STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79-267

The Honorable Jack H. Brier
Secretary of State
Second Floor, State Capitol
Topeka, Kansas

Re: Counties and County Officers--County Commissioners--Vacancies

Synopsis: Under K.S.A. 1978 Supp. 19-202, a person elected to the office of county commissioner may not qualify and assume the duties of that office unless and until that person establishes residence in the commission district such person is elected to represent. Residence in that district must continue throughout the term of office, and failure of a person to maintain such residency results in such person's disqualification to hold the office of county commissioner and creates a vacancy therein.

* * *

Dear Secretary Brier:

On your behalf, Mrs. Mary W. Ritter, Assistant Secretary of State for Elections, has requested our review and determination of the validity of Attorney General Opinion No. 76-7, relating to the effect of a county commissioner's removal from one commissioner district of the county to another.

The prior opinions of this office that have addressed this proposition, including Opinion No. 76-7, have been predicated on an interpretation of K.S.A. 19-2608, concluding that, under the terms of this statute, a vacancy is not created on a board of county commissioners when a commissioner changes his residence from the district in which he was elected to another district

within the same county. However, in 1976, 19-2608 was repealed (L. 1976, ch. 129, §1), and the statutes are now silent as to the effect a change of residence has on a commissioner's continued qualification for office.

County commissioners are elected pursuant to K.S.A. 1978 Supp. 19-202, which in pertinent part provides:

> "(a) The board of county commissioners of each county shall consist of three (3), five (5) or seven (7) qualified electors.
>
> "(b) One (1) county commissioner shall reside in and represent each commissioner district within the county." (Emphasis added.)

The statute requires each member of the board of county commissioners to be a qualified elector and a resident of the district within the county that he or she represents. The term "qualified elector" is defined in Article 5, Section 1 of the Kansas Constitution, which reads in part:

> "Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." Kan. Const., Art. 5, §1.

It is clear that to be a qualified elector for the purposes of voting at the election of county commissioners, a person must reside in the appropriate county commissioner district. As to the meaning of "reside," the New Century Dictionary defines this term as follows:

> "To dwell permanently or for a considerable time, as in a settled or recognized place of abode; have one's abode, or live for a time; live or stay as in a place, for the discharge of official or other duty." New Century Dictionary, 1533 (1953).

Further, the term "residence" is defined in K.S.A. 77-201, Twenty-Third, which provides:

> "The term 'residence' shall be construed to mean the place adopted by a person as such person's place of habitation, and to which, whenever such person is absent, such person has the intention of returning. When a person eats at one place and sleeps at another, the place where such person sleeps shall be deemed such person's residence."

The effect of residence on a county commissioner's qualification for office was considered in Attorney General Opinion No. 76-203. That opinion was synopsized thus:

> "Under K.S.A. 19-202, as amended by ch. 121, § 2, L. 1976, a person elected to the office of county commissioner may not qualify and assume the duties of that office unless and until that person establishes residence in the commissioner district which such person is elected to represent. Residence in the commissioner district need not exist at the time of filing of candidacy, or nomination or election, however."

We agree with the conclusion reached in that opinion, and based upon the principles stated therein, as well as the other previously-enunciated considerations regarding residency, it is our opinion that, to be qualified to assume the duties of county commissioner, a person must be a resident of the county commissioner district in which such person is elected. Moreover, we believe that such residency requirement is a continuing, as well as a preliminary qualification for the office. This conclusion is supported by decisions of the Kansas Supreme Court and other authorities.

In State, ex rel., v. Stice, 186 Kan. 69 (1960), a judge of a court of common pleas was disbarred after his election. The Court interpreted the statutory requirement that such judge be admitted to practice law at the time of his election as a continuing qualification, and not just a prerequisite for election to the position. Id. at 74, 75. The Court found that to hold otherwise "would lead to an absurdity." Id. at 74.

In Bankers Service Life Ins. Co. v. Sullivan, 188 Kan. 783 (1961), the Court held that a foreign insurance company had to meet statutory requirements not only at the time it began doing business in Kansas, but at all times it continued to do business in this state. Referring to Stice, the Court said:

> "[O]nce a standard or requirement is met by a person, or other local entity, to do what the applicant seeks to do, such standard or requirement must continue so long as that act which is permitted thereby is carried on in the state." Id. at 790, 791.

The Court held further that it was the voluntary action by the insurance company that destroyed its qualification to continue to do business in Kansas. Id. at 791.

