February 21, 2007

The Honorable Vida O. Miller
Member, House of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Dear Representative Miller:

You have requested an opinion from this Office regarding S.C. Code Ann. Section 57-1-330(A) (1976 as amended). Your question concerns the current procedure with respect to the election of commissioners of the South Carolina Department of Transportation (SCDOT) and how such election is affected by the federal constitutional requirement regarding "one person, one vote." By way of background, you state the following:

> [t]he legislative delegation from the First Congressional District is considering election of candidates. Section 57-1-330(A), Code of Laws of South Carolina, 1976, provides for this election which states in part: "...for the purpose of electing a commission member, a legislator shall vote only in the congressional district in which he resides...". We have members of delegations representing the First Congressional District who do not live in the district. Our delegation also is under the assumption that we must vote using the "weighted voting" requirement imposed by United States District Judge Patrick Michael Duffy in Neil G. Vander Linden, et al v. James Hodges, et al., an order C.A. No. 2-91-3635, dated June 22, 2000.
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> The delegation would be appreciative of an opinion reconciling Vander Linden with Section 57-1-330(A). Is the vote counted using the weighted vote or by a polled vote?

Law / Analysis

Section 57-1-330(A) provides in pertinent part as follows:

> (A) Beginning February 15, 1994, 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.

Thus, on its face, the statute is clear: legislators may only vote in their own Congressional District (the District in which they reside).

Thus, the question which you raise is the impact of the "one person, one vote" requirement, particularly as applied in the *Vander Linden* decision, to this statute. In an opinion dated March 4, 2003, we addressed at some length the constitutional requirements of "one-person, one vote." We considered the issue in the context of "election" (appointment) of public officers in joint assembly of the Legislature, concluding in that opinion that the requirement of "one person, one vote" did not apply to such appointments. We noted that this constitutional requirement originated with the Supreme Court decision of *Reynolds v. Sims*, 377 U.S. 533 (1964), which held that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment as much as invidious discrimination based upon factors such as race." 377 U.S. at 565.

In the opinion, we also noted, however, that subsequent decisions by the United States Supreme Court had distinguished appointments to office from those offices selected by popular election. We there cited cases such as *Hadley v. Jr. College Dist. of Metro. Kansas City*, 397 U.S. 50 (1970); *Fortson v. Morris*, 385 U.S. 231 (1966) and *Sailors v. Bd. of Ed. of County of Kent*, 387 U.S. 105 (1967) in support of this distinction. In *Hadley, supra*, we quoted the Supreme Court as concluding that

> where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people the equal protection of the laws.

377 U.S. at 58. And in *Sailors*, we highlighted the Court's language that "[s]ince the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man one vote' has no relevancy." 387 U.S. at 107.

Our 2003 Opinion also distinguished the Fourth Circuit decision of *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999). In *Vander Linden*, the Fourth Circuit held that the county legislative delegation is subject to the requirements of "one person, one vote." Because the votes of the members of county delegations were not proportionately weighted in terms of the number of voters represented, the Fourth Circuit in *Vander Linden* found the delegation system "to be unconstitutional." In the majority's opinion, the legislative delegations performed numerous important governmental functions, including the power to make appointments, to approve payment of certain funds, as well as budget approval in particular instances and the power to initiate referenda in limited circumstances. Thus, in view of the fact that the votes of the members of the legislative delegations were not weighted in accordance with their corresponding populations, the Fourth Circuit concluded that the composition of these delegations violated the Equal Protection Clause of the Constitution.

Our 2003 opinion, however, distinguished *Vander Linden* in the context of appointments made by the General Assembly *in joint assembly*. There, we stated as follows:

> [i]t is undeniable ... that in *Vander Linden v. Hodges, supra*, the Fourth Circuit imposed the "one person, one vote" requirements of the Equal Protection Clause upon South Carolina legislative delegations. As you suggest, the *Vander Linden* situation might be likened to the full Legislature's convening in joint assembly to make judicial and other appointments. However, the United States Supreme Court has never ventured nearly as far as the Fourth Circuit did in *Vander Linden*. Moreover, by following the *Sailors* case and concluding that "one person, one vote" principles were irrelevant to appointments made by legislative delegations, our own Supreme Court in *Moore v. Wilson* [296 S.C. 321, 372 S.E.2d 357 (1988)] took the same path as did Judge Neimeyer in [his dissent in] *Vander Linden*. In our opinion, the courts would deem the situation you raise to be much closer to the Supreme Court's decision in *Fortson* than to the Fourth Circuit's decision in *Vander Linden*.

