



ALAN WILSON
ATTORNEY GENERAL

July 11, 2016

Mr. Michael D. Smith
Town Administrator
Town of Cheraw
P.O. Box 219
Cheraw, SC 29520

Dear Mr. Smith,

Attorney General Alan Wilson has referred your letter dated March 11, 2016 to the Opinions section. This Office understands you request an opinion (1) seeking further clarification regarding how to determine the residency of members of the Cheraw Town Council ("Town Council"), and (2) whether a municipal councilman is required to resign his position upon military deployment or otherwise have his position filled by appointment.

Short Answer

- (1) The residency of a municipal councilman is determined primarily by his intent. S.C. Code Ann. § 7-1-25 (1976 Code, as amended). It is presumed that a person intends to continue a residence until it is shown to the contrary. Clarke v. McCown, 107 S.C. 209, 213-214, 92 S.E. 479, 480 (1917). The Town Council is the judge of the qualification of its members and of the grounds for forfeiture of their office, including determinations of residence. S.C. Code Ann. § 5-7-210. To that end the Town Council can subpoena witnesses, administer oaths and require the production of evidence. Id. If the Town Council determines a councilman fails to reside within the municipality, the councilman is deemed to vacate or forfeit his office as of the time he ceased to be a resident. S.C. Code Ann. § 5-7-200; Op. S.C. Atty. Gen., 1984 WL 159925 (October 4, 1984).
- (2) An elected official is not required to vacate his office due to absence caused by his military service. S.C. Code Ann. § 8-7-30. Such an absence creates a temporary vacancy to be filled during the absence of the official in military service or until the expiration of his term of office, whichever period is shorter. S.C. Code Ann. § 8-7-40. Where the temporary vacancy is that of a municipal official or employee, the Governor fills the temporary vacancy by appointment upon the recommendation of the mayor and town council. S.C. Code Ann. S.C. Code Ann. § 8-7-10(3)(d).

Law/Analysis

As noted in your letter, this Office has issued a prior opinion regarding the residency requirements for members of the Town Council. See Op. S.C. Atty Gen., 2008 WL 3198127 (July 30,

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2008).¹ You seek further clarification on whether presumptions concerning residency arise under certain scenarios and what authority the Town Council has to remove a councilman who is found to no longer be a resident. Additionally, you request an opinion on how military deployment affects a councilman's status.

I. How is the residence of a municipal councilman determined?

As an initial matter, we set out the controlling constitutional and statutory reasons why a determination of residency of a municipal councilman results in a vacancy or forfeiture of their seat on the Town Council. The South Carolina Constitution lists among the eligibility requirements for office that “[n]o person may be popularly elected to and serve in any office in this State or its political subdivisions unless he possesses the qualifications of an elector...” S.C. Const. Art. VI, § 1. Likewise, S.C. Const. Art. XVII, § 1 states that “[n]o person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector...”

The South Carolina Code of Laws mandates that “[m]ayors 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 (1976 Code, as amended). South Carolina Code § 7-5-610 establishes the qualifications for those who are entitled to vote in a municipal election. It states:

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 (1976 Code, as amended) (emphasis added). Accordingly, in order to be qualified to serve as a councilman for a municipality, one must be a resident of that municipality. Op. S.C. Atty. Gen., 2008 WL 4145997 (August 13, 2008); Op. S.C. Atty. Gen., 2008 WL 3198127 (July 30, 2008).

Further, a councilman must maintain his residency within the municipality throughout his term or forfeit his office. The grounds for forfeiture of office of mayor or councilman and the method to fill

¹ This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Op. S.C. Atty. Gen., 2013 WL 6516330 (Nov. 25, 2013); Op. S.C. Atty. Gen., 2013 WL 3762706 (July 1, 2013); Op. S.C. Atty. Gen., 2009 WL 959641 (March 4, 2009); Op. S.C. Atty. Gen., 2006 WL 2849807 (September 29, 2006); Op. S.C. Atty. Gen., 2005 WL 2250210 (September 8, 2005); Op. S.C. Atty. Gen., 1986 WL 289899 (October 3, 1986); Op. S.C. Atty. Gen., 1984 WL 249796 (April 9, 1984).

vacancies in those offices is governed by South Carolina Code of Laws § 5-7-200. Denman v. City of Columbia, 387 S.C. 131, 135-36, 691 S.E.2d 465, 467 (2010). § 5-7-200 reads:

(a) A mayor or councilman shall forfeit his office if he (1) lacks at any time during his term of office any qualification for the office prescribed by the general law and the Constitution; (2) violates any express prohibition of Chapters 1 to 17; or (3) is convicted of a crime involving moral turpitude.

(b) A vacancy in the office of mayor or council shall be filled for the remainder of the unexpired term at the next regular election or at a special election if the vacancy occurs one hundred eighty days or more prior to the next general election.

S.C. Code Ann. § 5-7-200 (1976 Code, as amended). This Office has previously opined that a councilman forfeits his position on the town council when he ceases to maintain a residence within the municipality during his term of office. Op. S.C. Atty. Gen., 1984 WL 159925 (October 4, 1984); Op. S.C. Atty. Gen., 1968 WL 12584 (October 4, 1968).²

Residence is defined for purposes of voter registration as the person's "domicile." S.C. Code Ann. § 7-1-25(A) (1976 Code, as amended). Domicile is further defined as "a person's fixed home where he has an intention of returning when he is absent. A person has only one domicile." Id. The statute provides that a person has changed his domicile for voting purposes "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." Id. § 7-1-25(B). As explained in our August 13, 2008 opinion:

[J]ust 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 there permanently, he or she does not effectuate a change in residency.

Op. S.C. Atty. Gen., 2008 WL 4145997 (August 13, 2008). Further, the statute lists eleven nonexclusive factors to consider in determining a person's intention regarding his domicile Id. § 7-1-25(D).³ Finally, the statute provides that "a spouse may establish a separate domicile" for voting purposes. Id. § 7-1-25(C).

² See also 3 McQuillin Mun. Corp. § 12:110 (3d ed.).

³ (D) For voting purposes, factors to consider in determining a person's intention regarding his domicile include, but are not limited to:

- (1) a voter's address reported on income tax returns;
- (2) a voter's real estate interests, including the address for which the legal residence tax assessment ratio is claimed pursuant to Section 12-43-220(C);
- (3) a voter's physical mailing address;
- (4) a voter's address on driver's license or other identification issued by the Department of Motor Vehicles;
- (5) a voter's address on legal and financial documents;
- (6) a voter's address utilized for educational purposes, such as public school assignment and determination of tuition at institutions of higher education;
- (7) a voter's address on an automobile registration;
- (8) a voter's address utilized for membership in clubs and organizations;

As our prior opinions explained, whether or not a councilman remains a resident “primarily depends on his or her intent.” Op. S.C. Atty. Gen., 2008 WL 4145997 (August 13, 2008); Op. S.C. Atty. Gen., 2008 WL 3198127 (July 30, 2008); Op. S.C. Atty. Gen., 1995 WL 803679 (June 12, 1995) (opining as to the residence requirement to serve on the Clarendon County Hospital District Board of Trustees). The Supreme Court of South Carolina described the concept of residency in Clarke v. McCown when it stated:

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

107 S.C. 209, 213-214, 92 S.E.479, 480 (1917) (emphasis added).

The South Carolina Code of Laws incorporates this emphasis on the intention of the voter when determining residence. Indeed, the statutory definition of domicile and the elements to find a change of domicile reference the voter’s intention. The definition of domicile includes the voter’s “intention to return when absent.” S.C. Code § 7-1-25(A). To find a voter changed his domicile both the voter’s “present intent to make that place his home, and [lack of] present intention to leave” are listed among the elements to find a voter changed his domicile. S.C. Code § 7-1-25(B). South Carolina Code § 7-1-25(D) lists eleven nonexclusive factors to consider in determining a person’s intent regarding his domicile. These sections are consistent with the case law and this Office’s prior opinions which hold that a determination of residency depends primarily on the intent of the voter.

The South Carolina Court of Appeals noted that a distinction has long been made between the concepts of a “legal residence” determined by a person’s domicile, and an “actual residence” determined

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- (9) the location of a voter's personal property;
 - (10) residence of a voter's parents, spouse, and children; and
 - (11) whether a voter temporarily relocated due to medical care for the voter or for a member of the voter's immediate family.

by his “present physical location.” Estate of Nicholson ex rel. Nicholson v. S. Carolina Dep't of Health & Human Servs., 377 S.C. 590, 597, 660 S.E.2d 303, 306 (Ct. App. 2008). It is this concept of “legal residence”, as set forth in S.C. Code. Ann. § 7-1-25, which is used to determine whether a mayor or town councilman is a qualified elector.

