Coates' Canons Blog: Residency Changes by Elected Officials

By Robert Joyce

Article: https://canons.sog.unc.edu/residency-changes-by-elected-officials/

This entry was posted on December 07, 2010 and is filed under Elections, Removal Of Elected Officials

Two years ago, you won a countywide at-large election to a seat on the board of county commissioners, and now one of your fellow citizens, Mary Anderson, has developed the suspicion that you don't really live in the county. She thinks you really live at the big house you just bought on the lake in the next county, not in the little house downtown that your wife inherited from her mama. Can you continue to serve as a county commissioner? The answer to that question turns on where the law considers your residence to be.

To be eligible to hold an elective office in North Carolina—county commissioner, city council member, school board member, any other elective office—you must be eligible to vote for that office. More precisely, the state's Constitution (Article VI, Sec. 8) provides that you are disqualified for office if you are "not qualified to vote in an election for that office." To be qualified to vote for an office, you must reside in the appropriate jurisdiction—the county or city or other electoral district (Article VI, Sec. 2). So, your eligibility to be elected to office or to continue in office turns on your residency for voting purposes. What happens if your residency comes into question?

The meaning of "residence" for voting purposes. A unique body of law has grown up around the question of residence for voting purposes. It starts with the statutory definition (found in **G.S. 163-57**) that some people find a little vague. "That place shall be considered the residence of a person in which that person's habitation is fixed, and to which, whenever that person is absent, that person has the intention of returning." Got it? It's not a simple formula, such as where you sleep or where you get your mail. Instead, it's a little more fluid, boiling down to a few rules, simple to state but sometimes hard to apply.

First, everybody has one and only one residence for voting purposes. You may own and spend time at two or more houses, but only one can be your voting residence.

Second, your residence once established remains your residence until by your actions and intent you affirmatively change it to a new residence. As the state supreme court once put it, a person acquires a new residence for voting purposes when "he (1) has abandoned his prior home, (2) has a present intention to make that place his home, and (3) has no intention presently to leave that place." Lloyd v. Babb, 296 N.C. 416, 449 (1979).

And third, your intent counts (that is, what you consider your home is very important in a determination as to what your residence is), but what you say your intent is can be overridden by what you actually do. As the state court of appeals once put it, "We have not ignored defendant's declarations concerning his [residence]. We must point out, however, that conduct is of greater evidential value than expressions of intent." Farnsworth v. Jones, 114 N.C. App. 182, 189 (1994).

So, is your residence really still the little house downtown, or have you, like Mary Anderson believes, in fact changed your residence to the big house on the lake? Mary is so convinced that you have moved out to the lake that she thinks you should no longer serve as a county commissioner in her county. What can Mary do?

Challenge to voter registration. State law provides no procedure for directly challenging an elected official's residence, so Mary must take the indirect route of disputing your voter registration. Remember that to be eligible to hold your elective office you must be eligible to vote for it. So Mary may use her statutory right to challenge your right to vote, based on your residency: "Any registered voter of the county may challenge the right of any person to register, remain registered or vote in such county." **G.S. 163-85**.

If, when she files her challenge, Mary comes forward with evidence that your residence is really at the lake—perhaps Mary

supplies an affidavit that she has personally observed that no lights have been turned on in the little house in five months—the board of elections then has the duty, set out in **G.S. 163-86**, to conduct a hearing on Mary's challenge. The question for it to decide is your residence. Is it the lake house or the house downtown? The board can subpoena witnesses and it hears testimony under oath. Mary has the burden to substantiate her challenge with "affirmative proof." **G.S. 163-90.1**. Perhaps witnesses testify about how many nights it appears that you and your wife have spent at the lake house, or maybe there is testimony about where you had your Thanksgiving and Christmas dinners, or the amount of the electric bills at the two houses, or the state of the furnishings of the two places, or where the family dog stays.

If the board of elections finds that Mary has not carried the burden of proving that you have changed your residence, it will dismiss the challenge. If, however, it finds that you have changed your residence, it will cancel your voter registration. **G.S. 163-90.2**. At that point, you are no longer eligible to vote in the county, and, as we have seen, you are no longer eligible to continue in office as a county commissioner. [Of course, either Mary or you, depending on who loses, can appeal the matter to court. **G.S. 163-90.2**]

Now, if the decision is against you, what happens? You are ineligible to continue in office and you should resign. But what if you don't? Again, there is no state law setting out the procedure for removal, but your fellow commissioners may act nonetheless.

Removal from office. A member of the board of commissioners may move that a vacancy be declared: "I move that Fred Jones's seat on this board be declared vacant because he has been determined by the board of elections not to be a resident of the county and that this board proceed to fill the vacancy as provided by law." The board then should vote on the motion, and you may vote because you are still on the board at that time.

Although there is no specific statutory provision for declaring a vacancy, there is from the board's point of view a keen advantage to proceeding this way: it puts the onus on you, the former incumbent, to bring the lawsuit to challenge it.

The only removal alternative to this declare-the-vacancy-and-fill-it process is an action in the nature of quo warranto, a process found in G.S. Ch. 1, Art. 41. This action is completely unsuited to the purpose, because of its awkward process and because by its own terms it must be brought within 90 days after the office holder's induction into office. Nonetheless, in a 1999 letter opinion, the Attorney General's office cited Art. 41 as the means for removal.

So, on balance, the best advice to the board is this: declare the vacancy and fill it, and don't bother with quo warranto.

Counties, cities, school boards, and other elective offices. Everything said above applies not just to county commissioners, but to all elected officials. Everybody elected from a county or a city or a special electoral district must reside in the proper county or city or district to be eligible to hold the office. But, for some reason, only cities have a statute spelling it out. **G.S. 160A-59** provides: "When any elected city officer ceases to meet all the qualifications for holding office pursuant to the Constitution, or when a council member ceases to reside in an electoral district that he was elected to represent, the office is ipso facto vacant." When you see Latin in there like that, you know the statute means business.

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_163/GS_163-57.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_163/GS_163-85.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_163/GS_163-86.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_163/GS_163-90.1.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_163/GS_163-90.2.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-59.html