June 5, 2008

The Honorable Bill Herbkersman
Member, House of Representatives
434-B Blatt Building
Columbia South Carolina 29211

Dear Representative Herbkersman:

We received your letter requesting an opinion of this Office concerning the interpretation of the term "resident freeholders" as used in section 5-3-280 of the South Carolina Code. Specifically, you inquire as to whether this term includes illegal aliens owing property in your district. In addition, you also inquire as to the use of the term "freeholder" as it applies to corporations. You state: "I am concerned about a corporation organized in another county or another State that owns property in one of these annexed districts. Would that be a "freeholder" as defined by the statute?"

Law/Analysis

Section 5-3-280 of the South Carolina Code (2004) is contained among the provisions of the Municipal Code that govern changes in corporate limits. This provision in particular governs reductions in a municipality's corporate limits and provides as follows:

> Whenever a petition is presented to a city or town council signed by a majority of the resident freeholders of the municipality asking for a reduction of the corporate limits of the city or town, the council shall order an election after not less than ten days' public advertisement. This advertisement shall describe the territory that is proposed to be cut off. If a majority of the qualified electors vote at the election in favor of the release of the territory, the council must issue an ordinance declaring the territory no longer a portion of the municipality and must notify the Secretary of State of the new boundaries of the municipality.

Before we address the interpretation of the term "resident freeholder" as used in this provision, we must note that this provision is of questionably constitutionality. In Hayward v. Clay, 573 F.2d 187, the Fourth Circuit Court of Appeals found the "freeholder" provision contained in chapter 3 of title 5, allowing an annexation proceeding to be initiated by a petition signed by fifteen

percent of the freeholders in the area, is unconstitutional as it violates the Equal Protection Clause. Subsequently, in Fairway Ford, Inc. v. Timmons, 281 S.C. 57, 314 S.E.2d 322 (1984) the parties agreed this provision is unconstitutional. Thus, while we were not asked to opine as to the constitutionality of this provision, we are compelled to point out that our courts found a statute similar to section 5-3-280 unconstitutional.

Despite finding section 5-3-280 of questionable constitutionality, we will address your questions as presented in your request letter. First, you inquire as to whether "resident freeholders," as used in this provision, includes individuals that own property in the area to be removed from the municipality's corporate limits, but who are in the United States illegally. Section 5-3-240 of the South Carolina Code (2004) defines the term "freeholder" as follows:

> a "freeholder" is defined as any person eighteen years of age, or older, and any firm or corporation, who or which owns legal title to a present possessory interest in real estate equal to a life estate or greater (expressly excluding leaseholds, easements, equitable interests, inchoate rights, dower rights, and future interests) and who owns, at the date of the petition or of the referendum, at least an undivided one-tenth interest in a single tract and whose name appears on the county tax records as an owner of real estate.

You state in your letter that illegal aliens "have bought land under land contracts . . . ." Thus, we presume they are freeholders per the definition provided in section 5-3-240. However, the issue is whether they are considered "resident" freeholders given their illegal status. Unfortunately, the provisions under chapter 3 of title 5 do not define the term "resident." In addition, we did not find any South Carolina case law interpreting the term "resident" with respect to section 5-3-280. However, in an opinion of this Office issued in 1995, we were asked to interpret the term "resident freeholder" to determine whether it "requires a freeholder to be a full time, permanent resident, or whether periodic or part time residency" complies with section 5-3-280. Op. S.C. Atty. Gen., September 14, 1995. We employed the definition provided in section 5-3-240 to interpret the term freeholder. However, finding no definition of the term "resident," we looked to prior South Carolina Supreme Court decisions and opinions of this Office interpreting this term. Id.

