The State of South Carolina

Office of the Attorney General

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The Honorable John Campbell
Secretary of State of South Carolina
P. O. Box 11350
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Dear Mr. Secretary:

Mr. Medlock has referred your recent letter to me for reply. You have stated that the St. Andrews election was protested and declared invalid due to certain irregularities. You have inquired what questions will be before the electorate at this election.

At the original vote on incorporation the electorate voted on six questions; i.e., incorporation, the name of the municipality, the form of government, the method of election, whether the elections should be partisan or non-partisan, and, the term of the mayor and council. According to information provided to us by Mr. Ellisor, the only issue protested to the State Board of Canvassers was the incorporation question and not the remaining five questions as set out above. The protest, therefore, centered only on the vote on the one question of incorporation and, as we understand it, the question of whether or not the entire election should be re-run was not at issue. However, in dictum in the February 26, 1985, Order of the Commissioners of Election, it was stated at page 5 of that Order that "...every issue set out on the incorporation ballot must stand alone." The State Election Commission adopted these findings in their Order. The statement of the Commissioners and the fact that the other questions were not protested indicates that only the one question of incorporation should be re-run. Such is the obvious intent of the orders of the Commissions. Considerable deference should be given to an interpretation by the agencies which administer and decide election contests. See, Etiwan Fertilizer Co. v. S. C. Tax Comm., 217 S.C. 354, 60 S.E.2d 682 (1950).

There is no South Carolina law directly on point on this difficult issue. However, the incorporation statute, itself, Section 5-1-50, as amended, indicates that the six questions are considered to be separate questions with incorporation being only one of the issues voted upon. The statute proves in part that

> ...all registered electors living in the area sought to be incorporated shall be allowed to vote on the following questions: (a) incorporation; (b) name of the municipality; (c) the form of government; (d) method of election as prescribed in §5-15-20; (e) whether the election shall be partisan or non-partisan; and (f) the terms of the mayor and council members.

Obviously, based upon this statute, even those who vote against incorporation are nevertheless permitted to vote on one or more of the other questions. Thus, each question is treated separately.

Likewise, the prior incorporation provisions provided that when the question of incorporation was voted on, not only that question but the name of the proposed city and the candidates for mayor and aldermen were to be voted on. South Carolina Code of Laws, 1962, Section 47-352. In a 1969 opinion of this office, regarding these incorporation provisions, Robert W. Brown wrote that when full-slate (which was the law at that time) had not been complied with for purposes of the vote for aldermen this fact would not mean that the persons ballot would not be properly counted for the other votes on the ballot for mayor, the question of incorporation and the name of the municipality. (Copy enclosed) The opinion, therefore, implied as the Commissioners of Election stated in their Order, that each question stands on its own. This would appear to be a proper interpretation of both the old and the new statute, in that, by analogy, if a protest had been made of the vote on only the name of the municipality and subsequently been sustained, it would not be probable or logical for the vote on the other questions, including the vote on incorporation, to be re-run in a subsequent election on what the name of the municipality should be.

This conclusion, while not based upon a specific situation which is precisely on point, appears to be in accord with analogous general law. It is the law in South Carolina that every reasonable presumption must be made to sustain the results of an election and uphold the wishes of the voter. Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 381 (1954). Courts are extremely

hesitant to re-run elections because such amounts to disfranchisement of the voters. State ex rel. Bonzon v. Weinstein, 514 S.W.2d 357 (Mo. 1974). Thus, where an election is not protested, the declaration of the Board of Canvassers is deemed final. Smith v. Hendrix, 265 S.C. 417, 219 S.E.2d 312 (1975).

In Duncan v. York Co. 267 S.C. 327, 228 S.E.2d 92 (1976), our Supreme Court held that an entire election will not be voided when absolutely necessary; even where a portion of the ballot in a referendum was deemed constitutionally defective, the Court stated that no new election would be ordered where such defect did not affect the result. Supra at 100. See also, Creamer v. City of Anderson, 240 S.C. 118, 124 S.E.2d 788 (1962).

