

1980 WL 120615 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 21, 1980

\*1 Anne C. Osborne, Esquire  
Deputy County Attorney  
Charleston County  
2 Courthouse Square  
Charleston, South Carolina 29402

Dear Ms. Osborne:

You have requested the opinion of this Office on several questions relating to the method currently employed by the Charleston County Council to select its chairman. I will respond to those questions in the order in which they were posed.

1. Is the advisory referendum called for in the Rules of Council of the Charleston County Council in conflict in any way with [Section 4-9-110, CODE OF LAWS OF SOUTH CAROLINA, 1976](#)?

In my opinion, an advisory referendum does not conflict with that section. [Section 4-9-110](#) provides in part:

The Council shall select one of its members as chairman, except where the chairman is elected as a separate office, one as vice-chairman and such other officers as are deemed necessary for such terms as the council shall determine, unless otherwise provided for in the form of government adopted.

Under general principles of statutory construction, the word 'shall' is interpreted as mandatory rather than permissive. 2A SUTHERLAND STATUTORY CONSTRUCTION § 57.03 (1973). By its use of the word 'shall' in the above-quoted statute, the General Assembly intended that a county council select a chairman from among its members except where the position is a separately elected position. *See, e.g.*, 53 STAT. 2202 (1964). While the duty of choosing the chairman is placed upon the council itself, the statute does not prohibit purely advisory referendums to aid it in its choice.

2. Is the wording of the Charleston County Council's Rule in conflict with the mandate of [Section 4-9-110](#)?

The Rule of Council for Charleston County outlining the advisory referendum provides in part:

. . . The candidate receiving the highest number of votes in the referendum shall be selected to serve as chairman for the two year period beginning in January following the November referendum.

In my opinion, the use of the word 'shall' might present problems. Under the Rule as written, the advisory referendum becomes more than merely advisory; instead, it appears to require that the candidate receiving the highest number of votes be the council's chairman. I doubt that the duty imposed upon a county council by [Section 4-9-110](#) can be permissibly delegated to the voters of Charleston County. The general rule is that powers delegated to a county by the legislature cannot, without authorization, be delegated to others. 2McQUILLIN MUNICIPAL CORPORATIONS § 10.39 (1971).

3. Is there any problem with the fact that the present chairman was elected pursuant to the Rule of Council in question?

In my opinion, there is no problem presented by the fact that the present chairman was elected pursuant to the Rule. Even if he were presently unauthorized to hold that position, his actions would be those of a de facto officer and are as valid and

effectual as those of an official properly holding office, as least until such time as his title is judged insufficient. [State, ex rel. McLeod v. Court of Probate of Colleton County, et al.](#), 266 S.C. 279, 223 S.E.2d 166 (1976). To qualify as a *de facto* officer, the present chairman need only show that he is in possession of the office in good faith, that he entered it by right, claiming to be entitled thereto, and that he is discharging his duty under color of authority. [Heyward v. Long](#), 178 S.C. 351, 183 S.E. 145 (1935). Furthermore, in the case of the current chairman, my understanding is that a majority of the Charleston County Council subsequently voted for him. Such action would appear to ratify his election and resolve any potential difficulties.

With kind regards,

\*2 Karen LeCraft Henderson  
Senior Assistant Attorney General

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