



COMMONWEALTH of VIRGINIA

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December 3, 2008

The Honorable Clifford L. "Clay" Athey, Jr.
Member, House of Delegates
35 North Royal Avenue
Front Royal, Virginia 22630

Dear Delegate Athey:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether the Town Council for the Town of Front Royal (the "Town") under the Charter of the Town of Front Royal (the "Charter"), may appoint an individual to serve the remaining two years of the unexpired term of a council member elected as mayor, or whether such individual must be elected pursuant to the requirements of Article VII, § 5 of the Constitution of Virginia. Further, you ask whether the Town Council may appoint such individual after a vacancy has existed for more than forty-five days. You also inquire regarding whether the Town Council may call a special election to fill the vacated council position. Finally, you ask whether the term "elected" members of the governing body as used in several provisions of Title 15.2 includes a member who is appointed by the Town Council to serve the remaining two years of the unexpired term of the council member elected as mayor in contrast with an individual elected by the qualified voters of the Town in a special election.

Response

It is my opinion that the Charter of the Town of Front Royal authorizes the Town Council of Front Royal to appoint an individual to serve the remaining two years of the unexpired term of a council member elected as mayor. Further, it is my opinion that the Town Council is not authorized to appoint such individual when the vacancy has existed for more than forty-five days. It also is my opinion that pursuant to § 24.2-226, the Town Council may petition the circuit court to issue a writ of election to fill the vacancy in an election that complies with the requirements of Article VII, § 5 of the Virginia Constitution. Finally, it is my opinion that an individual appointed to serve such unexpired term is not an elected member of the Town Council as that term is used in Title 15.2.¹

¹But see *infra* note 33 and accompanying text.

Background

You advise that the Town Council consists of six members and the mayor. The mayor does not have a vote except as a tiebreaker. In May 2008, a Town Council member was elected as mayor. On June 25, 2008, the mayor-elect resigned his Town Council position to qualify as mayor, with his term beginning on July 1, 2008. Effective July 1, 2008, you state there were only five members of Town Council and the mayor. You note that the Council intends to fill the vacancy on August 11, 2008, which is more than forty-five days after the mayor-elect resigned. You further advise that, historically, vacancies on the Town Council have not been filled by the usual special election process applicable to local government in Virginia under Article 6, Chapter 2 of Title 24.2, §§ 24.2-225 through 24.2-229, because § 6 of the Charter permits the Council to appoint a member to fill a vacancy for the balance of the unexpired term.

Further, you advise that the five-member Town Council currently seeks to impose an assessment against adjoining property owners for certain improvements the Town is constructing under Chapter 24 of Title 15.2, §§ 15.2-2400 through 15.2-2413. You note that § 15.2-2405 requires that without a petition from affected landowners, the assessment may only be imposed “by a two-thirds vote of all the members *elected* to the governing body.” (Emphasis added.) You note that there are a number of similar provisions contained in the *Code* limiting the actions of a governing body to votes by its “elected” members.² You relate that the Council has been advised that when it appoints an individual to serve an unexpired term, the vote of such appointed member cannot be counted for any votes that require the vote of an “elected” member of the governing body.

Applicable Law and Discussion

Section 6 of the Charter of the Town of Front Royal provides that “[t]he council *may* fill any vacancy that occurs in the membership of the council for the unexpired term.”³ In addition, pursuant to § 24.2-228(A) “[w]hen a vacancy occurs in a local governing body ..., the remaining members ..., within forty-five days of the office becoming vacant, *shall* appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy.” If the governing body fails to make the appointment within forty-five days, the judges of the circuit court must make the appointment.⁴ The Supreme Court of Virginia has noted that while the effect of the word “shall” primarily is mandatory, and “may” primarily is permissive, “courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe ‘may’ and ‘shall’ as permissive or mandatory in accordance with the subject matter and context.”⁵ The word “may” in § 6 of the Charter clearly is permissive because both the

²See, e.g., VA. CODE ANN. § 15.2-1428 (2008) (appropriation of money exceeding \$500); § 15.2-2100(A) (2008) (sale of Town property); § 15.2-2102 (2008) (award of franchise); § 15.2-2636 (2008) (issuance of bonds); § 15.2-3202 (2008) (petition for annexation); § 15.2-3203(B) (2008) (rejection of annexation petition).

³See 1993 Va. Acts ch. 479, at 572, 573 (emphasis added). The charter for the Town of Front Royal was enacted in 1937. See 1936-7 Va. Acts ch. 44, at 142. While § 6 of the Charter was amended in 1993, the provision in § 6 concerning the filling of a vacancy on the town council remains essentially the same as originally enacted in 1937. Compare 1993 Va. Acts, *supra* at 573 (amending portions of § 6) with 1936-7 Va. Acts, *supra*, at 144.

