



HENRY McMASTER  
ATTORNEY GENERAL

April 30, 2009

The Honorable Raymond E. Cleary, III  
Senator, District No. 34  
501 Gressette Building  
Columbia, South Carolina 29201

Dear Senator Cleary:

You have asked for an opinion regarding your right as Senator “to represent my 46,000 constituents which live in Horry County by being allowed to have a weighted vote for appointing members to the Grand Strand Water and Sewer Authority.” You note that if this Office finds that you are not authorized to vote on such appointments, you will ask “the Supreme Court to make a ruling which will take my [disenfranchised] constituents who would have no rights or representation and correct this injustice.” We agree with your assessment that the current law providing for appointment of members to the *Grand Strand Water and Sewer Authority* is constitutionally suspect under principles of “one person, one vote” as articulated in *Vander Linden v. Hodges*, 193 F.3d 268 (4<sup>th</sup> Cir. 1999). While further clarification by a court would be ideal, in the absence of such further clarification, we believe the remedial Order of the District Court subsequent to *Vander Linden* should be followed.

#### Law / Analysis

Act No. 771 of 1978 provides for appointment of the Grand Strand Water and Sewer Authority, as follows:

[t]he authority shall be composed of six members, who shall be resident electors of the county and who shall be appointed by the Governor, upon the recommendation of a majority of the *resident* members of the Horry County Legislative Delegation, including the *resident* Senator, for terms of six years, and until their successors are appointed and qualify.

(emphasis added). We have previously interpreted similar language as meaning only the *resident* Senator (if any) and *resident* House members. *Op. S.C. Atty. Gen.*, June 8, 1971. Thus, the statute, as written, is not ambiguous and there is little or no room for interpretation.

However, in our opinion, a court would most likely conclude that *Vander Linden* renders such a statute to be constitutionally infirm. In *Vander Linden* the Fourth Circuit concluded that the “one person, one vote” requirements of the Equal Protection Clause are applicable to South Carolina’s legislative delegations. The Fourth Circuit, in *Vander Linden*, 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’ stipulations, 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.*

193 F.3d at 276. (emphasis added). The Court also referenced numerous statutes empowering legislative delegations to perform various governmental functions. *Id.* at 276-277. 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 277-278.

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.” 193 F.3d at 272. According to the Court, this disparity was demonstrated clearly by the evidence presented. The Fourth Circuit 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

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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.* at 272.

As noted above, Act No. 771 of 1978 permits only “resident members of the Horry County Legislative Delegation, including the resident Senator” to vote for members of the Grand Strand Water and Sewer Authority. As we read *Vander Linden*, this statutory provision is inconsistent with that decision, and thus a court would likely conclude Act No. 771 of 1978 violates the Equal Protection Clause, to the extent it only authorizes *resident members* of the Horry Delegation to vote for appointments to the Grand Strand Water and Sewer Authority. For example, you note that you, as Senator, represent 46, 000 constituents of Horry County, yet Act No. 771 of 1978 only allows the “resident” members, including the “resident senator,” to vote. *Vander Linden* holds that such constituents may not be constitutionally disenfranchised in such manner.

With respect to a remedy, a new lawsuit, specifically directed at the constitutionality of Act No. 771 of 1978 would, of course, be preferable. However, the *Remedial Order* of the District Court, filed June 22, 2000 to implement the *Vander Linden* decision, is apparently still in effect, as the General Assembly has not adopted further remedial legislation since *Vander Linden* was handed down. The *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.” (emphasis added). 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, we suggest that the Remedial Order be followed, thus allowing *all members* of the Horry County Delegation (including non-resident members) to vote on a *weighted vote basis* for members of the Grand Strand Water and Sewer Authority. Such adherence to the Remedial Order would thus allow you, as a non-resident Senator of Horry County to vote upon such appointments.

Yours very truly,

Henry McMaster  
Attorney General

By:   
Robert D. Cook  
Deputy Attorney General

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