ALAN WILSON
ATTORNEY GENERAL

May 29, 2013

Gregory D. Padgett, Chair
College of Charleston Board of Trustees
66 George Street
Charleston, South Carolina 29424

Dear Chairman Padgett:

You have written us as Chairman of the Board of Trustees for the College of Charleston, requesting an opinion "on when the terms of Office for newly elected members of the Board of Trustees (Board) commence." By way of background, you state the following:

> [p]rior to June 1, 2012, College of Charleston's Board of Trustees consisted of the Governor of the State or her designee and seventeen members, fifteen of which were elected by the General Assembly and two of which were appointed by the Governor. Pursuant to the S.C. Code Ann. § 59-130-10, the Board was comprised as follows:
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> > Each position on the board constitutes a separate office and the seats on the board are numbered consecutively as follows: for the First Congressional District, Seats One and Two; for the Second Congressional District, Seats Three and Four; for the Third Congressional District, Seats Five and Six; for the Fourth Congressional District, Seats Seven and Eight; for the Fifth Congressional District, Seats Nine and Ten; for the Sixth Congressional District, Seats Eleven and Twelve; for the at-large positions elected by the General Assembly, Seats Thirteen, Fourteen, and Fifteen. The member appointed by the Governor shall occupy Seat Sixteen. The member appointed by the Governor upon recommendation of the alumni association shall occupy Seat Seventeen. The Governor of the State or her designee shall occupy Seat Eighteen.
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> According to § 59-130-10, the term of office for a Board member is four years. The terms of the seats are staggered so that the General Assembly holds elections every two years for half of the seats. Section 59-130-10 further provides that the

"term of an elective trustee commences on the first day of July of the year in which the trustee is elected."

Seats Two, Four, Six, Eight, Ten, Twelve, and Fourteen of the Board expired on June 30, 2012. However, the General Assembly did not conduct elections for these seats in 2012 due to the addition of the Seventh Congressional District resulting from Congressional reapportionment after the 2010 Census. Although the General Assembly did not hold elections, it enacted Act 176 of 2012 (S. 1307), which added new seats to various state boards, including the College of Charleston Board of Trustees, to represent the newly created Seventh Congressional District. Specifically, Section 12 of Act 176 amended § 59-130-10 by adding two seats to the Board for the Seventh Congressional Districts (now seats Thirteen and Fourteen), renumbering the at-large seats (now seats Fifteen, Sixteen, and Seventeen), renumbering the member appointment by the Governor (now seat Eighteen), renumbering the member appointed by the Governor upon recommendation of the alumni association (now seat Nineteen) and renumbering the Governor of the State or her designee (now seat Twenty).

Section 12 of Act 176 did not amend the provision of § 59-130-10, which states that the term of office for a trustee commences on the first day of July in the year in which he or she is elected. Section 19 of Act 176 did, however, provide that "in the event that elections for incumbent university board of trustees' seats whose terms are expiring this year are not held prior to June 30, 2012, current board members will retain their seats until the General Assembly reconvenes and holds elections."

As stated above, the General Assembly did not hold elections for the Board in 2012. Rather, it conducted elections for Seats Two, Four, Six, Eight, Ten, Twelve, and Sixteen (formerly Fourteen) on May 1, 2013. It elected the two new seats (Seats Thirteen and Fourteen) representing the Seventh Congressional District on May 1, 2013, as well. As a result of the May 1, 2013 elections, there will be a total of seven new Board members of which five incumbent members will relinquish their seats.

Section 19 of Act 176, which states that incumbent university board members retain their seats until the General Assembly reconvenes and holds elections, seemingly conflicts or is inconsistent with § 59-130-10, which provides that a Board member's term commences on July 1st of the year in which he or she is elected. This apparent inconsistency raises the issue of whether the terms of office of the newly elected Board members who are replacing incumbent Board members commences upon their election by the General Assembly, which

occurred on May 1, 2013, under Section 19 of Act 176 or on July 1, 2013 under § 59-130-10. Accordingly, I am requesting an interpretation of these provisions to determine when the terms of office of the newly elected Board members commence.

