

July 30, 2008

J. William Taylor, Town Administrator
Town of Cheraw
P.O. Box 219
Cheraw, South Carolina 29520

Dear Mr. Taylor:

We received your letter requesting an opinion of this Office regarding the residency requirement for members of the Cheraw Town Council (“Town Council”). You inquired “if there are specific ways to identify whether or not an individual is no longer ‘qualified’ under the statute.” You described the situation of the councilmember in question as follows:

A couple of years ago one councilmember married an individual who lives outside the town limits. It has been alleged that the councilmember continues to visit the home located in the district and even stays there at times, however, the majority of the time is actually spent in the home located outside of town. Mail service continues to be delivered at the house inside the district and, supposedly, phone service has been redirected from the home outside of town to the home in town.

The public property tax records on file indicate that the town address of the councilmember is listed as a Class OT property meaning it is *rental* or *commercial* and not RQ which one would have for an *owner-occupied* residence.

You inquired what methods, other than examining local public records, the Council could use to investigate the issue of the councilmember’s residency, and whether the council is empowered to subpoena utility records to that end. You further inquired as follows: “Does it matter if the councilmember resides outside of town most of the year but maintains a property inside town, and, if so, does that meet the definition of being a ‘qualified elector’ in the district?”

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Law/Analysis

As you noted in your letter, 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). Accordingly, pursuant to section 7-5-610(3), in order to be qualified to serve as a member of Town Council, one must be a resident of the Town of Cheraw (the “Town”).

Pursuant to section 5-7-210 of the South Carolina Code (2004), Town Council is charged with the authority to determine whether its members meet their qualifications for office. Moreover, if during a member’s term he fails to satisfy the required qualifications, section 5-7-200 of the South Carolina Code (2004) requires that he or she forfeit the office. Therefore, if a member of Town Council fails to meet the residency requirement during his or her term of office, section 5-7-200(a) effectuates a forfeiture of his or her position. See Op. S.C. Atty. Gen., October 4, 1984 (finding a city councilmember who moved outside of the city’s limits forfeited his office).

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Based on this understanding of the law, we understand you seek clarification as to how to determine whether a member of Town Council continues to be qualified pursuant to the residency requirement if he or she spends time at two different homes. For guidance, we first look to section 7-1-25 of the South Carolina Code (Supp. 2007), which 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 described 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

Moreover, as we explained in a 1984 opinion of this Office:

Our Supreme Court has stated that for the purpose the voting, 'residence' generally means 'domicile.' Phillips v. S.C. Tax Commission, 195 S.C. 472, 12 S.E.2d 13 (1940). The Court has defined a person's domicile as 'the place where [he] . . . 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, 176 S.E.2d 527 (1970).

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Intent 'is a most important element in determining the domicile of any individual.' Ravenel v. Dekle, 265 S.C. 364, 218 S.E.2d 521 (1974). Intent is primarily an issue of fact, determined on a case by case basis. Ferguson v. Employers Mut. Cas. Co., 254 S.C. 235, 174 S.E.2d 768 (1970). A person may have but one domicile at any given time; to change one's domicile, 'there must be an abandonment of, and an intent not to return to the former domicile.' 28 C.J.S., Domicile, § 13. There must also be the clear establishment of a new domicile. Gasque v. Gasque, 246 S.C. 423, 143 S.E.2d 811 (1965). The Supreme Court has emphasized that '[o]ne of the essential elements to constitute a particular place as one's domicile . . . is an intention to remain permanently or for an indefinite time in such place.' Barfield v. Coker and Co., 73 S.C. 181, 53 S.E. 170, 171 (1906).

Op. S.C. Atty. Gen., April 11, 1984.

Based on the authority cited above, whether or not the councilmember you refer to is a resident primarily depends on his or her intent. Because the councilmember originally lived within the city's limits, the councilmember must demonstrate an abandonment of his or her intent to return to the home within the city's limits. In addition, while you point out that the councilmember's spouse lives in the home outside the city's limits, according to section 7-1-25 and Clarke, just because the councilmember's spouse lives outside the Town's limits, does not mean that the councilmember cannot remain a resident of the Town. However, as we concluded in an opinion issued in 2006, simply owning land in the area does not automatically satisfy the residency requirement. Op. S.C. Atty. Gen., March 28, 2006. Furthermore, while facts such as how much time the councilmember spends at one residence as opposed to the other and the classification of the property upon which the council member resides are certainly relevant to an inquiry of his or her intent to remain, all the facts and circumstances indicating the councilmember's intent must be considered.

In addition to your inquiry as to how to determine if a council member is no longer a resident, you also inquire as to the methods Town Council may use to investigate an allegation that a councilmember is no longer a resident. Section 5-7-210 of the South Carolina Code states:

The council shall be the judge of the election and qualifications of its members and of the grounds for forfeiture of their office and for that purpose shall have power to subpoena witnesses, administer oaths and require the production of evidence. A member charged with conduct constituting grounds for forfeiture of his office shall be entitled to a public hearing, and notice of such hearing shall be published in one or more newspapers of general circulation in the

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municipality at least one week in advance of the hearing. Decisions made by the council under this section may be appealed to the court of common pleas.

According to this provision, Town Council has the ability to require testimony of witnesses and the production of evidence in order to determine whether or not one of its members is in compliance with the residency requirement. We presume that utility records are included in those items Town Council is permitted to require for production. Thus, we suggest Town Council follow the guidelines set forth in this provision in investigating and making a determination as to whether the councilmember satisfies the qualifications of his or her office, including the residency requirement.

Conclusion

While we are unable to provide you with a specific list of criteria Town Council may use to identify whether one of its members is in compliance with the residency requirement, we hope the guidance provided above will assist you and Town Council in making this determination. Furthermore, in investigating whether or not the particular councilmember in question continues to be qualified to serve on Town Council, we suggest you look to section 5-7-210 of the South Carolina Code, which allows Town Council to compel witness testimony and the production of evidence.

Sincerely,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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