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HENRY McMASTER
ATTORNEY GENERAL

March 28, 2006

The Honorable Glenn F. McConnell
President *Pro Tempore*
The Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You have asked for an opinion "on an issue that was recently brought to my attention by a constituent who passed the questions to me." You note that it is your constituent's understanding that "an elected member of the St. Andrews Public Service District recently moved outside of the district. He says that he still holds his seat thereon." Thus, you request an opinion regarding the following:

[m]y questions, based upon the information provided to me, are whether a person who moves from within the territory of the St. Andrews Public Service District becomes ineligible for continued service on the District board. Also would the individual's move outside the district trigger an automatic vacancy of the seat?

Law / Analysis

Your specific questions are answered by prior opinions of this Office. In an opinion, dated July 7, 1999, we addressed the situation of whether the members of the Goose Creek Recreation Commission must reside within the boundaries of a newly enlarged District. In that Opinion, we noted that Art. XVII, § 1 of the State Constitution provides that "[n]o person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector" Our Supreme Court has stated that where a residency requirement has not been specified by the legislature, such may necessarily implied, to prevent circumvention of the Constitution. *McLure v. McElroy*, 211 S.C. 106, 44 S.E.2d 101 (1947), *overruled on other grounds by Weaver v. Recreation District*, 328 S.C. 83, 492 S.E.2d 79 (1997). To be qualified as an elector, the earlier opinion recognized the following:

one must meet the requirements specified in S.C. Code An. § 7-5-120. One of the requirements listed in this section is that an individual must be a resident in the

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county and in the polling precinct in which the elector offers to vote. Residency is a mixed question of fact and law and turns on the individual's intent. *Op. Atty. Gen.*, dated May 7, 1991.

The July 7, 1999 Opinion thus concluded that members of the Goose Creek Recreation District board were required to reside in the District in order to hold such offices. We stated as follows:

(t)his Office has issued several opinions on questions similar to the one raised in your opinion request. For example, in an opinion dated May 7, 1991, we were asked whether a person residing outside of the New Prospect Area Fire District, but owning land in the district, may be appointed to the Board of Fire Control for the district. The enabling legislation provided that the Board shall be composed of five members who shall be appointed by the Governor upon the recommendation of a majority of the Spartanburg County Legislative Delegation. The enabling legislation was silent as to any qualifications regarding the residency of appointees. Relying on Article XVII, §1 of the Constitution and S.C. Code Ann. § 7-5-120, this Office concluded that since one must be a qualified elector of a district to be an office-holder in the district, a member of the Board of Fire Control must be a resident of the district and not merely own property therein.

In an opinion dated August 1, 1985, this Office was asked whether a mayor possessed the power to remove an individual from the office of housing authority commissioner if that individual had moved out of the city limits. In this case, a commissioner formerly residing in the City of Greenville had moved to the City of Simpsonville. After the move, the individual was reappointed to an additional term of office. As is often the case, the enabling legislation did not contain a residency requirement. The author, citing Article XVII, §1 and its implied residency requirement, concluded that an individual appointed to the office of housing authority commissioner must reside within the City of Greenville.

Based on the foregoing, a member of the Goose Creek Recreation Commission is an office-holder and is thus required to be a qualified elector within the district. One of the requirements needed to be a qualified elector is residency within the boundaries of the district. Accordingly, in order to properly serve on the Goose Creek Recreation Commission, one must reside within the boundaries of the Goose Creek Recreation Commission. However, since residency is a mixed question of fact and law and turns on an individual's intent, you may wish to consult with the county attorney to determine whether a specific individual resides within the boundaries of the Goose Creek Recreation Commission.

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Another previous Opinion addresses your remaining question as to whether or not a vacancy is created by an officer moving outside his or her district. In *Op. S.C. Atty. Gen.*, Op. No. 93-68 (October 18, 1993), we stated:

[t]his Office has previously advised that an individual serving on Colleton County Council, who moved from the district from which he was elected to council, would no longer be qualified to serve on Colleton County Council. *Op. Atty. Gen.* dated August 27, 1985; see also *Ops. Atty. Gen.* dated October 4, 1984; October 4, 1968; March 8, 1978; February 17, 1956; and December 16, 1970 as to the same or substantially similar issues, to the effect that public officers vacate or forfeit their offices at the time they ceased to be a resident of the affected district or political subdivision.

Thus, the same conclusion would be reached as to a member of Sumter County Council who has moved from the district from which he was elected, that he has vacated his office as he is no longer qualified to serve from that district.

Opinion No. 93-68 went on to discuss the legal status of the officer who had moved out of the election district in question, noting that

[w]e have advised previously that the aforementioned member of Colleton County Council would continue to serve in a de facto capacity until his successor could be selected; as you observed, however, Colleton County was under jurisdiction of the federal court at the time of that opinion and the court order was an important factor. We have, however, advised that a city council member would continue to serve, in a de facto capacity, after he had moved permanently out of the city, until such time as his successor could be selected. *Op. Atty. Gen.* dated October 4, 1984; see also the opinions cited therein. Section 5-15-40 is similar to § 4-9-90 in its lack of language concerning a term of years "and until a successor has been elected/appointed and qualified."

As you point out, the decision in *Bradford v. Byrnes*, 221 S.C. 255, 70 S.E.2d 228 (1952), states 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." *Id.*, 221 S.C. at 262. In conjunction with our response to your fourth question and in keeping with *Bradford v. Byrnes*, the individual could continue to serve in a de facto capacity until his successor is selected

As noted, residency is a mixed question of law and fact. Of course, only a court and not this Office in an opinion may make factual determinations. See, *Op. Atty. Gen.*, December 12, 1983.

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Thus, as you have indicated, we must assume that the individual in question is not a resident of the District. We thus make no conclusion in this regard.

However, the law is clear. A member of the St. Andrews Public Service District must remain a resident of the District in order to continue to be qualified to serve. If the member no longer resides in the District, he or she automatically vacates the Office, but continues as a *de facto* officer until a successor is chosen and qualifies.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. D. Cook", written in a cursive style.

Robert D. Cook

Assistant Deputy Attorney General