Law / Analysis

Section 12 of Act No. 176 of 2012 provides in pertinent part as follows:

> Section 59-130-10. The Board of Trustees for the College of Charleston is composed of the Governor of the State or his designee, who is an ex officio of the board and nineteen members, with seventeen of these members elected by the General Assembly, one member appointed from the State at large by the Governor, and one member appointed by the Governor upon recommendation of the College of Charleston Alumni Association … .
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> Of the seventeen members to be elected, two members must be elected from each congressional district and the remaining three members must be elected by the General Assembly from the State at large.
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> The term of office of the at-large trustee appointed by the Governor is effective upon certification to the Secretary of State and is coterminous with the term of the Governor appointing him. He shall serve after his term has expired until his successor is appointed and qualifies. The member appointed by the Governor upon recommendation of the College of Charleston Alumni Association shall serve for a term of four years, beginning on July 1, 2010, until his successor is appointed and qualifies. The member must be a South Carolina resident and hold an undergraduate or graduate degree from the College of Charleston.
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> Each position on the board constitutes a separate office and the seats on the board are numbered consecutively as follows: for the First Congressional District, Seats One and Two; for the Second Congressional District, Seats Three and Four; for the Third Congressional District, Seats Five and Six; for the Fourth Congressional District, Seats Seven and Eight; for the Fifth Congressional District, Seats Nine and Ten; for the Sixth Congressional District, Seats Eleven and Twelve; for the Seventh Congressional District, Seats Thirteen and Fourteen; for the at-large positions elected by the General Assembly, Seats Fifteen, Sixteen, and Seventeen. The member appointed by the Governor shall occupy Seat Eighteen. The member appointed by the Governor upon recommendation of the alumni association shall occupy Seat Nineteen.

> *Effective July 1, 1988, the even-numbered seats of those members elected by the General Assembly must be filled for four-year terms expiring June 30, 1992.* The remaining elective odd-numbered seats on the board must be filled for two-year terms beginning July 1, 1988, and expiring June 30, 1990. The trustees for the odd-numbered seats must then be elected for four-year terms beginning July 1, 1990, and expiring June 30, 1994. Effective July 1, 2012, the member elected to Seat Thirteen on the board must be elected for two-year terms beginning July 1, 2012, and expiring June 30, 2014, and the member elected to Seat Fourteen on the board must be elected to fill a four-year term beginning July 1, 2012, and expiring June 30, 2016. The General Assembly shall hold elections every two years to select successors of the trustees whose four-year terms are then expiring. Except as otherwise provided in this chapter, no election may be held before April first of the year in which the successor's term is to commence. *The term of office of an elective trustee commences on the first day of July of the year in which the trustee is elected.*
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> If an elective office becomes vacant, the Governor may fill it by appointment until the next session of the General Assembly. The General Assembly shall hold an election at any time during the session to fill the vacancy for the unexpired portion of the term. A vacancy occurring in the appointed office on the board must be filled for the remainder of the unexpired term by appointment in the same manner of the original appointment.

(emphasis added). Thus, Section 12 recognizes that terms of the Board's even numbered seats originally began on July 1, 1988 and have commenced and ended every four years up to 2012. Odd numbered seats began in 1990 and have commenced and ended every four years up to 2014.

The issue here, as you present it, is the fact that the General Assembly did not elect in a timely manner members for Seats Two, Four, Six, Eight, Ten, Twelve and Sixteen (formerly Fourteen) of the Board, whose terms expired on June 30, 2012. This was because, as you explain, the addition of the Seventh Congressional District resulting from Congressional reapportionment after the 2010 census. Instead, in enacting Act No. 176 of 2012, the General Assembly provided that "in the event that elections for incumbent university board of trustees' seats whose terms are expiring this year are not held prior to June 30, 2012, current board members will retain their seats until the General Assembly reconvenes and holds elections." Thus, your concern is the "apparent inconsistency" created by the Act's statement that holdover status ends upon election of new members (May 1, 2013) when compared with the requirement that terms of Board members begin on July 1 of the year elected. In this light, you seek guidance as to "when the terms of office for newly elected members of the Board of Trustees ... commence?"

