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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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August 1, 2012

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Municipalities – Elections – Candidates – Death – Municipal Elections

Under the principles of law pronounced by the Alabama Supreme Court in *State ex rel. Cleveland v. Stacy*, 263 Ala. 185, 82 So. 2d 264 (1955) and the statutory authority provided in sections 11-46-25(g) and 11-46-26 of the Code of Alabama, the City of Eufaula should allow the name of a deceased candidate to remain on the general election ballot.

If the deceased candidate receives a majority of the votes cast, the position should be declared vacant and filled pursuant to section 11-44G-1 of the Code.

The city council does not have the authority under section 11-43-41, or under any other Code provision, to order a special election to fill a vacant council seat.

Dear Mr. Calton:

This opinion of the Attorney General is issued in response to your request on behalf of the City of Eufaula.

QUESTIONS

> Under the principles of law pronounced by the Alabama Supreme Court in *State ex rel. Cleveland v. Stacy*, 263 Ala. 185, 82 So. 2d 264 (1955), does the City of Eufaula allow the name of a deceased candidate to remain on the general election ballot?
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> If the answer to Question 1 is in the affirmative, and if the deceased candidate were to receive a majority of the votes cast, would the position be declared vacant and filled pursuant to section 11-44G-1 by the elected council taking office on Monday, November 5, 2012?
>
> Does the city council have the authority, under section 11-44G-1 or under any other Code provision, to order a special election to fill a vacant council seat as opposed to making the appointment itself?

FACTS AND ANALYSIS

In your letter of request, you informed this Office of the following:

> The City of Eufaula is a class 7 municipality according to the 1970 federal census and is conducting a municipal general election on August 28, 2012. The last date to qualify for a position on the city council was July 17, 2012, at 5:00 p.m. Two candidates qualified for District Seat #5.
>
> The city clerk is required by the election laws to cause to be printed on the ballot the names of all qualified electors as of that date. The list of qualified electors was sent to the printer at 5:34 p.m. on July 17, 2012, and the printer acknowledged receipt of the list at 6:02 p.m. that same day. The printed ballots were

> scheduled to be received by the city on Tuesday, July 24, 2012. Absentee balloting began on the 24th upon receipt of the ballots. On Saturday, July 21, 2012, one of the candidates died.

Section 11-46-25 of the Code provides the manner in which candidates may qualify or withdraw, as well as various aspects regarding the structure or composition of the ballot. Relevant portions of this section state as follows:

> (b) There shall be but one form of ballot for all the candidates for municipal office and ***every ballot*** provided for use at any polling place in a municipal election ***shall contain the names of all candidates who have properly qualified and have not withdrawn,*** as provided in subsection (g), together with the title of the office for which they are candidates.
>
> . . .
>
> (g) ***The mayor shall cause to be printed*** on the ballots ***the name of any qualified elector who, by 5:00 P.M. on the third Tuesday in July preceding the date set for the election, has filed a statement of candidacy,*** accompanied by an affidavit taken and certified by an officer authorized to take acknowledgments in this state that ***such person is duly qualified to hold the office for which the person desires to become a candidate***. . . .
>
> (h) No names shall be printed upon the ballot as candidates for election except the names of such persons as become candidates in the manner prescribed in subsection (g) nor may any person be a candidate or be permitted to file a declaration for more than one place or position in a group of offices of the same name when such offices have been designated by number as authorized in Section 11-46-22.

. . .

> (j) ***Any candidate may withdraw as a candidate by giving written notice to the mayor, at any time, prior to the date of the election.*** If a candidate withdraws, as herein provided, the election officials shall, if paper ballots are used in the election, draw a line in ink through the name of such candidate; the election officials shall, if voting machines are used in the election, paste or otherwise secure a strip of white paper over the name of such candidate. If electronic voting tabulators are used in the election, the name of the candidate shall be removed from the ballot in accordance with the manufacturer's guidelines or instructions.
>
> ***All written notices of withdrawal*** filed with the mayor shall be preserved for six months after the election.

