



HENRY McMASTER
ATTORNEY GENERAL

August 13, 2008

B. Bayles Mack, Esquire
Mack & Mack
Post Office Box 128
Fort Mill, South Carolina 29716-0128

Dear Mr. Mack:

We understand that you are the Town Attorney for the Town of Fort Mill (the “Town”) and wish to request an opinion on behalf of the Mayor and the Town Council for the Town of Fort Mill (“Town Council”) concerning the residence of on one of the Town’s councilmembers who was elected in November of 2007. You state: “Some citizens have appeared before Town Council questioning Councilman Ken Starnes residency to be re-elected to an at-large seat on Council.”

Law/Analysis

Section 5-15-20 of the South Carolina Code (2004), describing the methods of election for city council members, imposes the following requirement on city council members:

Mayors and councilmen shall be qualified electors of the municipality and, if they are elected subject to residential or ward requirements as provided in this section, they shall be qualified electors of the ward prescribed for their election qualification.

S.C. Code Ann. § 5-15-20. Section 7-5-610 of the South Carolina Code (Supp. 2007) states the qualifications of those desiring to vote in a municipal election. This provision provides:

Every citizen of this State and of the United States:

- (1) Of the age of eighteen years and upwards;
- (2) Having all the qualifications mentioned in § 7-5-120;
- (3) Who has resided within the corporate limits of any

incorporated municipality in this State for thirty days previous to any municipal election;

(4) Who has been registered for county, state, and national elections as herein required;

is entitled to vote at all municipal elections of his municipality.

S.C. Code Ann. § 7-5-610 (emphasis added). Pursuant to section 7-5-610(3), in order to be qualified to serve as a member of Town Council, Mr. Starnes must be a resident.

Section 7-1-25 of the South Carolina Code (Supp. 2007) defines residency for purposes of voter registration as the person's domicile. This provision continues on to define "domicile" as "a person's fixed home where he has an intention of returning when he is absent. A person has only one domicile." S.C. Code Ann. § 7-1-25(A). Moreover, this provision adds: "(B) For voting purposes, a person has changed his domicile if he (1) has abandoned his prior home and (2) has established a new home, has a present intention to make that place his home, and has no present intention to leave that place. (C) For voting purposes, a spouse may establish a separate domicile." Id. § 7-1-25.

In Clarke v. McCown, 107 S.C. 209, 213-14, 92 S.E. 479, 480 (1917), our Supreme Court addressed the concept of residency as follows:

The residence of a person is a mixed question of law and fact; and the intention of that person with regard to the matter is deemed the controlling element of decision. His intention may be proved by his acts and declarations, and perhaps other circumstances; but when these, taken all together, are not inconsistent with the intention to retain an established residence, they are not sufficient in law to deprive him of his rights thereunder, for it will be presumed that he intends to continue a residence gained until the contrary is made to appear, because inestimable political and valuable personal rights depend upon it . . .

That a man does not live or sleep or have his washing done at the place where he has gained a residence, or that his family lives elsewhere, or that he engages in employment elsewhere are facts not necessarily inconsistent with his intention to continue his residence at that place

In your letter, you refer to a recent opinion of this Office addressing the residency

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requirement with regard to boards of trustees for state colleges and universities. Op. S.C. Atty. Gen., March 31, 2008. After determining trustees of state colleges and universities must be residents, we discussed what constitutes residency. Quoting a 1995 opinion of this Office, we explained:

“‘[r]esidence’ for suffrage purposes means ‘domicile’ in South Carolina. Phillips v. South Carolina Tax Commission, 195 S.C. 472, 12 S.E.2d 13 (1940); Clarke v. McCown, 107 S.C. 209, 92 S.E. 479 (1917). One’s domicile is ‘the place where a person has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent, an intention of returning.’ O’Neill’s Estate v. Tuomey Hospital, 254 S.C. 578, 583-584, 176 S.E.2d 527 (1970). An intention to remain permanently, or for an indefinite time, in a place is one of the essential elements of domicile. Barfield v. Coker & Co., 73 S.C. 181, 53 S.E. 170 (1906). Intent of the individual is probably the most important element in determining the residency of an individual. Ravenel v. Dekle, 265 S.C. 364, 218 S.E.2d 521 (1974). Intent is primarily a question of fact, determined on a case by case basis.”

Op. S.C. Atty. Gen., March 31, 2008 (quoting Op. S.C. Atty. Gen., June 12, 1995).

Based on the authority cited above, whether or not Mr. Starnes is a resident primarily depends on his intent. According to an email sent from Mr. Starnes to David Hudspeth, the Town Manager, on July 15, 2008, Mr. Starnes declared his intention to remain a resident of the Town. In that email, Mr. Starnes acknowledges that he and his wife separated in June 2007 and he temporarily moved to the couple’s second home outside the Town’s limits. However, he states that since that time he “spent many days and nights back at my primary residence in Fort Mill” In addition, with regard to his time spend in Fort Mill, Mr. Starnes states: “In fact I have spent in some cases up to a week at a time there and most recently as of this writing, I have been living there one month.” Furthermore, Mr. Starnes added: “It is and has always been my intention to live in my primary residence”

According to the authority above, just because an individual is absent from his or her home and temporarily resides in another location he or she does not automatically establish a new residence. To the contrary, an individual may be absent, but so long as that individual has the intent to return and to remain there permanently, he or she does not effectuate a change in residency. In the circumstance presented in your letter, although Mr. Starnes admits being absent from his martial home located within the Town’s limits, he proclaims his intent to return to such a home and to treat it as his permanent residence. In addition, he states that as of July 15, 2008 he is currently living in that home. Unless evidence is presented indicating that Mr. Starnes in fact did not intend to retain

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his residency within the Town, we believe a court could find Mr. Starnes is a resident.

Nonetheless, as we noted above, the determination of residency is primarily question of fact. Because this Office does not have the ability or authority to investigate or determine factual questions, we cannot decisively determine Mr. Starnes intent in this regard and therefore, cannot conclusively opine as to his residency. See Op. S.C. Atty. Gen., July 17, 2007 (“[T]his office does not have the jurisdiction of a court to investigate and determine facts.”). According to section 5-7-210 of the South Carolina Code (2004), “council shall be the judge of the election and qualifications of its members” Thus, we believe Town Council must make the ultimate determination as to Mr. Starnes’ qualifications, including his residency, by considering not only his declarations, but his actions and other circumstances. Furthermore, Town Council’s decision in this regard may only be reviewed by a court. S.C. Code Ann. § 5-7-210.

Conclusion

The determination of residency hinges upon the intent of the individual in question. Based solely upon the information provided by Mr. Starnes that he intends to remain a resident of the Town, Mr. Starnes likely remains a resident of the Town. However, because residency involves a question of fact, we believe Town Council, based upon all evidence available, must ultimately determine whether Mr. Starnes satisfies the residency requirement for his membership on Town Council.

Very truly yours,

Henry McMaster
Attorney General



REVIEWED AND APPROVED BY:



ROBERT D. COOK
Assistant Deputy Attorney General