Vacancy in Office -- Residence

Number: INFORMAL

Date: October 17, 2013

Ms. Antoinette Leake
District Manager, Lake St. Charles
Community Development District
6801 Colonial Lake Drive
Riverview, Florida 33578

Dear Ms. Leake:

On behalf of the Board of Supervisors of the Lake St. Charles Community Development District, you have asked for assistance in determining the residency requirements of a district supervisor and whether a vacancy has occurred when the supervisor has listed her residence within the district for sale and the property appraiser's website lists a mailing address for the supervisor outside the district boundaries. While this office is unable to provide a definitive answer to your question, the following general comments are provided to be of assistance.

Initially, I would note that a determination of whether an individual resides within the district is a mixed question of law and fact which cannot be resolved by this office. Such a determination involves an evaluation of the facts of each particular case.[1] Determination of an individual's residence may involve evaluation of several factors, such as an actual presence in a place and the intention to remain in that place.[2] As evidence of such intent, the fact-finder will consider such things as a driver's license, automobile registration, voter registration, declarations of domicile, location of a bank account, rental receipts, home mortgage, tax returns, and employment documents. Courts have recognized that significant weight will be given to an individual's declaration.[3] Moreover, the courts have recognized that if there are doubts or ambiguities regarding eligibility of a candidate, such doubts should generally be resolved in favor of eligibility.[4] It is a generally established principle that the right to hold office is a valuable one which should not be curtailed in the absence of plain provisions of law.[5] If ambiguity exists in construing provisions limiting the right to hold office, those provisions should be construed in favor of an officer's eligibility.[6]

Section 190.006, Florida Statutes, sets forth instances after the initial appointment of the district's board of supervisors, that the position of the initial member whose term has expired must be filled by a "qualified elector of the district[.]"[7] "Qualified elector" is defined as "any person at least 18 years of age who is a citizen of the United States, *a legal resident* of Florida and *of the district*, and who registers to vote with the supervisor of elections in the county in which the district land is located."[8] (e.s.)

Article X, section 3, Florida Constitution, provides that a vacancy in office occurs upon, *inter alia*, "failure to maintain the residence required when elected or appointed[.]" Section 114.01(1)(g), Florida Statutes, similarly provides that a vacancy in office occurs "[u]pon the officer's failure to maintain the residence required of him or her by law." As noted above, section 190.006, Florida

Statutes, sets forth those instances in which a supervisor must be a resident of the district. Subsection (2) of section 114.01, Florida Statutes, provides that with respect to a vacancy created pursuant to section 114.01(1)(g), the Governor shall file an executive order with the Secretary of State setting forth the facts giving rise to the vacancy, the title of the office, the name of the incumbent, and the date on which the vacancy in office occurred. The statute provides that the office shall be considered vacant as of the date specified in the executive order or, in the absence of such a date, as of the date the order is filed with the Secretary of State.

In *State ex rel. Askew v. Thomas*,[9] the Supreme Court of Florida determined that a school board member who chose to relocate her residence outside the area from which she was elected had failed to maintain the residency required for her office, leaving her office vacant. The Court found the constitutional and statutory requirement of maintaining residency applicable during any of the term in which the office was held. In simplifying the implications of an officer moving out of the district from which he or she was elected, the Court stated "if he leaves, he leaves his office and a vacancy occurs in that residence area to be filled."[10]

It may be advisable to have your legal counsel review the matter you have brought to this office's attention and evaluate the application of the above-referenced statutes, opinions and case law in determining whether the supervisor has left her residence within the district and established residency outside the district, such that there is a vacancy on the board of supervisors.

I trust that these informal comments will be of assistance to you.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *See* Op. Att'y Gen. Fla. 73-193 (1973).

[2] *See, e.g., Kiplinger v. Kiplinger*, 2 So. 2d 870 (Fla. 1941); *Fowler v. Fowler*, 22 So. 2d 817 (Fla. 1945); *Cruickshank v. Cruickshank,* 420 So. 2d 914 (Fla. 1st DCA 1982); *Gillman v. Gillman,* 413 So. 2d 412 (Fla. 4th DCA 1982).

[3] *See, e.g., Ogden v. Ogden,* 33 So. 2d 870, 873 (Fla. 1947) ("best proof of one's domicile is where he says it is"), *overruled in part on other grounds, Pawley v. Pawley*, 46 So. 2d 464 (Fla. 1950); *Frank v. Frank*, 75 So. 2d 282, 286 (Fla. 1954); *Coons v. Coons,* 765 So. 2d 167, 172 (Fla. 1st DCA 2000).

[4] *See Ervin v. Collins*, 85 So. 2d 852 (Fla. 1956) (where there are doubts or ambiguities as to eligibility, they should be resolved in favor of a free expression of the people; it is the sovereign right of the people to select their own officers and the rule is against imposing disqualifications to run recognizing the sovereign right of the people to select their officers); *Smith v. Crawford,* 645 So. 2d 513, 520 (Fla. 1st DCA 1994) ("the law requires judges to resolve doubts about

qualification of a political candidate in favor of the candidate").

[5] *See* Ops. Att'y Gen. Fla. 12-22 (2012) and 71-324 (1971). *And see Treiman v. Malmquist*, 342 So. 2d 972 (Fla. 1977); *Ervin v. Collins,* 85 So. 2d 852 (Fla. 1956) (statutes and constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers); *Vieira v. Slaughter*, 318 So. 2d 490 (Fla. 1st DCA 1975), *cert. denied,* 341 So. 2d 293 (Fla. 1976).

[6] *Ervin, supra* at 856.

[7] Section 190.006(3)(a)2., Fla. Stat.

[8] Section 190.003(17), Fla. Stat.

[9] 293 So. 2d 40 (Fla. 1974).

[10] *Id.* at 43.