March 28, 2007

The Honorable George E. Campsen, III
Senator, District 43
604 Gressette Building
Columbia, South Carolina 29202

Dear Senator Campsen:

You have enclosed a letter dated January 17, 2007 to Governor Sanford recommending the appointment of Mr. Joe Young to serve as Commissioner of the South Carolina Department of Transportation for the First Congressional District. You state that this letter was hand delivered to the South Carolina Secretary of State on March 15, 2007.

In addition, you note that you are a resident member of the First Congressional District Legislative Delegation, and thus "entitled to represent my constituents by casting a vote in the election of the Department of Transportation Commission from the First Congressional District, pursuant to South Carolina Code Section 57-1-325." This statute requires that "[l]egislators residing in the congressional district shall meet upon written call of a majority of the members of the delegation of each district at a time and place to be designated in the call for the purpose of electing a Commissioner to represent the district." Yet, you indicate that you "received no notice – either by word or in writing – that a meeting would be held to elect a First Congressional District Representative to the Department of Transportation Commission." Furthermore, you state that "a meeting was neither called by a majority of the members of the delegation, nor held to conduct the election of the First Congressional District Commissioner, as required by the statute."

Thus, you pose a number of questions regarding the validity of the selection of the SCDOT Commissioner in light of the requirements of § 57-1-325 and other provisions of state law. These questions are as follows:

(a) What is the procedure under state law, including but not limited to Section 57-1-325, by which a District Commissioner of the Department of Transportation should be elected;

(b) Whether South Carolina Code Section 57-1-325, or other state law, provides for the circulation of a letter among congressional district delegation

members, separately for their signatures, as a sufficient means of electing a Department of Transportation Commissioner from the congressional district;

(c) Whether resident members of congressional district legislative delegations are entitled to notice as to the time and place that an election for a Department of Transportation Commissioner from their congressional district be held;

(d) Whether or not the alleged election of Mr. Young as the First Congressional District Department of Transportation Commissioner by way of the Recommendation Letter complies with state law, including but not limited to South Carolina Code Section 57-1-325;

(e) If the alleged election of Mr. Young as the First Congressional District Department of Transportation Commissioner by way of the Recommendation Letter does not comply with state law, whether Mr. Young is currently a Commissioner of the Department of Transportation Board;

(f) If the alleged election of Mr. Young as the First Congressional District Department of Transportation Commissioner by way of the Recommendation Letter does not comply with state law, and a subsequent election is held that does comply with state law, including but not limited to South Carolina Code Section 57-1-325, who will the First Congressional District Commissioner be? Will it be Mr. Young who was elected in a manner that violates state law and did not give all legislators entitled to vote an opportunity to vote, or will it be the subsequently elected Commissioner elected in compliance with state law through a method giving all legislators entitled to vote? If the answers to these questions are unclear, please explain how the issue would be resolved and,

(g) If the election of Mr. Young as the First Congressional District Department of Transportation Commissioner by way of the Recommendation Letter is not in compliance with state law, but he remains a voting commissioner with the Department of Transportation, what remedies are available, including but not limited to removal of Mr. Young from the Commission, what parties would have standing to pursue such remedies, and are any actions the Commission takes that he participates in placed in jeopardy because of his participation?

Law / Analysis

Pursuant to S.C. Code Ann. Section 57-1-310, the congressional districts of the State are constituted as Department of Transportation Districts. The SCDOT Commission is composed of one member of each transportation district "elected by the delegations of the congressional district and one member appointed by the Governor, upon the advice and consent of the Senate from the State

at large." Section 57-1-325 specifies the manner and procedure for selecting commissioners from each congressional district, providing in pertinent part, as follows:

> [l]egislators residing in the congressional district shall meet upon written call of a majority of the members of the delegation of each district at a time and place to be designated in the call for the purpose of electing a commissioner to represent the district. A majority present, either in person or by written proxy, of the delegation from a given congressional district constitute a quorum for the purpose of electing a district commissioner. No person may be elected commissioner who fails to receive a majority vote of the members of the delegation.

Section 57-1-330(A) further provides:

> (A) Beginning February 15, 1994, commissioners must be elected by the legislative delegation of each congressional district. For the purpose of electing a commission member, a legislator shall vote only in the congressional district in which he resides.[1]

As with any statute, the overriding rule of interpretation is determination of the intent of the legislature. The cardinal rule of construction is, in other words, to ascertain and effectuate the intent of the General Assembly. *Dreher v. Dreher*, 370 S.C. 75, 80, 634 S.E.2d 646, 648 (2006). Words must be given their plain and ordinary meaning without resort to subtle and forced construction to limit or expand the statute's operation. *Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 468-69, 636 S.E.2d 598, 606-07 (2006). Courts will generally apply the terms of the statute according to their literal meaning. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1990).

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[1] In an opinion, dated February 21, 2007, this Office concluded that a court would likely not apply the constitutional requirement of "one person, one vote" to the appointments of a SCDOT Commissioner made by the delegation of the congressional district pursuant to §§ 57-1-325 and 57-1-330(a). Notwithstanding the Fourth Circuit decision of *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999), applying "one person, one vote" requirement to the county legislative delegation, it was our conclusion in that opinion that the legislative delegation of the congressional district is distinguishable from the county delegation. *Vander Linden* rested on the premise that the county legislative delegation "'perform[s] numerous and various general county governmental functions ...." 193 F.3d at 276. While it may certainly be argued that *Vander Linden* also applies with equal force to the appointment of a SCDOT commissioner by the congressional district's legislative delegations, our own Supreme Court in a case decided before *Vander Linden*, *Moore v. Wilson*, 296 S.C. 321, 372 S.E.2d 357 (1988), rejected the applicability of the "one person, one vote" requirement to the appointment under an earlier law providing for the appointment of SCDOT commissioners by the combined delegation of judicial districts. Thus, it is our view, that unless and until set aside by a court, there is no constitutional requirement of "weighted voting" in the appointment of SCDOT commissioners pursuant to § 57-1-325 and 57-1-330(a). Only a Court may determine this issue with finality, however.

Applying these fundamental rules of construction, it is clear that Section 57-1-325 sets forth a very specific procedure for the legislative delegation of a congressional district to select a SCDOT commissioner. The statute requires those legislators residing in the district to "meet upon the written call of a majority of the members of the delegation of each district *at a time and place* to be designated in the call ... ." (emphasis added). Further, § 57-1-325 specifies the required vote to elect a commissioner, such being "a majority present, either in person or by written proxy of the delegation ..." A "quorum" of members is required to select the commissioner. Only those residing in the district may vote for the commission, pursuant to § 57-1-330(A).

Thus, it is clear that § 57-1-325 mandates that, in order to select a SCDOT Commissioner, a "meeting" i.e. a physical convening of members, must be held "upon a written call" of a majority of the eligible members of the legislative delegation of the congressional district (those legislators "residing in the congressional district.") The "written call" requirement obviously means that each such member of the delegation of that district must receive written notice of the time and place of the meeting. In our opinion, the statute does not permit the circulation of a letter or petition or "vote" as a substitute for a physical "meeting." Nor does it comply with the statute that written notice not be given to each and every member of the delegation of the congressional district who is eligible to vote for the SCDOT Commissioner, that is, those legislators who reside in the congressional district.

This plain reading of the statutory requirements, set forth above, is completely consistent with the mandates of the common law governing public bodies generally. In an opinion of this Office, *Op. S.C. Atty. Gen.*, Op. No. 84-111 (September 6, 1984), we set forth these general law requirements that a public body must conduct business and take action pursuant to a physically convened "meeting." In that opinion, the question presented was whether or not a legislative delegation could approve a budget "by circulating a petition, one at a time, among that body's individual members." Therein, we discussed at length the longstanding rule "that a public meeting is required to take the contemplated action."

Among the authorities referenced in that opinion was the decision of our own Supreme Court in *Gaskins v. Jones*, 198 S.C. 509, 18 S.E.2d 452 (1942), wherein the Court stated:

> [i]n the absence of any statutory or other controlling provision, the common law rule to the effect that a majority of a whole body be necessary to constitute a quorum applies, and no valid act can be done in the absence of a quorum. A majority of such body *must be present* to constitute a Board competent to transact business.

(emphasis added). Other decisions of our Supreme Court are in accord. *See*, *McMahan v. Jones*, 94 S.C. 362, 77 S.E. 1022 (1913) ["... the answer is that the Legislature has expressed the intention that the states should have the benefit of the judgment and discretion, individually and collectively, of a commission of five members – not three – in the administration of this charity."] In the opinion, we also quoted the Court in *Abbeville v. McMillan*, 52 S.C. 60, 72 (1897), which referenced with approval language used by the United States Supreme Court in *Cooley v. O'Connor*, 12 Wall. 391, 398 (1871), *Cooley* stated that "[i]t is true when an authority is given jointly to several persons, they

must generally act jointly or their acts are invalid ...." In *Cooley*, the United States Supreme Court also emphasized that this rule requiring joint action of a body is especially applicable when the authority given is public in nature and is "created to perform a governmental function."

