



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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September 7, 2005

FILE NO. 05-007

MUNICIPALITIES:
Use of Non-Statutory Election
Systems in Home Rule Municipalities

The Honorable Barbara Flynn Currie
House Majority Leader
State Representative, 25th District
300 State House
Springfield, Illinois 62706

Dear Representative Currie:

I have your letter inquiring whether home rule municipalities may, by referendum, implement election systems, such as cumulative voting or instant run-off voting, that are not specifically authorized by the Election Code (10 ILCS 5/1-1 *et seq.* (West 2004)) or the Illinois Municipal Code (65 ILCS 5/1-1-1 *et seq.* (West 2004)). For the following reasons, it is my opinion that, pursuant to article VII, section 6, of the Illinois Constitution of 1970, a home rule municipality is authorized, subject to referendum approval, to adopt procedures for selecting municipal officers that differ from those set forth in either the Election Code or the Municipal Code.

During the 93rd legislative session, you sponsored House Bill 2544, a bill intended to amend the Municipal Code to authorize any municipality, whether home rule or non-home-rule, to adopt an ordinance granting the municipality's electors the authority to exercise cumulative voting for the offices of alderman, trustee and commissioner. As described in the bill, the phrase "cumulative voting" refers to a system that gives each voter a number of votes equal to the number of candidates running for a particular office. Voters may cast their votes for as many or as few candidates as they please, giving all votes to one candidate or one vote to each candidate, for example. The candidate or candidates with the highest cumulative number of votes would be elected.

Another bill, House Bill 3301, was introduced during the 93rd legislative session to amend the Election Code and the Municipal Code to authorize both home rule and non-home-rule municipalities to adopt, by referendum, an instant run-off voting procedure for the offices of mayor, city clerk, city treasurer, city councilman and city alderman. As described in that bill, the phrase "run-off voting" refers to a system under which an elector votes for his or her first, second and third choices among the candidates. If none of the candidates receive a majority of the votes cast on the first count, then the candidate receiving the fewest first-choice votes is eliminated and recounting occurs until a candidate receives a majority of the votes cast.

Ultimately, the legislature did not pass either House Bill 2544 or House Bill 3301. You have asked whether a home rule municipality may nonetheless implement one or both of

these election systems, which are not expressly authorized by State statute, through the exercise of its home rule powers.

Article VII, section 6(f), of the Constitution provides:

(f) A home rule unit shall have the power *subject to approval by referendum* to adopt, alter or repeal a form of government provided by law, * * *. A home rule municipality shall have the power to provide for its officers, *their manner of selection* and terms of office *only as approved by referendum* or as otherwise authorized by law. (Emphasis added.)

Although they have been granted extensive powers with respect to their local government and affairs (Ill. Const. 1970, art. VII, §6(a)), home rule municipalities may change their manner of selecting officers only: (1) as provided by statute; or (2) as approved by a referendum. *See Leck v. Michaelson*, 111 Ill. 2d 523, 528 (1986); *Clarke v. Village of Arlington Heights*, 57 Ill. 2d 50, 54 (1974).

The Municipal Code generally provides that a municipality shall operate under one of four statutory forms of government: (1) the aldermanic (weak mayor) form; (2) the commission form; (3) the managerial form; or (4) the strong mayor form. Although the Municipal Code prescribes the process for certain, limited aspects of municipal elections (*e.g.*, 65 ILCS 5/3.1-25-35, 3.1-25-40 (West 2004)), most municipal elections are conducted in accordance with the Election Code. 10 ILCS 5/2A-1 (West 2004). Under the Election Code, the person receiving the highest number of votes is ordinarily determined to be nominated or elected, as the case may be. *See* 10 ILCS 5/7-59, 22-12 (West 2004); 10 ILCS 5/22-8 (West 2004), as amended by Public Act 94-645, effective August 22, 2005. Additionally, the Election Code

makes it clear that an elector may vote only for the number of persons to be elected to an office. *See* 10 ILCS 5/17-11, 17-16 (West 2004). If an elector casts votes for more candidates than there are persons to be elected, the ballot will not be counted for that particular office. *See* 10 ILCS 5/17-16 (West 2004). With one limited exception, neither the Election Code nor the Municipal Code currently provides for "cumulative voting" or "instant run-off voting" in municipal elections. *See* 10 ILCS 5/2A-1.2, 2A-26 (West 2004); *see also* 65 ILCS 20/21-5, 21-12 (West 2004) (if no candidate on the ballot for certain, specified municipal offices in the City of Chicago receives a majority of votes, a run-off election shall be conducted between the candidates receiving the highest number of votes). Because the statutes do not provide for either of these election systems, we must determine whether cumulative voting or run-off voting is a change in the manner of selecting officers that, under article VII, section 6(f), the voters may approve by referendum.

With respect to the power of a home rule municipality to change the manner of selection of its officers, in *Boytor v. City of Aurora*, 81 Ill. 2d 308, 314-16 (1980), the Supreme Court held that a home rule municipality could provide by referendum for the nonpartisan election of its officers under article VII, section 6. Similarly, in *Clarke v. Village of Arlington Heights*, 57 Ill. 2d 50 (1974), the Court held that a home rule municipality could, by referendum, change the number of its trustees and make the office of village clerk appointive, even though the ordinance would be contrary to the provisions of the Municipal Code limiting the number of trustees and requiring the election of the village clerk. The Court found that the change in the

manner of selection of municipal officers and their terms superseded the provisions of the Municipal Code to the contrary. *Clarke*, 57 Ill. 2d at 54. Relying on these authorities, my predecessor concluded in opinion No. 00-003, issued March 7, 2000, that a home rule municipality has the authority to change the durational residency requirement for municipal officers.

Most closely paralleling the question you have raised, in *Leck v. Michaelson*, the Supreme Court invalidated an attempt by the Village of Lansing to require run-off elections for trustees receiving less than 50% of the votes cast, but on the basis that the referendum question adopted was vague, ambiguous and not self-executing. With respect to the authority of a municipality to institute run-off voting by referendum under article VII, section 6(f), the Court stated:

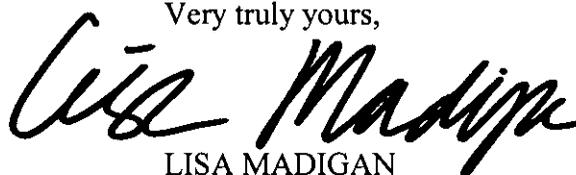
It is clear that providing runoff elections for candidates for public office who do not receive the requisite number of votes is a change in the manner of selecting municipal officers, and in the absence of legislative authority for such a change, it can be accomplished only by referendum. *It is undisputed in the present case that the voters of Lansing had the power under section 6(f) to effect by referendum a rule requiring that their local officials be elected by 50% of the votes cast, and that such a referendum was required because there was no legislative authority for the change.* (Emphasis added.) *Leck*, 111 Ill. 2d at 528.

The Court in *Leck v. Michaelson* unequivocally recognized that a municipality could adopt a procedure for run-off voting pursuant to article VII, section 6(f). The implementation of a run-off system of voting in the Village of Lansing was invalidated not because the village lacked the constitutional authority to act, but because the referendum

proposition lacked the detail necessary to effectuate the change. Because a change in the manner of selecting officers may be made only with referendum approval, the village had no authority to enact an ordinance implementing the referendum that included significant additions and, in some respects, conflicted with the adopted referendum. It is clear, therefore, that any referendum changing the manner of the selection of municipal officers must create a complete, self-executing system for selection of officers and not merely embody a concept to be implemented by an ordinance adopted at some later time. *See also Lipinski v. Chicago Board of Election Commissioners*, 114 Ill. 2d 95 (1986).

Based on the authorities cited above, home rule municipalities possess the power to provide by referendum for election systems that are different from those specifically authorized by the Election Code or the Municipal Code. Under article VII, section 6, of the Constitution, a change in the manner of selecting officers of a home rule municipality may be effected by referendum, regardless of whether the legislature has authorized the particular method for selection. Therefore, because the Election Code and the Municipal Code provisions for selecting municipal officers may be superseded by a referendum adopted in a home rule municipality pursuant to article VII, section 6, it is my opinion that home rule municipalities may adopt procedures for electing municipal officers by cumulative voting or by instant run-off voting with referendum approval.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan", written in a cursive style.

LISA MADIGAN
ATTORNEY GENERAL