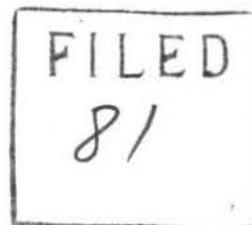


CITIES, TOWNS & VILLAGES: (1) A duly elected town trustee forfeits his office by moving from the town of his election; (2) until his removal from the board of trustees, a nonresident trustee is a de facto officer and his official acts and decisions are valid; and, (3) Section 80.230, RSMo 1969 provides that all vacancies in the board of trustees shall be filled by the remaining members of the board, the chairman or temporary chairman not voting except in case of a tie.

OPINION NO. 81

August 2, 1972



Honorable Jack E. Gant
State Senator
9517 East 29th Street
Independence, Missouri 64052

Dear Senator Gant:

This is in response to your request for an opinion concerning residency requirements for town commissioners. Specifically, you requested answers to the following questions:

"If a Commissioner of a town moves from that town, may he still legally serve as a Commissioner of that town? Could his participation as Commissioner, and consequently, the activities and decisions of the town's Commission, be legally challenged because of this? If he is no longer legally qualified to serve as a Commissioner of this town, how is his replacement to be elected?"

Chapter 80, RSMo 1969, which governs the organization of towns and villages, entrusts the town's corporate powers and duties to a "board of trustees". We understand that in town government the words "commissioner" and "trustee" are roughly synonymous; nevertheless, we shall hereafter use the statutory word "trustee".

Section 80.050 establishes the qualifications, or perhaps more accurately, the disqualifications for town trustees:

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"No person shall be a trustee who has not attained the age of twenty-one years; who is not a citizen of the United States; who is not an inhabitant of the town at the time of his election, and has not resided therein for one whole year next preceding the time of his election. . . ."

The basic issue is whether the residency or inhabitancy requirement, which appears merely to state a qualification for election, can also be construed as a disqualification against continuing in office. Section 80.050 has not been construed in any reported Missouri cases.

The Missouri courts, however, have spoken strongly on the nonresidence of officeholders where similar statutes were involved. In 1907 the St. Louis Court of Appeals upheld the ouster of a city alderman who, after an election, moved from his ward. State ex rel. Johnston v. Donworth, 105 S.W. 1055 (St.L.Ct.App. 1907). The statute construed in Donworth required aldermen to be twenty-one years old, a citizen of the United States, an inhabitant of the city for one year next preceding his election, and a resident of the ward from which he was elected. There was no specific statutory provision requiring a continuous residency while holding office, but the court so found, declaring:

"Several incongruities arise if we accept the reasoning of defendant's counsel. If a person elected alderman is a resident of the ward on the day of the election, but immediately moves into another ward, he could serve his two-year term; and, if all the aldermen of a city should happen to move into one ward during their respective terms of office, they would still constitute the board of aldermen. Such contingencies are opposed to the policy of the statute, which policy is to require aldermen to be residents of the ward, not only when elected but during their terms in office." l.c. 1056 (emphasis added).

In State ex rel. City of Republic v. Smith, 139 S.W.2d 929 (Mo. banc 1940), the Missouri Supreme Court, citing its approval of the Donworth case, also held that the requirement that an alderman be a resident of the ward from which he is elected was a continuing requirement, and that an alderman that moved from the city was properly ousted.

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These Missouri cases demonstrate the strong public policy of Missouri to require that those elected to office from a ward shall remain residents during their terms, and therefore, one who removes from the ward from which he was elected forfeits his office.

The provisions of Section 80.120 further confirm a continuing residency requirement as the true legislative intent. This section relates to the chairman of the board of trustees of a town and provides in part as follows:

" . . . and in case he shall die, resign, be removed from office or remove from the town, the board of trustees shall appoint one of their number chairman, who shall hold the office of the unexpired term."

The phrase "or remove from the town" indicates that the individual is no longer a trustee as in all of the preceding eventualities. Thus, it is apparent the legislature intended that a person who removes from the town in which he was elected trustee has by such action forfeited his office.

Your second question concerns the legality of the official acts of such a trustee. The court in State v. Smith, supra, considered the official acts of an alderman ~~who became unqualified by moving from his ward.~~* The court held that this alderman was a "de facto officer" and said:

" . . . ' . . . Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer, may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.' . . ." l.c. 933.

The court further held that acts of the de facto officer are valid and cannot be questioned because of the officer's

* Erratum (10/29/84).

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ineligibility. We believe that the Smith case applies to the present situation, making the nonresident trustee a de facto officer and validating his official acts and decisions.

The final question concerns the selection of a replacement trustee. We note that Section 80.230, RSMo 1969 appears to answer this question adequately:

"All vacancies in the board of trustees shall be filled by the remaining members of the board. In case the office of chairman becomes vacant, the remaining member shall select one of their own number as temporary chairman and then proceed to elect some person to fill such vacancy; provided, the chairman or temporary chairman shall have no vote except in case of a tie."

We enclose Opinion No. 328 issued September 13, 1962 regarding the role of the chairman in filling vacancies on the board of trustees.

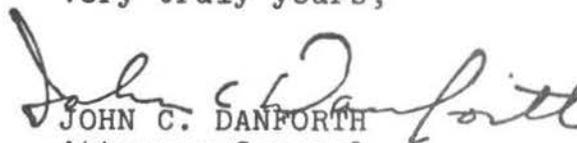
CONCLUSION

It is therefore the opinion of this office that:

(1) A duly elected town trustee forfeits his office by moving from the town of his election; (2) until his removal from the board of trustees, a nonresident trustee is a de facto officer and his official acts and decisions are valid; and, (3) Section 80.230, RSMo 1969 provides that all vacancies in the board of trustees shall be filled by the remaining members of the board, the chairman or temporary chairman not voting except in case of a tie.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leland B. Curtis.

Very truly yours,


JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 328
9-13-62, Anderson