

**LETTER OPINION  
2004-L-16**

February 12, 2004

Mr. James D. Hovey  
Larimore City Attorney  
PO Box 5758  
Grand Forks, ND 58206-5758

Dear Mr. Hovey:

Thank you for your letter requesting my opinion on the eligibility of a city council member to continue in office. You indicate that one of the six city council members recently sold his home within the city limits and has moved to a location outside the city. You further indicate that the council member wishes to serve the remainder of his term and that he owns rental property within the city and considers the city to be his "residency for voting purposes."

In order to be eligible to hold an elective municipal office, a person must be a qualified elector of the municipality. N.D.C.C. §40-13-01. "When any officer removes from a municipality . . . the office shall be deemed vacant." N.D.C.C. §40-13-07. An office becomes vacant if the incumbent ceases to be "a resident of the state, district, county, or other political subdivision in which the duties of the office are to be discharged, or for which the person may have been elected." N.D.C.C. § 44-02-01(7).

As one noted author stated:

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 a forfeiture of office. . . . Other examples include ceasing to be an elector or voter of the municipal corporation . . . or ceasing to be a resident of the municipal corporation, or moving out of a ward, where aldermen or councilmen are required to be residents of wards or subdivisions of the city. Ordinarily such removal will be treated as an abandonment or implied resignation of the office, this depending, of course, upon the construction of the particular law involved.

3 Eugene McQuillin, The Law of Municipal Corporations § 12.65 (3d ed. 2001). Sections 40-13-01 and 40-13-07, N.D.C.C., have been similarly construed by this office. See, e.g., N.D.A.G. Letter to Brorby (Nov. 6, 1969) (“[I]n view of the foregoing provisions of law, it would appear that such person moving from the municipality would no longer be qualified under the law and that a vacancy would be deemed to exist.”).

The complicating factors in this instance are that the council member in question owns rental property within the city and considers the city to be his residency for voting purposes. In Dietz v. City of Medora, 333 N.W.2d 702 (N.D. 1983), a city resident challenged the qualifications of a mayor and city council member to serve as city officers where both had residences in the city and in another city. The court noted that both individuals

are “residents” of Medora for purposes of §§ 40-08-05 and 40-13-01, N.D.C.C., if they live, reside, or dwell in Medora. Both have living quarters in Medora where they keep personal possessions, clothing, furniture, and items of sentimental value. These living quarters are the dwelling places of Tjaden and Connell whenever they are in Medora. It is not necessary that Tjaden and Connell spend every day of the year in Medora to be “residents thereof.”

Id. at 704.

The court further analyzed whether these two city officials have legal residences within the city of Medora for purposes of voting eligibility by applying the rules in N.D.C.C. §§ 16.1-01-04(3) and 54-01-26. The court noted that every person may only have one legal residence where that person votes, although they may have “several actual physical residences.” Id. at 705. While “[a] person’s declaration of intent is significant . . . inconsistent acts can negate declared intent.” Id. In this instance, it is not clear that the council member in question has an actual physical residence within the city. You indicated that he owns rental property, but it is not clear from your letter whether this rental property is an “actual physical residence,” i.e., that this rental property is used by the council member as living quarters where he keeps personal possessions, clothing, furniture, and items of sentimental value, etc. Id. at 704.<sup>1</sup>

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<sup>1</sup> In Dietz, the trial court, in denying the residency challenge, found that the mayor voted in Medora, belonged to Medora clubs and advisory councils, supported a church there, listed Medora as his address for his will, checks, income tax forms, passport, and car registration, had a telephone in Medora and received newspapers there, was provided a home in Medora by his employer at which he kept personal possessions, and declared his intent to be a legal resident of the city of Medora. Likewise, the council member in

A somewhat similar situation was presented in N.D.A.G. 98-L-61. A mayor, as a result of a divorce, obtained dwelling quarters in a different city but wished to continue in office. He still had an ownership interest in the marital home in the city in which he was mayor and stayed there periodically, kept possessions there, and periodically did maintenance and repair work on the home. The opinion noted:

Your . . . question involves the meaning of N.D.C.C. §40-13-07. This section provides: “When any officer removes from a municipality . . . the office shall be deemed vacant.” You ask what the phrase “removes from a municipality” means. It is my opinion that the quoted phrase in N.D.C.C. § 40-13-07 means that when an officer is no longer an “actual resident” of the municipality, the office shall be deemed vacant. . . . The key question in determining whether the Mayor has removed from the city of Lincoln, is whether the Mayor continues to have an “actual residence” in the city of Lincoln. My response to your first few questions indicated that one must rely on the criteria indicated in the Dietz case in order to determine whether a person is an “actual resident” of a city.

N.D.A.G. 98-L-61.

Section 40-08-02, N.D.C.C., provides that the city council “shall be judge of the election and qualifications of its own members.” Thus, it is up to the city council to determine whether the particular council member is still an “actual resident” of the city of Larimore. See N.D.A.G. 98-L-61; see also N.D.A.G. Letter to Gullicks (Dec. 30, 1988). In doing so, the city council should rely on the criteria indicated in the Dietz case to make the determination of whether the council member is still an actual resident of the city. N.D.A.G. 98-L-61. Should the city council determine that the council member is still an actual resident of the city, it would then need to determine the council member’s legal residence using the rules set out in N.D.C.C. §§ 16.1-01-04(3) and 54-01-26 and the Dietz case analysis in order to determine if the council member continues to possess the qualifications necessary to hold elective municipal office, i.e., that he is still a qualified elector and legal resident of Larimore as required by N.D.C.C. § 40-13-01.

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Dietz declared his intent to be a legal resident of Medora, listed it as his address on checks, income tax forms, driver’s license, car registration, and life insurance policy, voted and banked in Medora, purchased a cemetery plot there, owned a business there, had living quarters above his business containing personal belongings, was involved in community activities there, and received mail there. Dietz, 333 N.W.2d at 705-06. As is apparent, these determinations are very fact specific.

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Should the city council determine that the council member is no longer an actual resident of the city and thus that a vacancy in the council exists, it has the authority under N.D.C.C. §40-08-08 to either fill the vacancy for the unexpired term through appointment or a special election.

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/pg