

March 30, 2011

Dear City Manager:

According to your fax of March 9, 2011, Mr. A, who was appointed to fill a vacancy on the city's utility board in April, 2006, removed his residence from the city sometime in 2009, and was not eligible to vote in the city in the most recent city election in November, 2010. Apparently, someone questioned his eligibility to continue his service on the city's utility board, and Mr. A stated in an open public meeting on March 8, 2011, that it was his opinion that since he met the qualifications to be a utility board member when he was appointed to that position, his eligibility continued, apparently even after he was no longer a resident of the city. He apparently also said at the same public meeting that he had purchased property inside the city on March 8, 2011. The question from those facts is whether Mr. A forfeited his office when he removed his residence from the city?

When this question first arose, I assumed that Mr. A derived his right to vote based on his residency in the city. But your fax indicates that, "reportedly he [Mr. A] sold the property his law office was located on in 2009 and did not maintain his voter eligibility in your City." That statement leads me to believe that he derived his voter eligibility from his property ownership rather than his residency in the city.

Section 4 of your City Charter provides that,

In accordance with Tennessee Code Annotated, Section 2-2-107(3), no more than two (2) persons who own an interest in real, taxable property within the bounds of the corporation, shall be entitled to vote based upon the ownership of an individual tract of property regardless of the number of property owners.

The statute cited in that charter provision permits persons who live outside the city to vote in city elections if they own property inside the city, if the charter of the city so permits. Tennessee Code Annotated, § 2-2-107(a)(1) also provides that:

A person shall be registered as a voter of the precinct in which the person is a *resident*, and, if provided for by municipal charter or general law, may also be *registered in a municipality in which the person owns real property* in order to participate in that municipality's elections.

Section 18 of your City Charter provides for a Utilities Board of seven members, "each of

whom shall be a qualified voter of your City, Tennessee.” Tennessee Code Annotated, § 2-2-102 provides that: “Any citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter unless the citizen is disqualified under the provisions of this title or judgment of infamy pursuant to § 40-20-112.”

Tennessee Code Annotated, §§ 2-2-102, 2-2-107(a)(1) and 2-2-107(3), and § 4 of your City Charter seem to make it clear that a *non-resident of a city* who owns property inside a city which has a charter provision authorizing such non-residents to vote in city elections is a “qualified voter” of that city (even if he is not a registered voter). That conclusion is also consistent with Trammel v. Griffin, 207 S.W.726 (Tenn. 1918), in which the question was whether the term “voter” as used in a city charter meant a person qualified to vote or a person registered to vote. The Court held that under Tennessee’s election and registration laws, the word “voter” is used in the sense of one who is qualified to vote, and not in the sense of a registered voter. [At 727]

But it seems equally clear that if such a non-resident property owner who sells or otherwise disposes of the property upon which he relies on for his right to vote under the above statutes and Section 18 of your City Charter, “is disqualified under the provisions of this title” to be a qualified voter under Tennessee Code Annotated, § 2-2-102.

Two questions arise at this point:

1. Is the “qualified voter” requirement in Section 18 of your City Charter a continuing requirement? Section 18 plainly says that each member of the utility board “shall be a qualified voter of your City, Tennessee.” It says nothing about that qualification attaching only when the members of the utility board are appointed and disengaging when the appointment is complete.
2. If the answer is yes, what is the effect of the utility board member failing to meet that continuing requirement?

It is said in 3 McAllen, *Municipal Corporations*, 3rd Ed., § 12.65 that:

Under *some* laws, as judicially construed, the officer must continue to possess the prescribed qualifications during his or her term of office, and ceasing to possess the legal qualifications works as a forfeiture of office....

Tennessee law appears scarce on which way the Tennessee courts would go on that question, but Brimer v. Municipality of Jefferson City, 216 S.W.2d 1 (Tenn. 1948) is instructive. One of the questions in that case was whether an alderman’s residence in his ward was a continuing requirement. Another question was the effect on the alderman’s votes cast after he did failed to meet that requirement. The Court declared that the Jefferson City Charter clearly required the alderman to be a resident of the city during his term of office, but that it provided with

respect to the alderman's residency in the ward from which he was elected, only that, "Each Aldermen shall be a resident of the ward from which he was elected...." [At 4] On that point, the Court declared that, "It will be noted that the above provision of the Charter does not require the Alderman to continue to reside in his ward following his election....But conceding that it is clearly implied that he must continue to reside in his ward there is no provision to the effect that by his removal to another ward he thereby vacates his office. [At 4]

The Court went on to hold that:

We think until his office is adjudged to be vacated by a competent tribunal his official acts are binding on the municipality as a *de facto* officer. In an interesting case, the facts of which are quite similar to the instant case, *State ex rel. Hartford v. Craig*, 132 Ind. 54, 31 NE 352, 1y L.R.A. 688, it was held that the removal of a councilman from his ward was not in and of itself sufficient grounds to oust him from his office. In that case, the statute provided for separate wards and that, "no person shall hold the office of Councilman unless, at the time of his election, he is a resident of the ward," Etc. Rev. St. Ind. 1881, § 1043. The Court said that the statute '*not only committed to the city council the power to declare a vacancy in such a case, but it also left the exercise of that power to the discretion of the council. Until that body has acted, the mere fact of removal to another ward will not of itself have the effect to create a vacancy.*' [At 4] [Emphasis is mine.]

The Brimmer Court also declared that the alderman in question was a *de facto* officer whose votes were valid notwithstanding the fact that he did not live in his ward.

Mr. A is not involved in the question of whether he is a resident of the city nor of a ward in the city. But the logic of Brier appears to apply to the question of whether the property ownership that makes him a qualified voter of the city is a continuing requirement, he apparently having sold the property that made him a qualified voter of the city. That case probably reflects the proposition that because there is no provision in your City Charter that expressly imposes a requirement on utility board members that they be "qualified voters" throughout their terms of office Mr. A did not automatically forfeit his office when he no longer met that requirement, and that while your City Council had the right to declare the utility board member's office vacant, it had the "discretion" whether to exercise that option.

Section 18 of your City Charter also says with respect to the utility board, that, "Members of the board shall be removable from office only by general ouster proceedings for the causes appropriate to such proceedings." Tennessee's general ouster statute is found at Tennessee Code Annotated, § 8-47-101 et seq. It is not clear to me that the Ouster Law contemplates ouster of a

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public officer for being disqualified to hold office during his term, which triggers the question of whether the city council could have simply declared his office vacant without resort to the Ouster Law. While it is my opinion that the qualification of being a “qualified voter of Your City” was a continuing requirement, and that it was within the authority of the board to have removed him from office when he failed to meet that requirement without resort to the Ouster Law, in either case the timing of such an action does appear to me to make sense. He was appointed in 2006 to fill a utility board member’s existing term of six years.

If he is still in office in this year of 2011, his term must be near over. It seems a questionable decision for the board to attempt to remove him either by ouster proceedings or *quo warranto* if he decided to fight to removal action, especially where he appears to have recently bought property in the city again. I am not suggesting that his purchase of property “forgives” his holding of a seat for which he was disqualified, but it does not appear to me economical to attempt to remove him at this late date because his term would undoubtedly expire before any legal action against him began to seriously gear up.

Incidentally, the city might be interested in changing the charter to make it expressly clear that being a “qualified voter” (or even a “registered voter” if that was or is what the was intended in Section 18 of the city charter) is a continuing requirement, and that a utility board member who does not meet that qualification shall automatically vacate his office.

Let me know if I can help you further in this or any other matter.

Sincerely,

Sidney D. Hemsley
Senior Law Consultant

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