HENRY MCMASTER
ATTORNEY GENERAL

March 16, 2009

The Honorable Harold Mitchell
Member, House of Representatives
P. O. Box 3046
Spartanburg, South Carolina 29304-3046

Dear Representative Mitchell:

You have asked a number of questions regarding the impact of the decision of the Fourth Circuit Court of Appeals in *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999). In that case, the Fourth Circuit concluded that the Equal Protection Clause's requirement of "one person, one vote" applied to South Carolina's legislative delegations. In the words of the Fourth Circuit panel, "[i]n sum, we conclude that the legislative delegations are elected bodies that exercise governmental functions, and that therefore the one person one vote requirement applies to them. Because there is no serious dispute that the delegation system fails to satisfy this requirement, we hold it to be unconstitutional." 193 F.3d at 281.

By way of background, you note that "[u]nder the Freedom of Information Act, a 'meeting' occurs on convening a quorum to discuss or act on matters over which the body has supervision, control, jurisdiction or advisory power." Thus, you note, a "quorum means a simple majority of the body." Further, you recognize that "[u]nder the *Vander Linden* court order, weighted votes are required by legislative delegation members on scheduled matters at scheduled delegation meetings."

You reference the fact that the Spartanburg delegation currently has thirteen members. Your specific questions are as follows:

1. At legislative delegation meetings, is a quorum required as described under the Freedom of Information Act? (In this case, seven (7) members of the Spartanburg County Legislative Delegation members would be required to attend a meeting to act on the matters over which the body has supervision, etc.).

2. Or, would the total members present calculated weighted votes constitute a quorum for legislative delegation members to act on matters at public meetings?

**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, in *Vander Linden* held that these "one person, one vote" requirements of the Equal Protection Clause are applicable to South Carolina's legislative delegations. In *Vander Linden*, the Fourth Circuit 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.

193 F.3d at 276. 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.

*Vander Linden* was thus concerned with the "powers" of the legislative delegations and the inequality such exercise of powers would have when wielded by legislators who represented disproportionate populations. Nothing in the Court's opinion, however, spoke to procedural issues such as determination of a quorum. Rather, the issue in *Vander Linden* was *action* by the delegation through the "exercise of the governmental functions." In issuing its opinion, the Court did not, moreover, attempt to "dictate any remedy." The Fourth Circuit 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 District Court issued its remedial order. Judge Duffy noted that the "South Carolina General Assembly has failed to enact remedial legislation ...." In the view of the

District Court, a "weighted voting" plan best cured the constitutional defects identified by the Fourth Circuit. The Court concluded that "[a]ny remedy imposed by this court will be limited to curing the 'one person, one vote' defect in the method of electing county legislative delegations." According to the District Court, "[a]n interim imposition of a weighted voting scheme *would allocate voting to delegation members in proportion to the population of the county that resides in each district." Order* of the District Court in *Vander Liden v. Hodges*, June 22, 2000. Thus, the District Court, 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 could have easily addressed these procedural issues if the Court had considered these issues to be part of the Fourth Circuit's opinion.

We have searched in vain for any definitive authority, in the form of statutes enacted or court decisions rendered since Judge Duffy's interim order of June 22, 2000, addressing the question of whether "weighted voting" applies to the determination of a quorum of the legislative delegation. By way of analogy, we note that one opinion of the New York Attorney General concludes that the remedy of weighted voting applies to all motions raised before the body whether or not such motion may be characterized as procedural. See, 1991 N.Y. *Op. Atty. Gen.* (Inf.) 1047, No. 91-23, 1997 WL 537240 (April 4, 1991). That opinion referenced a scholarly law review article which concluded that "[a] weighted vote would probably have to be used for all purposes, including determinations of quorums and committee decisions, for these procedural aspects are no less important than final votes in the legislative process." See, Weinstein, "The Effect of Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government," 65 Col. L.R. 21, 42 (1965).

On the other hand, an earlier New York Attorney General's Opinion concluded that the question of quorum determination was distinct from that of applications of weighted voting. In 1975 N.Y. *Op. Atty. Gen.* 176, 1975 WL 341339 (April 11, 1975) the Attorney General of New York addressed the issue of what constituted a quorum of a county Board of Supervisors, which consisted of six towns as members. The votes of the towns were weighted and the Attorney General was asked to advise whether a quorum was "determined by counting each town as one or would it be determined by the weighted vote of the County." Concluding that under New York law a quorum consisted of a majority of members of the body, the New York Attorney General advised that

> [t]hus, at least 4 members of said Board must be present to constitute said quorum and a minimum weighted vote in the aggregate of 29 cast by any of said members is necessary to constitute a simple majority.

We further reference the decision of our own Supreme Court in *State ex rel. McLeod v. West*, 249 S.C. 243, 153 S.E.2d 892 (1967) which concluded that while "one person, one vote" principles required apportionment of the South Carolina Senate, such federal constitutional principles did not repeal the provision of the South Carolina Constitution which controlled *the number of Senators*. The Court emphasized the rule that if the invalid part of a statute or Constitution is severable from

the valid portion, the valid part should be upheld and maintained. *West* held that "... article III, section 6 remains an effective and valid part of the Constitution of this State for the purpose of determining the size of the Senate." 249 S.C. at 247.