We note that other cases have also distinguished appointive offices from those which are elected for purposes of the "one person, one vote" requirement. For example, it has been held that the appointment (or "election") of members of the state Dental Board by geographic district does not violate the "one person, one vote" requirement. *Plowman v. Massad*, 61 F.3d 796 (10th Cir. 1995), citing *Sullivan v. Alabama State Bar*, 295 F.Supp. 1216 (M.D. Ala), *affd. without opinion*, 394 U.S. 812 (1969). Moreover, in *City of St. Albans v. Northwest Regional Planning Commission*, 167 Vt. 466, 708 A.2d 194 (1998); the Vermont Supreme Court held that state may constitutionally provide for appointment of commissioners of a regional planning commission as representatives of each participating municipality without violating the equal protection principle of "one person, one vote." Other cases are in accord. *See, Warden v. Pataki*, 35 F.Supp.2d 354 (S.D.N.Y. 1999) ["one person, one vote" principle did not apply to composition of appointed boards]; *Eastern v. Canty*, 75 Ill.2d 566, 389 N.E.2d 1160 (1979) [there is no constitutional requirement that appointed governing body of sanitary district be so constituted that majority of its members "represent" more populous of areas which comprise district]; *Van Zanen v. Keydel*, 89 Mich. App. 377, 280 N.W.2d 535 (1979) [equal protection one person - one vote doctrine applies to state and local government units which are composed of members elected by voters, but state or local government may select some government officials by appointment and, where appointment is permissible, the one person - one vote doctrine does not apply]; *J.B. VanSlyke v. Bd. of Trustees of State Institutions of Higher Learning*, 613 So.2d 872 (1993) [one-man, one vote rule is not applicable to members of Board of Trustees of State Institutions of Higher Learning; rule does not apply to appointed positions].

There does exist authority somewhat to the contrary, however. For example, in *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994), the Tenth Circuit concluded that principles of "one person, one vote" require that a statutory system for election of Board of Agriculture delegates from private agricultural associations violates the "one person, one vote" requirement of the Equal

Protection Clause. The *Brownback* Court noted that the Board's powers were extensive, stating that the district court had found that the Board's powers ranged

> ... from regulating the healthfulness of milk and meat sold in the state to generally regulating all weights and measures including those commercially used by entities outside the agricultural industry.

42 F.3d at 1334. In the Court's view,

> [o]nce a state agency has the authority to affect every resident in matters arising in their daily lives, its powers are not disproportionate to those who vote for its officials. The quality of meat and dairy products consumed by everyone in the state; the accuracy of the scales upon which people are charged for consumer goods; the right to divert and use water; the use of pesticides on residential lawns, city parks, and farmlands are not services disproportionate to those who attend the annual meeting of the Board. Those matters unremittingly influence every person within the State of Kansas.

Id. at 1335. Thus, the Tenth Circuit upheld the District Court's conclusion that selection of members of the twelve person Board by the agricultural organizations and societies violated the Equal Protection Clause of the Constitution.

And, in *Fumarolo v. Chicago Bd. of Education*, 142 Ill.2d 54, 566 N.E.2d 1283 (1991), the Illinois Supreme Court concluded that appointments of members of a board of education violated "one person, one vote" requirements. There, the Court found that even though the nominating commission was an appointed body, it was made up of and selected by members of the local school council who were elected in violation of Equal Protection. The Court distinguished *Sailors v. Bd. of Ed., supra*. on the basis that in *Sailors* "... there was no question that the members of the bodies responsible for making the appointments were constitutionally selected." According to the Court, the situation in *Fumarolo*, however, was different because

> [h]ere, however, both the subdistrict councils and the nominating commission are made up of and selected by members of an unconstitutionally elected body, the local school council. We conclude, therefore, that the *Sailors* principle does not extend to a situation such as this where the members who are responsible for selecting the appointed body are not constitutionally selected. The nominating commission is simply too closely connected local school councils to conclude that it has been properly selected or that it can properly select candidates for the board of education.