We further noted in the 1984 opinion that the underlying reasons for the need for collective action by a public board or public body is best summarized by former South Carolina Attorney General T. C. Callison in an opinion dated July 28, 1954. There, Attorney General Callison addressed the situation in which a public body had passed a Resolution in a regular meeting at which a quorum was present; however, individual members of the Board circulated a letter outside of that meeting, attempting to nullify the Board's earlier action. Attorney General Callison summarized the law requiring a physical meeting of a public body in order for that body to take action and the reasons therefor, as follows:

> I call your attention to the case of *Gaskins v. Jones*, 18 S.E.2d, page 454, 198 S.C. 508 and the case of *McMahan v. Jones*, 94 S.C., page 362.
>
> The latter case, you will note, holds that the public is entitled to the benefit of the judgment and discretion individually and collectively of a Commission of five members in the administration of its charity.
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> It is my opinion that under the above decisions the County of Lancaster would be entitled to the combined judgment and discretion of the members of your Board of Directors in session with the majority present, which would preclude the circulation of a petition, contract or agreement to individuals separately for signature, unless such procedure had been authorized in a regular meeting with a quorum present.

In other words, the public is entitled to the collective wisdom of the body, assembled together.

The 1984 opinion also referenced a Pennsylvania case in particular, *Commonwealth v. Burns*, 365 Pa. 596, 76 A.2d 383 (1950). In *Burns*, a majority of the judges of the court of common pleas of the county were given authority to appoint members to the Board of Revision of Taxes. However, the method the judges chose to make the appointments was by a "round robin" letter, circulated from one judge to the next. After being signed by a majority of the judges, the paper was then forwarded to the Secretary of the Board of Judges, who then notified the proper parties of the appointments.

Subsequently, an action for *quo warranto* was brought challenging a particular appointment. The basis for the challenge was that the appointment was made without notice to all the judges and without a meeting of them. The Pennsylvania Supreme Court held the appointment to be void, concluding as follows:

> [t]he improvised expedient of a round robin – signed by fifteen of the twenty judges, the name of one being signed by proxy, with no one of the judges being given an opportunity to express his opinion of the appointee, and with one President Judge

> of said Courts, having no knowledge of the appointment until after it has been made, clearly does not satisfy the requirements of the Act.

76 A.2d at 384. *Burns* is virtually on all fours with the situation which you have presented in your letter to us. As noted, the Supreme Court of Pennsylvania declared the appointment pursuant to the round robin procedure to be void.

Finally, the 1984 Opinion concluded that South Carolina's Freedom of Information Act (FOIA), codified at § 30-4-10 *et seq.*, fully supports the conclusion that a public body must meet collectively in a physical meeting in order to take action. We stated as follows:

> [c]ertainly, ... the entire tenor of the Act ... anticipates that public bodies will conduct their business in "meetings" as defined. Indeed, the conduct of the public's business in a "meeting" of the public body is the basic starting point of the Act. Clearly then, we cannot say that the Freedom of Information Act derogates the general law, cited above, requiring a public body to act collectively in a meeting; if anything, it reinforces that requirement. Accordingly, the general law mandates that a public body act collectively in a formally convened meeting when acting upon matters within its authority; and if the body constitutes a "public body" as defined by the FOIA, the Freedom of Information Act than requires the meeting of that public body to be open to the public unless a specific statutory exemption is applicable.

A decision of our Supreme Court, *Fowler v. Beasley*, 322 S.C. 463, 472 S.E.2d 630 (1996) is also instructive with respect to the requirement of a collective assemblage of members of a legislative delegation in a "meeting" in order to take action. In *Fowler*, a citizen brought an action against the county legislative delegation and others to prevent an appointed school board candidate from being seated on the county school board due to alleged violations of FOIA. A majority of the delegation made the recommendation to fill the unexpired vacancy. Among other arguments, Appellants contended that the procedure for appointment – sending around a sign-up sheet at a properly noticed, open, public meeting of the delegation – did not violate FOIA. The sign-up sheet was publicly announced prior to being circulated among the members of the delegation.