Before turning to the clarifications requested in your letter, we again note that the determination of residency is a mixed question of law and fact. Clarke v. McCown, 107 S.C. at 213-214. Because this Office does not have the ability or authority to investigate or determine factual questions, we cannot decisively determine a councilman’s intent or, as a result, his residence. See Op. S.C. Atty. Gen., 2015 WL 4497734 (July 2, 2015) (“[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts.”). With this limitation in mind, we provide this Office’s opinion on the interpretation of the legal authorities in regard to your requests.

1. Are there a particular number of nights per week that must be spent at the residence in question?

For the reasons stated above, spending a set number of nights per week at a home within the municipality does not definitively decide a councilman’s residence. The residence of a person is a mixed question of law and fact with the intention of that person deemed the controlling element. While the number of nights spent at a home is not a factor listed in Section 7-1-25(D) to consider in determining a person’s intention regarding his domicile, the statute explicitly states that such a determination is “not limited to” those eleven factors. Therefore, it is this Office’s opinion that the frequency of visits to a home can be included as a factor for consideration in determining a person’s intention regarding his domicile.

2. If a councilman has two residencies and one is located outside their district, and they spend the majority of their time at that residence, is that grounds for assuming the residence outside the district is considered their “primary” residence?

For the reasons stated above, no presumption is created in regard to a councilman’s residence where he has two homes, one within the district and the other without, and spends the majority of his time at the home outside of the district. As described in our response to Question 1, it is this Office’s opinion that the frequency of visits to a home can be included as a factor for consideration in determining a person’s intention regarding his domicile.

3. Does receiving their mail at the residence inside their district with the utilities on, and spending one or two nights there constitute that residence being their primary place of residency?

For the reasons stated above, receiving mail at a home, having utilities on, and spending time at a home does not necessarily decide a councilman's residence. The residence of a person is a mixed question of law and fact with the intention of that person deemed the controlling element. A voter's physical mailing address is a factor listed in Section 7-1-25(D) to consider in determining a person's intention regarding his domicile. While the number of nights spent at a home and whether the home has utilities on are not factors listed in Section 7-1-25(D), the statute explicitly states that such a determination is "not limited to" those eleven factors. Therefore, it is this Office's opinion that the frequency of visits to a home and whether the utilities are on can be included as a factor for consideration in determining a person's intention regarding his domicile.

4. What is the proper procedure to seek an investigation and who has the authority to remove the councilman in question should such investigation reveal the councilman in question is in fact, not a legal resident in their district?

In this Office's prior opinions, we found that the Town Council is granted the authority to judge the election and qualification of its members. Op. S.C. Atty. Gen., 2008 WL 4145997 (August 13, 2008); Op. S.C. Atty. Gen., 2008 WL 3198127 (July 30, 2008); Op. S.C. Atty. Gen., 1992 WL 682835 (August 17, 1992). The applicable statute reads:

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 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.

S.C. Code Ann. § 5-7-210 (1976 Code, as amended). In accordance with the statute, our prior opinions consistently state that the Town Council is the decision maker, in the first instance, as to whether its members satisfy the qualifications of office, including residency. See, e.g., Op. S.C. Atty. Gen., 2008 WL 4145997 (August 13, 2008); Op. S.C. Atty. Gen., 2008 WL 3198127 (July 30, 2008); Op. S.C. Atty. Gen., 1992 WL 682835 (August 17, 1992).⁴

The statute provides the Town Council with the power to require testimony of witnesses and production of evidence in order to determine whether or not one of its members is in

⁴ This Office makes no opinion as to the original jurisdiction of the Circuit Court to decide such a matter. S.C. Const. Art. V, § 11.

compliance with the residency requirement. Id. However, the statute is silent as to the procedure for seeking an investigation of a councilman's residence. Id. This Office advises that the Town Council consult with its town attorney or the Municipal Association of South Carolina regarding the proper procedure to conduct an investigation and hearing.

As described above, South Carolina Code § 5-7-200 provides that a municipal councilman forfeits his office if he lacks at any time during his term of office any qualification for such office. If the Town Council determines that a councilman no longer satisfies the residency requirement, the council seat is considered vacant. The vacancy "shall be filled for the remainder of the unexpired term at the next regular election or at a special election if the vacancy occurs one hundred eighty days or more prior to the next general election." S.C. Code Ann. § 5-7-200(b). This Office has previously said that a councilman found to have forfeited his position because he is no longer a municipal resident may serve in a de facto capacity until the seat is filled unless removed otherwise. Op. S.C. Atty. Gen., 1984 WL 159925 (October 4, 1984).

