

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

November 3, 2015

Opinion No. 15-72

Industrial Development Corporations – Qualifications of Directors Serving on Boards

Question 1

What is the meaning of the phrase “duly qualified electors of . . . the municipality” in Tenn. Code Ann. § 7-53-301?

Opinion 1

A “duly qualified elector of the municipality” means a person qualified to vote in an election of the “municipality,” as that term is defined in Tenn. Code Ann. § 7-53-101(10).

Question 2

If it is determined that an individual serving on the board of an industrial development corporation is not a “duly qualified elector of the municipality,” what effect does that have on votes cast by that board member?

Opinion 2

In most instances, improperly appointed members of boards are viewed as *de facto* officers. The acts of *de facto* officers are considered valid. Thus, the participation of an ineligible member on board votes does not render the actions of the board invalid.

Question 3

What is the appropriate action for the board of an industrial development corporation to take to correct the votes of a board member who was not a “duly qualified elector of the municipality” at the time of the member’s vote?

Opinion 3

As stated above, improperly appointed members of boards are generally viewed as *de facto* officers, and acts of such officers are considered valid. Nevertheless, as a precaution, the board, once all of its members are appropriately appointed, may wish to review the actions taken by the earlier board and vote to ratify, confirm, modify, or reject such actions.

Question 4

Does a board member of an industrial development corporation bear criminal responsibility if he or she votes on an issue before the board at a time when he or she is not a “duly qualified elector of the municipality”?

Opinion 4

There is no specific statute that imposes criminal sanctions upon a board member lacking the qualifications to serve on an industrial development board. The board member, though, is subject to removal through a *quo warranto* action. Although this action is civil in nature, it is generally initiated by the district attorney general.

ANALYSIS

In 1955, the Tennessee General Assembly enacted the Industrial Development Corporation Act, which is currently codified at Tenn. Code Ann. §§ 7-53-101 to 316. This Act authorizes the formation of corporations in the municipalities of this state for the purpose of financing and developing projects deemed by the Act to promote industry, trade, commerce, tourism, recreation, agriculture, and housing construction. Tenn. Code Ann. § 7-53-102(a). Corporations organized under the Act are “public corporations” and expressly “declared to be performing a public function in behalf of the municipality with respect to which the corporation is organized and to be a public instrumentality of such municipality.” *Id.*; Tenn. Code Ann. § 7-53-305(a)(1).

The powers of an industrial development corporation are vested in a board of directors who are elected by the governing body of the municipality. Tenn. Code Ann. § 7-53-301. A director generally serves a six-year term without compensation, except for reimbursement of actual expenses incurred in the performance of his or her duties. *Id.* Persons elected to the board of directors must be “duly qualified electors of and taxpayers in the municipality.” *Id.*

1. “[D]uly qualified elector” is not a defined term in the Act. When a statutory term is not defined in an Act, courts often look to *Black’s Law Dictionary* for guidance. *See, e.g., State v. Edmondson*, 231 S.W.3d 925, 928 (Tenn. 2007); *State v. Fitz*, 19 S.W.3d 213, 216 (Tenn. 2000).

A “qualified elector” is defined as “[a] legal voter; a person who meets the voting requirements for age, residency, and registration and who has the present right to vote in an election. *See* VOTER.” *Black’s Law Dictionary* 558 (8th ed. 2004). “Voter,” in turn, is defined as follows:

1. A person who engages in the act of voting. 2. A person who has the qualifications necessary for voting. – Also termed (in sense 2) *legal voter*; *qualified voter*.

registered voter. A person who is qualified to vote and whose name is recorded in the voting district where he or she resides.

Id. at 1608. In short, a “qualified elector” is a “qualified voter” or “legal voter” – a person who has the qualifications to vote. As discussed below, this definition is consistent with Tennessee cases that have construed the term “voter.”

In *Trammell v. Griffin*, 141 Tenn. 139, 207 S.W. 726 (1918), the Tennessee Supreme Court construed the term “voter” in the city of Jellico charter. The charter required a mayoral candidate to be a “voter in said city.” The Court was asked to determine if “voter” meant “a person having the qualifications entitling him to vote, or . . . a person who has registered and thus lawfully evidenced his right to vote.” *Id.* at 141, 207 S.W. at 726. The Court concluded that “[a]n inspection of our election and registration laws demonstrates that the word ‘voter’ is used in the sense of one who is qualified to vote, and not in the sense of a registered voter.” *Id.* at 144-45, 207 S.W. at 727. In reaching this conclusion, the Court relied on the principle that “[t]he registration laws of the state do not prescribe qualifications of electors.” *Id.* at 144 (quoting *State v. Weaver*, 122 Tenn. 198, 122 S.W. 465 (1909)). Registration laws pertain to the regulation of the exercise of the right to vote. *Id.* Accordingly, the Court determined:

So it is obvious, from the authorities quoted, that we cannot properly speak of registration as a qualification for voting in state and county elections. One qualified to vote in those elections is likewise a qualified voter in Jellico, provided he resides there, or owns property there. It follows that registration is not necessary to make one a “voter in said city.”

