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May 15, 2000

Rex Carpenter  
General Manager  
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800 So. 13<sup>th</sup> Street  
PO Box 82048  
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Re: De facto Director (Supplements opinion on Inclusion of Municipalities in Chartered Territory and Election of Directors)

Dear Rex:

You have asked about the validity of a director's vote under the following circumstances:

- (1) the municipality from which the director was elected is no longer either a retail or wholesale customer of the public power district ("detachment"); and
- (2) the municipality has not been included in the chartered territory along with other municipalities with populations of less than 1500.

Under the above circumstances, as stated in my previous opinion dated April 24, 2000, a vacancy on the board occurs for any board member elected from such municipality after detachment.

Nevertheless, the vacancy in the office of such board member, does not in and of itself invalidate the vote of such member which occurs after detachment.

The doctrine of de facto status, which validates a vote that could otherwise be argued to be invalid, applies to the director whose office has been vacated. The doctrine of de facto status is described generally in American Jurisprudence as follows:

Where an office exists under the law, and a person is elected or appointed to fill it and enters in the discharge of his or her official duties, he or she is a de facto officer, and his or her acts

are valid, although he or she is ineligible or otherwise does not possess all the necessary qualifications for the office.

63C Am. Jur. 2d § 33, p. 482. In the situation posed, the doctrine is applicable since the director who voted is no longer eligible or otherwise does not possess the necessary qualifications to hold office because of the detachment.

The doctrine has been recognized in Nebraska in several Supreme Court cases. In *McCollough v. Douglas County*, 150 Neb. 389, 34 N.W.2d 654 (1948) the Court described a de facto officer as follows:

A person is a de facto officer where the duties of the office are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like, (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.

Although the vacation of a public office is not specifically mentioned above, it would appear that it could fall under category (2) above. The director has failed to conform to the requirement or condition of residing in the chartered territory of the district because of the detachment. See *State v. Jones*, 202 Neb. 488, 490, 275 N.W.2d 851, 853(1979) (the court found that a Cherry County commissioner was not a resident of Cherry County, in violation of a Nebraska statute and therefore affirmed the order vacating the commissioner's office).

In *Conagra, Inc. v Cargill, Inc.*, 223 Neb.92, 96, 388 N.W.2d 458 (1986) the Court stated:

The effect of the doctrine is that the acts and judgements of a de facto officer are as binding and valid as those performed and rendered by a de jure officer. (Citations omitted.)

The purpose of the doctrine is to protect the interests of the public and third parties.

See also, *Sanitary and Imp. Dist. No. 57 of Douglas County v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995) (acts of de facto public officer are valid and binding as if performed by duly elected public officer whose title is beyond dispute); *State v. Kidder*, 169 Neb. 181, 98 N.W.2d 800 (1959); *State ex rel. Weiner v Hans*, 174 Neb. 612, 119 N.W.2d 72 (1963).

In addition it has been held to be the general rule in Nebraska that the title to an office can be litigated only in a proceeding brought directly for that purpose and cannot be determined by a collateral attack in another proceeding. *Sanitary and Imp. Dist. No. 57 of Douglas County v. City of Elkhorn*, 248 Neb. at 487. In other words, if someone wanted to determine whether the office of the director in question was vacated, the issue would have to be litigated in a suit to remove the director from office, and cannot be determined in a suit challenging the validity of his or her vote.

In summary, the office of the board member is vacant as soon as the municipality becomes detached from the district's chartered territory. Nevertheless, the board member's vote is valid until he or she resigns or is removed from office. Voting also includes making motions and seconding motions and falls within the de facto doctrine.

This opinion should not be understood to endorse voting by a board member once his or her office has been vacated. The opinion only address the question of whether the board member's vote is valid, if such board member elects to vote after his or her office becomes vacated.

Sincerely,

FOR THE FIRM:

Steven G. Seglin