



ALAN WILSON
ATTORNEY GENERAL

December 17, 2012

The Honorable William G. Herbkersman
Member, House of Representatives
434-B Blatt Building
Columbia, SC 29211

Dear Representative Herbkersman:

In a letter to this office, you have requested an opinion concerning voting rights and weighted voting for the Jasper County Delegation (the "Delegation"). As a result of reapportionment, you indicate to us that the size of the Delegation has increased from two to five members.

Law/Analysis

Based upon the constitutional principles first established by the United States Supreme Court in Reynolds v. Sims, 377 U.S. 533 (1964), the Fourth Circuit Court of Appeals, in Vander Linden v. Hodges, 193 F.3d 268 (4th Cir. 1999), held that the "one person, one vote" requirements of the Equal Protection Clause are applicable to South Carolina's legislative delegations. In Vander Linden, the Court focused upon the fact that legislative delegations in South Carolina "are elected bodies that exercise governmental functions." In the Court's opinion, based upon the parties' stipulation, the county legislative delegations:

actually "perform numerous and various general county governmental functions," including 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 districts, reducing special school levies, submitting grant applications for park and recreation facilities, and making or recommending appointments.

Id., 193 F.3d at 276. The Court also referenced numerous statutes empowering legislative delegations to perform various governmental functions. Id. at 276-77. Therefore, the Court 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 277-78.

The constitutional problem identified in Vander Linden was the disparity in representation between various members of the legislative delegation. Under the legislative delegation system, each member of the delegation possessed one vote “regardless of how many of the member’s constituents live in the county,” thereby diluting “the voting power of county residents from more populous areas.” Id. at 272. According to the Court, this disparity was demonstrated clearly by the evidence presented. The Court noted that:

[i]n support of their one person, one vote claim, the voters here presented demographic reports showing that the delegation system deviates from the standard of equal, population-based representation set by the Supreme Court. The reports demonstrated that by one measure, 45 of the 46 legislative delegations in South Carolina deviate from the equal population standard by amounts that range from 75.15% to 330.56%, and that by another measure, 44 of the 46 delegations deviate from the standard by amounts that range from 34.86% to 418.47%. The State proffered no evidence that in any way contradicted these findings.

Id.

In issuing its opinion, the Court did not, however, attempt to “dictate any remedy.” The Court instead remanded “the case to permit the South Carolina legislature to correct, subject to the approval of the district court, the constitutional defect in the delegation system that we have identified today.” Id. at 281.

On June 22, 2000, the South Carolina District Court issued its Remedial Order to implement the Vander Linden decision. This Order is still in effect, as the Legislature has not adopted further remedial legislation since Vander Linden was handed down. The Remedial Order of the Honorable Michael Duffy, United States District Judge, expressly directs that “[a]n interim imposition of weighted voting scheme would allocate voting to delegation members in proportion to the population of the county that resides in each district.” Referencing Vander Linden, the District Court defined a delegation member as “each legislator ... of every county containing territory that falls within the legislators’ district.” Accordingly, absent further clarification from a court, and as we have previously stated and again advise you today, the Remedial Order should be followed, thus allowing all members of the Delegation (including non-resident members) to vote on a weighted vote basis. See, e.g., Ops. S.C. Atty. Gen., September 7, 2011 (2011 WL 4592367); April 30, 2009 (2009 WL 1266916); April 23, 2009 (2009 WL 1266923); March 16, 2009 (2009 WL 959647).

Additionally, a question may arise as to whether the Delegation must use the weighted vote of the entire Delegation, or may the outcome of matters acted upon by the Delegation be determined using the weighted vote of a quorum, present and voting. We have advised previously that neither the Vander Linden decision nor the United States Supreme Court’s “one person, one vote” cases have suggested

legislative delegations cannot reach decisions by a majority of the weighted vote of a quorum, present and voting. See Ops. S.C. Atty. Gen., September 7, 2011, March 16, 2009. In these opinions, we stated:

. . . 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.

See Mitchell v. Spartanburg Co. Legislative Delegation, 385 S.C. 621, 685 S.E.2d 812, 814 (2009) [concluding 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]; see also United States 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”].

In fact, our 2011 opinion noted that:

the District Court [in Vander Linden], 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.

We thus advised that:

[i]n our view, if such a method was not in conformity with the principles of “one person, one vote,” [Vander Linden] 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. 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 their weighted vote, a majority of a quorum, present and voting, may thus reach decisions. . . . [T]he 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.

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Id. [citing Fortson v. Morris, 385 U.S. 231, 234 (1967) (United States Supreme Court concluded that appointment of the Governor by a majority of members of the General Assembly who are present does not contravene “one person, one vote”)].

Conclusion

Absent further clarification from a court, we advise that the Delegation should follow Vander Linden as the prevailing law, and that the Delegation comply with the “one person, one vote” requirement by use of weighted voting as imposed by the South Carolina District Court’s Remedial Order dated June 22, 2000, which allocates voting to all Delegation members (including non-resident members) in proportion to the population of the county that resides in each district. A Delegation member is defined as “each legislator ... of every county containing territory that falls within the legislators' district.” In addition, we advise that the Delegation may reach decisions using the weighted vote of a quorum, present and voting, rather than the weighted vote of the entire Delegation, and that such a procedure is constitutional. We emphasize, however, that the Delegation may adopt rules to employ valid methods of selection, such as a majority of a quorum or even a majority of the entire Delegation, but we advise that such a rule may not be inconsistent with a statute.¹ See Moore v. Wilson, 296 S.C. 321, 372 S.E.2d 357, 358 (1988) [Delegation's rule which conflicted with statute is invalid].

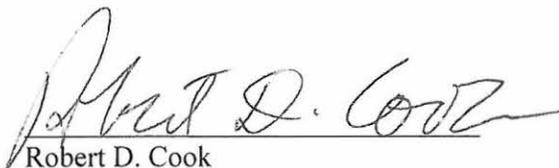
If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

¹We have not been provided with any present Rules of the Delegation.