A number of principles of statutory construction are here applicable. First and foremost, is the cardinal rule of construction, which is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan,* 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Hay v. S.C. Tax Comm.,* 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). The best evidence of the Legislature's intent is found in the plain language of the statute. *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007). Further, as the South Carolina Supreme Court stated in *Greenville Baseball Inc. v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942), "it is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words." In addition, in construing statutory language, a statute must be read as a whole, not provisions thereof in isolation. All sections must be construed together with one another and each section given effect. *Higgins v. State,* 307 S.C. 446, 415 S.E.2d 799 (1992). As our Supreme Court has recognized, "[i]n ascertaining the intent of this Legislature, a court should not focus on a single section or provision but should consider the language of the statute as a whole." *Croft v. Old Republic Ins. Co.,* 365 S.C. 402, 618 S.E.2d 909, 914 (2005).

You note that Section 12 of Act No. 176 of 2012 "did not amend the provision of § 59-130-10 which states that the term of office for a trustee commences on the first day of July in the year in which he or she is elected." Such provision, in other words, preceded the enactment of Act No. 176. Thus, the terms of those incumbent members of Seats Two, Four, Six, Eight, Ten, Twelve and Sixteen (previously Fourteen) have, over the years, expired every four years in even numbered years and in this instance expired on June 30, 2012. The incumbents have "held over" until the present time.

The law is well established in South Carolina regarding the status of officers who hold over beyond their terms. In an Opinion of this Office, dated July 2, 2012 (2012 WL 2867808), we referenced a previous opinion of June 5, 2003, in which we set forth the law governing holdover officers. There, we stated as follows:

> [t]he law distinguishes somewhat between an officer who holds over by statute and one holding over where no statute providing for holdover status is applicable. 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. On the other hand, it was recognized by our Supreme Court in *Bradford v. Byrnes*, 221 S.C. 255, 262, 70 S.E.2d 228 (1952) that

> ... in the absence of pertinent statutory or constitutional provision, public [officers] ... hold over *de facto* until their successors are 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.
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> Thus, where no statute authorizing an officer to hold over is present, that officer serves in a *de facto* capacity.

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. Atty. Gen.*, February 10, 1984. A "de facto" officer by contrast, 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." *Hayward v. Long*, 178 S.C. 351, 367, 183 S.E. 145 (1935).

Our June 5, 2003 Opinion also addressed the question of the legality of the acts of a *de facto* officer. We recognized there that even though the officer may be serving in a *de facto* capacity, all acts taken by that officer are valid and legally binding upon third parties. In that regard, we stated:

> [t]his 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.*, March 15, 2000. See for examples, *State ex rel. McLeod v. Court of Probate of Colleton County,* 266 S.C. 279, 223 S.E.2d 166 (1976); *State ex rel. McLeod v. West*, 249 S.C. 243, 153 S.E.2d 892 (1967); *Kittman v. Ayer*, 3 Strob. 92 (S.C. 1848). In addition, we have opined on numerous occasions that an individual may continue performing the duties of a previously held office as a *de facto,* rather than *de jure* [officer] with a successor is duly selected. See *Ops. S.C. Atty. Gen.*, December 23, 1996 and September 5, 1995 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, assuming these individuals are simply continuing to hold over without reappointment, their acts would, nevertheless be valid.

Further, it is also well established that a situation where an officer holds over beyond his term does not serve to vary the term because of the delay of the successor's election or appointment. As our Supreme Court recognized in *Heyward v. Long, supra,*

> "since the term of an office is distinct from the tenure of an officer, the term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed; and a holding over does not change the length of the term *but merely shortens the term of the successor*."

183 S.E.2d at 156. (emphasis added).

Turning now to the situation at hand, your letter indicates that "seats Two, Four, Six, Eight, Ten, Twelve and (Sixteen (formerly Fourteen)] expired on June 30, 2012." You further state that the Legislature "conducted elections for Seats Two, Four, Six, Eight, Ten, Twelve and Sixteen (formerly Fourteen) on May 1, 2013." Thus, the new terms for these seats would have, under the practice begun in 1988, commenced on July 1, 2012 but for the delay caused by the creation of the new Seventh Congressional District. The question presented is what impact, if any, Act No. 176 has upon the commencement of the terms of the successors for these seats, particularly where the Act expressly states that terms begin in the year of election (in this case, this year), as well as provides that holdovers serve until the General Assembly elects successors.