> One of the classic statements as to residency by our Supreme Court is found in Clarke v. McCown, 107 S.C. 209, 92 S.E. 479 (1917):
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> > The residence of a person is a mixed question of fact and law; and the intention of that person with regard to the matter is deemed the controlling element of decision. His intention may be proved by his acts and declarations, and perhaps other circumstances; but when these, taken all together, are not inconsistent with the intention to retain an established

> residence, they are not sufficient in law to deprive him of his right thereunder, for it will be presumed that he intends to continue a residence gained until the contrary is made to appear, because inestimable political and valuable personal rights depend upon it. ...
>
> That a man does not live or sleep or have his washing done at the place where he has gained a residence, or that his family lives elsewhere, or that he engages in employment elsewhere are facts not necessarily inconsistent with his intention to continue his residence at that place, and when they are opposed by his oath, and that is corroborated by indisputable circumstances, . . . showing that it was not his intention to change his residence, the facts and circumstances stated become legally insufficient as evidence upon which he may be deprived of the rights to which he is entitled by reason of the residence gained.

107 S.C. 213-214.

As to residency of an individual, this Office has similarly examined such in two lengthy opinions . . . Particularly helpful is the research and reasoning in Op. Att'y Gen. No. 84-41:

> Our Supreme Court has stated that for the purpose of voting "residence" generally means "domicile." [Cite omitted.] The Court has defined a person's domicile as "the place where [he] ... has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent an intention of returning." [Cite omitted.]
>
> Intent "is a most important element in determining the domicile of any individual." [Cite omitted.] Intent is primarily an issue of fact, determined on a case by case basis. [Cite omitted.] A person may have but one domicile at any given time; to change one's domicile, "there must be an abandonment of, and an intent not to return to the former domicile. [Cite omitted.] There must also be the clear establishment of a new domicile. [Cite omitted.] The Supreme Court has emphasized that "[o]ne of the essential elements to constitute a particular place as one's domicile ...

> is an intention to remain permanently or for an indefinite time in such place. [Cite omitted.] [Emphasis added.]

Id. Based upon this analysis, we determined an individual only has one residence or domicile at a time. Id. Thus, we concluded "the term 'resident' connotes an individual who has established a domicile in a particular place with the intention to remain there permanently or at least for an indefinite period of time; certainly one may be absent from the residence periodically, but the residence would be the permanent place to which one intends to return when he is absent therefrom." Id.

While our 1995 opinion gives some guidance as to what our courts will likely consider in determining whether an individual is a resident for purposes of section 5-3-280, it does not address the issue of whether an illegal alien is a resident. Furthermore, in our research, we did not discover any South Carolina case specifically addressing whether an illegal alien may be considered a resident in any State law context. In Curiel v. Environmental Management Services (MS), 376 S.C. 23, 655 S.E.2d 482 (2007), the South Carolina Supreme Court came close to addressing whether an illegal alien is a resident for purposes of receiving workers' compensation benefits. The appellant argued that the individual claiming benefits is not a resident because "his address on file with [his employer] is Salisbury, North Carolina address, and in any event he is not a legal resident given his status as an illegal alien." Id. at 31, 655 S.E. 2d at 486. The Court, in finding that the individual was a resident, appears to rely on the fact that the individual lived and worked in Charleston, South Carolina for several years prior to the accident. However, the Court then states: "Moreover, § 38-31-20(8) provides a claim is covered by the Fund if the claimant or the insured is a South Carolina resident. There is no allegation that Employer, who is the insured party, does not qualify as a resident." Id. at 32, 655 S.E. 2d at 486. Thus, the Court did not directly address the issue of whether an illegal alien is a resident.

Finding no South Carolina case law addressing whether an illegal alien may be a resident, we look to authority in other jurisdictions for guidance. In our research, we found several decisions in other jurisdictions holding that an illegal alien is a resident for purposes of various state statutes requiring residency. In St. Joseph's Hospital and Medical Center v. Maricopa County, 688 P.2d 986 (Ariz. 1984), the Arizona Supreme Court considered whether illegal status prevents an alien from becoming a resident of a county for purposes of a statute requiring counties to reimburse hospitals for providing emergency room care for indigent residents. The Court considered the fact that the alien was subject to deportation, but the Court found

> there is no assurance that a [person] subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. See, e.g. 8 U.S.C. §§ 1252, 1253(h), 1254. In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented [person] will

> in fact be deported until after deportation proceedings have been completed.

