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Opinion No. 85-50

Office of the Attorney General

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April 15, 1986

Stephen L. Elliott, Staff Counsel
Education and Public Works Committee
House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Mr. Elliott:

By your letter of April 9, 1986, you have advised that several questions have arisen with respect to the election of district highway commissioners pursuant to Sections 57-3-220 and 57-3-240, Code of Laws of South Carolina (1976 & 1985 Cum. Supp.). You have asked how a majority is to be calculated under these Code sections and further how the Freedom of Information Act, Section 30-4-10 et seq. of the Code, applies in the election of district highway commissioners.

Section 57-3-220, concerning the election and term of district highway commissioners, provides in relevant part that

[a] majority present, either in person or by written proxy, of the members of the county legislative delegations from a given highway district shall constitute an quorum for the purpose of electing a district highway commissioner, but no person shall be declared elected district highway commissioner who shall fail to receive a majority vote of all the members of the county legislative delegations from the highway district. ...
[Emphasis added.]

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Similarly, Section 57-3-240 provides for rotation of the office of commissioner and how nominations are made. The pertinent part of this section provides that

[t]he legislative delegation of any county entitled to a district highway commissioner ... shall nominate at least three suitable persons for the office, one of whom shall be elected district highway commissioner by a majority vote of all of the members of the county legislative delegations representing the district. [Emphasis added.]

The two provisions are substantively identical and require election by a majority vote of all members of the county legislative delegations within a given highway district.

You have asked whether a majority should be calculated (1) by determining a majority of all members of the county legislative delegations, (2) on the basis of those members of the delegations who are present and voting, or (3) on the basis of delegation members present, whether or not they vote. In the absence of ambiguity, words of a statute are to be given their plain and ordinary meanings. Hartford Accident and Indemnity Co. v. Lindsay, 273 S.C. 79, 254 S.E.2d 301 (1979). Because the statute plainly requires election by a majority of all delegation members within a highway district, your first option would be correct; the statute does not call for a majority of those present, whether or not he or she is voting.

It should be noted that a majority of delegation members must be present, either in person or by proxy, ^{1/} to have a quorum for the purpose of electing a district highway commissioner. Section 57-3-220 continues with the language emphasized supra; use of the word "but" following the language about determining a quorum indicates that what follows is intended to be an exception to what had gone before and is not to be controlled by it. Evans v. McCabe, 164 Tenn. 672, 52 S.W.2d 159 (1932). Thus, for a highway district encompassing ten delegation members, six would be required to make up a quorum. Six members, at least, must vote for an individual for him or her to be elected district highway commissioner. The majority vote required for election would not be calculated only on the number making up the quorum but on the number comprising the total delegations' membership.

^{1/} The constitutionality of the provisions of Section 57-3-220 relative to proxy voting have been questioned in Op. Atty. Gen. No. 4274, dated March 2, 1976.

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You have also asked whether the delegation meeting may be closed to the public pursuant to Section 30-4-70(a)(1) of the Code when electing the district highway commissioner. If the meeting may be closed, you have asked under what circumstances or for what type of discussions may the meeting be closed, i.e., to discuss or vote upon candidates. By Opinion No. 84-111, dated September 6, 1984, this Office determined that the Freedom of Information Act would most probably apply to a meeting of a legislative delegation as a public body. Applicability of the Act relative to election of the district highway commissioner is your basic inquiry.

Section 30-4-60 of the Act requires that all meetings of public bodies be open unless they are closed pursuant to Section 30-4-70 of the Code. Section 30-4-70(a)(1), pertaining to executive sessions, provides that a meeting may be closed to the public for, inter alia, "[d]iscussion of ... the appointment of a person to a public body" Clearly, the Highway Commission is a public body. Op. Atty. Gen. No. 84-46. Thus, the delegations comprising a highway district may meet in executive session to discuss the appointment of a person to a public body, though such a meeting in executive session certainly is not required.

Section 30-4-70(a)(5) specifies the procedures to be followed when a public body enters executive session:

Prior to going into executive session the public agency shall vote in public on the question and when such vote is favorable the presiding officer shall announce the purpose of the executive session. Any formal action taken in executive session shall thereafter be ratified in public session prior to such action becoming effective. As used in this item "formal action" means a recorded vote committing the body concerned to a specific course of action.

These procedures are discussed in detail in Opinion No. 84-46 and may be summarized as follows:

1. The purpose for going into executive session must be one clearly specified in Section 30-4-70.

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2. The public agency [legislative delegation] must vote affirmatively in public to go into executive session.
3. The presiding officer must announce the purpose of the executive session.
4. Following the executive session, any action taken in the session must be ratified in public prior to such action becoming effective.

As discussed in the opinion, ratification is necessary to effectuate any action taken in an executive session. See also Multimedia, Inc. v. Greenville Airport Commission, Op. No. 0623, filed January 28, 1985 (S. C. Ct. App.). A copy of Opinion No. 84-46 is enclosed herewith.

We trust that the foregoing has sufficiently responded to your inquiry. Please advise if you need clarification or additional assistance.

Sincerely,

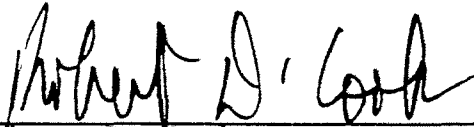
Patricia D. Petway

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PDP/an

Enclosure

REVIEWED AND APPROVED BY:



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