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May 4 1984

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ARIZONA ATTORNEY GENERAL

The Honorable Roy W. Hudson
Arizona State Representative
State Capitol, House Wing
1700 West Washington
Phoenix, Arizona 85007

Re: I84-063 (R83-172)

Dear Representative Hudson:

In your letter of November 30, 1983, you inquire whether the State's absentee voting law, A.R.S. § 16-541, et seq., applies to "charter government elections" and, if so, what time frames are applicable. Two separate elections are actually involved in the charter adoption process: a freeholder election to select a board to draft the proposed city charter and a ratification election to decide whether the charter drafted by the board will be adopted. Ariz. Const., Art. XIII, §§ 2 and 3 ("Article 13"). We conclude that absentee voting must be provided for the ratification election and that the statutory time limits set forth in A.R.S. § 16-541, et seq., are to be strictly followed. However, because these time limits cannot be reconciled with the constitutionally-mandated time frame for freeholder elections, we conclude that absentee voting does not extend to this initial aspect of the charter process.

We note initially that in Arizona there is no constitutional right to cast an absentee ballot. Absentee voting statutes confer a privilege, and not an absolute right. See, e.g., Kiehne v. Atwood, 93 N.B. 657, 604 P.2d 123 (1979); Mommsen v. School Dist. No. 25, 181 Neb. 187, 147 N.W.2d 510 (1966); State ex rel. Van Horn v. Lyon, 119 Mont. 212, 173 P.2d 891 (1946); and Annot., 97 A.L.R.2d 257, 264-265 (1964). The statutes granting the privilege to cast an absentee ballot and its time limits are to be strictly construed. Board of Supervisors v. Superior Court, 103 Ariz. 502, 446 P.2d 231 (1968). Accord, State ex rel. Van Horn v. Lyon, 119 Mont. 212, 173 P.2d 891, 893 (1946).

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The present language¹ of Arizona's absentee voting law clearly encompasses charter government elections. By its terms, A.R.S. § 16-541 applies to "any election called pursuant to the laws of this state . . ." (emphasis added). The difficulty lies in reconciling the time limits contained in the absentee voting statute with the time limits applicable to charter government elections. Since the latter time limits are of constitutional origin, and the former have been held to be inviolate, we conclude that when the two are irreconcilable, the statutory absentee voting privilege must yield. See Dorgan v. Pima County, 131 Ariz. 491, 492, 642 P.2d 488 (1982) (in the case of a conflict, the provisions of the Constitution prevail over any legislative action); Harris v. Maehling, 112 Ariz. 590, 591, 545 P.2d 47 (1976).

In the case of the ratification election, there is no irreconcilable conflict. The time for such elections is set forth in Article 13, and A.R.S. § 9-282. These provisions require the election to take place within a 10-day period which begins to run only after the proposed charter has been filed, published for twenty-one days, and an additional 20-day period has elapsed. In other words, the earliest that such an election can occur is forty-one days from the filing of the charter, assuming that publication begins on the day of filing.²

¹This language was adopted in 1974, see Laws 1974, Ch. 134, § 30, and represents the culmination of a series of statutory changes which increasingly broadened the scope of the absentee voting law. For example, prior to 1974 the law extended only to a "general or primary election, or a special election called pursuant to Section 1, Article 21, of the Constitution". Laws 1954, Ch. 76, § 1. And before that, the absentee voting law applied only to a "general or primary election." A.R.S. § 55-1301 (1939 ed.). Accordingly, our former opinions narrowly construed the extent of the privilege, in keeping with the more restrictive statutory language then in effect. See Atty.Gen.Ops. 61-62, 61-8 and 53-157.

²Article XIII § 2 and A.R.S. § 9-282 provide that the first publication must commence within twenty days after completion of the proposed charter.

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This 41-day period, however, is sufficient to accommodate the critical deadlines set forth in the absentee voting law.

The key deadline in the absentee voting law is the requirement that the ballots be prepared and delivered to the election official at least thirty days prior to the Saturday before the election. A.R.S. § 16-545.B. The other pertinent deadlines set by that law, such as the last date for requesting absentee ballots³, for delivery of the ballot to the voter, and for receipt of the cast ballots, all occur after this 30-day cut-off. Thus, from both a legal and a practical standpoint, the absentee voting deadlines can be harmonized with the deadlines for a charter ratification election.

However, the opposite is true of the freeholder election which also has specific time frames governed by the Constitution. Article 13, § 3 requires the freeholder election to be conducted not later than thirty days from the date on which the election is called. Since the ballots for such an election cannot be prepared until after the call, i.e., after the determination has been made to hold such an election in the first place, the absentee ballot delivery deadline in A.R.S. § 16-545.B cannot be met.

The Supreme Court has repeatedly interpreted the 30-day deadline for delivery of absentee ballots as an inflexible requirement. In Board of Supervisors v. Superior Court, supra, at 504, 446 P.2d at 233, for example, the Court declared:

If we allow an additional day to deliver the ballots because the last day falls upon a Sunday, the delivery will no longer be "thirty days prior." We believe this statute is to be strictly construed. Therefore, the phrase "not less than thirty days" is to be followed strictly.

³ Although A.R.S. § 16-542.A permits a voter to request an absentee ballot up to ninety days preceding the Saturday before the election, we do not view accommodation of the initial request date as crucial. First, the privilege of requesting a ballot has no meaning until an election has been called. Moreover, despite an early request, the voter has no absolute right to receive the ballot until forty-eight hours after the 30-day cut-off. A.R.S. §§ 16-542.B and 16-545.B. Thus, we do not judge the absentee voting law to be fatally inconsistent with the charter ratification election because a voter may have less than ninety days to request an absentee ballot.

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(Emphasis added.) See also Rapier v. Superior Court, 97 Ariz. 153, 398 P.2d 112 (1964) (viewing the 30-day deadline as an absolute cut-off). Since the case law would thus preclude a reduction of the absentee ballot delivery time, and the 30-day time limit is incompatible with the freeholder election schedule mandated by the Constitution, we conclude that the absentee voting privilege cannot be extended to the initial freeholder election.

Very truly yours,



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Attorney General

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