ALAN WILSON
ATTORNEY GENERAL

August 16, 2016

The Honorable Bruce Bannister
Greenville County Legislative Delegation
301 University Ridge, Suite 2400
Greenville, SC 29601

Dear Representative Bannister:

You have asked our opinion as to how a majority of the Legislative Delegation is determined for purposes of appointment by the Delegation of two members of the Renewable Water Resources Board of Commissioners (ReWa). ReWa was formerly known as the Western Carolina Sewer Authority. See Act No. 393 of 1984. By way of background, you state the following:

> At the Greenville County Legislative Delegation meeting on July 11, 2016, the Delegation held an election for the appointment of two members to the Renewable Water Resources Board of Commissioners. Six nominations were received for the two vacancies. A quorum was present and the weighted vote total of those present and voting was 79.11. The vote totals each candidate received were as follows: Candidate 1, 45.5; Candidate 2, 50.42; Candidate 3,0; Candidate 4; 41.34; Candidate 5, 20.96; and Candidate 6, 0. Candidate 2 was declared a winner having received a majority of the weighted vote of the entire delegation.
>
> It was then determined necessary by Vice Chairman Bruce Bannister to hold a second election. The results of the second election were as follows: Candidate 1, 22.54; Candidate 3, 0; Candidate 4; 56.57; and Candidates 5 and 6, 0. Candidate 4 was declared the winner having received a majority of the weighted vote of the entire delegation.
>
> There was no point of order made and the meeting adjourned.
>
> As Vice Chairman of the Delegation, I would like your opinion on two questions. First can the outcome of a vote be changed in a subsequent meeting in a situation where a vote was called, a winner declared, no point of order was made and the meeting adjourned? If so, by what method?
>
> Second does the delegation have the authority to require a majority weighted vote of the entire delegation as opposed to a majority of those present and voting? If the decision is challenged, would the Delegation's decision be upheld in the court of law?

Law/Analysis

As you indicate in your letter, "weighted voting" is constitutionally required for substantive decision-making by the Legislative Delegation including the making of appointments. In Op. S.C. Att'y Gen., 2011 WL 4592367 (September 7, 2011), we recognized:

> [i]n Van Der Linden [v. Hodges], 193 F.3d 268 (4th Cir. 1999), the Fourth Circuit recognized that the Supreme Court had concluded that "'the Equal Protection Clause' requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly or equal population as is practicable." 193 F.3d at 272 (quoting Reynolds v. Sims, 377 U.S. 533, 577 (1964)). Based upon Reynolds and other Supreme Court decisions, Van Der Linden held that the "one person, one vote" mandate of the Equal Protection Clause is also applicable to South Carolina's legislative delegation. In the Court's opinion, based upon the parties' stipulation, county legislative delegations in South Carolina "actually 'perform numerous and various general county governmental functions. . . . '"

Included within those governmental functions, according to the Fourth Circuit, is the power of "making or recommending appointments." 193 F.3d at 276. Therefore, as the Fourth Circuit concludes, the disparity in voting as members of the Delegation is constitutionally intolerable:

> South Carolina legislators are elected from districts that contain parts of more than one county. Upon election to the General Assembly, each legislator automatically becomes a member of the legislative delegation of every county containing territory that falls within the legislator's district. Generally, each member of a delegation has one vote in delegation decisions regardless of the number of constituents he or she has in the county. The voters presented uncontroverted evidence that some legislators are members of the legislative delegation of a county in which they have relatively few constituents, and that some are even members of a delegation for which they have no constituents at all.

193 F.3d at 271. Accordingly, a system of "weighted voting" has been developed since Van Der Linden was decided, to ensure that the Equal Protection Clause's mandate of "one person, one vote" is now met. Delegations generally employ this "weighted voting" system.

However, in Mitchell v. Spartanburg Co. Legislative Delegation, 385 S.C. 621, 685 S.E.2d 812, (2009), our Supreme Court applied Van Der Linden, concluding that weighted voting is not necessary in every instance. The Court found that the "one person, one vote" requirement is inapplicable to the election of county legislative delegation officers and that such election could constitutionally be conducted by a simple majority vote. Quoting Van Der Linden, the Supreme Court reasoned:

> [i]n determining that the one person, one vote rule applied to the election of legislative delegations, the Fourth Circuited stated, "Focusing on whether the delegations exercise governmental functions seems to us entirely appropriate." . . . .