The Supreme Court rejected respondent's argument that the informal letter-signing procedure violated FOIA's requirement that the recommendation must take place during the course of an official meeting. The Court's reasoning was as follows:

> South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government. *Martin v. Ellisor*, 264 S.C. 202, 213 S.E.2d 732 (1975). S.C. Code Ann. § 30-4-60 requires that every meeting of a public body be open to the public unless it is closed pursuant to section 30-4-70(a), which provides that a public body may hold a closed meeting for, *inter alia*
>
> > (1) Discussion of appointment of an employee or the appointment of a person to a public body.

> (6) Prior to going into executive session the public agency shall vote in public on the question and when such vote is favorable the presiding officer shall announce the specific purpose of the executive session. No formal action may be taken in executive session ... .
>
> Although "formal action" is defined as a "recorded vote," nothing in Section 30-4-70 requires such a vote to be by open roll-call. We find the circulation of a letter, at an open public meeting, at which each individual member signs his recommendation is in compliance with subsection six. *So long as the vote is taken at an open public meeting, and the public is able to glean the results and how each member voted,* there is no FOIA violation.

322 S.C. at 468-69, 472 S.E.2d at 633-34.

Fowler thus emphasizes at least two important points for our purposes here. First, the Supreme Court in *Fowler* indicated that a county legislative delegation is a "public body" for purposes of the FOIA. The legislative delegation of a congressional district would, in our opinion, be no different as to the applicability of FOIA. Secondly, the Court appears to have concluded that a round robin circulating petition or letter may be used, consistent with FOIA, *only as part of a properly noticed public meeting under FOIA*. This being the case, in our opinion, *Fowler* provides further support for the requirement that a public body must collectively meet in public pursuant to a publicly noticed meeting in order to take action. Individual action taken in round robin fashion by circulating a letter or petition is thus inconsistent with FOIA.

The next issue is the legal effect of non-compliance with the statute. As noted above, the Pennsylvania Supreme Court in *Burns* held that the failure of a public body to physically meet and to provide proper notice to all its members in compliance with the applicable statute rendered the appointment void. *See also, Sloan v. Hardee*, ___ S.C. ___, 640 S.E.2d 647 (2007) [failure to appoint SCDOT Commissioners in compliance with governing statute delineating number of terms in which a commissioner may be appointed renders appointments invalid]. Moreover, it is generally recognized that appointments not made in compliance with statutory requirements are void. 62 C.J.S. *Municipal Corporations* § 353.

Moreover, in this same vein, our Supreme Court has, while recognizing that appointments made in disregard of statutory requirements are invalid, the actions of officers acting under color of law are valid as to the public and third parties. In *Gaskins v. Jones*, *supra*, our Supreme Court addressed the question of the legal effect of action to reappoint a county manager by the governing board of Florence County. After numerous attempts to reach a consensus as to the appointment, certain board members left the room, leaving less than a quorum. The remaining members made some effort to reach those who had withdrawn, but did not do so. In any event, Jones was reappointed by less than a quorum of the Board. Our Supreme Court held that "the meeting of January 2d did not result in an election." 18 S.E.2d at 458. Further, since Jones held over under the common law principles that public officers hold over until their successors are appointed and qualify,

see *Heyward v. Long*, 178 S.C. 351, 183 S.E. 145 (1935), the Court concluded that "[w]e think it is conducive to the public interest and the efficient conduct of public affairs that under such circumstances the incumbent should remain as an officer *de facto* until the vacancy is filled." *Id*. at 458. *See also*, *Elledge v. Wharton*, 89 S.C. 113, 71 S.E. 657 (1911) [rural policeman appointed by Governor upon recommendation of only one member of legislative delegation instead of three, the "appointment was made without authority ...." However, policemen served *de facto* and were entitled to salary].

The question here is whether Mr. Young would be entitled to *de facto* status until a court rules on the question of the validity or invalidity of the appointment. Our Supreme Court long ago stated in *Ex Parte Norris*, 8 S.C. 473 (1876) that "[t]o constitute an officer *de facto*, he must have a presumptive or apparent right to exercise the office, resulting from either full and peaceable possession of the powers of such office, or reasonable color of title, with actual use of the office." And, in *State v. Messervy*, 86 S.C. 503, 68 S.E. 766 (1910), the Court stated that "[p]ublic policy requires that the authority of one in fact holding a public office under color of legal title shall not be questioned collaterally."

