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March 23, 1987

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Dear Mr. Thompson:

By your letter of November 18, 1986, you have referenced the municipal nonpartisan election and runoff method of selecting municipal council members and mayors, Section 5-15-62 of the Code of Laws of South Carolina (1986 Cum. Supp.), and you have asked these questions: (1) are write-in candidacies or votes to be permitted in the runoff election; and (2) should write-in votes be counted in the ballot totals of the runoff election?

We have exhaustively researched these issues and have found no controlling case law on similar statutes from other jurisdictions or from the courts of this State. Thus, the ultimate resolution of your questions may be up to the legislature, by clarifying legislation, or by the courts of this State, by a declaratory judgment action or as the result of an election contest. I will offer herein my comments on the various legal arguments and suggest that the Town of Mount Pleasant seek clarification from the courts or the legislature.

Section 5-15-62 of the Code provides for municipal elections using a nonpartisan majority method of election. No primary is held, and all candidates file for their respective offices to run in one general election. To be elected in the general election, an individual must receive a majority of the votes cast for that office. Failure of a candidate to receive a majority of votes cast causes a runoff election to be held two weeks

after the general election. In such an instance, Section 5-15-62(b) provides:

> (b) If no candidate for a single office receives a majority of the votes cast in the first election or if an insufficient number of candidates receives a majority of the votes cast for a group of offices, a runoff election shall be held as herein provided:
>
> (1) If no candidate for a single office receives a majority of the votes cast in the first election, a second election shall be conducted two weeks later between the two candidates receiving the largest number of votes in the first election who do not withdraw. The candidate receiving a majority of the votes cast in the runoff election shall be declared elected.
>
> (2) If candidates for two or more offices (constituting a group) are to be selected and aspirants for some or all of the positions within the group do not receive a majority of the votes cast in the first election, a second election shall be conducted two weeks later between one more than the number of candidates necessary to fill the vacant offices. The candidates receiving the highest number of the votes cast in the second election equal in number to the number to be elected shall be declared elected.

By the clear language of the statute, the runoff election is to be held between one more than the number of candidates necessary to fill the vacant office or offices. The statute does not address write-in votes, however.

A "runoff" is defined to be "a final race, contest, or election to decide an earlier one that has not resulted in a decision in favor of any one competitor." Webster's Third New International Dictionary 1990 (1976). A "runoff primary" is "a

second primary election held in some states to decide which of the two highest candidates for an office in the first primary will be awarded the party nomination." Id. This notion of a runoff involving only those receiving the highest number of votes in the first election is consistent with the language of Section 5-15-62 of the Code and the literal interpretation thereof.

Following this interpretation, it appears that the General Assembly has imposed an additional requirement upon those who would be voted upon in a runoff election, namely the requirement of having been among the top recipients of votes in the general election first held. The General Assembly does have the authority to regulate elections, within reason, by virtue of Artile II, Section 10 of the State Constitution. See also 29 C.J.S. Elections § 3; McKenzie v. Boykin, 111 Miss. 256, 71 So. 382 (1916). However, Article I, Section 5 of the State Constitution provides that "[a]ll elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office."

An argument that Article I, Section 5 would be contravened if the legislature were to add qualifications not contemplated by this provision was made in McLure v. McElroy, 211 S.C. 106, 44 S.E.2d 101 (1947), in the context of requiring that certain trustees of the Union Hospital District be physicians practicing within the District. The Supreme Court distinguished between offices created by the State Constitution and those created by legislative act, deciding that the requirements of Article I, Section 5 applied only to the former. As to the latter, the Court stated:

> The distinction between offices of constitutional origin and those created by statute as to their control by the Legislature has been repeatedly recognized, and the rule has been often announced that an office created by legislative action is wholly within the control of the Legislature which can declare the manner of filling it, how, when, and by whom the incumbent shall be elected ... . [I]t is held that; 'Constitutional provisions prescribing the qualifications of electors do not apply to any election for municipal offices, not provided for by the Constitution, but created by legislative enactment.'

Id., 211 S.C. at 117. The Court discussed much relevant material, including treatises by Throop and Mechem on public officers, as support for the foregoing. The Court concluded that

> all officers, constitutional and statutory, and whether elected or appointed, must be qualified electors, and the legislature may not add other conditions for eligibility to those specified in the constitution for election or appointment to constitutional offices, that is, those offices created by the constitution; but as to offices established only by legislative acts, the General Assembly may prescribe other and additional qualifications which are reasonable in their requirements.

Id., 211 S.C. at 120.

Based on the foregoing, the General Assembly may impose the qualification of having been among the top recipients in the general election to participate in the runoff election. Thus, it would be consistent with the statute to restrict candidates to those who were among the top vote recipients and not include write-in candidates.

The problem, however, is that the courts of this state have mandated that write-in votes be counted since the "purpose of an election is to express the will of the electorate." Redfearn v. South Carolina Board of Canvassers, 234 S.C. 113, 120, 107 S.E.2d 10 (1959). However, all decisions which we were able to locate dealt with writing in names of candidates in general elections rather than in runoff elections held pursuant to a scheme such as Section 5-15-62 of the Code allows. See also Ops. Atty Gen. dated June 19, 1964; April 3, 1970; and Opinion No. 621 (write-in votes not permitted in primary elections). Whether the courts of this state would require write-in votes to be counted in a runoff election is not known at this time.

Based upon the foregoing, while the answers to your questions are by no means free from doubt, it would appear that write-in candidacies should not be permitted for the runoff election contemplated by Section 5-15-62 and that write-in ballots probably should not be counted. Because the rights to vote

and run for public office are basic to our concepts of freedom in this country, however, it may be advisable to clarify the issue by legislation or declaratory judgment action.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

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