Id.

In *Halbert v. Shelby Cnty. Elec. Comm’n*, 31 S.W.3d 246 (Tenn. 2000), the Court considered the meaning of the phrase “resident voter and taxpayer of the City of Memphis” in the Memphis City Schools Board of Education charter. The Court focused on the word “voter” because the appellant conceded that the candidate in question was a resident of the City of Memphis. *Id.* at 248. The Court turned to *Black’s Law Dictionary* and observed that the word “voter” has more than one meaning:

The word has two meanings – a person who performs the act of voting, and a person who has the qualifications entitling him to vote. Its meaning depends on the connections in which it is used, and is not always equivalent to electors. In a limited sense a voter is a person having the legal right to vote, sometimes called a legal voter.

Id. (quoting *Black’s Law Dictionary* 1576 (6th ed. 1990)).

In determining which definition of “voter” to apply, the Court observed that its decision in *Trammell* was consistent with decisions from other jurisdictions that had found the terms “qualified voter” and “legal voter” to mean a person qualified to vote. *Id.* at 248-49 (citations omitted). Accordingly, the Court held that the term “resident voter” as used in the School Board’s charter provision establishing the eligibility requirements for service on the School Board requires the candidate to possess the legal qualifications to vote in the election if registered. *Id.* at 248-49.

In so holding, the Court, as it did in *Trammell*, emphasized that registration laws do not affect the qualifications for voting.¹ *Id.* at 249.

Similar to the provisions in these cases, the Industrial Development Corporation Act provides that persons elected as directors of an industrial development board must be “duly qualified electors of . . . the municipality.” Tenn. Code Ann. § 7-53-301. In other words, they must be “qualified voters” or “legal voters” of the municipality. Based on the cases above, this statutory requirement means that a person must be qualified to vote in an election of the “municipality”² in order to be eligible to serve as a director on the board of an industrial development corporation. The person, however, does not have to be registered to vote.

Furthermore, we note that in *Trammell* and *Halbert*, the Court logically focused on whether the persons involved in those cases were qualified to vote in the elections in which they were candidates. Directors of industrial development boards, however, are elected by the governing body of the municipality; they are not candidates in an election in which they vote. Consequently, we think the “qualified elector” requirement of Tenn. Code Ann. § 7-53-301 should be construed liberally.

[T]he right to hold office is a valuable one and its exercise should not be declared prohibited or curtailed except by plain provisions of law . . . Statutes imposing disqualifications are to be construed strictly, while those declaring qualifications are to receive a liberal construction. In consequence, ambiguities are to be resolved in favor of eligibility to office

Halbert, 31 S.W.3d at 249 (citation omitted). *Accord* 67 C.J.S. Officers § 23 (2015).

Accordingly, a person should be deemed to be a duly qualified elector of the municipality for the purposes of Tenn. Code Ann. § 7-53-301 if that person is qualified to vote in *any* election of the municipality.³

2. If an industrial development board member does not meet the definition of a “duly qualified elector of the municipality,” you ask the effect of votes cast by this member. In most instances, improperly appointed members of boards are viewed as *de facto* officers. The *de facto*

¹ The Court also observed that the Tennessee Code defines the term “registered voter” as “a qualified voter who has fulfilled the registration requirements of this title” and “qualified voter” as “a United States citizen who is 18 years or older and who is a resident of Tennessee.” *Id.* at 249 n. 5 (citing Tenn. Code Ann. § 2-1-104(a)(23) (1994) and Tenn. Code Ann. § 2-2-102(1994)). *See also* Tenn. Att’y Gen. Op. 99-077 (Apr. 5, 1999) (opining that the term “qualified voter” in Tenn. Code Ann. § 2-2-102 should be interpreted as a definition of those persons who are qualified to register in the State of Tennessee).

² “Municipality” is defined by the Act as “any county or incorporated city or town in this state with respect to which a[n industrial development] corporation may be organized and in which it is contemplated the corporation will function.” Tenn. Code Ann. § 7-53-101(10).