⁴See VA. CODE ANN. § 24.2-228(A) (2006).

⁵Pettus v. Hendricks, 113 Va. 326, 330, 74 S.E. 191, 193 (1912).

Town Council and the circuit court have appointive power to fill vacancies on the Council under § 24.2-228(A). Therefore, either the Town Council or the circuit court may appoint a replacement to the Council. Accordingly, the Charter authorizes, but does not require, the Town Council to fill such vacancy.

In 1996, an opinion of the Attorney General (the “1996 Opinion”) considered the provisions of § 6 of the Charter and concluded that § 6 does not divest the circuit court of authority under § 24.2-228(A) to appoint a replacement if the town council does not act.⁶ The 1996 Opinion also concluded that the intent of § 6, when read in conjunction with Article 6 of Title 24.2, was “that vacancies in local offices be filled within a limited time period.”⁷ Because the Town has a population greater than the threshold of 3,500 specified by the General Assembly in §24.2-228(A), the appointment of a replacement allows the individual to hold office only until the qualified voters of the Town fill the vacancy by special election pursuant to § 24.2-226. The General Assembly has not substantially amended the statutes considered by the Attorney General in the 1996 Opinion, including § 6 of the Charter.⁸ While an opinion of the Attorney General is not binding on the courts of the Commonwealth, it is “entitled to due consideration.”⁹ This particularly is the case when the General Assembly has knowledge of such Attorney General’s opinion and has done nothing to amend the law. “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.”¹⁰

Article VII, § 5 provides that “[t]he governing body of each ... town shall be elected by the qualified voters of such ... town in the manner provided by law.” Title 24.2 governs the administration of elections in the Commonwealth. Pursuant to the election laws of the Commonwealth, the General Assembly recognizes only three types of elections – general, primary, and special.¹¹ A general election is “an election held in the Commonwealth on the Tuesday after the first Monday in November or on the first Tuesday in May for the purpose of filling offices regularly scheduled by law to be filled at those times.”¹² A primary is “an election held for the purpose of selecting a candidate to be the nominee of a political party for election to office.”¹³ Finally, a special election is “any election that is held pursuant to law to fill a vacancy in office or to hold a referendum.”¹⁴ The facts that you provide clearly demonstrate that the matter about which you inquire would involve a special election. Sections 24.2-226(A) and 24.2-228(A)

⁶1996 Op. Va. Att’y Gen. 127, 129-30 (interpreting prior version of § 24.2-228(A)). At the time of the 1996 Opinion, §24.2-288(A) provided that when a vacancy occurred in a local governing body, the remaining members had thirty days to appoint a successor, and the failure to do so authorized the circuit court to make such appointment. *Id.* at 128.

⁷*Id.* at 130.

⁸*See, e.g.*, 1999 Va. Acts ch. 128, at 158, 158 (amending § 24.2-228(A) to provide period of forty-five days instead of previous period of thirty days).

⁹*Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998) (quoting *Va. Beach v. Va. Rest. Ass’n*, 231 Va. 130, 135, 341 S.E.2d 198, 201 (1986)).

¹⁰*Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161, 300 S.E.2d 603, 605-06 (1983).

¹¹*See* § 24.2-101 (Supp. 2008) (defining term “election”).

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

would require a special election to fill the position vacated by a Town Council member who resigns to assume the duties of mayor.

Title 15.2 governs local government in Virginia. Section 15.2-1424 generally provides that vacancies in a local governing body “shall¹⁵ be filled as provided for in Title 24.2,” which, as previously noted, governs elections. The 1997 Session of the General Assembly recodified the Commonwealth’s laws regarding local government.¹⁶ The drafting note following § 15.2-1424 in the 1997 Code Commission report on the recodification of Title 15.1 provides that:

No substantive change in the law; provides for continuity of government by appointed officials, as provided in (§ 24.2-225 et seq.), until appointed officials are replaced by elected ones.¹⁷

As previously noted, § 24.2-228(A) authorizes “the remaining members of the [local governing] body ..., within forty-five days of the office becoming vacant, [to] appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy.” The 1993 Session of the General Assembly recodified the Commonwealth’s election laws within Title 24.2¹⁸ (the “1993 Recodification”). Prior to the 1993 Recodification, § 24.1-76, the predecessor statute to § 24.2-228, provided that interim appointments to fill vacancies in any county, city, town, or district office were to be made by the appropriate circuit court judges when “no other provision is made for filling the same.”¹⁹ Former § 24.1-76 was consistent with its predecessor statute, § 136.²⁰ The 1975 Session of the General Assembly

¹⁵ “[T]he use of ‘shall,’ in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent.” *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994). “A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.” *Nelms v. Vaughan*, 84 Va. 696, 699, 5 S.E. 704, 706 (1888), *quoted in* *Commonwealth v. Rafferty*, 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991).

