

The State of South Carolina



Office of the Attorney General

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October 18, 1993

Henry B. Richardson, Jr., Esquire
Sumter County Attorney
Post Office Box 1716
Sumter, South Carolina 29151

Dear Mr. Richardson:

You have sought the opinion of this Office as to several issues facing Sumter County Council, as to the effect of a member of Sumter County Council establishing a residence outside the district of his election.¹ You have asked the following questions:

1. Does the change of residency result in a vacancy in this office?
2. Does the present councilman who has moved his residence continue to serve until his successor is elected or appointed?
3. Do the circumstances presented require an election or appointment to fill the vacancy?
4. May the governor appoint a successor to serve in the place and stead of the councilman who changed his residence until a new member of council is elected and qualified?

Each of your questions will be addressed separately, as follows:

¹ Residency is a mixed question of fact and law, turning on one's intent. Because this Office does not investigate facts or make factual determinations, we assume for purposes of this letter that the individual in question has in fact given up his residence in the district from which he was elected.

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Question 1

As you noted in your opinion, Art. XVII, §1 and Art. VI, §1 of the state Constitution require that office holders possess the qualifications of an elector. Section 7-5-120, S.C. Code Ann. (1992 Cum. Supp.), sets forth the qualifications of an elector; among them is that he be a "resident in the county and in the polling precinct in which [he] offers to vote..." In addition, the first paragraph of §4-9-90 provides in part that "[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." The final paragraph of §4-9-90 provides that "[f]or 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."

Considering these constitutional and statutory provisions, it is clear that to be elected to a county council position in a county in which elections are held according to defined single-member districts (which includes Sumter County Council), 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. Op. Atty. Gen. dated August 27, 1985; 67 C.J.S. Officers §18.

This 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 cease 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.²

² As to what constitutes a "vacancy" in a public office, see Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952). A physical vacancy is not required; an office is deemed vacant when it is occupied by one who is no longer qualified to hold office.

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Question 2

Whether the individual should continue to serve until his successor is elected or appointed is not expressly covered in §4-9-90 (as to election of council members, filling vacancies on council, and the like). We did not find any prior opinions construing this Code section in light of the circumstances existing in Sumter County; the opinions previously rendered by this Office seem to have dealt with situations involving death of a council member or criminal conviction of a council member, so that the individual was not available to continue to serve should that be an option. Also, the fact that more than 180 days remain before the next general election (as is the case here) makes a difference, as will be observed in response to your last two questions.

We 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 pursuant to §4-9-90, since he is available to serve and there are more than 180 days before the next general election.

Question 3

As previously stated, there are more than 180 days before the next general election is to be held. Section 4-9-90 requires a special election in that instance. Section 7-13-190 provides the mechanism to conduct the special section.

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Question 4

As to the Governor's power to appoint a successor when an individual resigns or must remove himself from a county council, we have previously advised in Op. Atty. Gen. No. 81-42:

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. As concluded within the response to your second question, the individual would continue to serve in a de facto capacity until his successor is elected and qualifies.

We trust that the foregoing will be responsive to your inquiries. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

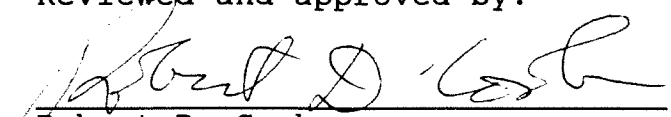
Patricia D. Petway

Patricia D. Petway
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PDP/sp

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Reviewed and approved by:



Robert D. Cook
Executive Assistant for Opinions