566 N.E.2d at 1303.

However, we must also recognize that prior to *Vander Linden* being decided, the South Carolina Supreme Court in *Moore v . Wilson, supra* addressed the question of the constitutionality

of the then existing method of selection of SCDOT Commissioners in light of "one person, one vote" requirements. Although the selection process reviewed by the Court in *Moore* was somewhat different than the one contained in present § 57-1-330(A), the difference was not constitutionally significant. In *Moore*, the combined legislative delegations of a Highway District (judicial circuit) appointed the particular commissioner for that District. See, former § 57-3-240 (Supp. 1987) [commissioners were rotated, from county to county in the district to be "elected ... by a majority vote of the members of the county legislative delegations representing the districts."] One of the issues raised by Appellant Wilson was that then § 57-3-240 "is unconstitutional because it violates the principle of one man, one vote." The Appellant asserted that "the statutory scheme is unconstitutional because it gives the smaller legislative delegations from less populous counties considerably more power than the larger delegations from more populous counties." Such "dilution of the more populous counties' voting rights," the Appellant argued, violated the federal Constitution. 296 S.C. at 325, 372 S.E.2d at 359.

The South Carolina Court in *Moore*, however, viewed this argument to be "without merit." In the Court's view, the constitutional principle of "one person, one vote" was inapplicable to the selection of SCDOT commissioners, for the following reasons:

> [i]n situations involving popular elections, the State is required to ensure that each person's vote counts, as much as possible, as much as any other person's. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). However, where the State chooses to select members of an official body by a method other than by popular vote, the principle of one man, one vote has no relevancy. *Sailors v. Board of Education of County of Kent*, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967). In the present case, the selection of a highway commissioner is not made by voters in a popular election. Instead, the selection is made by members of the joint legislative commission and the principle of one man, one vote, is therefore inapplicable.

Id. Thus, our own Supreme Court has held that, because SCDOT commissioners are appointed rather than elected, the constitutional requirement of "one person, one vote" does not apply to a system whereby such commissioners are appointed by a combination of members of various legislative delegations. Absent further judicial clarification, we believe the *Moore* case controls.

Conclusion

Based upon the foregoing, it is somewhat unclear how far, if at all, *Vander Linden* may be extended to other situations such as the one about which you inquire. As noted, in our 2003 Opinion, we believe *Vander Linden* may be limited to the specific circumstances at issue there – the composition of the legislative delegation itself. But, it is questionable whether *Vander Linden* may be extended to situations involving the appointment of officers by other bodies such as by a joint session of the Legislature or by a combination of various legislative delegations of a congressional district. Particularly compelling here is the fact that our own Supreme Court has already concluded

in *Moore v. Wilson, supra* that the selection of SCDOT commissioners by a majority of members of combined legislative delegations does not violate "one person, one vote" principles.

While it is true that the *Moore* case was decided before *Vander Linden*, nevertheless, it is well recognized that a decision from the State's highest court regarding constitutional issues is entitled to equal weight as that of a decision of a lower federal court. As one court has stated, "[i]n passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position ...." *U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970). *See also, Steffel v. Thompson*, 415 U.S. 452, 482, n. 3 (1974) (Rehnquist and Burger, concurring) ("... the federal decision would not be accorded the *stare decisis* effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might, of course, be viewed as highly persuasive.") Thus, *Moore's* conclusion that the SCDOT method of appointment by a combination of legislative delegations is constitutionally valid, must be given strong weight.

Accordingly, it is our opinion that § 57-1-330(A) must be followed until repealed by the Legislature or set aside by a court. *See e.g.., Op. S.C. Atty. Gen.*, January 24, 2007 [only a court, and not this Office, may deem a statute unconstitutional; "... unless and until a court renders (a statute) unconstitutional ... [it] remain[s] valid and enforceable."]. Thus, while it certainly can be argued that *Vander Linden* now requires application of "one person, one vote" requirements to § 57-1-330(A), our Supreme Court in *Moore v. Wilson, supra* has ruled that because the position of SCDOT commissioner is appointed by members of various legislative delegations, rather than elected by the people, such principles do not apply. Until a court rules otherwise, we suggest *Moore v. Wilson* be followed. Thus, we would advise that § 57-1-330(A), as written by the General Assembly, including the requirement that "a legislator shall vote only in the congressional district in which he resides ...." is controlling here without the necessity of "weighted voting" with respect to appointments of SCDOT commissioners. Consistent with our prior opinions and decisions of the United States Supreme Court, the appointment process is not subject to the requirement of "one person, one vote."

Very truly yours,

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