

7622 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

September 16, 2003

G. P. Callison, Jr., Esquire
McCormick County Attorney
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Dear Mr. Callison

In a letter to this office you raised several questions relating to McCormick County Councilperson Strom. You referenced the following situation:

McCormick County is governed by a five member county council elected from single member districts for four year staggered terms. In 1990, Strom was elected to county council from District Three and was a resident of that district at that time. In early 2002, McCormick County began redistricting based upon the 2000 census. The County Redistricting Plan was approved in the spring of 2002 and used in the general election that year. As a result of redistricting, Strom's residence remained in District Three.

Recently, Strom moved to a new residence which is not located in District Three as composed after the 2002 redistricting but is located instead in District Four. Although the residence is in current District Four, the new residence is also located in District Three as it was composed at the time of Strom's election in 2000.

Referencing this situation, you first asked where Strom's change in residency results in a vacancy in the office for District Three. You also asked whether the fact that Strom moved to a residence which, while in present District Four, is also located in her district as it was composed at the time of her election in 2000 (District Three), impacts the question. You particularly referenced provisions of S.C. Code Ann. Section 4-9-90 (Supp. 2002) which state:

Any council member who is serving a four year term in a district that has been reapportioned and whose term does not expire until two years after reapportionment becomes effective shall be allowed to continue to serve the balance of his unexpired term representing the people in the new reapportioned district if he is an elector in such reapportioned district. In the event that two or more council members, because

of reapportionment, become electors in the same district, an election shall then be required. Provided, however, that if any seat should become vacant after election districts have been reapportioned but prior to the expiration of the incumbent's term of office due to death, resignation, removal, or any other cause, the resulting vacancy shall be filled under the new reapportionment plan in the manner provided by law for the district that has the same district number as the district from which the council member whose office is vacant was elected. For the purpose of this section, a council member will be deemed a resident of the district he represents as long as he resides in any part of the district as constituted at the time of his election. (emphasis added).

Generally, Article XVII, Section 1 and Article VI, Section 1 of the State Constitution require that an office holder possess the qualifications of an elector. Pursuant to S.C. Code Ann. Section 7-5-120 (Supp. 2002), an elector must be a "resident in the county and in the polling precinct in which the elector offers to vote." Pursuant to another provision of Section 4-9-90, "(i)n the event the members of the governing body are required to be elected from defined single-member election districts, they must be elected by the qualified electors of the district in which they reside."

An opinion of this office dated October 18, 1993 determined that

...it is clear that to be elected to a county council position in a county in which the elections are held according to defined single-member districts..., an individual must be a qualified elector who resides in the district he is to represent, to be voted upon by the electors of that district. While one's qualification for office is determined as of the date of election, this Office has advised previously that qualifications such as residence are deemed to be continuing throughout the officer's tenure.

That opinion referenced prior opinions of this office that determined that an individual serving on county council, who moves from the district from which he was elected to council, would no longer be qualified to serve on county council. See also: Ops. Atty. Gen. dated August 27, 1985; October 4, 1984. The opinion concluded that by moving from the district from which he was elected, a member of county council vacates his office as he no longer is qualified to serve from that district.

Consistent with the above, it appears that Councilperson Strom vacated her office by moving from her residence in District Three, the district from which she was elected, to a residence in District Four. As to the impact of that provision in Section 4-9-90 which states that "(f)or the purposes of this section, a council member will be deemed a resident of the district he represents as long as he resides in any part of the district as constituted at the time of the election", it is our conclusion that such provision offers no relief to Strom. That provision is included in a paragraph of Section 4-9-90 which provides for the manner of operation in situations of reapportionment. Those provisions protect office-holders from involuntary effects of reapportionment where a current office-holder no longer resides in the district from which he was elected after reapportionment. The provisions protect office holders who are "removed" by reapportionment from their districts. It is

inapplicable to Strom in that Strom's status of residency in a district, District Four, was not brought about by results of redistricting and reapportionment, but instead by her own actions in moving to a residence in District Four. By her actions in moving out of her district, she is deemed to have vacated her county council office. As indicated, the referenced provision comments "for purposes of this section", this section dealing with reapportionment.

As to any question regarding the literal interpretation of the provision "(f)or the purposes of this section, a council member will be deemed a resident of the district he represents as long as he resides in any part of the district as constituted at the time of the election", in its decision in Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815 (1942), the supreme court stated

It often happens that the true intention of the Legislature, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which is the prime and sole object of all rules of construction, can be accomplished only by departure from the literal interpretation of the language used. Hence, Courts are not always confined to the literal meaning of a statute; the real purpose and intent of the lawmakers will prevail over the literal import of the words.

In this instance, the provisions of Section 4-9-90 must be interpreted in light of the referenced constitutional provisions and the other referenced statutory provisions requiring an office holder to possess the qualifications of an elector. Such interpretation offers no relief to Councilperson Strom.

You also questioned whether Councilperson Strom would continue to serve until her successor is elected or qualified. You also asked whether if she would be considered a *de facto* member of Council, does she retain the right to vote and participate in Council decisions. The previously referenced August 27, 1985 opinion concluded that as to a council person who is considered unqualified to continue to serve on council due to a change of residency, "...while the individual in question has vacated his seat by his permanent change of residence, he would continue to serve on council until his successor has been elected and qualified." See also: Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952); Op. Atty. Gen. dated December 23, 1996 ("This office has opined 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 to complete his term of office.")

You next asked whether the circumstances of the vacated seat of Councilperson Strom require an election or an appointment to fill the vacancy. The next general election is in 2004. Section 4-9-90 provides that "(v)acancies on the governing body shall be filled in the manner of original election for the unexpired terms in the next general election after the vacancy occurs or by special election if the vacancy occurs one hundred eighty days or more prior to the next general election." An opinion of this office dated March 3, 1987 concluded that consistent with such

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provision, "(b)ecause more than 180 days would remain before the next general election, the individual's successor would be elected in a special election." The referenced October 18, 1993 opinion further indicated:

Where there are fewer than one hundred eighty days remaining on the term, it is my opinion that the Governor has the authority, pursuant to Sections 4-11-20 and 1-3-220, to fill the vacancy for the reason that it is then being filled by the Governor until the next general election, in precise accordance with the wording of the statutes to which reference is made.

Should more than one hundred eighty days remain on the term, the special election must be ordered to fill the vacancy for the unexpired term and I do not think that the Governor has the authority under the cited statutes to fill the vacancy pending the holding of the special election....

In accordance with the prior opinion of this office, we would advise that the Governor would not appoint someone to serve until the special election could be held....(T)he individual would continue to serve in a de facto capacity until his successor is elected and qualifies.

Inasmuch as there are more than 180 days prior to the next general election, the vacancy would be filled by a special election.

If there are any questions, please advise.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General