> Id., at 275. "Surely it is fair to infer . . . that the one person, one vote rule does not apply to the election of officials who do not perform governmental functions."
>
> Id.

Our 2011 Opinion, referenced above, also concluded that the one person, one vote rule does not require a Delegation to determine a majority either by the method of determining a majority of those present and voting, or a majority of the entire body. In that 2011 Opinion, we concluded:

> . . . the law has never required, absent a statutory provision or rule otherwise, that there be a concurrence of a majority of all members in order for that body to take action. Fed. Trade Commission v. Frutill [Products, Inc., 389 U.S. 179 (1967)]. . . .; Cf. Bd. Of Trustees of Fairfield County v. State, [395 S.C. 276, 279-81, 718 S.E.2d 210, 211-213 (2011)]. . . .
>
> The fact that the system relies upon a weighted majority of a quorum, or a weighted vote majority of those present and voting, might result in a minority of the total membership dictating the outcome is viewed by the courts as not controlling. Whether there is weighted voting or voting based upon each member casting one vote, it is often the case that a majority of those present and voting constitutes a minority of the total membership. As the United States Supreme Court has stated, "[i]f all the members of the select body or committee, or if all the agents are assembled, or if all have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provide those present constitute a majority of the whole number." U.S. v. Balin, 144 U.S. at 7, quoting 1 Dill. Mun. Corp. (4th ed.) § 283. . . .
>
> Finally, we emphasize, of course, that the delegation may change its rules to employ some other valid method of selection, such as a majority of a quorum or even a majority of the entire Delegation. The Delegation may analyze any rule not inconsistent with a statute. See Moore v. Wilson, 256 S.C. 321, 324, 372 S.E.2d 357, 358 (1988) [Delegations' rule which conflicted with statute is invalid].

Thus, the use of a particular method of determining a majority – whether by a majority of those present and voting, or by a majority of the entire body – does not violate federal law. The body may thus use either method, unless a statute or rule specifies a particular method.

In this instance, ReWa was formerly known as the Western Carolina Regional Sewer Authority. ReWa provides waste water treatment services to Greenville County and portions of Spartanburg, Laurens, and Anderson counties. As was stated recently in an unpublished decision of our Court of Appeals, "Renewable Water Resources (ReWa) is a special purpose district formerly known as Western Carolina Regional Sewer Authority." Harrison Partners, LLC v. Renewable Water Resources, Op. No. 2015 Op. 527 (unpublished opinion, 2015). In Act No. 393 of 1984, it was provided that the Board members of the Authority are appointed by the Governor "upon the recommendation of the legislative delegation of the county from which the

member must be appointed." Your letter confirms that the issue is the appointment of "two members of the Renewable Water Resources Board of Commissioners" by the Greenville County Legislative Delegation.

As discussed above, courts are divided as to the interpretation of a statute requiring a majority vote when the statute does not specify the particular method of calculating the number for constituting a "majority." See e.g. 63 ALR3d 1072 at § 4. There, it is noted:

> [t]o the extent that nay generalizations may be drawn from the diverse language and forms of expression to be found in the statutes of the various states, it may perhaps be safely said that where reference is made therein to a simple majority, or other proportion of the "elected members," or of "all of the elected members" of a city council, the courts have usually interpreted such language as meaning the total original membership, and that stipulations such as "all of the members," or the entire membership," have generally been given a similar construction. On the other hand, language specifying some proportion "of the council" has frequently been seen as indicative, of an intention that the basis for computation should be the number of members in attendance, assuming that they constitute a quorum.

Compare Gaskins v. Jones, 198 S.C. 508, 18 S.E.2d 454 (1942) with Redmond v. Incorporated Town of Surphur, 120 P.262 (Okl. 1912). In the latter case, the Court found that two thirds of the members composing county council meant "two thirds of the members composing council either present or absent." We note that in the matter at hand, Act. No. 393 of 1984 references "the legislative delegation" and provides that the "legislative delegation consists of all House members and Senators representing any portion of a county whose districts also include all or any portion of the Western Carolina Sewer Authority." (emphasis added).

