January 17, 2007

The Honorable Tee Hooper, Chairman
SC Department of Transportation Commission
P. O. Box 16359
Greenville, South Carolina 29606

Dear Chairman Hooper:

You have enclosed a copy of the decision recently rendered by the South Carolina Supreme Court in *Sloan v. Hardee, et al*. You note that "[t]he Court has determined that S.C. Code Section 57-1-320 prohibits a SCDOT Commissioner from serving a consecutive term of office." You further state that "[t]wo SCDOT Commissioners (Commissioners Hardee and Harrell) are currently serving consecutive terms as Commissioner." Regarding the Court's decision, you thus seek the following guidance as to whether

(1) Commissioners Hardee and Harrell can vote on and/or participate in discussion of matters coming before the Commission;

(2) Commissioners Hardee and Harrell are (entitled) to payment of per diem, mileage and other reimbursements for official business as allowed pursuant to S.C. Code Section 57-1-350 after the date of the opinion.

Law / Analysis

In *Hardee v. Harrell*, Op. No. 26242 (January 8, 2007) the South Carolina Supreme Court in its original jurisdiction decided the issue of whether "Commissioners for the South Carolina Department of Transportation (DOT) ... were appointed in violation of S.C. Code Ann. § 57-1-320(B) and 57-1-330(A) (2006)." Section 57-1-320(B) states that "[n]o county within a Department of Transportation district shall have a resident commission member for more than *one consecutive term* and in no event shall any two persons from the same county serve as a commission member simultaneously, except as provided hereinafter." (emphasis added). Petitioners Sloan and the South Carolina Public Interest Foundation brought the action for declaratory and injunctive relief against Respondents Hardee, Harrell and Truluck, seeking resolution of the meaning of the phrase "one consecutive term" as employed in § 57-1-320(B).

By way of background, Respondents Hardee and Harrell had been reelected by their respective legislative delegations for consecutive terms as commissioner.[1] These appointments were made despite the fact that several opinions of this Office had advised over the years that the meaning of the phrase "one consecutive term" is that a commissioner is not eligible for succeeding terms, but instead, after serving a single term, is ineligible for reappointment until an intervening term has expired. *See, Ops. S.C. Atty. Gen.*, June 5, 2003; June 8, 1999; May 15, 1997; February 25, 1996; September 20, 1995.

In their Complaint, Petitioners Sloan and the South Carolina Public Interest Foundation alleged that the Commissioners are serving in violation of § 57-1-320(B) inasmuch as they are serving consecutive terms. The Supreme Court accepted the matter in its original jurisdiction.

In its decision, the South Carolina Supreme Court concluded that a construction of § 57-1-320(B), permitting commissioners to serve one term, and then a consecutive term, would produce an absurd result. The Court observed, that, by comparison, numerous other statutes use the phrase "two consecutive terms," and indeed the South Carolina Constitution allows the Governor to serve no more than "two successive terms." In the Court's view, these provisions would be rendered meaningless if the term "one consecutive term," in essence, means the same thing as these other provisions. Thus, the Court, employing ordinary rules of construction, concluded that "section 57-1-320(B) prohibits a DOT Commissioner from serving a consecutive term of office."

In an Opinion of this Office, dated June 5, 2003,we addressed in great detail the status of commissioners who are reappointed in contravention of § 57-1-330's language. There, we concluded in part as follows:

> [b]ased upon the foregoing authorities, it is our opinion that the positions of DOT commissioner referenced in your letter may be immediately filled pursuant to § 57-1-330. In light of our previous opinions, the present incumbents may not be reappointed without sitting out an intervening term. However, even where individuals are serving beyond their statutory six month holdover period or even if they are reappointed to a new term, they would be considered to be de facto officers. Until a court removes them or declares their acts void, the law treats all official duties and acts performed by these incumbent commissioners as valid with respect to third parties.

The question now thus becomes what is the effect of the recent decision of *Sloan v. Hardee, et al*. In other words, is this decision one which "removes" the commissioners who were illegally appointed? It is our opinion that the Supreme Court has made it clear in this opinion that the question posed to the Court in *Sloan* was whether Commissioners "Hardee, Harrell and Truluck *are serving in violation of"* § 57-1-320." (emphasis added). The Court concluded that they are.

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[1] Respondent Truluck's status is apparently not now at issue as his term ended in May, 2006.