Our own opinions mirror the above decisions – concluding that appointment made in contravention of the governing statutes are invalid, but also recognizing the *de facto* status of officers invalidly appointed. For example, in an opinion, dated June 5, 2003, we addressed the issue of the validity of acts taken by S.C. DOT Commissioners who were appointed in contravention of § 57-1-320(B) authorizing commissioners to serve for "one consecutive term" only. We concluded that notwithstanding such invalid appointment, public policy required that any actions taken by these appointees were valid as to third parties and to the public. Consistent with the recent ruling in *Sloan v. Hardee, supra*, we stated:

> [s]hould the individuals in question be reappointed as commissioner without sitting out a term, and assuming the correctness of our earlier opinions, the law would deem these persons in question ineligible to hold office. It is well recognized under the general law that "in order to hold a public office, one must be eligible and possess the qualifications prescribed by law, and the appointment to office of a person who is ineligible or unqualified gives him no right to hold the office." *Op. S.C. Atty. Gen*., January 14, 1999. In that same opinion, we noted that "the appointment of an individual not qualified to serve is void and an absolute nullity." Citing 67 C.J.S. Officers § 19. This Office has previously stated that if a person is not qualified to hold office when he is appointed and begins to serve, that appointment is ineffective. *Op. S.C. Atty. Gen*., February 17, 1983.
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> However, the January 14, 1999 opinion also recognized that "[t]he fact that the appointment is an absolute nullity would not necessarily jeopardize the actions taken by the individual in question during his service on the board or commission." Just as the situation where the individual holds over beyond his or her statutory term ... without statutory authority to do so, "[i]t is well settled that one who holds office under an appointment giving color of title may be a *de facto* officer, although the

> appointment is irregular or invalid." *Id.* As the opinion stated,"[t]he acts of a *de facto* officer are valid and effectual so far as they concern the public or the rights of third parties."

Other opinions are in accord. *See Op. S.C. Atty. Gen.*, March 15, 2000. ["(a)s an officer *de facto*, any action taken as to the public or third parties would be as valid and effectual as those actions taken by an officer *de jure* unless or until a court would declare such acts void or remove the *de facto* officer from Office."]; *Stat ex rel. McLeod v. Court of Probate of Colleton* Co., 266 S.C. 279, 223 S.E.2d 166 (1976); *State ex rel. McLeod v. West*, 249 S.C. 243, 153 S.E.2d 892 (1967); *Kittman v. Ayer*, 3 Strob. 92 (S.C. 1848); *Op. S.C. Atty. Gen.*, December 31, 1992 [acts of a *de facto* officer would not be void *ab initio*, but would be valid, effectual and binding until a court should declare otherwise."]. Moreover, "[i]n the absence of a statutory provision to the contrary, where there are two claimants to an office, the one who has *prima facie* title to it by reason of a commission or certificate of election has the right to possession of it pending a contest, except as against a *de facto* officer in possession under color of authority." 67 C.J.S. *Officers* § 86.

As to your questions regarding what action may be brought to determine the validity of Mr. Young's appointment, and who could bring such action, a recent opinion by this Office, dated January 17, 2007 is illuminating. There, we addressed the impact of the South Carolina Supreme Court's ruling in *Sloan v. Hardee, supra* concluding that Commissioners Harrell and Hardee were not validly appointed to the SCDOT Commission because they were ineligible for such appointments pursuant to § 57-1-320 which requires that commissioners may not serve more than "one consecutive term." The question was the impact of this ruling upon the status of the invalidly appointed commissioners. We concluded that once the Supreme Court had ruled in the action for declaratory judgment brought by a private citizen, the commissioners could no longer vote or be paid. We reviewed the types of action which could lead to an ouster of a public officer who had been invalidly appointed, concluding that such ouster could be accomplished either by a writ of *quo warranto* or a declaratory judgment action. We noted that the law was evolving to the point that a declaratory judgment could serve the same purpose as a writ of *quo warranto* – the traditional means for removing a person invalidly holding public office. There, we stated:

> [a]s noted above, the Supreme Court in *Sloan* expressly held that "section 57-1-320(B) prohibits a DOT Commissioner from *serving* a consecutive term of office." The highest Court in the State has now definitively declared what the law is and that no commissioner may be validly appointed to a term consecutive to his or her initial term. Thus, we deem such strong language as constituting or serving the same purpose as a removal of these commissioners in question were not appointed in accordance with the governing statute and they may not serve in such capacity. Any *de facto* status or color of authority once enjoyed by them has now been removed by the decision of the State's highest court.... The Court has now declared these positions vacant....
>
> Accordingly, the ruling by the Supreme Court [for declaratory relief] has the same coercive effect as a *quo warranto* or injunction. In our opinion, the *Sloan*

> decision holds that the Commissioners in question may not serve on the Commission either in a *de jure, de facto* or hold over capacity. *Once the Court ruled that the Commissioners are ineligible* to serve, such ruling ends their status completely. This being the case, they are ineligible under the *Sloan* case to participate in Commission meetings or to receive compensation therefor.

