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The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

August 7, 1996

Elizabeth B. Partlow  
Legal Counsel  
Office of the Governor  
Post Office Box 11369  
Columbia, South Carolina 29211

Dear Ms. Partlow:

By your letter of August 2, 1996, you have advised that Governor Beasley received a letter from the Acting Mayor and four council members of the City of New Ellenton, which letter states that the Acting Mayor and council members are resigning their elective offices effective immediately. The referenced letter was dated August 1, 1996. It is your understanding that these individuals are the only remaining duly elected members of the New Ellenton Town Council.

With respect to the situation existing in the Town of New Ellenton, you have sought an opinion on the following questions:

1. Is the Governor authorized to accept the resignations of an Acting Mayor and council members of a municipality?
2. If the Governor is authorized to accept the resignations, what is the effect of his refusal to do so?
3. If the Governor is authorized to accept the resignations, and he does so, who is responsible for governing the City of New Ellenton until elections can be held and new council members take office?

In a municipality, all powers of the municipality are vested in its municipal council, except as otherwise provided by law, and the municipal council is required to provide for

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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. Op. Att'y Gen. No. 86-78, dated July 10, 1986, citing State ex rel. Jernigan v. Stickley, 80 S.C. 64, 61 S.E. 211 (1908), and State v. Aucker, 2 Rich. 245.

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." That section also provides:

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. A resignation tendered to an improper person or body is a nullity. [Emphasis added.]

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 mayor or municipal council should be tendered. Nor is there specific authority for the Governor to accept such a resignation or an implied authority to accept such resignation due to any authority for the Governor to appoint a successor to a mayor or member of a municipal council. Therefore, I am of the opinion that a purported resignation from the office of mayor or member of a municipal council would not be effective if submitted to the Governor, as the Governor does not have the requisite statutory or constitutional authority to accept the resignation or to fill such vacancies in municipal offices.

In response to your first question, I am of the opinion that the Governor is not statutorily or constitutionally authorized to accept the purported resignations of an Acting Mayor and council members of a municipality, in this instance from the Town of New Ellenton. Because the response to your first question is negative, it is unnecessary to address your remaining questions. At this point in time and assuming that no other attempts have been made by these officers to resign their offices, I am of the opinion that they are still lawfully holding office as de jure officers.<sup>3</sup>

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<sup>3</sup>A de jure officer is one who is in all respects legally appointed or elected to the  
(continued...)

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Should the Acting Mayor and members of the Town Council of the Town of New Ellenton 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.<sup>4</sup> While the relevant statutes do not make any provision for the mayor and members of a municipal council to continue 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 or imprisonment or remote geographic location of the incumbent), the incumbent would continue to serve. The following is stated in Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228 (1952):

[I]n the absence of pertinent statutory or constitutional provision, public offices [sic] hold over de facto until their successors are appointed or elected and qualify. Vacancy, nevertheless, exists in the sense that successors may be 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 ordinarily countenance an interregnum. [Emphasis added.]

In 67 C.J.S. Officers §102, it is stated:

[W]hile the right of an officer or public employee to resign is well recognized, generally the right to resign is not absolute, and is subordinate to the right of the people to an orderly government. According to some authorities, an attempted resignation is not effective where it is submitted in order to avoid the performance of a specific duty in the interest of one in whose behalf such performance is obligatory or merely to thwart litigation. [Emphasis added.]

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<sup>3</sup>(...continued)

office and has qualified to exercise the duties of the office. See Op. Att'y Gen. dated February 10, 1984; 63A Am.Jur.2d Public Officers and Employees §605.

<sup>4</sup>A de facto officer 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." Heyward v. Long, 178 S.C. 351, 367, 183 S.E. 145 (1936).

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It would create a most troublesome situation to permit the entire governing body of a political subdivision of this State to abdicate its responsibilities, not to mention violating the oath required of all office holders by Article VI, Section 5 of the South Carolina Constitution, by permitting all council members to leave office as outlined above without successors to carry on the exercise of the powers and duties and responsibilities imposed by law on the incumbent office holders. As stated above, the people governed by those elected officials have a right to orderly government, which right is superior to the right of the incumbents to resign and leave the political subdivision without a governing body. Thus, if all members of the New Ellenton Town Council, Acting Mayor included, should effectively resign from office, I am of the opinion that they would continue to serve in a de facto capacity until their successors should be duly elected and qualify.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that it has satisfactorily responded to your inquiry.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Senior Assistant Attorney General