

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

July 21, 2003

The Honorable Jeffrey D. Duncan
Member, House of Representatives
P.O. Box 721
Clinton, South Carolina 29325

Re: Incapacitated County Council Member

Dear Representative Duncan:

You have requested an opinion from this Office concerning a county councilman who was involved in an automobile accident. By way of background, you indicate that the accident left the councilman in a coma from which he is yet to recover. You also indicate that the area of the county which this councilman represents is currently un-represented and citizens have asked for your assistance with his replacement. Given this background, you specifically ask the following questions:

1. What can be done to replace an elected official who is incapacitated and incapable of fulfilling his or her duties?
2. Is there anything in the statute which allows for the temporary replacement?
3. What can be done through the Legislature to address this situation?

LAW/ANALYSIS

The Legislature has enacted general law to deal with vacancies which may occur on the governing bodies of counties. S.C. Code Ann. §4-9-90 provides in pertinent part that "[v]acancies on the governing body shall be filled in the manner of original election for the unexpired terms in the next general election after the vacancy occurs or by special election if the vacancy occurs one hundred eighty days or more prior to the next general election." Prior to filling a vacancy pursuant to Section 4-9-90, however, it must be determined that a vacancy actually exist.

Certain events, such as the death of an office holder or the expiration of his or her term, obviously create vacancies. The occurrence of other events create vacancies in offices as a matter of law. For example, dual office holding as prohibited by the State's Constitution creates, by

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operation of law, an automatic vacancy in the first office held. See Op. S.C. Atty. Gen., dated May 27, 2003. Vacancies are declared when officers are convicted of certain crimes. See Article VI, §8 of the South Carolina Constitution, S.C. Code Ann. §8-1-100 and Op. S.C. Atty. Gen., dated February 3, 1998. Also, a failure to comply with residency requirements by an elected official creates a vacancy "... at the time [the official] ceases to be a resident..." See Ops. S.C. Atty. Gen., dated September 5, 1995 and December 19, 1980. I can locate no law or authority, however, which would indicate that the situation described in your request letter creates an automatic vacancy in the councilman's office. Therefore, before the councilman could be replaced, he would have to be removed from office thereby creating a vacancy.

There are certain constitutional and statutory provisions which relate to the removal of public officials, such as county council members for, among other things, incapacity. Article VI, Section 9 and Article III, Section 27 both provide that "[o]fficers shall be removed for incapacity, misconduct, or neglect of duty, in such manner as may be provided by law when no mode of trial or removal is provided in this Constitution." This provision of the Constitution is not self-executing. See Op. S.C. Atty. Gen., dated August 1, 2000. Therefore, in order for a public officer, such as a county council member, to be removed from office pursuant to the authority of these constitutional provisions, the legislature would have to enact a law providing for the "... mode of trial or removal..." The Legislature has passed general law in this area. Section 1-3-240(A) provides in pertinent part that

Any officer of the county or State ... who is guilty of malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty in office, or incapacity shall be subject to removal by the Governor upon any of the foregoing causes being made to appear to the satisfaction of the Governor. But before removing any such officer, the Governor shall inform him in writing of the specific charges brought against him and give him an opportunity on reasonable notice to be heard.

Whether or not Section 1-3-240(A) is applicable to the situation at hand is unclear. Under South Carolina law, the Governor can neither appoint to office nor suspend or remove from office unless the power to do so is conferred upon him by the Constitution or statute. Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997). Pursuant to Section 1-3-240(A), the Governor has the power to remove a county officer upon the meeting of certain conditions if that officer is "guilty of ... incapacity..." The application of Section 1-3-240(A) to the situation raised in your request appears to turn on the meaning of the phrases "incapacity" and "guilty of."