Applying the rules regarding holdovers, set forth above, in our view, the holdovers validly served as de jure officers following the expiration of their terms on June 30, 2012, and continue to validly serve today in such capacity. While Act No. 176 states that the holdover status continues until the time of "election" of new members, which in this instance occurred on May 1, 2013, we believe that it may be readily implied that the General Assembly intended the holdovers to continue to serve until their successors qualified for their offices by taking the oath of office. A public officer does not achieve the status of a *de jure* capacity until he or she is qualified. See *Op. S.C. Atty. Gen.*, September 23, 1980 (1980 WL 120892) [officer becomes incumbent *de jure* upon qualification]. Thus, in our opinion, any omission by the Legislature of the words, "and qualifies" in the phrase "until the General Assembly reconvenes and holds elections" was entirely inadvertent and may be implied as part of the statute. Thus, in our opinion, the holdover trustees continue to serve *de jure* until their successors qualify by taking the oath of office. Upon qualification, their successors become *de jure* trustees.

Nor do we believe the phrase in Section 12, stating that "the term of an elective trustee commences on the first day of July in which the trustee is elected" serves to vary the terms of the

successor trustees to *July 1st of this year.* The fact that these Trustees were not elected until May 1, 2013 is not controlling for purposes of when the new term commences. Instead, the principle stated in *Heyward v. Long, supra*, referenced above, that the "term of office" is distinct from the "tenure of an officer" is applicable here. According to *Heyward*, the terms of the successor officers "are not affected by the holding over" of the incumbents and this holding over "does not change the length of the term but merely shortens the term of the successor." Here, there is no indication in Act No. 176 that the Legislature intended to vary this rule. Indeed, the Legislature, in the 2012 Act, spoke expressly of the "terms [of members] expiring *this year.*" (emphasis added). Moreover, the Legislature stated in Section 12 that the terms of these Seats *originally* commenced on July 1, 1988. While it is true that another part of the Act provides that the terms of members begin on July 1st *in the year in which these members were elected*, this provision preceded Act No. 176 and dates back to 1988. Any perceived conflict or impression that Act No. 176 of 2012, causes these terms to now begin in 2013, rather than 2012, can be readily resolved because the Legislature acknowledged that the terms of the incumbent Board members expired on June 30, 2012. We thus cannot imply any intent to change these terms by virtue of the unanticipated situation of creation of the new Seventh Congressional District. The fact that successors were not appointed until recently (May 1, 2013) does not, in our view, mean that these members' terms now begin on July 1, 2013. Instead, such officers would begin to serve the remainder of terms which began on July 1, 2012 upon their qualification.

An Opinion, dated March 5, 1987 (Op. No. 87-22) (1987 WL 245431) is instructive in this regard. There, the predecessor Parole Board member's term was to expire on March 15, 1975, but that member held over until 1976. Relying upon *Heyward v. Long, supra*, we stated that "[t]hus, the predecessor holding over for one year, until March 15, 1976, shortened the tenure which the individual in question would subsequently serve, though the term of office would remain twelve years." In that opinion, we referenced an Opinion dated February 16, 1956. Our 1987 opinion stated with respect to the 1956 opinion:

> [t]he term of office of the Treasurer of Jasper County expired July 1, 1955, but the individual apparently held over past that time. The term of the successor was addressed in that opinion. Attorney General Callison stated:
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> > [a]n appointment now would be for the remaining of the term of the four-year term which should have begun July 1, 1955. If this course is not followed, an officer who succeeds himself could, at the expiration of a given term, refuse to qualify and continue in office as a holdover for practically the entire length of the succeeding term, then qualify and begin a new term upon his qualification. In this manner he could prolong the term of his office which, in my opinion, was not contemplated. ... It is my opinion that the Treasurer who qualifies July 1, 1956 will have three more

> years to serve, in view of the fact that he has already served one year of the term which began July 1, 1955.

