



The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

November 20, 1997

The Honorable Allen Bozardt  
Mayor, Town of Ridgeville  
P. O. Box 475  
Ridgeville, South Carolina 29472

RE: Informal Opinion

Dear Mayor Bozardt:

Attorney General Condon has forwarded your recent opinion request to me for reply. You request an opinion of this Office on three questions which arise out of the fact that one of the members of the Ridgeville Town Council is not a resident of the town. According to the facts contained in your opinion request, an approximately 16 year member of Town Council has recently brought to your attention that his residence is not within the town limits and has not been for his 16 years of service. The large majority of this council member's property, including his home, lies outside the town limits and a very small portion of his property lies within the town limits. You also state that this member has paid personal property taxes and water service fees to the Town during this period of time. Finally, you state that this council member has submitted a petition to be annexed into the Town.

**Questions 1 & 2**

1. Is annexation of the non-resident member of Town Council the most expeditious and convenient manner in which to resolve his non-resident status and allow him to continue to serve as a member of Council? If not, what are the alternatives to correct this situation?
2. In the event that annexation is the manner in which to handle this situation, is the appropriate method of annexation the manner prescribed in Section 5-3-150 of the South Carolina Code of Laws?

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The qualifications to hold public office in South Carolina are fixed and established by Article VI, Section 1 of the South Carolina Constitution. This Article reads in pertinent part: "[n]o person may be popularly elected to and serve in any office in this State or its political subdivisions unless he possesses the qualifications of an elector ..." See also Article XVII, Section 1. Further, Section 5-15-20 of the Code provides that a councilman shall be a qualified elector of the municipality. One of the qualifications necessary to vote in a municipal election is residency. Specifically, the elector must have resided in the municipality in which he offers to vote for thirty days next preceding the election. Article II, Section 5. In addition, Section 7-5-610 of the South Carolina Code of Laws provides that an individual who has resided within the corporate limits of an incorporated municipality for thirty days previous to any municipal election is entitled to vote in all municipal elections of the municipality. In order to determine an individual's residency, one must look to the physical location of the residence, rather than to the tract of land upon which the residence is located. Op. Atty. Gen. dated July 27, 1987.

A candidate for public office must not only be a qualified elector, but must also be eligible to vote in the election that elects him. State ex rel. Culp v. City of Union, 95 S.C. 131, 78 S.E. 738 (1913). The qualifications of a candidate to be elected to public office are determined as of the date of election. State ex rel. Harrelson v. Williams et al., 157 S.C. 290, 154 S.E. 164 (1930).

Where the legislature has fixed the qualifications for an office pursuant to its authority to do so, the electors may not select one not possessing the qualifications prescribed. One who is not eligible is not regarded as elected to office, although he may have received the highest number of votes cast and is in possession of a certificate of election. 67 C.J.S. Officers § 19. If a candidate is not a qualified elector at the time of election, his election is a nullity. Op. Atty. Gen. dated January 5, 1970.

As a general rule, if a member of council is not qualified when he is elected, the curing of his disqualification several years into his term would not cure the defect in title to the office. Op. Atty. Gen. dated August 28, 1981. Moreover, the subsequent qualification does not qualify a person to continue in office. Id. Put another way, when the office is an elective one, it will not suffice to remove the disqualification after the individual assumes office. 67 C.J.S. Officers § 18.

To summarize the foregoing, in order to be elected and serve in an office of a municipality, one must be a qualified elector of the municipality. One of the requirements necessary to be a qualified elector of a municipality is that the individual must be a resident of the municipality. This determination is made as of the date of the election. If a candidate is not a qualified elector at the time of the election, his election is a nullity. After a council member assumes office, an attempt to cure the council member's lack of

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qualifications that existed at the time of election will not cure the defect in title to the office.

In this case, this council member is not now, nor has been for the past 16 years, a resident of the Town of Ridgeville and, therefore, may not properly serve on the town council. I believe that if a court were to address this issue, it would find that since this council member did not possess the qualification of residency at the time of election, his election is a nullity and the office would be declared vacant. Subsequent annexation of the council member's property so as to bring his property within the town limits will not cure the fact that he was not a resident at the time of election. In further support of this conclusion is Section 5-7-200(a) of the Code. This Section provides that a councilman shall forfeit his office if he lacks at anytime during his term of office any qualification for the office prescribed by the general law and the Constitution.

When a vacancy arises in the office of a member of municipal council, Section 5-7-200 of the Code requires that an election be held to fill the remainder of the unexpired term at the next general election or at a special election if the vacancy occurs one hundred eighty days or more prior to the next general election. Section 7-13-190 provides a schedule for the special election where one is required to be held.

### Question 3

3. What repercussions and/or impact does the issue of the Town Councilman's lack of residency over the last 16 years have upon the votes and action taken by the Town Council over that period of time? If this matter does have an impact then what action may be taken to remedy the situation or to ratify the past actions of the Town Council?

It appears from your letter that the fact that this council member did not reside within the Town of Ridgeville was not known to anyone until fairly recently. It also appears that during this council member's previous 16 years of service, no one had raised an issue regarding whether this council member was a resident of the Town. Assuming that this council member is not, and has not been, qualified to serve for the past 16 years, it must then be determined whether he meets the definition of "de facto officer."

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

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

In my opinion, despite the fact that his election was irregular or invalid, 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 the defect was unknown to the public.

As 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. Therefore, in my opinion, in light of this council member's de facto status, a court would determine that his acts taken in such capacity over the past 16 years are valid and effectual where they concern the public or the rights of third persons.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,



Paul M. Koch  
Assistant Attorney General