Likewise, in Finklea v. Daniel, 192 S.C. 298, 6 S.E.2d 472 (1939), our Court refused to overturn an entire Congressional election because there were defective votes in one county in the congressional district. The Court noted that "it will readily be seen that if the votes in Berkeley County be disregarded, it will in no wise affect the result of the election." 192 S.C. at 300. Thus, even though one portion of the election was thrown out, the Court refused to invalidate the entire election. Similarly, our Court has held that merely because the votes in one precinct are infirm, such will not necessarily vitiate an entire election. State v. State Bd. of Convassers, 86 S.C. 451, (1910). While these decisions are not directly on point, they clearly suggest that the court will always seek to divide the invalid from the valid portions of an election and will not dissolve an entire election result unless absolutely necessary.

Even more analogous are the cases where an election for a particular office is invalidated either in a general election or an election where there are a number of different races being run. Consistently, these cases do not invalidate the results of the entire election, but only those in contest. For example, in Mehling v. Moorehead, 14 N.E.2d 15 (Ohio 1938), the Court stated that a ballot could be defective with respect to certain offices and not as to others. 14 N.E.2d at 18. In Bergeson v. Mullinix, 399 Ill. 470, 78 N.E.2d 297 (1948), where only a clerk's race was contested, there was no thought of invalidating other races held in the general election. In O'Neal v. Simpson, 350 So.2d 998 (Miss. 1977), even though the court concluded that the election for supervisor was void and a new election ordered for that office, the remainder of the election results were not considered invalid. Likewise, in In re Appeal, 45 N.C. 556, 264 S.E.2d 338 (1980), only the election results for certain county

offices in a general election were contested and the remainder of the elections were not invalidated. The Court in Woods v. Mills, 503 S.W.2d 706 (Ky. 1974) ordered only the election as to Sheriff be re-run; other election results were not affected. In Payne v. Gentry, 149 La., 90 So. 105 (1921), the Court held that an election for marshal was void and "held to have been of no effect, in so far only as respects the office of marshal." (emphasis added). 90 So. at 107. And in Green v. James, 109 S.C. 263, 96 S.E. 400 (1918), it is apparent from the opinion that where in an election for mayor and aldermen, the mayor's race was invalidated, and a new election held, the aldermen's election was not re-run.

Thus, while there is no case precisely addressing your question, we believe the better conclusion is that only the question of incorporation should be placed on the ballot. Such conclusion would be in accord with the order of the Commissioners of Election and the State Election Commission and with a previous opinion of this Office and would seem to be consistent with existing general law. It is generally recognized that separate questions on a ballot must stand or fall on their own merits. 26 Am.Jur.2d, Elections, § 222. Here, the questions placed upon the ballot pursuant to §5-1-50 are each treated separately and the results are separately tabulated. Each separate question could have been protested. Thus, they would appear to be separate elections and case cited above concerning elections for various offices would appear analogous.

Additionally, on October 25, 1985, the United States Department of Justice sent a letter to this office regarding the request for preclearance of various issues regarding the St. Andrews incorporation election. This letter stated in part that this letter

> ... refers to the procedures for conducting the February 12, 1985, special election, including the use of paper ballots and the ballot allocation formula; the incorporation of the City of St. Andrews; the adoption of a mayor and council form of government; the at-large election, in non-partisan elections, of council members from residency wards to two-year, concurrent terms; the establishment of four polling places; and the August 6, 1985, special election procedures. ... the August 6, 1985, special election was not held. Accordingly, it would be inappropriate for the

Attorney General to make a determination concerning this matter .... The Attorney General does not interpose any objections to the other changes in question. (Emphasis added)

Therefore, as none of the other questions voted on at this incorporation election were protested, and, as the Justice Department has precleared all the changes but the actual incorporation and the incorporation date, it would appear that only the question of incorporation should be on the ballot at the re-running of this incorporation referendum. (I am enclosing for your information the May 31, 1985, request for additional information from the Justice Department to Alonzo W. Shealy, especially note question 2; Mr. Jones' August 22, 1985, response to this letter, especially note answer number 2 on the first page; and the October 25, 1985, letter of the Justice Department to Mr. Jones which is quoted from in the body of this letter.)

Sincerely,

Treva G. Ashworth/an

Treva G. Ashworth
Senior Assistant Attorney General

TGA/an

Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions