

December 20, 1993

OPINION NO. 93-055

The Honorable Gerald L. Heaton
Logan County Prosecuting Attorney
County Courthouse
Bellefontaine, Ohio 43311

Dear Prosecutor Heaton:

You have requested an opinion regarding the residence requirement for members of the township board of zoning appeals. Your letter presents the issue as follows:

One of our townships is primarily a resort area that consists of residents who only live there temporarily. Because of this, the Township Trustees contend that they can not find enough qualified residents living in the unincorporated and zoned area of the township to serve on the Board of Zoning Appeals. I have advised the Trustees that the potential members must either live here the majority of the time, or at least be registered to vote here in order to fulfill the resident requirement. Can your office offer any other alternatives?

Members of Township Boards of Zoning Appeals Must Be Residents of Unincorporated Territory in Township

R.C. 519.13 provides in relevant part, that "[i]n any township which adopts zoning regulations the board of township trustees shall appoint a township board of zoning appeals of five members *who shall be residents* of the unincorporated territory in the township included in the area zoned." (Emphasis added.) Thus, your question requires an examination of the meaning of the word "resident" as used in R.C. 519.13.

Type of Residence Required Is the Same as Required for Voting

The term "resident" is not defined in R.C. Chapter 519. As stated in *Kelm v. Carlson*, 473 F.2d 1267, 1271 (6th Cir. 1973), "[t]he word _resident_ has many meanings in the law, largely determined by the statutory context in which it is used." In interpreting statutes that require public officers to be residents of the particular districts or subdivisions they represent, it has long been held that the type of "residence" required is the same as that required for voting purposes. See, e.g., *State ex rel. Nichols v. Vinton County Bd. of Elections*, 20 Ohio St. 3d 1, 484 N.E.2d 690 (1985) (candidate for township trustee); *State ex rel. Weber v. Hathaway*, 28 Ohio C.C. Dec. 481, 482

(Cuyahoga County 1908) ("the residence which is required by this section of the statutes, for the purpose of maintaining the right to hold the office of councilman, is precisely the residence which is required to qualify the person as an elector").¹

Although the appointed position of member of a township board of zoning appeals is not a public office in the constitutional sense,² the language and the considerations of public policy embodied in R.C. 519.13 are substantially the same as the language and policy embodied in R.C. 503.24 and R.C. 503.241, the statutes requiring public officers of the township to be residents of their particular subdivisions. *See generally State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 602-03, 589 N.E.2d 1327, 1329 (1992) (holding that although R.C. 503.24 and R.C. 503.241 do not apply to members of the board of zoning appeals, the purpose of R.C. 519.13 is "to ensure that township zoning regulations are administered absolutely by the residents to whom they apply"). It is reasonable to conclude, therefore, that the legislature's use of the word "resident" in the context of membership on the township board of zoning appeals is intended to convey the same meaning that it has acquired with respect to township officers. *See generally Turney v. Yeoman*, 14 Ohio 207, 218 (1846) (when words that have acquired a fixed legal significance are used in a statute, the legal presumption is that the legislature used them in that legal sense). Accordingly, when making appointments to the township board of zoning appeals, the township trustees should be guided by the principles set forth in R.C. 3503.02, which defines residence for purposes of qualifying as an elector. *See generally* 1992 Op. Att'y Gen. No. 92-008 at 2-21 to 2-22.

Voting Residence

R.C. 3503.02 states:

(A) That place shall be considered the residence of a person in which his habitation is fixed and to which, whenever he is absent, he has the intention of returning.

¹ Public officers are subject to the constitutional requirement that they be electors of the state. Ohio Const. art. XV, §4 ("[n]o person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector"). The qualifications of an elector include, *inter alia*, that the individual be a resident of the state as statutorily defined in the election law. Ohio Const. art. V, §1; R.C. 3503.01-.02; *see State ex rel. Jeffers v. Sowers*, 171 Ohio St. 295, 298, 170 N.E.2d 428, 430 (1960) (constitutional requirement is that officers be electors of the state and, absent additional statutory requirement, not of a particular subdivision). Thus, when by statute an individual is also required to be a resident or elector of the particular political subdivision of the office involved, *see, e.g.*, R.C. 3.15; R.C. 733.02, the individual must meet the statutory residency requirements not only with respect to the state as a whole but also with respect to the particular political subdivision.

² Pursuant to Ohio Const. art. X, §2, public officers of the township must be elected. *See State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917) (syllabus, paragraph three); 1990 Op. Att'y Gen. No. 90-077 at 2-331.

(B) A person shall not be considered to have lost his residence who leaves his home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.

(C) A person shall not be considered to have gained a residence in any county of this state into which he comes for temporary purposes only, without the intention of making such county his permanent place of abode.

(D) The place where the family of a married man or woman resides shall be considered to be his or her place of residence; except that when the husband and wife have separated and live apart, the place where he or she resides the length of time required to entitle a person to vote shall be considered to be his or her place of residence.

(E) If a person removes to another state with the intention of making such state his residence, he shall be considered to have lost his residence in this state.

(F) If a person removes to another state with the intention of remaining there an indefinite time and making such state his place of residence, he shall be considered to have lost his residence in this state, notwithstanding the fact that he may entertain an intention to return at some future period.

(G) If a person removes out of the county to engage in the services of the United States government, he shall not be considered to have lost his residence in this state during the period of such service, and likewise should he enter the employment of the state, the place where such person resided at the time of his removal shall be considered to be his place of residence.

(H) If a person goes into another state and while there exercises the right of a citizen by voting, he shall be considered to have lost his residence in this state.

As summarized by the Ohio Supreme Court, "[t]he essence of that statutory definition of residence [R.C. 3503.02] is fixed habitation. Habitation is defined in *Webster's Third New International Dictionary* as ***dwelling place; house, home, residence." *Kyser v. Board of Elections*, 36 Ohio St. 2d 17, 21, 303 N.E.2d 77, 80 (1973), *appeal dismissed*, 415 U.S. 970 (1974). The court further stated that "R.C. 3503.02 lists two elements which are determinative of residency - (1) fixed habitation and (2) the intention of returning to that habitation. It is the present intention which determines a person's residency status..." *Id.* at 22, 303 N.E.2d at 80. The remaining provisions, R.C. 3503.02(B)-(C), list specific examples of the application of the basic definition found in R.C. 3503.02(A). *Id.* at 20, 303 N.E.2d at 79.

It is possible, however, for an individual to come within the scope of more than one of the situations described in R.C. 3503.02(B)-(H), and thus to have more than one residence. *State ex. rel. Klink v. Eyrich*, 157 Ohio St. 338, 343-44, 105 N.E.2d 399, 401 (1952) (Taft, J., concurring) (interpreting G.C. 4785-31, the predecessor of R.C. 3503.02); *see also State ex. rel. Clinard v. Greene County Bd. of Elections*, 51 Ohio St. 3d 87, 88, 554 N.E.2d 895, 896 (1990) (stating that under the evidence presented the board of elections could have determined that relator was resident of either of two counties). This is possible because "[a] man may have more than one residence although he can have only one domicile," and R.C. 3503.02 uses the term residence rather than the more narrow legal concept of domicile. *Eyrich*, 157 Ohio St. at 343, 105 N.E.2d at 401; *see also*

Grant v. Jones 39 Ohio St. 506, 515 (1883) (there is "no substantial difference between the words residence and domicile in regard to these matters," except that a person can have more than one residence but only one domicile). When an individual has more than one dwelling that qualifies as a voting residence, the individual may select which of the qualifying places is his or her voting residence, although by law the individual is of course limited to choosing only one. *Id.* at 344, 105 N.E.2d at 402.

Residence Determination in a Resort Area

Many people in a resort area do not live there the entire year, but nevertheless maintain a habitation to which they return regularly. If an individual lives in the resort area for temporary purposes only -- vacation, for example -- then, pursuant to R.C. 3503.02(D), such an individual does not gain a residence in the resort area. On the other hand, pursuant to R.C. 3503.02(B), if the individual treats the resort dwelling as his or her permanent place of abode, and leaves only for temporary purposes -- to winter in a warmer climate or to work, for example -- such temporary absences, however long and frequent, do not negate residency. *See* 1946 Op. Att'y Gen. No. 764, p. 128 (syllabus, paragraph one); 1924 Op. Att'y Gen. No. 1792, p. 525, 526; 1880 Op. Att'y Gen. (March 23, 1880) at 740-41. It should be noted that in the case of elected township officers, the legislature has specifically provided that absence from the township for ninety consecutive days creates a vacancy in the office. R.C. 503.241.³ There is no equivalent provision, however, with respect to members of the township board of zoning appeals. *See Gulvas*, 63 Ohio St. 3d at 603, 589 N.E.2d at 1329. R.C. 519.13 requires only that members of the township board of zoning appeals be residents. Thus, when an individual does not live a majority of the time in the unincorporated area of the township, the question becomes whether such absence is for temporary purposes only, or whether it is evidence of an intent to make some other place a permanent abode. Obviously, this determination of residency can only be made on a case by case basis, based on the declared intent of each individual and the degree to which the facts support that declared intent. *See* Op. No. 92-008 at 2-22 n.1.

The fact that an individual votes in the unincorporated area of the township may be considered evidence of residence for purposes of appointment to the board of zoning appeals, because residence, as defined in R.C. 3503.02, is a qualification of an elector. *See* R.C. 3503.01; *Wickham v. Coyner*, 20 Ohio Cir. Dec. 765 (Cir. Ct. Delaware County 1902); *Esker v. McCoy*, 5 Ohio Dec. Reprint 573 (C.P. Ross County 1878). Conversely, if an individual has chosen to vote elsewhere, that individual should not be considered a resident of the township for purposes of serving on the board of zoning appeals. *See, e.g.,* R.C. 3503.02(H) (voting out of state results in loss of residency); *State ex rel. Herdman v. Franklin County Bd. of Elections*, 67 Ohio St. 3d 593, 621 N.E.2d 1204 (1993) (application for absentee ballot listing residence in Columbus, Ohio considered

³ In *State ex rel. Hartshorn v. Walker*, 17 Ohio 135, 141 (1848), the court stated that a similar statute governing the absence of county commissioners "was intended to meet and provide for a case, in all its essential features, entirely different [than non-residence] — a case of neglect of duty, by continued absence from the county, *without a change of residence.*" (Emphasis added.)

evidence against claimed residence in Brice, Ohio for purposes of candidacy for public office). *But see Hager v. Hager*, 79 Ohio App. 3d 239, 607 N.E.2d 63 (Greene County 1992).⁴ As noted previously, however, R.C. 519.13 requires only residency. It does not require that an individual actually be a registered voter in order to serve on the board. If an individual is not registered to vote anywhere, his or her residence would have to be determined on the basis of other evidence in order to determine eligibility to serve on the board of zoning appeals.

Thus, while both of the requirements you have suggested may be evidence of residence, neither are an absolute necessity. Regardless of whether a person is a registered voter or whether he lives the majority of the time elsewhere, the determination of residency is a question of fact based on present intent. *See Kyser*, 36 Ohio St. 2d at 22, 303 N.E.2d at 80, *accord* 1946 Op. No. 764; 1939 Op. Att'y Gen. No. 820, vol. II, p. 1048.⁵

Conclusion

⁴ In *Hager*, the fact that the plaintiff had a home in Ohio and clearly intended to remain was held to establish residence for divorce purposes, even though the plaintiff was registered to vote and continued to vote in Florida during the same period of time.

⁵ Although an individual who is not registered to vote or is frequently absent from the township is not necessarily disqualified as a matter of law, this opinion does not suggest that it is inappropriate for a board of township trustees to consider such facts when deciding whether to appoint the individual to the township board of zoning appeals.

It is, therefore, my opinion and you are hereby advised that for purposes of appointment to a board of township zoning appeals under R.C. 519.13, an individual is a resident when that individual has a fixed habitation in the unincorporated territory of the township included in the area zoned, coupled with a present intent to return to that habitation whenever absent; there is no statutory requirement that such individual live in that habitation a majority of the time or be registered to vote there, although each of these factors may be evidence of residence or non-residence when considered with other facts.

Respectfully,

LEE FISHER
Attorney General

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Logan County Prosecuting Attorney
County Courthouse
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SYLLABUS:

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