County Commissioners, residency

Number: INFORMAL

Date: October 09, 2006

The Honorable Jeb Bush
Governor, State of Florida
The Capitol
Tallahassee, Florida 32399-0001

Dear Governor Bush:

You ask whether a vacancy in office occurs when a natural disaster destroys a county commissioner's residence, the commissioner purchases new residences outside her district and is absent from her district for nearly two years but recently retains a contractor to rebuild her residence within the district under a contract that may take over one year.

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." The Charlotte County Code provides that "during the term of office . . . each commissioner shall reside in the district from which such commissioner ran for office."[1]

In *State ex rel. Askew v. Thomas*,[2] 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."[3]

The court's analysis in *Thomas* would apply equally to a county commissioner, given the constitutional and statutory requirements of residency for that office.[4] Thus, for example, this office in Attorney General Opinion 73-52 stated that when a member of a county commission ceases to reside within the district from which the commissioner was elected, the office becomes vacant pursuant to section 114.01(4), Florida Statutes.[5]

This office, however, has recognized that a vacancy does not occur when an officer, through no fault of his own, no longer resides within the district from which he was elected. For example, this office has stated that the term of office of a county commissioner is not affected by the redistricting of the county, even though his residence may no longer be within the district that he represents.[6] This office has also recognized that an officer's temporary relocation to an area outside a commissioner's district for military service would not constitute a vacancy.[7]

As this office noted in Attorney General Opinion 073-193, the question of whether an incumbent

is a legal resident of the district from which he was elected is a mixed question of law and fact to be settled or determined from the facts of each particular case. In determining residency, the Florida courts have stated that residency generally means an actual presence in a place and the intention to remain in that place.[8] As evidence of that intent, public officials will generally consider such things as a driver license, automobile registration, voter registration, declarations of domicile, location of bank account, rent receipts, home mortgage, tax returns, and employment documents.

In the instant inquiry, it is clear that the commissioner was no longer able to reside at her residence within the district due to damage caused by Hurricane Charlie. If you find that the commissioner's actions indicate that her absence from the district is temporary and that she intends to return to the district, you should not take action to fill a vacancy in office. I trust that the above informal comments may be of assistance.

Sincerely,

Charlie Crist
Attorney General

CC/jwgh

---

[1] Section 2.2(a), Charlotte County Code.

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

[3] *Id*. at 43.

[4] *See* s. 1(e), Art. VIII, Fla. Const. ("[o]ne commissioner residing in each district shall be elected as provided by law"); s. 124.01(2), Fla. Stat., providing for the election of one county commissioner for each county commission; and s. 124.011(1)(a), Fla. Stat. ("[f]ive county commissioners shall reside one in each of five county commission districts," under single-member representation districts). *Cf.*, Op. Att'y Gen. Fla. 55-182 (1955) (county commissioner must reside in the district in which he or she was elected).

[5] *And see* Op. Att'y Gen. Fla. 55-182 (1955) (when county commissioner, elected in district sold home and moved into rented home in an adjacent district, a vacancy in office occurred).

[6] *And see* Ops. Att'y Gen. Fla. 72-177 (1972); 46-389 (1946) (county commissioner whose district's lines are redrawn such that commissioner's residence is no longer within the district from which he or she was elected remains a commissioner for the district, provided residence is still within the county). *Compare* Op. Att'y Gen. Fla. 72-177 (1972), stating that while a commissioner could not be deprived of his office due to the redistricting, the commissioner could not seek election in another district (the one which the commissioner then resided in due to the redistricting) without resigning his old office.

[7] Op. Att'y Gen. Fla. 01-76 (2001) (leave of absence granted to board member due to active military duty does not create a vacancy in office). *And see* Op. Att'y Gen. Fla. 73-193 (1973) and Biennial Report of the Attorney General 1937-1938, p. 72 (April 9, 1938) (if an officer has only temporarily removed himself from the district, he has not vacated his office but if his removal is permanent, the office is vacant). *See also In re Advisory Opinion to Governor*, 8 So. 2d 26 (Fla. 1942), *supplemented*, 9 So. 2d 172 (Fla. 1942) (no vacancy in office when sheriff was inducted into U.S. Army Reserve and granted leave of absence by Governor).

[8] *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).