¹⁶ See 1997 Va. Acts ch. 587 at 976, 1069.

¹⁷ 5 H. & S. Docs., *Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia*, S. Doc. No. 5, at 351 (1997).

¹⁸ See 1993 Va. Acts ch. 641, at 812 (revising and recodifying election laws of Virginia by repealing Title 24.1 and adding Title 24.2). The 1991 Session of the General Assembly requested that the Virginia Code Commission study and revise Title 24.1 and report its findings to the Governor and the 1993 Session of the General Assembly in the form of a recodified title. See 1991 Va. Acts S.J. Res. 242, at 2135, 2135. The Virginia Code Commission rendered its report, which resulted in the recodification of Title 24.1. See 5 H. & S. Docs., *Report of the Virginia Code Commission on the Recodification of Title 24.1 of the Code of Virginia*, S. Doc. No. 25 (1993) [hereinafter S. Doc. No. 25].

¹⁹ The phrase “no other provision is made for filling the same” originally appeared in the first sentence of § 24.1-76. See 1970 Va. Acts ch. 462, at 826, 846. The 1984 Session of the General Assembly added subsection A to § 24.1-76, and the phrase continues in the first sentence of that subsection. See 1984 Va. Acts ch. 480, at 764, 769.

²⁰ See VA. CODE ANN. § 136 (1919), *amended by* 1920 Va. Acts ch. 296, at 410; 1928 Va. Acts ch. 24, at 22; 1930 Va. Acts ch. 68, at 79. Section 136 subsequently was codified at § 24-145. See 1 REP. OF THE COMM’N ON CODE RECODIFICATION AND PROPOSED CODE OF VIRGINIA (Michie 1947). The 1970 Session of the General Assembly repealed Title 24, including § 24-145, which was recodified at § 24.1-76 in Title 24.1. See 1970 Va. Acts, *supra* note 19, at 846.

first enacted § 24.1-76.1, establishing an exception for vacancies in county governing bodies and providing for interim appointments by the remaining members of the governing body.²¹ Prior to the 1993 Recodification, city and town council members had the authority to fill such vacancies by appointment only when their respective charters provided for such appointment.²² The 1975 Session of the General Assembly's enactment of § 24.1-76.1 created a separate mechanism for a county to fill a vacancy occurring in the membership of its governing body.

The 1993 Recodification resulted in the amendment and recodification of §§ 24.1-76 and 24.1-76.1 at § 24.2-226, dealing only with special elections; and §§ 24.2-227 and 24.2-228, dealing with interim appointments.²³ Section 24.2-226(A), which applies to towns, provides that “[a] vacancy in any elected local office ... shall be filled by special election [held at] ... the next ensuing general election ... in May.” The drafting note following § 24.2-226 in the Code Commission report on the recodification of Title 24.1 provides that:

The provisions of existing § 24.1-76 A. for interim appointments by circuit judges are moved to proposed § 24.2-227 so that it is clear that the basic principle of ... [A]rticle [6, Chapter 2 of Title 24.2] is to fill vacancies by election.^[24]

In addition, the drafting note following § 24.2-227 provides that:

Proposed § 24.2-227 is based on existing subdivision A of § 24.1-76. The only significant change in language occurs in the first sentence, where all local governing bodies are excluded from the court's power to make interim appointments to fill vacancies. This already is the case for vacancies in county governing bodies which occur during a member's term because existing § 24.1-76.1 authorizes the governing body to make the appointment.^[25]

Section 24.1-76 clearly was the basis for drafting § 24.2-228, as the drafting note provides that:

Proposed § 24.2-228 is based on existing § 24.1-76 provisions for counties and makes no substantive change with regard to the governing body's authority to make an interim appointment when a vacancy occurs during a member's term in office. The proposed section would expand the governing body's interim appointment power to include vacancies arising when a member-elect did not qualify.^[26]

Based on the drafting notes of the Code Commission and the 1996 opinion, it is clear that the Town Council is authorized, but not required, to appoint an individual to serve the remaining two years of the unexpired term of the council member elected as mayor. It equally is clear that an individual may be

²¹ See 1975 Va. Acts ch. 515, at 1042, 1053 (adding § 24.1-76.1 (codified as amended at § 24.2-228)).

²² See 1996 Op. Va. Att'y Gen. 127, 129.

²³ See 1993 Va. Acts, *supra* note 18, at 822-23.

²⁴ S. Doc. No. 25, *supra* note 18, at 30.