Thus, it is reasonable from this language that a majority of the weighted voting of the Greenville Delegation was deemed to have been calculated based upon the total membership of the Delegation as opposed to those present and voting. Moreover, support for the Delegation's conclusion -- that the majority is determined on the basis of the entire body -- is found in a prior opinion of this Office. In Op. S.C. Att'y Gen., 1992 WL 682810 (May 22, 1992), we addressed the question of the "number of votes [which] would constitute a majority of a legislative delegation when voting on appointments." There, we referenced an opinion, dated April 15, 1986, where we advised that "the necessary vote would not be calculated on the basis of those members present and voting but on the basis of the total membership of the delegation (in that opinion, several delegations acting jointly.)" Thus, in the 1992 opinion, we advised as follows:

> [i]n the situation you have described, the Lexington County Legislative Delegation is comprised of ten members, it is noted that no limiting words such as "a majority of the delegation present and voting" were used. Thus, the majority would be calculated as more than half of the votes cast by those persons entitled to vote. See also Roberts Rules of Order Newly Revised § 43. In such case, at least six votes would be needed to comprise a majority of the Lexington County Legislative Delegation. As applied

> to the vote taken as described in your letter, it appears that no candidate received at least six votes and therefore no candidate received a majority favorable vote.

Accordingly, notwithstanding the split of authority in other areas, we have previously advised that a majority of the Legislative Delegation consists of a majority of the entire body.

With respect to any reconsideration of the vote, we have previously advised against such reconsideration. In Op. S.C. Att'y Gen., 1982 WL 189298 (May 19, 1982), we addressed the question of "[w]hen an election has been held by the Delegation, but results not announced, would it be legal to reconsider the vote?" Former Attorney General McLeod advised as follows:

> [w]hile I am not advised as to the particular elections with which you are concerned, those elections which are made by the Legislative Delegations are, to my knowledge, not subject to Rules of Parliamentary Procedure. Reconsideration of a vote may, nevertheless, be proper in appropriate circumstances, but the courts appear to follow the principle that there must be finality of decision and that reconsideration of an action on motion of one who has voted on the prevailing side is not favored. The answer to this question is, therefore, in my opinion, that reconsideration would not normally be proper unless prompted by ministerial errors or defects, but to reconsider a vote of election merely for the purpose of affording an opportunity for another vote upon a matter already decided would not, in my opinion, be proper.

In this same opinion, we addressed the question "[w]hat could be the ramifications of one who would have been elected (but) is, upon reconsideration, not elected." We advised as follows:

> [o]ne who has been elected by a proper vote and without the appearance of clerical or ministerial errors could validly complain that the electing body improperly reconsidered a vote whereby he had been previously declared elected even though the result of that election has not been announced. Depending upon the circumstances that existed, an estoppel on the part of the electing body could most probably be asserted.

Here, you note that the vote in question was announced ("Candidate 4 was declared the winner having received a majority of the weighted vote of the entire delegation"), that "[t]here was no point of order made and the meeting adjourned." Thus, based upon our advice in the 1982 opinion, the Delegation certainly could not reconsider its decision once the vote was announced, no point or order was made, and the meeting had adjourned.

Conclusion

In conclusion, our advice has been in earlier opinions that the Delegation has authority to require a majority weighted vote of the entire delegation as opposed to a majority of those present and voting. We believe a court would so rule based upon the specific language in the ReWa enabling statute, referenced above. While the courts are split as to which method to apply in a given instance, we are of the view that a court would find the language, defining the

legislative delegation, to require a weighted vote majority of the entire delegation. Certainly, we do not believe such a conclusion by the Delegation here conflicts with the statute or otherwise contravenes state law.

With respect to the question of changing the outcome of the vote in a subsequent meeting after the vote had been called, the winner declared, and no point of order made in the previous meeting, our 1982 opinion concludes that such a revote is not authorized.

As we emphasized in a previous opinion, no statute "provides for the operations or procedures of a delegation." Op. S.C. Att'y Gen., 1991 WL 633075 (November 20, 1991). Here, the Delegation applied the rule of determining a majority from the weighted voting of all members of the Delegation. Such a rule appears to be in accord with the language of ReWa's enabling statute. Consistent with our earlier Opinions, once the vote is taken pursuant to such procedure, results announced, no point of order raised, and the meeting adjourned, we would advise that the results are final and no reconsideration or revote is warranted.

Sincerely,

Robert D. Cook
Solicitor General