II. How does military deployment affect a municipal councilman's position?

In a prior opinion, our Office advised how a municipal councilman's position is filled during his absence due to military service. See Op. S.C. Atty. Gen., 2005 WL 2985559 (October 31, 2005); see also Op. S.C. Atty. Gen., 2006 WL 1376909 (May 8, 2006) (temporary vacancy of municipal recreation commissioner); 1990 WL 482458 (December 19, 1990) (temporary vacancy of state legislator). Moreover, the South Carolina Code of Laws §§ 8-7-10 et seq. contains the statutory scheme for addressing a public official's or employee's absence due to military service. South Carolina Code Section 8-7-30 states that:

The absence of any officer from his office or position caused by his being in the military service shall not create a forfeiture of or vacancy in the office or position to which such officer was elected or appointed but shall be construed merely to create a temporary vacancy. Wherever the terms "forfeiture of office" or "vacancy in office" or other words of similar import are used in any law of this State in relation to an officer they shall be construed in accordance with the provisions of §§ 8-7-10 to 8-7-80 and shall not be construed to apply to any absence of such officer who is absent from his office or position by reason of his being in the military service. An officer who is present at and able to perform the duties of his office shall not be considered absent within the meaning of this section.

S.C. Code Ann. § 8-7-30 (1976 Code, as amended) (emphasis added). South Carolina Code § 8-7-10(1) defines "officer" as "any officer or employee of the State or any political subdivision thereof who is elected or appointed for a definite term which is fixed by law." A municipal councilman is included within this definition because he is elected to a definite term as stated in both the South Carolina Code of

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Laws and the Town of Cheraw's Code of Ordinances. S.C. Code of Laws § 5-15-40; Code of Ordinances, Town of Cheraw, South Carolina § 2-4. Therefore, as provided by § 8-7-30, a councilman's absence from his office due to his military service will not result in a forfeiture of his office on the Town Council, but rather creates a temporary vacancy.⁵

Section 8-7-40 of the South Carolina Code of Laws provides how such a temporary vacancy is to be filled by appointment, the authority for making the appointment, and the duration of the appointment. It states that:

In case a temporary vacancy is created in any office or position by reason of the absence of the officer in the military service the appointive authority shall appoint some person to fill temporarily the office or position to which such officer was elected or appointed. All such appointees shall hold the office or position which they are temporarily to fill during the absence of the officer in the military service or until the expiration of the term for which such officer in the military service was elected or appointed, whichever period of time is the shorter.

S.C. Code Ann. § 8-7-40 (1976 Code, as amended). The "appointive authority" is defined by statute as:

(a) the person, board, commission or other authority originally electing or appointing the officer, (b) if the officer was elected to his office in a general election or nominated in a primary, the Governor of the State, with the advice and consent of the Senate, if the officer is a State official or employee, (c) the Governor, upon the recommendation of the county legislative delegation, if the officer is an official or employee of a county or any of its political subdivisions and (d) the Governor, upon the recommendation of the mayor and city council or other governing body of a city or town if the officer is an official or employee of a municipality.

S.C. Code Ann. § 8-7-10(3) (1976 Code, as amended) (emphasis added). In this Office's prior opinions, we have stated that South Carolina Code § 8-7-40 "requires the appointive authority to appoint someone to fill the officer's temporary vacancy." Ops. S.C. Atty. Gen., 2006 WL 1376909 (May 8, 2006); 2005 WL 2985559 (October 31, 2005) ("the action referred to is mandatory"). As stated above, the Governor is charged with appointing the person to fill the temporary vacancy of a municipal councilman upon the recommendation of the effected municipality's mayor and city council. S.C. Code Ann. § 8-7-10(3)(d). The appointee fills the temporary vacancy "during the absence of the officer in military service or until the regular expiration of the term of office for that position, whichever term is shorter." Op. S.C. Atty. Gen., 2006 WL 1376909 (May 8, 2006). Thus, the councilman does not forfeit his office because of deployment and his seat on the Town Council is not functionally vacant due to the appointment.

⁵ Additionally, we find this statute consistent with applicable federal statutes including the Federal Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901 et seq., etc.

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Conclusion

We hope that the guidance provided above will assist you and the Town Council in making the determination as to how to proceed regarding the residency and the deployment of a councilmember. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General