Id. at 991. Thus, the Court concluded the alien's status does not bar his or her ability to obtain domicile in the state. Id. at 991-92.

In Maldonado v. Allstate Ins. Co., 789 So.2d 464 (Fla. Dist. Ct. App. 2001), the Florida District Court of Appeals for the Second District addressed whether an illegal alien is a resident of Florida for purposes of Florida's no-fault insurance statute. The Court stated "a person is a resident if he or she lives in a place and has no present intention of removing themselves thereform." Id. at 467 (quotations and citations omitted). The Court also acknowledged that the term residency has different meanings based on the context in which it is used. Id. at 468. Looking at Florida's no-fault statutes, the Court determined that the Legislature did not intend for an individual's right to receive benefits to be conditioned up their "right to vote of . . . domicile or citizenship in Florida." Id. at 470. Thus, the Court concluded that the status of the person claiming benefits "as an illegal alien does not suggest that he lacked the intent to remain in Florida at the time of the accident." Id. at 470. Accordingly, the Court concluded the claimant was a resident and therefore, eligible to receive benefits under the no-fault statutes. Id.

Most recently, the New Jersey Supreme Court considered whether a claimant, who was an undocumented alien, was a resident of New Jersey with regard to that state's Unsatisfied Claim and Judgment Fund ("UCJF"). Caballero v. Martinez, 897 A.2d 1026 (N.J. 2006). The Court considered the claimant's illegal status, but made the distinction that residency under the statutes governing the UCJF must be interpreted according to state law, rather than according to federal immigration law. Id. at 1031. In addition, like the Florida court in Maldonado, this Court noted that in interpreting the term resident, it must look to the context of the UCJF. Id. at 1032. Based upon its context and the fact that the Court recognized that "[a] person may be a 'resident' even if his or her intent to remain ultimately is not realized," the Court stated:

> We hold that an undocumented alien's intent to remain in New Jersey can satisfy the intent required by the UCJF to qualify as a "resident." We recognize the apparent paradox that exists when an undocumented alien intends to remain in this State but that alien, because of his or her illegal status, is subject to deportation at any time. Yet, as noted, our test for residency under the UCJF is a subjective one based on a person's intent at the time of the accident. The test does not require that a person's intent to remain be realized. Consequently, the fact that an undocumented alien may some day be forced to return to his or her homeland does not necessarily defeat the intent to remain. That is especially true in light of the uncertain nature of deportation.

Id. at 1032, 1033. Furthermore, the Court indicates this finding furthers the UCJF statute's purpose "of providing compensation to those injured through no fault of their own." Id. at 1033. In addition, to this case and the other cases discussed, we are aware of other state court opinions and attorney general opinions finding illegal aliens may qualify as residents under state law. See, e.g., Garcia v. Angulo, 644 A.2d 498 (Md. 1994) (finding illegal aliens may qualify to receive benefits from the Maryland Automobile Insurance Fund); Op. Ariz. Atty. Gen., October 20, 1987 (finding undocumented aliens can establish domicile for purposes of receiving in-state tuition to Arizona colleges and universities); Op. Fla. Atty. Gen., February 13, 2007 (opining that a hospital authority must provide healthcare to illegal aliens pursuant to its charter that provides that indigent residents in its district receive healthcare).

To the contrary, we also discovered authority in other jurisdictions finding illegal aliens are not residents. In Lok v. I. N. S., 681 F.2d 107 (2d Cir. 1982), an illegal alien petitioned the Court for relief from deportation based on the fact that he accumulated seven continuous years of lawful unrelinquished domicile." The United States Court of Appeals for the Second Circuit stated that domicile is established when the petitioner establishes the intent to remain. Id. at 109. However, the Court conclude that in order to establish domicle, the intent to remain must be "legal under the immigration laws." Id. Thus, because the petitioner was in the United States illegally, "[h]e could not establish lawful domicile." Id.