Consistent with the foregoing, we have long advised that "[t]he Office possesses no authority, statutory or otherwise, to void or declare invalid any procedure utilized by the Legislative Delegation" for appointments made. Instead, we "can only advise ... as to how a court would probably view the matter." Op. No. 84-111, *supra*. As we stated in the June 5, 2003 Opinion, "only a court is empowered to remove the commissioners in question or require *de jure* appointments by the delegation to be made," consistent with the statutory requirements. As stated above, consistent with the *Sloan* case, it appears that such court action may be brought by a citizen by way of declaratory judgment.

Conclusion

1. Section 57-1-325 plainly mandates that in order to select a SCDOT commissioner, a publicly held "meeting" – i.e. a physical convening of "legislators residing in the congressional district" must be held. Section 57-1-530(a) clearly states that only members who are residents of the Congressional district may vote for the Commissioner of that district. The public meeting of the delegation must be conducted upon a "written call" of a majority of members of the delegation of that congressional district. This "written call" requirement means that each member of the delegation of that district must receive written notice of the time and place of the meeting. In our opinion, the statute does not permit the circulation of a letter or petition from member to member as a substitute for the meeting required by § 57-1-325. Nor does it comply with the statute that written notice is not given to each and every member of the congressional district who is eligible to vote for the SCDOT commissioner, that is, who resides in the congressional district.

2. Consistent with this interpretation of § 57-1-325, the general law is that a physically held meeting where a quorum is present is necessary in order for a public body to transact business and take action. As we concluded in *Op. S.C. Atty. Gen.*, Op. No. 84-111, both the common law and FOIA support the requirement of a collective assemblage of members in the form of a publicly conducted and publicly noticed meeting. Moreover, notice to all members of the time and place of such meeting is required. Circulating a document from one member to the next is no substitute for a publicly held and noticed meeting. The law requires a meeting because the public is entitled to the collective debate and exchange between members of a public body.

3. Courts which have considered the question of the effect of a vote taken by circulating a "round robin" letter or petition to individual members of a public body, rather than holding a properly noticed and publicly held meeting, have concluded that such action taken is void and a nullity. In our opinion, a South Carolina court is likely to reach the same conclusion

regarding the appointment of Mr. Young, assuming the facts are as presented in your letter. However, only a court, rather than an opinion of this Office, could make such a determination, having all the facts and circumstances before it.

4. Assuming Mr. Young takes office pursuant to an invalid appointment, as the law applicable here would indicate, a court will generally afford such officer *de facto* status, meaning that all acts taken by him will be deemed valid as to the public and third parties. As we stated in *Op. S.C. Atty. Gen.,* March 15, 2000, "[a]s an officer *de facto,* any action taken as to the public or third parties would be as valid and effectual as those actions taken by an officer *de jure* unless or until a court would declare such acts void or remove the *de facto* officer from office." Until a court rules that an officer is invalidly appointed or removes such officer, the *de facto* officer holds the office, even while the suit against such officer for removal is pending. *See, Sloan v. Hardee, supra* [SCDOT commissioners continued to serve *de facto* until Supreme Court ruled]. This is so because the law affords a presumption of validity to one who holds the office under color of title.

5. Removal of an officer who has been invalidly appointed may be by writ of *quo warranto*. Pursuant to § 15-63-10 *et seq*., a writ of *quo warranto* may be sought "upon the complaint of any private party or by a private party interested on leave granted by a circuit judge against the parties offending ... [w]hen a person shall usurp, intrude into or unlawfully hold or exercise any public office ...." Moreover, recently, in *Sloan v. Hardee, supra*, the Supreme Court permitted a private citizen to bring a declaratory judgment action which, in effect, removed SCDOT commissioners invalidly appointed to Office.

6. Of course, these defects in Mr. Young's appointment, set forth above, may be cured by holding a publicly noticed and conducted meeting as § 57-1-325, the common law and FOIA directs.

Very truly yours,

Henry McMaster
Attorney General

By: Robert D. Cook
Assistant Deputy Attorney General

RDC/an