



HENRY McMASTER
ATTORNEY GENERAL

October 28, 2008

The Honorable James E. Stewart, Jr.
Member, House of Representatives
584 Beaver Dam Road
Aiken, South Carolina 29805

Dear Representative Stewart:

In a letter to this office you indicated that a member of the New Ellenton city council lives in an area that was recently ruled by a court to no longer be considered a part of or annexed to the City of New Ellenton. You have questioned whether that individual may continue to serve out his term of office as a city councilman or does he have to resign.

A prior opinion of this office dated July 30, 2008 is responsive to your question. That opinion states that

...Section 5-15-20 of the South Carolina Code (2004), describing the methods of election for city council members, imposes the following requirement on city council members:

Mayors and councilmen shall be qualified electors of the municipality and, if they are elected subject to residential or ward requirements as provided in this section, they shall be qualified electors of the ward prescribed for their election qualification.

S.C. Code Ann. § 5-15-20. Section 7-5-610 of the South Carolina Code (Supp. 2007) states the qualifications of those desiring to vote in a municipal election. This provision provides:

Every citizen of this State and of the United States:

- (1) Of the age of eighteen years and upwards;
- (2) Having all the qualifications mentioned in § 7-5-120;
- (3) Who has resided within the corporate limits of any incorporated municipality in this State for thirty days previous to any municipal election;

(4) Who has been registered for county, state, and national elections as herein required; is entitled to vote at all municipal elections of his municipality.

S.C. Code Ann. § 7-5-610 (emphasis added). Accordingly, pursuant to section 7-5-610(3), in order to be qualified to serve as a member of Town Council, one must be a resident of the Town...

Pursuant to Section 5-7-210 of the South Carolina Code (2004), Town Council is charged with the authority to determine whether its members meet their qualifications for office. Moreover, if during a member's term he fails to satisfy the required qualifications, Section 5-7-200 of the South Carolina Code (2004) requires that he or she forfeit the office. Therefore, if a member of Town Council fails to meet the residency requirement during his or her term of office, Section 5-7-200(a) effectuates a forfeiture of his or her position. See Op. S.C. Atty. Gen., October 4, 1984 (finding a city councilmember who moved outside of the city's limits forfeited his office).

Consistent with such opinion, upon the final determination that a particular area is no longer considered a part of or annexed to the City of New Ellenton, an individual who lives in that area would be considered as failing to meet the residency requirement to hold office as a member of the New Ellenton city council and would, therefore, forfeit his office. Of course, this assumes that the order of the judge referred to in your letter is a final order and no further appeal is planned of that order which could alter or reverse the ruling.

I would only further add that as to any question regarding the validity of any actions taken by the councilman in question, consistent with a prior opinion of this office dated November 20, 1997, the actions of the councilman would be considered to be those of a "de facto officer." As stated in that opinion,

[a] de facto officer is one who has a colorable right or title to the office, accompanied by possession. Op. Atty. Gen. dated June 5, 1961. One who holds an office under an appointment or election giving color of title may be a de facto officer, although the appointment or election is irregular or invalid. Op. Atty. Gen. dated June 18, 1976 (citing 67 C.J.S. Officers § 270). Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such ineligibility,

The Honorable James E. Stewart, Jr.
Page 3
October 28, 2008

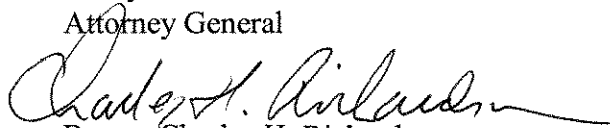
want of power or defect being unknown to the public. Alleger v. School District No. 16, Newton County, 142 S.W.2d 660 (1940).

Consistent with such, as to any actions of the councilman, in the opinion of this office, a court would find this council member to be a de facto officer. This council member's de facto status come from the colorable title to the office derived from his election, his possession of the office, and the fact that any defect was unknown to the public. As stated in the referenced opinion, "[a]s a general rule, the acts of an officer de facto are valid and effectual so far as they concern the public or the rights of third persons. See State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1975); Ops. Atty. Gen. dated June 18, 1976 and June 5, 1961.

With kind regards, I am

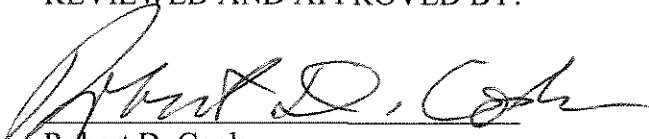
Very truly yours,

Henry McMaster
Attorney General



By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General