The Fifth Circuit Court of Appeals in Madrid-Tavarez v. I.N.S., 999 F.2d 111 (5th Cir. 1993) reached a conclusion similar to the Second Circuit in Lok. In that case, the illegal alien also sought relief from deportation under the same provision as Lok. Id. The Court held "if Madrid had no legal right to be in this country, he could not establish a lawful intent to remain." Id. at 113. Thus, Madrid failed to satisfy the qualification of seven years of domicile in the United States. Id.

In addition to these two cases, we discovered two state attorney generals' opinions finding illegal aliens are not residents under state law. First, in 1984, the California Attorney General opined that undocumented aliens did not meet the residency requirements to receive resident tuition rates at that state's institutions of higher education. Op. Cal. Atty. Gen., June 1, 1984. Second, the Michigan Attorney General considered whether illegal aliens are residents for purposes of obtaining a Michigan diver's license. Op. Mich. Atty. Gen., December 27, 2007. In his opinion, the Michigan Attorney General acknowledged Congress's authority to regulate immigration and accordingly stated:

> Michigan law must be interpreted against that background of federal law when considering questions involving aliens. It would be inconsistent with that body of law to find that a person in this country illegally, who has not secured permanent alien status from the federal government, can be regarded as a permanent resident in Michigan. There is nothing in the language or history of the Michigan Vehicle Code to indicate the Legislature intended to do so.

Id. Thus, the Michigan Attorney General concluded that illegal aliens are not Michigan residents and therefore, cannot obtain a Michigan driver's license. Id.

In our 1995 opinion, we equated residence for purposes of section 5-3-280 with domicile. Therefore, we believe that an individual may only have one residence. Furthermore, we conclude that the critical factor in determining an individual's residence is the intent of the individual to permanently remain in a particular place. From the authority cited above, we find differing opinions as to whether an illegal alien has the capacity to intend to remain permanently in the United States, moreover, a locality within the United States. In most of the cases we examined, the states found illegal aliens qualify as residents under various state laws. These jurisdictions appear to separate federal immigration law from state law. Further, they find an alien's illegal status does not affect their intention to remain within the jurisdiction. St. Joseph's Hospital and Medical Center and Caballero, seem to rely on the fact that whether or not a particular alien will be deported is at best uncertain. St. Joseph's Hosp. and Med. Ctr., 688 P. 2d 986; Caballero, 897 A. 2d 1026. However, other cases finding illegal aliens are residents appear to rely on specific circumstances to make these findings. For instance, in Garcia, the court, at least in part, based its determination that the alien was a resident on the fact that the alien in question could be afforded permanent status. 644 A.2d 498. In addition, unlike our interpretation of section 5-3-280 in 1995, the Court in Maldonado found that for purposes of the statute in question, residency was not the same as domicile. 789 So. 2d 464.

In Criel, our Supreme Court was faced with the issue of whether an illegal alien is considered a resident for purposes of workers' compensation. However, finding the claimant is entitled to benefits without being required to be a resident, the Court did not find it necessary to address this issue. Thus, we are faced with a novel question of not only whether an illegal alien is a resident for purposes of section 5-3-280, but also whether an illegal alien could be considered a resident under any provision of state law. In other words, our courts have yet to address the issue of whether an illegal alien is capable of manifesting an intent to remain in a particular place when remaining in that place is in violation of federal law. Because this question is novel, we cannot opine with any certainty as to how our courts may decide this issue. Several jurisdictions found that an alien's illegal status does not hinder their intent to remain in this country, moreover a particular state or locality. However, these jurisdictions do not appear to be an overwhelming majority. In addition, we note that some of these jurisdictions, under the circumstances presented to them, rely on the fact that the alien in question may not be or is likely not to be deported. However, we do not believe our courts would ignore the illegal status of an alien. Therefore, we are of the opinion that our courts are more likely to find, as the Court in Madrid-Taverez found, that in order to establish domicile, an individual must not only have the intent to remain, but must this intent must be lawful. Thus, we do not believe a South Carolina court is likely to find that an illegal alien qualifies as a resident under section 5-3-280.