Similarly, the New York Court of Appeals found in *In the Matter of Warren Anderson v. Krupsak*, 40 N.Y.2d 397, 353 N.E.2d 822, 386 N.Y.S.2d 859 (1976), that a quorum of a joint session of the Legislature, held to elect members of the Board of Regents of the University of the State of New York, is determined by a simple majority of the total membership of the unicameral body without regard to whether the members came from the senate or the assembly. In *Krupsak*, the Court of Appeals reasoned as follows:

> [t]urning to the issue of whether there was a quorum present for the election of Regents, we reject the claim that in order for there to be a quorum of the joint session there must be present a majority of the total number of Senators and also a majority of the total number of Assemblymen. ... Once the joint session had been convened, the Senate and Assembly were no longer separate bodies of the Legislature, but were instead merged into a unicameral body, where a quorum was simply a majority of the total membership of the unicameral body, without regard to whether those members come from the Senate or the Assembly. In an analogous situation, the Court for the Correction of Errors stated that when the board of supervisors and the Judges of the Court of Common Pleas met in a joint meeting to elect a county treasurer of Chautauqua County, the two bodies merged into one body for that purpose, and that even if one of the two groups refused to participate at all, a quorum of the joint meeting was simply a majority of the single body which resulted from this merger. (Whiteside v. People ex rel. Upham, 26 Wend. 634, 641; see, also, Matter of Bogaskie, 58 Misc. 243, 246-247, 109 N.Y.S. 598, 600-01; People ex rel. Hawes v. Walker, 23 Barb, 304, 312.) In addition, the highest courts in order jurisdictions have stated that a joint session is composed not of members of the two individual houses, but of members of the Legislature itself, without regard to the house to which the member was elected (Richardson v. Young, 122 Tenn. 471, 539, 125 N.W. 664), that the term 'joint session' implies that the two houses of the Legislature meet together and commingle, acting as one body (Snow v. Hudson, 56 Kan. 378, 386-387, 43 P. 260), and that a quorum of a joint session composed of the two separate houses of the Legislature is simply a majority of the combined membership of the Legislature (Wilson v. Atwood, 270 Mich. 317, 322, 258 N.W. 773). Only be defining quorum in this manner can there be any reasonable assurance that the purpose of section 202 of the Education Law-to insure that deadlocks in the election of Regents will be resolved-can be accomplished. To require that a majority of each house be present at the joint session would permit the statute to be too easily frustrated, particularly, as here, where the original deadlock resulted from the political division of the houses. (See Richardson v. Young, 122 Tenn. 471, 541, 125 N.W. 664, Supra; Snow v. Hudson, 56 Kan. 378, 387, 43 P. 260, Supra.)

323 N.E.2d at 827. *See also*, *LaValle v. Hayden*, 696 N.Y.S.2d 782 (1999).

Instructive also is the South Carolina Supreme Court decision in *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1999). There, the Court addressed the question, among others, of what constitutes a quorum of the governing board of the Reinsurance Facility. Specifically, the issue concerning a quorum was whether two members – Griner and Coombs – could be counted for quorum purposes even though they were ineligible to vote. The Court applied the common law rules regarding the determination of a quorum, stating the following:

> [i]n the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. *Prosser v. Seaboard Air Line R. Co.*, 216 S.C. 33, 44, 56 S.E.2d 591, 595 (1949); *Gaskin v. Jones*, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942). A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter. *Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972); *King v. New Jersey Racing Comm'n,* 103 N.J. 412, 511 A.2d 615, 618 (N.J. 1986).
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> ... We further conclude the circuit court correctly ruled that a quorum was present. The record shows that eleven members, including Griner and Coombs, were present in person for the entire hearing. Enough members were present in person to form a quorum without even considering the five other board members who had given their proxy to fellow board members.

333 S.C. at 454.

## Conclusion

We find no definitive authority providing guidance for resolving the question of how a quorum of a legislative delegation is determined in light of *Vander Linden*. The Fourth Circuit opinion does not speak directly to the issue of a quorum, but instead focuses upon the constitutional requirement of "one person, one vote" principles to *action* by the delegation. Likewise, the District Court's remedial Order imposes a "weighted *voting*" requirement, mandating no express application of "one person, one vote" principles to quorum determination.

Certainly, one could infer from the Fourth Circuit's opinion that all procedural matters, including ascertainment of a quorum, should be based upon weighted voting in keeping with the spirit of the "one person, one vote" requirement of the federal Constitution. *See*, *Weinstein, supra.* However, the *Vander Linden* Court could have easily so ordered such a mandate if it had deemed the constitutional requirement extended this far. The fact that the Fourth Circuit focused so extensively upon *actions* of the delegation and *the votes* of delegation members implies, at least, that the constitutional mandate may only involve *action by the delegation* in the form of actual votes.

Moreover, the decision of our Supreme Court in *Garris* seems to emphasize a clear distinction between determination of quorum for purposes of holding a meeting and the weight of the votes of the membership of the body at the meeting once there is a sufficient number of members present to proceed. We have recognized the purpose of a quorum requirement – where there is physically present a majority of a body or board – as being that "the public is entitled to the benefit of the judgment and discretion individually and collectively" of the body. *Op. S.C. Atty. Gen.*, No 84-111 (September 6, 1984), quoting *Op. S.C. Atty. Gen.*, July 28, 1954. *See also, Op. S.C. Atty. Gen.*, March 28, 2007, referencing, among other authorities, *Fowler v. Beasley*, 322 S.C. 463, 472 S.E.2d 630 (1996) [public body, such as legislative delegation, must only transact business through a collective majority of members physically present]. As can be seen from *Garris*, such physical presence of a corporal majority is necessary and determinative, even if one or more of the members present may possess *no right to vote.*

Based upon the foregoing, 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*. Absent further guidance from the Fourth Circuit or the District Court, our view is that a court would likely rule that the common law rule of majority of those present remains in place. The requirement of a quorum based upon the *physical presence of a majority*, rather than a corporal minority who may hold the majority of the weighted votes, insures that a sufficient number of members is present to participate and discuss issues, regardless of the weight of the members' vote.

Yours very truly,

Henry McMaster

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