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Office of the Attorney General

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ATTORNEY GENERAL

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April 12, 1985

Helen T. Zeigler, Special Assistant
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Office of the Governor
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Columbia, South Carolina 29211

Dear Ms. Zeigler:

Attorney General Medlock has referred your recent letter to me. You have stated that Jim Ellisor, Executive Director of the State Election Commission, has requested the Governor to call a new election regarding incorporation of St. Andrews in light of their March 19 Order that the incorporation election must be held over. You have inquired if the Governor is the proper authority to call this election.

South Carolina Code of Laws, 1976, Section 7-13-1170 provides in part that

whenever any...election...shall for any reason be declared void by competent authority, and any of these facts shall be made to appear to the satisfaction of the Governor, he shall, should the law not otherwise provide for such a contingency, order an election or a new election to be held at such time and place or places, and upon such notice being given as to him may seem adequate to insure the will of the electorate being fairly expressed. To that end he may designate the existing election official or officials or such other person or persons as he may appoint to perform the necessary official duties pertaining to such election and to declare the results thereof. (Emphasis added.)

The provisions regarding incorporation elections are set out in Section 5-1-10 et seq of the Code. Pursuant to Section 5-1-50 the Secretary of State upon receipt of a petition for

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incorporation, issues a commission to three or more persons residing in the area proposed to be incorporated. This Section proceeds to detail the notice and time for holding this election. However, there are no provisions for holding or calling a new election should the original be declared void. Therefore, since the law does "...not otherwise provide for [the]... contingency..." it would appear that only the Governor would have the power to call an election pursuant to his authority in Section 7-13-1170. 1/

Further, it would appear that the Governor could either designate the county election commission or the commissions who were appointed to conduct the first incorporation election to conduct this election. The final sentence of Section 7-13-1170 provides that the Governor

...may designate the existing election officer or officers or such other person or persons as he may appoint to perform the necessary official duties pertaining to such election and to declare the results thereof.

You have further inquired as to what time restrictions would apply to the setting of a new election date. Section 5-1-50 requires an incorporation election to be held not less than twenty nor more than ninety days after the issuance of a commission by the Secretary of State with notice of the election to be posted not less than five nor more than fifteen days before the election. Since these provisions govern an incorporation election, it would seem advisable for this incorporation election to follow these timelines as closely as possible. Additionally, these provisions evidence a desire for the election to be held in a speedy fashion following the issuance of the commission and therefore it would seem advisable for the Governor to set the new date at the earliest time possible.

An additional factor is that the Justice Department has already contacted this Office indicating that they believe that the election date should be submitted for preclearance prior to the holding of the election. Pursuant to the Voting Rights Act, if a submission is made the Justice Department has sixty days in which to consider the submission and may request additional information at any time therein which tolls their time

1/ As the statutory language used in this Section is the word "shall", it would appear this duty is a mandatory one and not a discretionary duty. 73 Am.Jur.2d Statutes §22.

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to consider a submission until they receive the additional information they have requested.

Of course, as with any opinion dealing with novel issues, only a court of competent jurisdiction could make a final determination on the questions that you have raised.

Sincerely,



Treva G. Ashworth
Senior Assistant Attorney General

TGA/bm
Enclosures

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions