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MEMORANDUM

December 18, 2006

TO: Linda Lamone

FROM: Mark J. Davis

SUBJECT: Analysis of Court of Appeals Decision in *Lamone v. Capozzi*

On December 11, 2006, the Court of Appeals issued its opinion explaining its order dated August 25, which affirmed a circuit court order that declared the early voting statute unconstitutional. As I explain below, the Court's opinion has ramifications for provisional voting, absentee balloting, and voter registration.

I. The Opinion

On April 9, 2005, the General Assembly passed Senate Bill 478, which authorized early voting in Maryland. The Governor vetoed the bill on May 20, 2005. On January 16, 2006, both houses of the General Assembly overrode the veto, enacting Senate Bill 478 as Chapter 5, Maryland Laws 2006, and adding a new §10-301.1 to the Election Law Article ("EL"). During the 2006 legislative session, HB 1368, another early voting bill, was passed as emergency legislation and vetoed by the Governor. That veto, too, was overridden and the bill became Chapter 61, Laws of Maryland 2006. The bill repealed and reenacted §10-301.1 with amendments, creating early voting as follows: a voting period for eleven hours each day for a five-day period beginning the Tuesday before a primary or general election through the Saturday before election day at designated sites.

On July 16, 2006, plaintiffs filed suit alleging that the early voting legislation violated various state constitutional provisions, claiming essentially that Article I only permitted in-person ballot voting and absentee voting. On August 8, 2006, the Circuit Court for Anne Arundel County declared §10-301.1 unconstitutional and void. On August 25, 2006, the

Court of Appeals heard argument and affirmed the circuit court in an order for reasons to be stated in an opinion to follow.

In the opinion that followed on December 11, the Court emphasized importance of the plain language principle of constitutional interpretation. Slip Op. at 18-20. Thus, the Court held that authorizing voters to cast ballots beginning the Tuesday through the Saturday before the election “is clearly inconsistent with the words of, and the plain meaning of Article XV, §7 and the other constitutional provisions that designate the “Tuesday next after the first Monday of November,” as the date of the general election.” *Id.* at 24-25. The Court read §7 to require that “the election shall be held *on* a specific day. . . [and] any statute that allows for a ballot to be cast before the prescribed day must be in derogation of the Constitution.” *Id.* at 33.

The Court also literally interpreted Art. I, §1, which provides that a voter can only vote in the election district or ward in which he resides. Noting that EL §10-301.1 allows for early voting to occur outside of a person’s district or ward, the Court held that the statute violated Art. I, §1, because “[w]e view the language in Article I, §1, as a mandatory requirement, not as a mere ‘entitlement,’ capable of being waived.” *Id.* at 35-36.

Finally, the Court held that “primary elections are included within the meaning of ‘at all elections to be held in this State’ in Article I, §1,” *id.* at 40; and that early voting is not a form of absentee voting, holding that “Article I, §3 clearly indicates that the inability to vote personally applies to ‘absent’ voters, not those who find the voting day to be inconvenient.” *Id.* at 41.

II. Ramifications of the Opinion.

A. Provisional Voting.

The opinion makes clear that a provisional ballot cast outside the voter’s district cannot be counted, even for candidates, such as statewide candidates, that the voter would be eligible to vote for in his or her district. As explained below, EL §§9-404(a) and 11-303(e) must be interpreted to apply to circumstances where a voter who is at the wrong polling place is in the same district as the correct polling place.¹

¹ A polling place is located within a district or ward which may consist of multiple precincts. A local board may combine or abolish precincts, *see* EL §2-303, but may not change a district or ward, which are established by local government.

Although provisional ballots are required by the federal Help American Vote Act (HAVA), “the individual’s vote shall be counted as a vote . . . in accordance with state law.” HAVA, §302(a)(4). Maryland law provides that an individual is eligible to cast a provisional ballot if the individual declares that he or she is a registered voter in the State and is eligible to vote in the election; and the individual’s name does not appear on the precinct register, an election official asserts the individual is not eligible to vote, or the individual does not have the necessary identification. EL §9-404(b). An individual who is eligible may cast a provisional ballot at a polling place on election day; or at the local board office in the county where the individual resides. EL §9-404(a).

Under *Capozzi*, a ballot cast at other than the voter’s correct district or ward may not be counted, which requires that the EL §11-303(e) be interpreted differently than it has been in recent elections. That provision states:

A local board shall count:

- (1) the entire provisional ballot if the address on the provisional ballot application is within the precinct where the provisional ballot was cast; or
- (2) only the votes cast by the voter for each candidate or question applicable to the precinct in which the voter resides, as determined by the address on the provisional ballot application of the voter.

SBE issued guidelines for the 2006 November elections that mirrored the language of the statute. *See* Guidelines for the Administration of Provisional Voting (June 21, 2006), §7.4D.² SBE instructed local boards to count ballots that the voter would have been eligible to vote for in his home precinct. For example, a vote cast by a Towson resident at a polling place in Essex would have been counted for the statewide races and for county executive, but not for any of the local races (e.g., House of Delegates, State Senate or County Council) that were not on the ballot at the voter’s Towson precinct.

As a result of *Capozzi*, however, no votes cast by the Towson voter would be counted; his vote will count only if his out-of-precinct vote is cast in the same Towson district in which he resides. The election judges at the Essex polling place should be instructed to advise the Towson voter to go to his correct polling place or his vote will not be counted.

² EL §11-303(a) provides that the canvass is to be conducted in accordance with the regulations and guidelines established by the State Board. SBE regulations relating to provisional ballots—found at COMAR 33.16—do not describe how provisional ballots are to be counted.

Although an individual who is eligible to vote a provisional ballot may do so at the local board office, *see* EL §9-404(a), that vote will not count if the board office is outside the voter's ward or district. An absentee ballot cast at the local board offices beginning on the Wednesday before the election until the closing of the polls on election day, *see* EL §9-305(c), is not subject to *Capozzi* and will be counted. Thus, local board staff should inform voters of their option to cast an absentee ballot to avoid the *Capozzi* problem and assure that their votes are counted.

B. Absentee Voting

Capozzi did not involve the constitutionality of the new no-excuse absentee voting statute, EL §9-304, but the Court read Article I, §3 very strictly.³ The Court held that early voting is not a form of absentee voting and that "the inability to vote personally applies to 'absent' voters, not those who find the voting day to be inconvenient." *Sip. Op.* at 41.

The current language of the absentee voter's oath does not contain a statement that the voter will be absent or will be unable to vote in person on election day.⁴ We therefore recommend that the absentee voter's oath be changed to track the language of Article I, §3.

C. Voter Registration.

Article I, §1 provides that an individual must be 18 in order to vote. *Capozzi* holds that "primary elections are included within the meaning of 'at all elections to be held in this State' in Article I, §1." *Slip Op.* at 40. EL §3-102(a) provides that a qualified voter includes an individual who "is at least 18 years or will be 18 years old on or before the day of the next succeeding general or special election."

The statute thus violates §1 because it permits an individual who has not yet turned 18 to vote in a primary election. The statute should be amended to add the word "primary" so that the pertinent phrase reads "next succeeding general, *primary*, or special election." In any event, only individuals who will turn 18 before the next election should be permitted to register.

³ Article I, §3 provides in part that the General Assembly may provides for voting by qualified voters "who are absent at the time of any election in which they are entitled to vote and for voting by other qualified voters who are unable to vote personally."

⁴ COMAR 33.11.03.03 provides that the State Board prescribe the form and content of the instructions for marking and returning the absentee ballots.

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Please let me know if you require clarification of these issues or require further assistance.

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