

The State of South Carolina

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December 31, 1992

The Honorable Timothy F. Rogers
Member, House of Representatives
Post Office Box 5151
Columbia, South Carolina 29250

Dear Representative Rogers:

You have asked for the opinion of this Office on the following question:

Is the Richland County council, newly constituted including the five new duly elected members, legally empowered to meet and take binding action as otherwise provided by law, notwithstanding the pending litigation to which the memorandum of December 22, 1992, submitted by the Richland County Attorney, makes reference?

A copy of the referenced memorandum was provided for our review. A number of issues are presented and must be resolved, following a brief summary of the relevant facts.

At the outset, it must be noted that certain matters respecting the redistricting of Richland County Council following the 1990 census, as required by S.C. Code Ann. §4-9-90, are pending in federal court; this Office's policy is ordinarily to refrain from commenting on matters pending in court, to avoid even the appearance of usurping the court's authority or prerogative as to those matters. However, we believe that the exact question raised by your letter is not pending before the court. We are also extremely concerned that to follow the memorandum of the County Attorney will result in the absence of county government in Richland County for an indeterminate period of time. As stated in Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E. 2d 228 (1952), "As nature abhors a void,

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the law of government does not ordinarily countenance an interregnum." In the interest of continuity of county government, then, this opinion is undertaken.

As stated in your letter, under the reapportionment plan passed by Richland County Council on January 3, 1992, and subsequently precleared by the United States Department of Justice, the members of Richland County Council are: David Elam, residing in and representing District 1; George Mick, residing in and representing District 2; Harriet Fields, residing in and representing District 3; Paul Livingston, residing in and representing District 4; Kit Smith, residing in and representing District 5; Nancy Sandel, residing in and representing District 6; Gwen Kennedy, residing in and representing District 7; Steve Morris, residing in and representing District 8; Sharon Jackson, residing in and representing District 9; Bernice Scott, residing in and representing District 10; and Eddie Weaver, residing in and representing District 11.

You have further advised that Mick, Fields, Kennedy, Morris, Jackson, and Scott were elected in November 1992 to four year terms commencing January 1, 1993. Elam, Livingston, Smith, Sandel and Weaver were elected in November 1990 to four year terms commencing January 1, 1991. Mr. John Monroe and Ms. Irene Neuffer were defeated in the November 1992 elections. The term of Ms. Leone Castles, a resident of District 6, expires December 31, 1992.

The redistricting plan adopted by council on January 3, 1992, was amended by council on June 6, 1992. Litigation ensued, resulting in an injunction issued on June 11, 1992, by the Court of Common Pleas of Richland County to prevent the holding of elections for individuals to represent Districts 5 and 6 on council. The matter is now pending in federal court, and we understand a hearing to be scheduled for early January 1993. The National Association for the Advancement of Colored People (NAACP) has apparently intervened in the lawsuit, as well.

At this stage in the litigation, we must observe that no member of council has been declared by a court to be holding office illegally or invalidly. The memorandum of

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the County Attorney is couched in terms of "If a court accepts and grants the Motion {of the NAACP} ... " or "If the June 6th (amended) version of the Ordinance is accepted by the courts ... " or "If the January 3rd version of the Ordinance is declared to be the valid redistricting ordinance ..."; at this time, many assumptions may be made or outcomes anticipated, but no decision is known. The County Attorney's memorandum reaches factual and legal conclusions which might or might not be accepted by a court. These uncertainties must be kept in mind.

Just as is any legislative enactment, the ordinance of January 3, 1992, is entitled to the presumption of validity, unless and until a court should declare otherwise. Ops. Atty. Gen. dated March 25, 1992; November 11, 1989; June 28, 1989; March 3, 1989; February 3, 1989; and others. That presumption would also attach to the amending ordinance of June 6, 1992, but for the injunction of the Court of Common Pleas issued June 11, 1992, which had the effect of delaying implementation of the latter ordinance or, in other words, maintaining the status quo. As a result, elections were held according to the January 3, 1992, ordinance in November 1992.

County council members elected in the November 1992 election will take office on January 1, 1993, pursuant to §4-9-610. See Ops. Atty. Gen. dated October 3, 1980; July 26, 1976; and October 8, 1984. Unless and until a court declares otherwise and assuming the new members have taken all steps to qualify, they will be considered de jure council members. A de jure officer is "one who is in all respects legally appointed {or elected} and qualified to exercise the office." 63A Am.Jur.2d Public Officers and Employees §580. This Office is not aware of any action having been taken by a court to prevent those individuals elected in November 1992 from assuming their offices.

If a court should later decide that the elections of November 1992 were invalid as to Richland County Council, these members would most probably be considered de facto officers. A de facto officer is "{o}ne who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties

under color of authority." Smith v. City Council of Charleston, 198 S.C. 313, 320, 17 S.E.2d 860 (1941). As stated in Bradford v. Byrnes, 221 S.C. at 261, "The purpose of the doctrine of de facto officers is the continuity of governmental service and the protection of the public in dealing with such officers...." Until such a determination is made by a court, in our opinion, the newly elected council members would be de jure officers entitled, even required, to exercise the duties of their offices for the continuity of governmental services.

As de jure officers, certainly the members of Richland County Council would be empowered to meet and to take whatever actions the council is authorized by law to take. Even if some of the members should be declared to be de facto officers in the future by a court, any actions taken by such officers as to the public and third parties would not be void ab initio but would be valid, effectual, and binding unless and until a court should declare otherwise. 67 C.J.S. Officers §276; 63A Am.Jur.2d Public Officers and Employees §605.1/ Whether to take action on a particular issue facing council would, of course, be a decision to be made by council, weighing all relevant factors such as time constraints, etc., known to council.

Finally, Ms. Sandel's membership on council has been questioned, as she is alleged to be unqualified to hold office due to her apparent failure to change her voter registration to reflect her current address. This Office must leave fact-finding to the appropriate court in an appropriate proceeding. Without commenting on the facts as such existed at the time of Ms. Sandel's election or at the present time, this Office has stated previously that,

1/ As noted in 63A Am.Jur.2d §605, this doctrine is inapplicable "where the defects in the title of the officer are notorious." No court has decided that any titles are defective, to our knowledge, and thus, in our opinion, it is premature to say that "defects in the title of the officer are notorious."

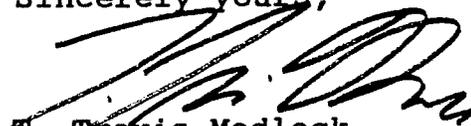
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as to a municipal council member, "even though he may not be a qualified officer, he would be a de facto officer and any actions he took while holding this office would not be questioned because of his lack of qualifications to hold that office." Op. Atty. Gen. dated August 28, 1981. See also 67 C.J.S. Officers §269; 63A Am.Jur.2d Public Officers and Employees §594. Unless and until a court concludes otherwise, Ms. Sandel would be a de facto officer, at the very least.

Based on the foregoing, it is our opinion that Richland County Council, newly constituted including the five new duly elected members, will be empowered to meet and take binding action as otherwise provided by law, unless and until a court should declare otherwise. To reach any other conclusion effectively renders Richland County without a governing body; we do not believe a court would countenance such an interregnum for an undetermined length of time until the above-mentioned litigation can be resolved.

With kindest regards, I am

Sincerely yours,


T. Travis Medlock

TTM:gmb