²⁵ *Id.*

²⁶ *Id.* at 31.

elected to fill the Town Council vacancy in a special election pursuant to § 24.2-226, which would comply with Article VII, § 5. Such special election is based upon the writ of election issued by the circuit court ordering such election. Finally, based upon the analysis of the applicable provisions of the *Code*, including the General Assembly's recodification of Titles 15.2 and 24.2, it is clear that an individual appointed to the Town Council to serve the remaining two years of the unexpired term of a council member elected as mayor is not an "elected" member of the Town Council as that term is used in various provisions of Title 15.2. Such an individual is an appointed member of the Town Council.²⁷

I am aware of the decision of the Circuit Court of Rockingham County,²⁸ which is a part of the Twenty-Sixth Judicial Circuit of Virginia²⁹ that also includes the Town. In its published decision, the Circuit Court considered § 15.2-2636, a portion of the Public Finance Act,³⁰ that mandates "[a]ny ordinance or resolution authorizing the issuance of bonds by a municipality must be passed by the recorded affirmative vote of a majority of all the members elected to its governing body." The Circuit Court concluded that the term "elected" in § 15.2-2636 is not limited to popular elections, but includes elections by members of a governing body.³¹ Prior opinions of this Office have concluded that the actions and decisions of a circuit court are not subject to the review of the Attorney General "and must be treated as the binding determination with regard to the case before the court."³² Therefore, the conclusions set forth herein are not intended to call into question the validity of the Circuit Court of Rockingham County's determination in the case before it.³³

²⁷ A 1975 opinion of this Office concludes that a "tie breaker and the appointed member of the Prince William Board of Supervisors may vote on matters requiring an affirmative vote of all 'elected' members pursuant to Article VII, Section 7, of the Constitution of Virginia (1971)." 1974-1975 Op. Va. Att'y Gen. 35, 36. The 1975 opinion is expressly overruled.

²⁸ See *Hutton v. Town of Elkton*, 57 Va. Cir. 278 (2002).

²⁹ See VA. CODE ANN. § 17.1-506 (Supp. 2008).

³⁰ Sections 15.2-2600 to 15.2-2663 (2008).

³¹ See *Hutton*, 57 Va. Cir. at 280.

³² See Op. Va. Att'y Gen.: 1987-1988 at 140; *id.* at 352.

³³ The doctrine of *stare decisis* "plays a significant role in the orderly administration of justice by assuring consistent, predictable, and balanced application of legal principles. And when a court of last resort has established a precedent, after full deliberation upon the issue by the court, the precedent will not be treated lightly or ignored, in the absence of flagrant error or mistake." *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265, 355 S.E.2d 579, 581 (1987). The Virginia Supreme Court has concluded that:

It is to the interest of the public that there should be stability in the laws by which they regulate their conduct. It may be that this [C]ourt, as at present constituted, would not, as an original proposition, have construed [the statute] as it was construed in the cases cited, but the construction of statutes ought not to vary with every change in the personnel of the appellate court. The construction was a fair and reasonable one, made after full deliberation by courts of very able judges, for whose opinion and judgment we entertain the highest respect. [T]his construction [has been] repeated three times by a unanimous court ... and cannot now be repudiated by this [C]ourt.

Kelly v. Trehy, 133 Va. 160, 169, 112 S.E. 757, 760 (1922). Absent an appeal to the Court of Appeals of Virginia or the Virginia Supreme Court, the Circuit Court for Rockingham County is the court of last resort in the Twenty-Sixth Judicial Circuit. Therefore, the Court in *Hutton* has established a precedent, after full deliberation, upon the interpretation of the meaning of the term "elected" in the context of § 15.2-2636. Accordingly, that precedent will not be treated lightly or ignored by a similar court in such Circuit absent flagrant error or mistake.

The Honorable Clifford L. Athey, Jr.
December 3, 2008
Page 7

Conclusion

Accordingly, it is my opinion that the Charter of the Town of Front Royal authorizes the Town Council of Front Royal to appoint an individual to serve the remaining two years of the unexpired term of a council member elected as mayor. Further, it is my opinion that the Town Council is not authorized to appoint such individual when the vacancy has existed for more than forty-five days. It also is my opinion that pursuant to § 24.2-226, the Town Council may petition the circuit court to issue a writ of election to fill the vacancy in an election that complies with the requirements of Article VII, § 5 of the Virginia Constitution. Finally, it is my opinion that an individual appointed to serve such unexpired term is not an elected member of the Town Council as that term is used in Title 15.2.³⁴

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in cursive script that reads "Robert F. McDonnell".

Robert F. McDonnell

1:213; 1:941/08-092

³⁴ See *supra* note 33 and accompanying text.