ALA. CODE § 11-46-25 (Supp. 2011) (emphasis added).

Under the established rules of statutory construction, words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used, a court is bound to interpret that language to mean exactly what it says. *Ex parte Cove Properties, Inc.*, 796 So. 2d 331, 333-34 (Ala. 2000). Based on the plain language used in section 11-46-25 of the Code, only the names of candidates who have qualified to run may be placed on the ballot. Also, only the names of candidates who have submitted a written notice of withdrawal may be removed from a ballot. *Id.*

Section 11-46-26 of the Code again reiterates the provisions established in section 11-46-25(g). Section 11-46-26 of the Code states as follows:

> ***In the event only one person has filed a statement of candidacy*** for an office by 5:00 P.M. on the third Tuesday in July preceding the date set for an election of municipal officers pursuant to subsection (g) of Section 11-46-25,

> ***then such person shall for all purposes be deemed elected to such office***, any provisions of this article to the contrary notwithstanding. The mayor or other chief executive officer shall not cause the name of such person or the office for which his candidacy was declared to be printed on the ballot, but he shall immediately file a written statement with the governing body of the municipality, attested by the clerk, certifying the fact that only one person filed a statement of candidacy for the office of _____ (naming the office) by 5:00 P.M. on the third Tuesday in July preceding the day of _____, 2__, the date set for an election of municipal officers in the City (Town) of _____, Alabama, and setting forth the name of such person. At its first regular meeting after receiving such statement the governing body of the municipality shall adopt a resolution declaring the person named in the statement duly elected to the office described in the statement and shall issue a certificate of election to such person. For the purpose of this article, each place on the council of a municipality organized under the mayor-council form of government shall be considered a separate office.

ALA. CODE § 11-46-26 (2008) (emphasis added).

In construing statutes, courts do not interpret provisions in isolation, but consider them in the context of the entire statutory scheme. *Siegelman v. Ala. Ass'n of School Boards*, 819 So. 2d 568, 582 (Ala. 2001). Both sections 11-46-25 and 11-46-26 state that the names of every person who has filed a statement of candidacy for an office by 5:00 P.M. on the third Tuesday in July preceding the date set for an election of a municipal office shall be listed on the ballot.

Under the facts presented, the deceased candidate properly filed a statement of candidacy before passing away, and his or her name was caused to be printed on the ballot. This candidate, however, did not present the mayor with a written notice of withdrawal. As such, it is the opinion of this Office that the names of both candidates who qualified for the District Seat 5 in Eufaula should be listed on the ballot.

Your inquiry questions whether, under the implementation of the holding in *Stacy*, the City of Eufaula may allow the name of the deceased candidate to remain on the general election ballot. In determining that the name of the deceased candidate may remain on the ballot as a result of the aforementioned statutory authority, this Office reiterates the principles expressed in *Stacy*.

In *Stacy*, ballots were prepared with the name of the Democratic candidate imprinted thereon. After the time prescribed by law for printing of the ballots, and 23 days prior to the election, the Democratic candidate died. The Court determined that "votes cast for a deceased, disqualified, or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards other candidates." *Stacy*, 263 Ala. 185 at 187, 82 So. 2d 264 at 265. In arriving at this conclusion, the Court stated the following:

> The theory behind the rule is based on the premises (a) that majority rule must prevail in elections, and (b) that death is merely a disqualification for filling public office.
>
> . . .
>
> The effect of not counting votes cast for a deceased candidate is summoned up by Mr. Justice Maxey in Derringe v. Donovan, supra:
>
>> "To hold that the votes cast for a contemporaneously or recently deceased winning candidate for Governor or United States Senator or Congressman or school director shall be regarded as nullities, and that his opponent who was voted for by only a minority of the voters is in fact elected because he receives the highest vote among the candidates who are alive at the time of the closing of the polls is repugnant to the principle of majority rule, which

> is the cornerstone of orderly government."
>
> To uphold the view that to permit a minority group to place in office a candidate otherwise totally unacceptable to the majority merely through mischance (death of a popular candidate) impresses us as a usurpation of the majority will through no fault or neglect of the voters. . . .
>
> If this be so, a candidate might be elected who received only a small portion of the votes, and who never could have been elected at all but for this mistake [a mistake of law or fact that causes a person to cast a vote for an ineligible candidate].