Next, you inquire as to what corporations are considered "freeholders" under section 5-3-280.

We previously quoted section 5-3-240, which defines the term freeholder for purposes of section 5-3-280. This definition specifically states corporations are considered freeholders. However, your question appears to relate more to whether the corporation is a "resident freeholder" because you state your concern is "about a corporation organized in another county or another State that owns property in one of these annexed districts."

As stated previously, article 3 of title 5 does not contain a definition of the term resident. In addition, as our courts recognize, "'[c]orporations have no domicile, residence, or citizenship in the sense in which those words apply to natural persons, but only in a metaphorical sense.'" Gibbes v. Nat'l Hosp. Serv., 202 S.C. 304, 24 S.E.2d 513 (1943) (quoting 18 C.J.S., Corporations, § 176). The Legislature, in some provisions of the Code, defines residency with regard to corporations. For example, the South Carolina Income Tax Act includes a definition of "resident corporation" for purposes of its provisions. Section 12-6-30 of the South Carolina Code (2000), under this act states "resident corporation" means "a corporation whose principal place of business, as defined in item (9), is located within this State." Item (9) defines "principal place of business: as the domicile of the corporation." S.C. Code Ann. 12-6-30(9).

Several South Carolina cases discuss the residency of a corporation with respect to venue. The Supreme Court in Deese v. Williams, 236 S.C. 292, 296, 113 S.E.2d 823, 825 (1960) stated that for purposes of venue, "a corporation is a resident not only of the county where its principal office is located, but also of any county in which it has an office and conducts its corporate business." See also, Sanders v. Allis Chalmers Mfg. Co., 235 S.C. 259, 111 S.E.2d 201 (1959); Gibbes v. Nat'l Hosp. Serv., 202 S.C. 304, 24 S.E.2d 513 (1943).

Our courts have yet to define the term resident with regard to corporate freeholders under section 5-3-280. However, we believe our courts would find that a corporation may not simply own property and qualify as a resident freeholder under section 5-3-280. Rather, we believe at a minimum a corporation must also conduct business in the area. In addition, given our strict interpretation of the term resident with regard to individuals, we also believe a court could find that the corporation must also maintain its principal place of business in the area to be annexed in order to petition for the removal of such area from a municipality's corporate limits.

Conclusion

Our courts have yet to interpret the term "resident" with regard to freeholders under section 5-3-280 of the South Carolina. In addition, our courts have not addressed whether illegal aliens may qualify as residents pursuant to this provision or any other provision of State law. Thus, finding the question raised in your request to be a novel issue, we cannot conclusively resolve this issue in an opinion of this Office. We note that other jurisdictions are split on whether an illegal alien may be considered a resident under state law. However, we believe our courts would require an individual's intent to remain be a lawful intent to remain. Thus, we find it best to advise that a court would most likely conclude that illegal aliens do not qualify as resident freeholders pursuant to section 5-3-280.

However, in as much as no South Carolina Court has addressed this issue and there is a splitting of authority in other jurisdictions, a court would have to resolve this question with finality.

In addition, you inquire as the circumstances under which a corporation may be considered a resident freeholder under section 5-3-280. Section 5-3-240 specifically includes corporations within the definition of freeholders. Thus, presuming a corporation is a resident, it may petition for the removal of a certain area from its municipal boundaries. However, our courts have not clarified when a corporation constitutes a resident under per section 5-3-280. Based on case law interpreting residency with regard to corporations for other purposes, we gather that at a minimum, a corporation must conduct business in an area in order to be a resident. Furthermore, a court may also find that a corporation must hold its principal place of business in an area to qualify as a resident.

Very truly yours,

Henry McMaster
Attorney General

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REVIEWED AND APPROVED BY:

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