



ALAN WILSON
ATTORNEY GENERAL

August 12, 2011

The Honorable Bob Bishop
Mayor *Pro Tem*, Town of Arcadia Lakes
6911 N. Trenholm Rd., Suite 2
Columbia, SC 29206

Dear Mr. Bishop,

As a way of background, you explained that during a meeting on February 23, 2011, a council member announced his "intention not to seek reelection . . . in the November 2011 election." At the March 3, 2011 meeting, minutes from the February meeting were approved. However, the minutes mistakenly stated that the council member's intention was to resign in six months, making August 23, 2011 the effective date of resignation. The mistake was later brought to the council member's attention; hence, a public council meeting has been scheduled for August 15, 2011. At the upcoming meeting, it is anticipated that the Town Council will vote to approve the council member's request to fulfill his current term.

The Arcadia Lakes Town Council has asked this Office to issue a formal opinion addressing this matter. Please share the following with the Arcadia Lakes Town Council as a response to the council's request.

Law/Analysis

"Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State . . ." S.C. Code § 5-7-30. In accordance with state law, the Town of Arcadia Lakes enacted a Code of Ordinances. S.C. Code § 5-7-160 explains that "[a]ll powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law." Such powers include establishing rules of procedure for council meetings, voting, and minutes.

It is clear from the general powers conferred upon municipal councils by statute and the Arcadia Lakes Town Ordinances that the Town Council of Arcadia Lakes has the authority and discretion to conduct a vote on matters relevant to maintaining order in the municipality. See, S.C. Code § 5-7-160 *supra*; Arcadia Lakes Town Code, Section 2-306. It is the opinion of this Office that

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there is nothing in the S.C. Code of Laws which would prohibit the Arcadia Lakes Town Council from voting to allow the councilman to fulfill his current four-year term.¹ In fact, without a successor the council member must continue in his position. See, Rogers v. Coleman, 245 S.C. 32, 34, 138 S.E.2d 415, 417 (1964).

However, it is beyond the scope of an opinion of this Office to investigate or make determinations of facts. Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006. Therefore, we cannot opine on whether resignation² was tendered by the council member and accepted by the Town Council when the minutes were approved.

If there was resignation, resignation would have no effect

The Supreme Court of South Carolina held in Rogers v. Coleman that the attempted resignation of three county election commissioners "was of no effect and their tenure in office, together with the duties and responsibilities thereof, must be held to continue, since no successors have qualified. This is in accord with the general rule that a **public officer does not cease to be such even when his resignation is accepted, but continues in office until a successor is qualified . . .**" Coleman, 245 S.C. 32, 34 (emphasis added).

¹ S.C. Code § 5-15-40 governs the terms of office of mayor and councilmen, instructing that "[t]he mayor and councilmen of each municipality shall be elected for terms of two or four years"

² In an opinion of this Office, dated November 30, 2000, we explained as follows:

Should a vacancy exist in a position of mayor or town council member, S.C. Code Ann. § 5-7-200 provides in subsection (b):

A vacancy in the office of mayor or council shall be filled for the remainder of the unexpired term at the next regular election or at a special election if the vacancy occurs one hundred eighty days or more prior to the next general election.

The applicable statutes do not contain provisions for a means of tendering notice of resignation or any other means of filling vacancies on a municipal council.

The requisites of an effective resignation are outlined in 63A AM.JUR.2D *Public Officers and Employees* § 171. No particular form is required unless so specified by statute. There must be an intention to resign from the office in question, accompanied by some act of relinquishment. A written resignation is to be tendered to the entity or person authorized by law to receive it. If the resignation is in writing, it is to be signed by the officer tendering the resignation and should be dated. To be effective, the tendered resignation must be accepted by the appropriate entity or person. See, Op. Atty. Gen. no. 86-78, dated July 10, 1986.

According to 63A AM.JUR.2D *Public Officers and Employees* § 172, "[t]he official with whom a resignation must be filed may be designated by statute." The section also provides that "in the absence of a statutory direction, a public officer should tender his resignation to the tribunal having authority to appoint his successor or to call an election to fill the office." As previously observed, the statutes concerning municipal council members, their terms, and filling vacancies, do not contain provisions relative to the appropriate entity or person to whom the resignation from the office of municipal council should be tendered.