Id. (internal citations omitted).

By allowing the citizens of Eufaula to vote for the deceased candidate, such votes should not be perceived as an endorsement of the deceased candidate as much as the votes should be analyzed to be votes against the other candidate and an indication of the desires of the majority of the electorate. *See, generally*, *State ex rel. Herget v. Walsh*, 7 Mo. App. 142, 143 (1879). If the City of Eufaula were to remove the deceased candidate's name from the ballot, then the other candidate vying for District Seat 5 would win by happenstance, which is exactly what the court in *Stacy* cautioned against. Based on the facts in this particular instance, it is the opinion of this Office that the name of the deceased candidate running for the District Seat 5 in Eufaula should remain on the ballot for the general election.

Next, you question whether the position should be declared vacant and filled pursuant to section 11-44G-1 of the Code in the instance where the deceased candidate receives a majority of the votes cast. As noted earlier, death should be considered a disqualification for filling office. *Stacy* at 265. As such, the disqualification of a deceased candidate should be treated the same as the disqualification of any other candidate.

In an opinion to Honorable Carl Pruett, Mayor, City of Albertville, dated October 16, 2008, A.G. No. 2009-004, this Office determined that a

vacancy in the office of mayor occurred at the beginning of the next term of office when the candidate elected by the majority had failed to file a 10- to 5-day report as required by law. Although *Pruett* stated that the vacancy was to be filled in compliance with section 11-43-42 of the Code, that opinion focused on a vacancy in the position of the mayor. In instances where there is a vacancy on the council in a Class 7 municipality, such position should be filled in compliance with section 11-44G-1 of the Code.

Finally, you question whether the city council has authority under section 11-44G-1 of the Code, or any other provision of law, to order a special election to fill a vacant seat, as opposed to the council making the appointment itself. Section 11-44G-1 states, in pertinent part, as follows:

> (a)(1) A vacancy in the office of city council member in any Class 7 or Class 8 municipality shall be filled by the city council at the next regular meeting or any subsequent meeting of the council. The person elected shall hold office for the unexpired term. In the event a vacancy is not filled within 60 days after it occurs in a Class 7 or Class 8 municipality, each existing city council member, including the mayor, may submit a name to the Governor for appointment. If the Governor fails to make an appointment from any submitted names within 90 days after the vacancy occurs, the judge of probate shall call a special election to fill the vacancy.
>
> (2) In the event the Governor is unable or unwilling to make the appointment within the time period provided, he or she shall immediately notify the judge of probate of the county.

ALA. CODE § 11-44G-1 (2008).

Based on the foregoing, the probate judge is authorized to call a special election to fill the vacancy if the Governor is unable or unwilling to make the appointment within 90 days after the vacancy occurs. It is the opinion of this Office that vacancies in the office of councilperson within

a class 7 or class 8 municipality should be filled in compliance with section 11-44G-1 of the Code.

CONCLUSION

Under the principles of law pronounced by the Alabama Supreme Court in *State ex rel. Cleveland v. Stacy*, 82 So. 2d 264 (1955) and the statutory authority provided in sections 11-46-25(g) and 11-46-26 of the Code, the City of Eufaula should allow the name of a deceased candidate to remain on the general election ballot.

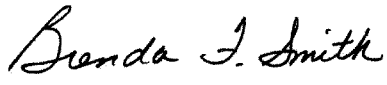
If the deceased candidate receives a majority of the votes cast, the position should be declared vacant and filled pursuant to section 11-44G-1 by the elected council taking office on Monday, November 5, 2012.

The city council does not have the authority under section 11-44G-1, or under any other Code provision, to order a special election to fill a vacant council seat.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:



BRENDA F. SMITH
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