South Carolina Supreme Court in Mullinax v. Garrison, 296 S.C. 370, 373 S.E.2d 471 (1988). There, the Court concluded that members of a county delegation committee could not prospectively fill an appointment which arose after the term of the delegation expired. The Court stated:

[a]s a general rule, appointments which fill a prospective vacancy in an office before the actual vacancy occurs are valid. [Citations omitted]. However, a legislative body may not usurp the rights of its successor by making a prospective appointment to fill an anticipated vacancy in an office where the appointee's term will not begin until after the legislative body's own term has expired. State ex rel. Aker v. Major, 94 S.C. 472, 78 S.E. 896 (1913); Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). Based on these rules we conclude that, should respondents fill the prospective vacancy on the Board of Education, their action would be contrary to our law.

Mullinax, 373 S.E.2d at 472. Relying on Mullinax, in an opinion of this office dated January 1, 2003, we advised that a State Senator could not reappoint a magistrate whose term expired three months after the Senator's resignation. We concluded that any election held in violation of these principles would be deemed invalid by a court.

We believe, however, that the Mullinax-type cases are inapposite to the question presented by your letter. Rather than filling offices in those cases, there is a vacancy for the DOT commissioner in the newly-created Seventh Congressional District. Under the preceding authority, and the express language of §57-1-740(A), a DOT commissioner may be lawfully elected pursuant to the procedures set forth in §§57-1-310 *et seq.*

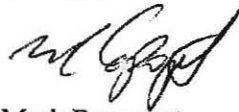
Lastly, in rendering this opinion we note that appointments or elections to other boards and commissions of this State are made on the basis of congressional district lines. Although we have

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attempted to respond to your inquiry keeping that fact in mind, we acknowledge our opinion today will not be responsive to all questions which may arise under the same circumstances for all boards or commissions. We have attempted to be as responsive as is possible regarding the election of DOT commissioners as affected by the Act.

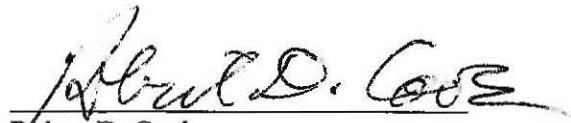
If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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