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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

June 15, 2005

Mr. William A. Frick  
Chester County Manager  
P. O. Drawer 580  
Chester, South Carolina 29706

Dear Mr. Frick:

In a letter to this office you indicated that currently Chester County has a council-manager form of government. However, a referendum was held during the last general election which may result in a change to the council-supervisor form of government. Presently, there are two declaratory judgments pending regarding this possible change of government. Because of such, you have questioned the status as of July 1, 2005 of the currently elected county treasurer and county auditor whose terms expire June 30, 2005. You have questioned who will carry out the duties of these offices after June 30 and have asked whether the individuals holding these two offices will remain in office pending resolution of the lawsuits regarding the change of government.

The position of county treasurer was created by S.C. Code Ann. § 12-45-10 (2000). Pursuant to such provision, "(t)he Governor shall by and with the advice and consent of the Senate, appoint for each county in the State a county treasurer." Pursuant to S.C. Code Ann. § 12-45-20 (2000),

(t)he county treasurer shall hold office for four years and until his successor is appointed or elected and qualified. His term of office shall commence on the first day of July following his appointment or election....

The position of county auditor was created pursuant to S.C. Code Ann. § 12-39-10 (2000). Such provision states in part:

(t)he Governor may, by and with the advice and consent of the Senate, appoint for each county in the State a county auditor, who shall hold his office for a term of four years and until his successor is appointed and qualified....

With the advent of home rule, pursuant to S.C. Code Ann. § 4-9-60 (1986),

(u)nder the council, council-supervisor and council administrator forms of government provided for in this chapter the county treasurer and the county auditor shall be elected...Under the council-manager form the county treasurer and county

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auditor shall serve out their unexpired terms but shall thereafter be elected or appointed as council shall by ordinance prescribe.

You have indicated that Chester County presently operates under the county-manager form of government and, as authorized by Section 4-9-60, the positions of county treasurer and county auditor are now elected rather than appointed. The time for commencement of the county treasurer's and auditor's terms of office is the first day of July next following the treasurer's and auditor's election. See: S.C. Code Ann. § 4-11-10 (Supp. 2004).

As set forth by Sections 12-45-20 and 12-39-10, a county treasurer and county auditor holds office until his successor is appointed or elected and qualified. A prior opinion of this office dated June 6, 2003 stated:

With reference to the status of public officers whose set terms have expired, the Supreme Court in State ex rel. Lyon v. Bowden, 92 S.C. 393 at 400, 75 S.E. 866 (1912), stated that " ... when a term of office is fixed by law at a term of years and until the appointment or election and qualification of a successor, the term of the incumbent does not end and there is no vacancy until the expiration of the time named and the appointment or election and qualification of his successor." In recognizing a constitutional provision consistent with that now found in Article 17, Section 11, the Court also noted that "unless the words 'until their successors have been appointed and qualified' are to be erased from the Constitution, the time which may elapse between the expiration of the [term] and the actual [election] ... of the successor is as much a part of the specific term of office fixed by the Constitution as the [set term itself]." *Id.*

See also: Op. Atty. Gen dated May 12, 1987. Therefore, in the situation you addressed, the individuals serving as county treasurer and county auditor by statute would hold over until their successors are appointed, elected or otherwise qualify.

In Op. S.C. Atty. Gen., Op. No. 84-129 (November 5, 1984), we noted that "where a statute provides that an officer hold over until a successor is selected and qualifies, such period is as much a part of the incumbent's term of office as the fixed constitutional or statutory period." A person who by statute holds over until a successor is elected or appointed and qualifies is, in other words, a de jure officer. A de jure officer is one who is in all respects legally appointed or elected to the office and has qualified to exercise the duties of the office. See, Op. S.C. Atty. Gen., December 16, 2004. Therefore, in response to your question of who will carry out the duties of the offices of county treasurer and county auditor after June 30, in my opinion, the two individuals currently holding these two offices will remain in office pending resolution of the lawsuits regarding the change of government.

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I would only add that even if there was no statute regarding an officer holding over, it was recognized by the State Supreme Court in Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228, 231 (1952) that

... in the absence of pertinent statutory or constitutional provision, public... [officers]  
... hold over de facto until their successors are appointed or elected and qualify.  
Vacancy nevertheless exists in the sense that successors may be appointed or elected  
as may be provided by law, qualify and take the offices; but meanwhile the  
"holdovers" are entitled to retain the offices. As nature abhors a void, the law of  
government does not countenance an interregnum.

Therefore, where no statute authorizing an officer to hold over is present, that officer serves in a de facto capacity.

A "de facto" officer is "one 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." Heyward v. Long, 178 S. C. 351, 183 S.E. 145, 151 (1936). This office has consistently recognized that "(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." Op. S.C. Atty. Gen., December 16, 2004. This office has indicated on numerous occasions that an individual may continue performing the duties of a previously held office as a de facto officer, rather than de jure, until a successor is duly selected. See Ops. S.C. Atty. Gen., December 23, 1996 and January 14, 1999 as examples thereof. In other words, the acts of a de facto officer "would not be void ab initio, but would be valid, effectual and binding unless and until a court should declare otherwise." Op. S.C. Atty. Gen., December 31, 1992. Accordingly, as to the individuals holding the offices of treasurer and auditor, even without the statute allowing them to hold over until their successors are appointed and qualified, their acts would, nevertheless, be valid while they continue to hold over in office.

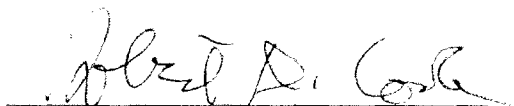
If there are any questions, please advise.

Sincerely,



Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General