Thus, based upon the 1956 opinion of Attorney General Callison, our 1987 opinion concluded as follows:

> [a]pplying the reasoning of the authorities cited above, it is the opinion of this Office that the twelve-year term of office to which the individual was appointed actually commenced on March 15, 1975 at the expiration of his predecessor's term. Because the predecessor held over for one year (Thus lengthening his own term), the actual tenure of the individual appointed in 1976 would be only eleven years.

In our opinion, these principles govern here with respect to the College of Charleston trustees.

Conclusion

1. Applying to this situation the governing law regarding holdovers, in our view, the holdovers for Seats Two, Four, Six, Eight, Ten, Twelve and Sixteen (formerly Fourteen) validly served as *de jure* officers following the expiration of their terms on June 30, 2012 and continue to validly serve today in such *de jure* capacity.

2. While Act No. 176 provides that these holdovers continue in that status until *the election of their successors*, which occurred on May 1, 2012, we believe that the General Assembly intended to have these holdovers continue in that capacity until such time as their successors qualify by taking the oath of office. As we understand it, these successors have not yet qualified. It is well recognized that a public officer does not become a *de jure* officer until qualification, and thus we believe it was the intent of the Legislature for the successors to have qualified before the holdovers relinquish their offices. Once the successors have qualified, they may assume office as *de jure* officers.

3. Finally, we do not believe that Act No. 176 of 2012 serves to vary the terms of the successor trustees. It is the well-established law in South Carolina, as prescribed by our Supreme Court in its decision in *Heyward v. Long, supra*, that continued service in office by holdovers does not vary the statutorily prescribed terms of the successors, but simply shortens the successors' terms. The terms of those presently holding over (Seats Two, Four, Six, Eight, Ten, Twelve and Sixteen (formerly Fourteen)) expired on June 30, 2012. New terms for the successors thus commenced on July 1, 2012. Accordingly, applying the principles of *Heyward v. Long* here, we conclude that the holdovers have been serving a portion of the successor trustees terms, due to the delay in electing new trustees brought about by the creation of the Seventh Congressional District.

We see nothing in Act No. 176 of 2012 which changes these well-established principles. Indeed, Act No. 176 expressly recognizes, in providing for the holding over of the present incumbents, that their terms expired on June 30, 2012. The statute also acknowledges that *the original* terms for these seats began on July 1, 1988. While, as you note, there is a provision in the Act stating that new terms commence on the first of July *in the year in which the trustee is elected,* such provision has been in existence since 1988 and is a provision common to the statutory authorization of other colleges' boards of trustees. This provision, when construed together with the holdover provision in Act No. 176, makes it apparent to us that the Legislature recognized the well-established law governing holdovers and did not intend to change the terms of the successor trustees to July 1, 2013. Instead, the General Assembly intended that the holdovers would fill a portion of the successors' terms, which had begun on July 1, 2012.

Accordingly, in our opinion the terms of the successor trustees commenced on July 1, 2012. New trustees may assume their rightful places to complete these terms upon their qualification. Such qualification may occur at any time hence.

4. With respect to your question regarding the two new seats (Seats Thirteen and Fourteen), Act No. 176 expressly provides that "[e]ffective July 1, 2012, the member elected to Seat Thirteen on the board must be elected for two-year terms beginning July 1, 2012, and expiring June 30, 2014, and the member elected to Seat Fourteen on the board must be elected to fill a four-year term beginning on July 1, 2012, and expiring June 30, 2016." New members for these seats were not elected until May 1, 2013. However, like the terms of Seats Two, Four, Six, Eight, Ten, Twelve and Sixteen (formerly Fourteen), the terms for these seats commenced July 1, 2012. Thus, these members may also assume their seats upon qualification, which may occur at any time hence. Please be advised, however, that, for the same reasons discussed above, these members also would serve only the remainder of the terms designated by the statute, i.e. until June 30, 2014 (for Seat Thirteen) and June 30, 2016 (for Seat Fourteen).

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an