Generally speaking, a common law writ of *quo warranto* (now codified by statute at § 15-63-60) is the remedy to try title to an office and to remove those who have no claim to the office or who are serving illegally. *See, Treasurers of State v. Lang*, 2 Bail. 430 (1831) ["... if Evans himself had assumed the duties of the office in the first instance, without having conformed to all the requisites enjoined by the law, it cannot be questioned, that he would have been guilty of an usurpation, and might have been removed upon quo warranto."]. While some authorities hold that a writ of *quo warranto* is the exclusive mechanism for such removal, *see, e.g. State ex rel. Battin v. Bush*, 533 N.E.2d 301 (1988), other authorities conclude that title to an office may be tried by declaratory judgment. *See, Boerschinger v. Elkay Enterprises, Inc.*, 132 N.W.2d 258 (Wis. 1965). In *Boerschinger*, the Court concluded that where the issue of title to the office is "ancillary to the principal cause of action for the declaratory judgment," such declaratory relief may serve as the basis for determining title to the office. This decision quoted with approval the following language from *Borchard on Declaratory Judgments* (2d ed.), pp. 362-363:

> 'Since *quo warranto* is a traditional writ of ancient lineage, an occasional court will conclude that it is the indicated method of trying title to office or the validity of an election or other public act. But most courts have readily perceived that the declaratory judgment is a vehicle of relief of equal efficacy with *quo warranto* for the determination of the rights of the parties, while having the advantage of escaping some of the restrictions of *quo warranto, ...*'

132 N.W.2d at 264. Thus, it is now the majority rule that a declaratory judgment may serve the same function as a writ of *quo warranto.*

Likewise, in *Op. S.C. Atty. Gen*, July 27, 1987, we noted that in order to bring the issue of title to office before the Court, "a declaratory judgment or *quo warranto* action could be commenced." Similarly, in *Florence Co. v. Moore*, 344 S.C. 596, 545 S.E.2d 507 (2001), our own Supreme Court determined who held the office of county treasurer in a declaratory judgment action. There, the Court determined the question whether "one appointed by the governor to fill a vacancy in the county treasurer's position serve for the remainder of his predecessor's term or only until a successor is elected in a general election, takes the oath of office, and receives a bond and commission?" 344 S.C. at 600, 545 S.E.2d at 509. While the Court did not specifically address the issue of determining title to office by way of declaratory judgment, its holding was that "... Moore will serve as treasurer until Fowler qualifies on or after July 1, 2001." Accordingly, our Supreme Court has approved the procedure of adjudication of title to office by way of declaratory judgment.

Here, the declaratory judgment action was brought against Respondents Harrell, Hardee and Truluck, those commissioners deemed to be in violation of § 57-1-320(B). In South Carolina, a declaratory judgment action may be brought pursuant to § 15-53-30 and is to be liberally construed in order to seek a judicial determination of the party's [or parties'] rights, *status* or other legal relations. Such action has been determined by our Supreme Court as "affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships." *Graham v. State Farm Mutual Automobile Ins. Co.*, 319 S.C. 69, 459 S.E.2d 844 (1995). As has

been written, a declaratory judgment "serves the same purpose as coercive relief ...," because, with respect to public officials performing their duty [as declared by the Court], "it is rarely conceivable that coercion to compel performance of that duty is required." *Ronken v. Bd. of Co. Commrs.*, 572 P.2d 1, 6 (Wash. 1977) (quoting Borchard, *Declaratory Judgements*).

As noted above, the Supreme Court in *Sloan* expressly held that "section 57-1-320(B) prohibits a DOT Commissioner from *serving* a consecutive term of office." The highest Court in the State has now definitively declared what the law is and that no commissioner may be validly appointed to a term consecutive to his or her initial term. Thus, we deem such strong language as constituting or serving the same purpose as a removal of these commissioners from office. The Court has made it clear, in our view, that the particular commissioners in question were not appointed in accordance with the governing statute and that they may not serve in such capacity. Any *de facto* status or color of authority once enjoyed by them has now been removed by the decision of the State's highest court. See, 74 C.J.S. *Quo Warranto* § 14. [*Quo warranto* or *proceeding in the nature thereof* serves to remove or oust an incumbent]. *Id*., § 24 [where person has become ineligible to hold office, he or she may be ousted therefrom by judicial proceedings]; C.J.S. *Officers* § 308 [compensation of office is dependent upon title thereto]. The Court has now declared these positions vacant.

Conclusion

Accordingly, the ruling by the Supreme Court has the same coercive effect as a *quo warranto* or injunction. In our opinion, the *Sloan* decision holds that the commissioners in question may not serve on the Commission either in a *de jure*, *de facto* or hold over capacity. Once, the Court ruled that the Commissioners are ineligible to serve, such ruling ends their status completely. This being the case, they are ineligible under the *Sloan* case to participate in Commission meetings or to receive compensation therefor.[2]

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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[2] One issue which we cannot address here is whether any of the Respondents will seek a petition for reconsideration and what effect such filing may have upon the Court's judgment in *Sloan*. The South Carolina Appellate Court Rules do not address the issue of whether the filing of a petition for reconsideration stays the judgment of the Court in an original jurisdiction case. In the absence of such provision, the Court may well utilize the general rule that "... the filing of application for rehearing does not of itself operate as a stay or supersedeas." 5 C.J.S. *Appeal and Error* § 693. However, only the Court itself may determine whether such filing, if it in fact occurs, operates as a stay of the judgment. Our opinion herein does not attempt to make such a determination.