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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

May 5, 2005

Samuel W. Howell, IV, General Counsel
Charleston County Board of Elections and
Voter Registration
Post Office Box 22495
Charleston, South Carolina 29413

Dear Mr. Howell:

In a letter to this office you indicated that elections for members of the Charleston County Council were conducted from single member districts for the first time in the 2004 election cycle. Prior to the November general election, the Republican candidate for District 7 died. As a result, the election for that seat was delayed until a January, 2005 special election following a new Republican party primary election and runoff election in November and December, 2004.

The approved district map for County Council District 7 includes the Plantation Apartments at 1840 Carriage Lane. You indicated that through administrative error at the Charleston County Planning Department, registered voters residing in the Plantation Apartments were listed as being in County Council District 5. Therefore, the poll lists for the 2004 election cycle mistakenly listed the registered voters at the Plantation Apartment as being in District 5.

According to your letter, none of the registered voters residing in the Plantation Apartments voted in the District 7 special election held in January, 2005. However, 116 residents of the Plantation Apartments voted in the November, 2004 general election on which ballot would have appeared the District 5 election in which some or all of the voters might have voted. You indicated that, in fact, 53 ballots were cast in the District 5 election in the precinct containing the Plantation Apartments in the November, 2005 general election.

Following a protest of the January, 2005 special election, based in part on the errors in the registration books as to voters in the Plantation Apartments, the results of the District 7 special election were overturned by the election board and a new election ordered. Following an appeal, the decision was upheld. A new special election for District 7 is to be conducted this

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summer. You have questioned whether qualified voters who voted in the general election in November, 2004, at which time these voters may have voted in the District 5 election, may now vote in the District 7 special election.

I have been unable to locate any authority specifically addressing your situation. However, in responding to your question, it must be noted that the United States Supreme Court has recognized that "...voting is of the most fundamental significance under our constitutional structure." Illinois State Board of Elections v. Socialist Workers Party et al., 440 U.S. 173, 184 (1979). Moreover, as determined by the State Supreme Court in Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 381, 384 (1954), "(v)oters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result." As similarly stated in Eubanks v. Hale, 752 So.2d 1113 (Ala. 1999),

(a)s this Court has held, "A legal voter has the right to express his free choice and wish in the premises, and will not be deprived thereof by reason of the fraud or neglect of election officers....(citing Campbell v. Jefferson County, 113 So. 230, 230-231 (1927))...Further, "a legal voter has the right to express his free choice and wish at an election and within the statutes, and will not be deprived [thereof] by reason of mistake of judgment, and of the law by election officials, or by the neglect or fraud of election or canvassing officials...(citing Pope v. Howle, 149 So. 222, 225 (1933)).

See also, Taylor v. Girard, 36 P.2d 773, 776 (Idaho, 1934) ("It would seem to be the general rule that the voter should not be deprived of his rights as an elector, nor disfranchised, by the errors, wrongful acts, fraud, or mistakes of election officers, if it is possible to prevent it."; 29 C.J.S. Elections § 337 ("Where persons offering to vote are challenged, but are not examined as to their qualifications, and do not refuse to take the oath to meet the challenge, they are entitled to cast their ballots, and mistake, neglect or fraud of election officials should not be permitted to deprive a legal voter of the due exercise of his or her franchise.")).

Consistent with such, in my opinion, qualified voters who live in the Plantation Apartments and who could have voted in the District 5 election in November, 2004 due to being mistakenly listed as being in District 5, should be allowed to vote in the upcoming District 7 special election. To deny them such privilege would be to disfranchise these voters from an

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election to which they could have voted but for a previous administrative error. Moreover to deny them such privilege would merely perpetuate a prior mistake.

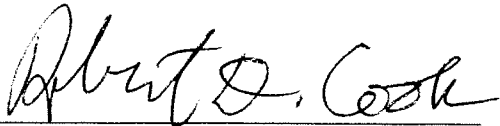
If there are any questions, please advise.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General