According to *Black's Law Dictionary*, "incapacity" means "[l]ack of physical or mental capabilities" and incapacitated person means "[a] person who is impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is impossible." See *Black's Law Dictionary* (7th ed. 1999). "Guilty" means "[h]aving committed a crime; responsible for a crime ... [r]esponsible for a civil wrong, such as a tort or breach of

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contract... ” Id. While it appears that the meaning of “incapacity” may be applicable to the situation you have described, it cannot be said that the councilman is responsible for committing a wrong which has lead to his incapacity. Further, Section 1-3-240(A) contemplates the officer receiving notice of the charges against him and being given the opportunity to be heard on the matter. Such would not be possible in cases where the health of the officer makes impossible proper notice and the ability for the officer to defend himself. Accordingly, I cannot say with any reasonable degree of certainty that a reviewing court would hold that Section 1-3-240(A) provides a mechanism for removing a county councilman from office who is in a coma resulting from an automobile accident.

Additionally, I can find no statutory authority which would allow for temporarily replacing the councilman in this circumstance. The statutory law related to the replacement of county council members generally requires as a prerequisite that a vacancy exist. Accordingly, unless there is a determination that the office is vacant, no replacement could be made. This does not mean, however, that the Legislature has no power to provide for such a mechanism by the enactment of a general law in this regard. In fact, the Legislature has enacted laws allowing for the temporary replacement of public officers, including county council members, who are absent from office due to military service. See S.C. Code Ann. §§8-7-10,30 &40 (See Op. S.C. Atty. Gen., dated December 19, 1990 opining that a reviewing court would most likely find the provisions of Sections 8-7-10 *et seq.* constitutionally valid). Therefore, it appears as though the Legislature could, if it so chose, provide by law for the temporary replacement of a county council member absent from office for reasons such as you describe.

Similarly, while it does not appear that existing law allows for the removal and replacement of a county council member based on his or her absence due to health reasons, the Legislature would have the authority to provide for such action if it so chose. Generally, the State Legislature has plenary authority to enact legislation. In previous opinions, we have recognized the well-established principle that:

The General Assembly is a creature of the Constitution. Ours is not a grant of authority to the General Assembly; it is a limitation on the General Assembly. The legislature, under its plenary powers, may enact any law not specifically, or by implication prohibited. Duncan v. County of York, 267 S.C. 327, 228 S.E.2d 92 (1976).

See Op. S.C. Atty. Gen., dated August 18, 1983. Therefore, in this and any other case, the General Assembly has the power to enact any law not prohibited by the Constitution. I have been able to locate no constitutional impediment to the legislative action in this regard.

In fact, in interpreting the language of Article VI, Section 9 and Article III, Section 27 our Court long ago stated that

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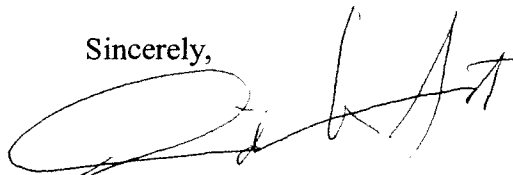
This section requires that officers shall be removed in the manner provided by law for incapacity, misconduct, or neglect of duty, legally shown to the removing power, and leaves to the legislature the discretion to provide the manner of removal, the designation of the person or tribunal which shall have the power of removal, and the procedure to ascertain the fact of incapacity, misconduct, or neglect of duty, unless a mode of trial or removal is provided in the SC Constitution.

McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873 (1912). Accordingly, it appears that, not only is there no constitutional impediment, there is express authority for the Legislature to determine when and how an officer should be removed and/or replaced.

CONCLUSION

There appears to be no existing statutory authority which would provide for the replacement of a county council member who is in a coma resulting from an automobile accident. It is my opinion that a reviewing court would most likely find S.C. Code Ann. §1-3-240(A) inapplicable to this situation. Neither does there appear to be existing authority which would allow for a temporary replacement of the county council member. It does appear, however, that the Legislature has the power to address this situation through the amendment of existing laws or the passage of new laws specifically addressing this and other similar circumstances.

Sincerely,

A handwritten signature in black ink, appearing to read 'David K. Avant', with a large, stylized initial 'D' and a long horizontal stroke extending to the right.

David K. Avant
Assistant Attorney General