In a prior opinion of this Office, we have similarly suggested that upon effective resignation, an individual would continue to serve in his or her official capacity until a successor is elected and found qualified:

Should the [mayor and town council members] effectively resign from their respective offices, I am of the opinion that these individuals would continue to serve in their offices until their successors should be elected and qualify. After such resignation, these officers would be considered de facto officers, at the very least. While the relevant statutes do not make any provision for the mayor and members of a municipal council to hold office until their successors are elected and qualify, as is the case in many other office-holding situations, the law would imply the requirement that, if available (i.e., the office is not vacant due to death, imprisonment or remote geographic location of the incumbent), the incumbent would continue to serve.

Op. S.C. Atty. Gen., August 7, 1996; Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228 (1952) (“In the absence of pertinent statutory or constitutional provisions, public [officers] hold over de facto until their successors are appointed or elected and qualify.”); Denman v. City of Columbia, 387 S.C. 131, 136 (2010) (“pursuant to § 5-7-200(b), if vacancy is less than 180 days prior to general election, vacancy will be filled at general election.”).

If there was no resignation, minutes may be corrected

Consistent with the advice provided to the Town of Arcadia Lakes by the S.C. Municipal Association, we agree that since the upcoming August 15, 2011 meeting will take place prior to the August 23, 2011 resignation date, logic suggests that the Arcadia Lakes Town Council may vote to revisit the March 3, 2011 decision to approve the February 23, 2011 minutes. The Town Council may vote to make a correction to the February 23, 2011 minutes, indicating that the council member does not intend to resign.

In a prior opinion of this Office, we suggested that a city council has the right to rescind its former action by proper procedure. Op. S.C. Atty. Gen., May 6, 1959. Also, in Jennings v. Charleston & W.C.Ry.Co., 218 S.C. 144, 150-151, 62 S.E.2d 114, 117 (1950), the South Carolina Supreme Court also suggests that a municipal council has the power to correct its minutes. The Court references 3 A.L.R. 1308 which explains as follows:

A municipal council may, at a subsequent meeting, if no intervening rights of third persons have arisen, order the minutes or record of its own proceedings at a previous meeting to be corrected according to the facts, so as to make them speak the truth, though the record has once been approved.

3 A.L.R. 1308 *Power of Municipal Council to Correct its Minutes.*

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One should also note that from the information provided in your letter, it does not appear that the council member has forfeited³ his position, but that he merely made a mistake in failing to correct the minutes.

Conclusion

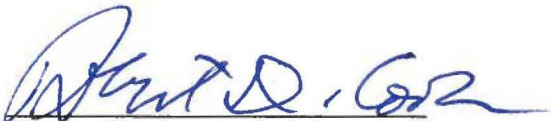
It is the opinion of this Office that Arcadia Lakes Town Council may vote to allow the council member to fulfill his term, remaining in compliance with South Carolina law. See, Coleman, 245 S.C. 32, 34. If there was a resignation, inadvertent or deliberate, the resignation would have no effect because there is no successor. Therefore the Town Council may vote to have the council member comply with established law as mentioned above. If there was no resignation, the Arcadia Lakes Town Council may vote to correct the February 23, 2011 minutes, especially considering that the August 23, 2011 date of resignation has not been reached.

Sincerely,



Leigha Blackwell Sink
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

³ § 5-7-200 sets forth the grounds for forfeiture of office of mayor or councilman and establishes procedures for filling vacancies in office: "(a) A mayor or councilman shall forfeit his office if he (1) lacks at any time during his term of office any qualification for the office prescribed by the general law and the Constitution; (2) violates any express prohibition of Chapters 1 to 17; or (3) is convicted of a crime involving moral turpitude. (b) A vacancy in the office of mayor or council shall be filled for the remainder of the unexpired term at the next regular election or at a special election if the vacancy occurs one hundred eighty days or more prior to the next general election."

§ 5-7-210 explains that the Council should serve as judge of election and qualifications of its members and of grounds for forfeiture of their office: "The council shall be the judge of the election and qualifications of its members and of the grounds for forfeiture of their office and for that purpose shall have power to subpoena witnesses, administer oaths and require the production of evidence. A member charged with conduct constituting grounds for forfeiture of his office shall be entitled to a public hearing, and notice of such hearing shall be published in one or more newspapers of general circulation in the municipality at least one week in advance of the hearing. Decisions made by the council under this section may be appealed to the court of common pleas."