



COMMONWEALTH of VIRGINIA

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The Honorable L. Louise Lucas
Member, Senate of Virginia
P.O. Box 700
Portsmouth, Virginia 23705-0700

The Honorable Frederick M. Quayle
Member, Senate of Virginia
P.O. Box 368
Suffolk, Virginia 23439

Dear Senators Lucas and Quayle:

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

Issue Presented

You inquire, in the context of a recall election for the Mayor of the City of Portsmouth ordered pursuant to the recall procedures set forth in the Portsmouth City Charter, whether an election to fill a possible vacancy in the office of Mayor should be governed by that City's Charter, or whether it will be governed by a recently amended provision of the Code of Virginia if one or more candidates meet the requirements to be listed on the recall ballot for possible election to the office of Mayor.

Response

It is my opinion that, in the context of a recall election for which one or more candidates meet the requirements to be listed on the recall ballot for possible election to the City of Portsmouth office that is the subject of the recall, a possible vacancy in that office would be filled pursuant to the recall provisions of the City Charter of the City of Portsmouth.

Background

You note that a petition has been filed to recall the Mayor of the City of Portsmouth. The Circuit Court for the City of Portsmouth has scheduled the recall election for July 13, 2010. You further relate that, during its 2010 session, the General Assembly modified the existing statute dealing with how vacancies in local elected offices should be filled.¹ That new law goes into effect on July 1, 2010.² The

¹ 2010 Va. Acts ch. 431.

² VA. CONST. art. IV, § 13.

The Honorable L. Louise Lucas
The Honorable Frederick M. Quayle
June 24, 2010

City Charter for the City of Portsmouth contains a provision addressing recall elections and how a vacancy should be filled should a recall election result in the removal of an officeholder.³

Applicable Law and Discussion

Section 24.2-226 does not specifically address recall elections. Rather, it provides a general procedure for filling vacancies in local government offices after those vacancies have occurred. Under its provisions, as amended by the General Assembly this year, within 15 days of the occurrence of the vacancy, the governing body must petition the circuit court to issue a writ of election to fill the vacancy.⁴ The circuit court then must issue a writ of election “promptly, which shall be no later than the next general election unless the vacancy occurs within 90 days of the next general election in which event it shall be held promptly but not later than the second general election.”⁵ The City Charter for the City of Portsmouth, in contrast, provides a special procedure for filling an office *simultaneously* with a recall by specifying that the recall ballot present to the voters both the question whether the named officer shall be removed from office and below that question the names of the candidates to fill the office should the officer be removed.⁶ If a majority of citizens approve the recall, then “the candidate receiving the highest number of the votes cast shall be declared elected.”⁷

The guiding principle governing the construction of charter provisions and general statutes is that conflicts between the two should be avoided if reasonably possible.⁸ The conflict between the two statutes must be clear and the provisions of the two so inconsistent with each other that both cannot prevail, before the prior statute will be held to be repealed or inoperative.⁹

Applying these principles, it is my opinion that there is no conflict between § 24.2-226, as amended, and the Portsmouth City Charter. Both can be reasonably construed to give full force and effect to each. The Code provision states a general rule that comes into play only when there is a vacancy in an elected local office. Under the City Charter, the recall procedures set forth a special rule for a recall election in which the voters simultaneously (i) determine whether to remove the office holder who is the subject of the recall and (ii) select the successor to that office holder from among candidates listed on the recall ballot. If the majority of votes cast in the recall election on the question of removal be affirmative, the office holder who is the subject of the recall is deemed removed upon the announcement of the official canvass of the election, and the candidate on the recall ballot receiving the highest number of

³ City of Portsmouth Charter § 10.09.

⁴ 2010 Va. Acts ch. 431.

⁵ *Id.*

⁶ City of Portsmouth Charter § 10.09(f).

⁷ City of Portsmouth Charter § 10.09(g).

⁸ See *Scott v. Lichford*, 164 Va. 419, 422-23, 180 S.E. 393, 394 (1935); 1991 Op. Va. Att’y Gen. 71, 74. See also *Kirkpatrick v. Board of Supervisors*, 146 Va. 113, 125, 136 S.E. 186, 190 (1926) (“where two statutes are in apparent conflict they should be so construed, if reasonably possible, so as to allow both to stand and to give force and effect to each”).

⁹ See *City of Richmond v. County Board*, 199 Va. 679, 685, 101 S.E.2d 641 (1958). See also 1986-87 Op. Va. Att’y Gen. 40, 41 (“presumption against an intent to modify or repeal a prior statute applies with particular force in the case of general legislation enacted subsequently to special, local legislation on the same subject”).

The Honorable L. Louise Lucas
The Honorable Frederick M. Quayle
June 24, 2010

votes is declared elected.¹⁰ The Charter also provides that, in the event the successor of the officer removed fails to qualify within 10 days after receiving notification of his election, "the office shall be deemed vacant."¹¹ Thus, in the context of this recall election, the provisions of § 24.2-226 for filling a vacancy in a local office would come into play only if the recall election resulted in the removal of the officeholder and no prevailing candidate from the recall ballot qualified to assume the office within the 10-day window set forth in the Charter.

Moreover, it is settled law that

[a] later statute which is general does not repeal a former one that is particular unless negative words are used, or the acts are so entirely inconsistent that they cannot stand together. Thus laws existing for the benefit of particular municipalities ordinarily are not repealed by general laws relating to the same subject-matter. Stated in different phrase, where the subsequent general law and prior special laws, charter or ordinance provisions do not conflict, they both stand, but this result must depend, of course, upon the legislative intent which is to be ascertained from an examination and comparison of the whole course of legislation relating to the subject under consideration.¹²


The changes made by the General Assembly in 2010 do not evince a clear intent by the legislature to displace more specific provisions contained in a city charter.

Conclusion

Accordingly, it is my opinion that, in the context of a recall election for which one or more candidates meet the requirements to be listed on the recall ballot for possible election to the City of Portsmouth office that is the subject of the recall, a possible vacancy in that office would be filled pursuant to the recall provisions of the City Charter of the City of Portsmouth.

With kindest regards, I am

Very truly yours,


Kenneth T. Cuccinelli, II
Attorney General

¹⁰ City of Portsmouth Charter § 10.09(g).

¹¹ *Id.*

¹² *Lichford*, 164 Va. at 423, 180 S.E. at 394.