³ In Tenn. Att’y Gen. Op. 99-142 (July 27, 1999), we gave a similar construction to Tenn. Code Ann. § 7-53-201, which requires applicants for incorporation of an industrial development corporation to be “duly qualified electors of and taxpayers in the municipality.” In that opinion, we found that a person met the taxpayer requirement if that person merely “pays *some* type of municipal tax to the municipality.” (Emphasis original).

doctrine is well established in Tennessee, particularly in matters involving public policy and necessity. *Kidd v. McCanless*, 200 Tenn. 273, 279, 292 S.W.2d 40, 43 (1956) (citation omitted).

An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of office were exercised . . . under color of a known election or appointment, void because the officer was not eligible, or 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. . . .

Heard v. Elliott, 116 Tenn. 150, 154-55, 92 S.W. 764, 765 (1906). *Cf. Kidd*, 200 Tenn. at 280, 292 S.W.2d at 43 (*de facto* doctrine not applied when person is not acting in good faith and public knows of lack of authority).

In sum, “the law validates the acts of ‘*de facto*’ officers as to the public and third persons on the ground, though not officers *de jure*, they are in fact officers whose acts, public policy requires, should be considered valid.” *County Clubs, Inc. v. City of Knoxville*, 217 Tenn. 104, 113-14, 395 S.W.2d 789, 793 (1965). *Accord State ex rel. Newsom v. Biggers*, 911 S.W.2d 715, 718 (Tenn. 1995). Accordingly, the participation of an ineligible member on board votes does not render the actions of the board invalid. *See State ex rel. Roberts v. Hart*, 106 Tenn. 269, 271-72, 61 S.W. 780, 781 (1901) (school board found to be *de facto* body whose acts were not subject to collateral challenge even though two of three board members were ineligible for membership).

3. You next inquire about the appropriate action for the board of an industrial development corporation to take in order to correct votes of a board member who was not a “duly qualified elector of the municipality.” As discussed above, the actions of a board containing an ineligible board member are generally valid under the *de facto* doctrine. Nevertheless, as a precaution, the board, once all of its members are appropriately elected, may wish to review the actions taken by the earlier board and vote to ratify, confirm, modify, or reject such actions.

4. Finally, you ask whether a board member of an industrial development corporation bears criminal responsibility if he or she votes on an issue before the board at a time when he or she is not a “duly qualified elector of the municipality.” Under Tenn. Code Ann. § 8-18-102, a person commits a Class C misdemeanor if he or she takes office while under any of the disqualifications specified in Tenn. Code Ann. § 8-18-101.⁴ Holding office as a board member despite lacking the

⁴ Tenn. Code Ann. § 8-18-101 provides:

All persons eighteen (18) years of age or older who are citizens of the United States and of this state, and have been inhabitants of the state, county, district, or circuit for the period required by the constitution and laws of the state, are qualified to hold office under the authority of this state except:

- (1) Those who have been convicted of offering or giving a bribe, or of larceny, or any other offense declared infamous by law, unless restored to citizenship in the mode pointed out by law;
- (2) Those against whom there is a judgment unpaid for any moneys received by them, in any official capacity, due to the United States, to this state, or any county of this state;

qualifications set forth in Tenn. Code Ann. § 7-53-301 is not subject to criminal redress under Tenn. Code Ann. §§ 8-18-101, -102. Thus, there is no specific statute that imposes criminal sanctions upon an individual lacking the qualifications to serve on a board of an industrial development corporation. Whether another criminal statute might apply would depend on the facts and circumstances surrounding the appointment of the board member and the votes cast by that person.

The board member, though, is subject to removal through a *quo warranto* action. Under Tenn. Code Ann. § 29-35-101(1), such an action lies against “any person [who] unlawfully holds or exercises any public office or franchise within this state, or any office in any corporation created by the laws of this state.” Although civil in nature,⁵ a *quo warranto* action is generally initiated by the district attorney general. *See* Tenn. Code Ann. § 29-35-109.

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(3) Those who are defaulters to the treasury at the time of the election, and the election of any such person shall be void;

(4) Soldiers, sailors, marines, or airmen in the regular army or navy or air force of the United States; and

(5) Members of congress, and persons holding any office of profit or trust under any foreign power, other state of the union, or under the United States.

⁵ *See State ex. rel. Wallen v. Miller*, 2012 Tenn. 498, 508, 304 S.W.2d 654, 658 (Tenn. 1957).