ALAN WILSON
ATTORNEY GENERAL

January 14, 2011

The Honorable Mike Fair
South Carolina Senate, District 6
P.O. Box 142
Columbia, South Carolina 29202

Dear Senator Fair:

We received your letter requesting an opinion of this Office regarding the effect of possible actions taken by a board member of a property owners association ("POA") who was ineligible to serve on the Board at the time such actions were taken.[1] Specifically you asked whether possible actions the board member may have taken, such as signing official documents, would "open up possible litigation" and whether other actions, such as making motions and voting on issues affecting the property owners, would make these actions void. This opinion addresses prior opinions and case law regarding this issue.

Law/Analysis

"A 'de jure officer' is one who in all respects is regularly and legally appointed and qualified to hold a particular office and exercise the duties as his right. A 'de facto officer' is one who has a presumptive or colorable right or title to an office, accompanied by possession or actual use of the office." 8 S.C. JUR. *Public Officers and Public Employees* § 4. "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.'" Op. S.C. Att'y Gen. (October 14, 1988) (quoting Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936)). *See also* Bradford v. Byrnes, 221 S.C.

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[1]Although your letter explains that the owner is apparently not the record owner of the property as required to be on the Board because his name is not on the fee simple title in the public records and that the individual is the trustee for his spouse's trust, but, as of the date of your letter, that interest has not been recorded in his county of residence, as you are aware, this Office cannot make factual determinations. *E.g.,* Op. S.C. Att'y Gen. (March 28, 2006). Accordingly, for purposes of this opinion, this Office assumes that the board member is in fact ineligible to serve on the Board of Directors for the POA.

255, 70 S.E.2d 228 (1952); Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1941); State v. Messervy, 86 S.C. 503, 68 S.E. 766 (1910) (officer de facto must have presumptive or apparent right to exercise office with actual use of the office).

Notably, "[o]ne may be a de facto officer although he or she is ineligible to hold the office." 18B AM. JUR.2D *Corporations* § 1231. In Watson v. Johnson, 24 P.2d 592, 594 (Wash. 1933), the directors of a building and loan association "were at least de facto officers, even though they did not have the financial interest in the association required by the statute. They were regularly chosen, took the oath of office, entered upon the discharge of their official duties, and were recognized as directors." Similarly, the court in Popperman v. Rest Haven Cemetery, Inc., 345 S.W.2d 715 (Tex. 1961) found that, although one of the directors authorizing execution of promissory notes did not own stock in the corporation, as required in the by-laws, the notes were valid because he was a de facto director. *See also* Forest Home Cemetery Ass'n v. Dardanella Financial Corp., 329 N.W.2d 885 (S.D. 1983) (although a director of a corporation fails to meet the statutory requirement of owning stock in the corporation, he may nevertheless act as a de facto director); H & H Press, Inc. v. Axelrod, 638 N.E. 2d 333 (Ill. App. 1994) (corporate officers exercising functions of their offices under color and claim of authority are de facto officers even if unlawfully elected).

According to the facts presented in your letter, the board member at issue "has served continuously in some capacity over the past 5 years on the Board." Although we are not presented with all facts in your letter necessary to make the determination as to whether such board member is a "de facto officer," if, as it appears from your letter, the board member at issue has been in possession of the office, in good faith, entered by right, claiming entitlement thereto, and discharging his duties under color of authority, the said board member is in fact a "de facto officer" of the POA.[2]

In Bradford v. Byrnes, 221 S.C. 255, 261, 70 S.E.2d 228, 231 (1952), the Supreme Court noted that "[t]he 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 . . . ." "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. Att'y Gen. (June 15, 2005) (quoting Op. S.C. Att'y Gen. (December 16, 2004)) *See also* Op. S.C. Att'y Gen. (September 19, 1988); Op. S.C. Att'y Gen. (May 16, 1988). However, "[i]t is the general rule that the de facto office is void as to such officers attempting to assert it to their own advantages at the expense or injury of others, but is valid so as to protect those relying on such acts from injury." Op. S.C. Att'y Gen. (August 30, 1971) Accordingly, "the acts of a de facto officer in the discharge of his duties are valid as if such

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[2]*See* Nottingdale Homeowners Ass'n, Inc. v.. Darby, 1986 WL 7908 (Ohio App. 1986), *rev'd on other grounds,* Nottingdale Homeowners Assn'n Inc. v. Darby, 514 N.E.2d 702 (Ohio 1987) and Board of Managers of General Apartment Corp. Condominium v. Gans, 340 N.Y.S.2d 826 (N.Y. City Civ. Ct. 1972) (both applying "de facto" doctrine to homeowners' boards of directors).

acts were done in a de jure capacity so long as they are not asserted for the benefit of such de facto officer." *Id.* As recognized above, these same principles would apply to corporate officers or, in this case, the officers of a homeowners' association.

Your letter presents no facts indicating that the board member at issue acted to his own benefit, and, as noted, this Office cannot make factual determinations. *E.g.,* Op. S.C. Att'y Gen. (March 28, 2006). Accordingly, as we have no facts to the contrary, for purposes of this opinion, we assume that the board member at issue did not act for his own benefit. Therefore, as a de facto officer, with regard to the public or third parties, his actions appear to be valid and effectual.

Conclusion

Based on the facts presented in your letter, it appears that the POA board member at issue is a de facto officer who has not acted for his own benefit. Although his actions may very well "open up possible litigation," it is the opinion of this Office that a court would likely determine that his actions, including signing official documents as well as making motions and voting on issues affecting the property owners, are not void, but are valid and effectual as to third parties and the public. Furthermore, with regard to any potential removal of said board member based on ineligibility, the POA should refer to the relevant provisions of the Covenants referenced in your letter.

Sincerely,

ElizabethAnn L. Felder
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General