According to the Annotation found at 88 A.L.R. 812 (1934):

> "The fact that the candidate is qualified at the time of his election is not sufficient to entitle him to hold the office, if at the time of the commencement of the term of office, or during the continuance of the term, he ceases to be qualified. Eligibility to public office is of a continuing nature, and must subsist at the commencement of the term, and during the occupancy of the office." Id. at 828.

Other states agree with this interpretation. In State ex rel. v. Donworth, 127 Mo.App. 377, 105 S.W. 1055 (1907), an elected city alderman had moved voluntarily from the ward he had been elected to represent to another ward in the same city. One of the statutory qualifications for the office was residence in the ward from which elected. The Court held that the statutory requirements were preliminary as well as continuing, stating that:

> "[C]hange of residence to another ward disqualifies him to represent the ward by which he was chosen and forfeits his right to the office." Id. at 380.

In its analysis of the problem, the Court indicated that the purpose of having an alderman live within the district he represents was twofold: First, he would be familiar with its needs, and, second, his interests would be identical with the interests of the ward community.

> "It is true that the aldermen act for the welfare of the city generally and pass ordinances which relate to the entire city; but it is also true that they represent in an especial manner their particular wards. It is well known that in the disbursement of city funds for lighting, fire protection, water, street improvementsand many other matters, rivalries and disputes often arise between the sections of a city, and it is important that a particular section be represented in the municipal assembly by its own residents. It is for this reason, we think, that the Legislature provided for representation by residents of the wards and election by their qualified voters." Id. at 380, 381.

In Donworth, the defense proposed that the qualification was merely preliminary and not continuing. The Court exposed the dangers of such a position:

> "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 years' 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 of office." Id. at 382.

In Commonwealth ex rel. v. Yeakel, 13 Pa. Co. Ct. 615 (1893), a Pennsylvania court decided that an elected member of the town council who had moved from the ward from which he was elected to another ward in the same borough had thereby forfeited his right to office. The Court said:

> "It seems to us that it is clearly the purpose of the law that councilmen should represent ward constituencies, and as a corollary . . . it would follow that they must be residents of the ward which they represent. The policy of the law has ever been that those who are to be the electors of any district or municipal subdivision, to fill representative offices confined to those districts, shall be themselves electors of those districts.
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> "It is clearly the policy of law as well as the legislative intent to give to each ward in a municipal legislative body equal representation from among the residents of that ward in order that there may be no unjust discrimination in either legislation or appropriations against any of the several wards constituting any borough. If this is true, then when a councilman divests himself of citizenship in any ward, he divests himself of office. Were it not so, instead of having the condition which is clearly the legislative purpose to maintain, we might have, by a series of removals, every member of council living in one and the same ward, leaving every other ward in the municipality without representation.
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> "It seems to us that it is clearly the intent of the legislature to provide against any such contingency by the creation of ward representation." Id. at 616-617.

The more recent case of State v. Bohannon, 421 P.2d 877 (1966), maintained these principles. The case involved a member of a State Board of Public Welfare who had been charged with and admitted committing a felony. The Court held that this misconduct disqualified the incumbent for the office:

> "'The general rule with respect to a public official is that eligibility to hold office is of a continuing nature and must exist not only at the commencement of the term but during the occupancy of the office. Some of the courts of other states hold that the date of election or appointment is the time to test eligibility to hold office. But most of the courts hold that even though a candidate is qualified at the time of his election this is not sufficient to entitle him to qualify and continue to hold office, if, at the commencement of the term, or during the continuance of the incumbency, he ceases to be qualified.' Valle v. Pressman, 229 Md. 591, 185 A.2d 368, 377.
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> "The principle has been accepted and applied under varying situations that where a constitution or statute creates a qualification for an office the subsequent loss of the qualification constitutes valid grounds for removal of the officer." Id. at 881-882.

The Arizona court cited the Stice case, supra, as supporting its decision.

Based on the foregoing, we are of the opinion that residency in the district from which a county commissioner is elected is a continuing qualification, and that once such residency requirement is no longer met due to the commissioner voluntarily moving from such district, he is disqualified from continuing in office. Such disqualification creates a vacancy in the office of county commissioner, because the office is no longer supplied in the manner provided by law with an incumbent legally qualified to hold such office. See Barrett v. Duff, 114 Kan. 220, 232 (1923), and Leek v. Theis, 217 Kan. 784, 790 (1975).

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

W. Robert Alderson

W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk