ALAN WILSON
ATTORNEY GENERAL

June 21, 2019

The Honorable Jerry N. Govan, Jr., Member
South Carolina House of Representatives, District No. 95
530-B Blatt Building
Columbia, SC 29201

Dear Representative Govan:

You note that "some South Carolina counties are requiring certain individuals to present proof of U.S. citizenship as a prerequisite for receiving the 4% owner-occupied assessment ratio (homestead exemption) for property taxes." By way of background, you state the following:

> [a] plain reading of relevant property tax statutes, in particular, SC Code §12-37-10(et. al) does not provide a clear answer as to whether or not the action above is lawful or whether there is intentional or unintentional discrimination against a particular group based on country of origin.
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> Due to the lack of clarity in current statute, I respectfully request an advisory opinion from your office on this matter.
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> My specific questions are outlined as follows:
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> 1. Does South Carolina law, in particular §12-37-10(et. al), require proof of U.S. citizenship for a homeowner to be eligible for the homestead exemption?
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> 2. Is it proper for a county to require a homeowner to present proof of citizenship prior to receiving a homestead exemption?
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> 3. Can a county use investigative methods to determine which potential homeowners may lack proof of U.S. citizenship in order to deny the homeowner the right to a homestead exemption?

Law/Analysis

In Op. S.C. Att'y Gen., 2009 WL 1968628 (July 12, 2009), we addressed the requirement that a taxpayer receiving the 4% special assessment ratio. There, we concluded:

> [i]n order to receive either the four-percent special assessment ratio or a homestead exemption, the property in question must be the legal residence of the taxpayer. According to South Carolina law, a person's legal residence is where they are domiciled. S.C. Code Ann. § 12-43-220(c)(1); Phillips [v. S.C. Tax Commission, 195 S.C. 472, 12 S.E.2d 13 (1940)] at 472, 12 S.E.2d at 13. Whether or not the taxpayer in question is domiciled at the property located in Dorchester County primarily depends on his intent to permanently remain for an indefinite period of time. Id. Section 12-43-220(c)(2)(iv) specifically contemplates the use of the taxpayer's vehicle registrations as evidence [of] domicile. In addition, we believe vehicle registrations can be a factor to consider in determining domicile for purposes of the homestead exemption. However, we do not believe this fact is conclusive. We are of the opinion that all factors indicating the intent of the taxpayer must be considered in determining domicile. . . . [B]ecause the determination of domicile is a factual issue, we cannot make a definitive determination as to whether this individual maintains his legal residence in Dorchester County. Such a determination must be made by a court.

Again, as the Opinion emphasized, ". . . like the special four-percent assessment ratio allowed pursuant to Section 12-43-220, in order for an individual to qualify for the homestead exception, he or she must use the property they are seeking the exception for as their legal residence."

With respect to non-citizens, courts have reaching varying conclusions with respect to the question of whether an alien may form the requisite intent to achieve domiciliary status. Thus, we agree with your assessment that there is no "bright line" rule to determine whether a non-citizen is or is not a domiciliary for purposes of the four-percent assessment ratio or homestead exception. As one court has explained, the determination of domicile is made on a case-by-case basis:

> [t]he ability to form the necessary intent to remain is the focal point of this dispute because in order to be eligible for the PFD, Alaska residents are required to have an intent to remain in Alaska. . . . Not all aliens are able to form that intent because of the restrictions on an alien's ability to intend to remain. . . . Some aliens are allowed in the country only if they do not intend to abandon a foreign residence. . . . These restricted aliens jeopardize their legal presence in the country and may be deported if they seek to abandon their foreign residence and establish domicile in this country.... Other aliens are not so restricted because their status does not preclude them from intending to remain in the United States. . . . Thus, nonrestricted aliens are able to form the intent to remain in Alaska without jeopardizing their legal alien status, but restricted aliens cannot.

State Dept. of Revenue v. Andrade, 23 P.3d 58, 68-69 (Alaska 2001).

Courts have also held that illegal aliens cannot form the requisite intent to achieve a domicile in the United States. As the Fifth Circuit has explained in Pritchard-Ciriza v. I.N.S., 978 F.2d 219, 223-224 (5th Cir. 1992),

> Since Prichard could not have been lawfully domiciled in the United States when he was in the United States illegally, the time he spent here as an illegal alien, even if it immediately preceded time spent as a lawful resident alien, could not count toward the seven-year requirement.
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> We read Lok v. United States, 681 F.2d 107 (2d Cir.1982) [Lok III], to hold that, while one need not be a permanent resident alien for the entire seven years in order to apply for a section 212(c) waiver, one must be a lawfully resident alien for the entire seven years to do so. See id. at 109-10. . . . An illegal alien is not a lawfully resident alien. Id. at 109. Neither the IJ nor the BIA erred by failing to consider Prichard's eligibility for a section 212(c) waiver at the time of his hearing before the IJ.

On the other hand, in Plyler v. Doe, 457 U.S. 202, 227, n. 22 (1982), the United States Supreme Court has previously stated that

> [a] state may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. And, illegal entry into the county would not, under traditional criteria, bar a person from obtaining domicile within a State. C. Bouvé, Exclusion and Expulsion of Aliens in the United States 340 (1912).

See also cases cited in U.S. v. Otherson, 480 F.Supp. 1369, 1371, n. 4 (S.D. Cal. 1979). As was summarized in Garcia v. Angulo, 644 A.2d 498, 493 (Md. 1994), "[c]ertainly a person with TPS is in a better position to acquire domicile than an illegal alien who is subject to deportation immediately upon discovery."

No decisions from our appellate courts have addressed the question of whether a non-citizen can establish a domicile in South Carolina. However, the Administrative Law Court has considered the question. In Richland County Assessor v. Herrera, 2018 WL 5114185 (18-ALJ-17-0006-cc) (Oct. 9, 2018), the ALC reversed the decision of the Richland County Board of Assessment Appeals "to grant Herrera the special property tax assessment ratio of four percent (4%) based on a legal residence classification." The taxpayer was a native of Honduras, who had been brought to the United States and was "granted 'deferred action' pursuant to the federal program called 'Deferred Action for Childhood Arrivals' (DACA)." The ALC's analysis is instructive here:

> This case involves the interpretation and application of the statute governing an individual's eligibility for a four percent assessment ratio on residential property. S.C. Code Ann. § 12-43-220(c)(2)(i) (Supp. 2017) provides as follows:
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> To qualify for the special property tax assessment ratio allowed by this item, the owner-occupant must have actually owned and occupied the residence as his legal residence and been domiciled at that address for some period during the applicable tax year. A residence which has been qualified as a legal residence for any part of

the year is entitled to the four percent assessment ratio provided in this item for the entire year, for the exemption from property taxes levied for school operations pursuant to Section 12-37-251 for the entire year, and for the homestead exemption under Section 12-37-250, if otherwise eligible, for the entire year.

Section 12-43-220(c) provides a tax exemption and, as such, the statute must be strictly construed against the taxpayer. CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); see also Mead v. Beaufort Cty. Assessor, 419 S.C. 125, 140, 796 S.E.2d 165, 173 (Ct. App. 2016). However, "[t]his rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor. It does not mean that [the Court] will search for an interpretation in [the taxing authority]'s favor where the plain and unambiguous language leaves no room for construction." CFRE, 395 S.C. at 74-75, 716 S.E.2d at 881 (quotation marks and citation omitted); Mead, 419 S.C. at 140, 796 S.E.2d at 173 (quotation marks and citations omitted).

In summary, the statute requires the taxpayer (1) to have owned and occupied the property, as her legal residence and (2) to have been domiciled at that property for some period during the taxable year.

The South Carolina Supreme Court has long recognized a distinction between actual and legal residences but not between legal residence and domicile. Phillips v. S.C. Tax Comm'n., 195 S.C. 472, —, 12 S.E.2d 13, 16 (1940) (""[A] distinction has long been made between actual residence and legal residence." However, "no sound distinction can be drawn between 'legal residence' and 'domicile."D' (emphasis in original).) "A person may have more than one residence, but cannot have more than one domicile ...." Ravenel v. Dekle, 265 S.C. 364, 379, 218 S.E.2d 521, 528 (1975; see also Phillips, 195 S.C. 472, 12 S.E.2d at 18. "[A] person's 'actual residence' will be determined by his or her 'present physical location."D' Estate v. Nicholson ex rel. Nicholson v. S.C. Dep't of Health and Human Servs., 377 S.C. 590, 597, 660 S.E.2d 303, 306 (Ct. App. 2008) (quoting 25 Am. Jur. 2d Domicil § 9 (2008)). "Legal residence" or "domicile," on the other hand, "means the place where a person has his true, fixed and permanent home and principal establishment, to which he has whenever he is absent, an intention of returning. The true basis and foundation of domicile is the intention, the quo animo, of residence." Gasque v. Gasque, 246 S.C.423, 426, 143 S.E.2d 811, 812 (1965) (quoting Phillips, 195 S.C. 472, 12 S.E.2d at 16).

Establishing domicile is ultimately an issue of fact. "The question of domicile is largely one of intent to be determined under the facts and circumstances of each case." Gasque, 246 S.C. at 427, 143 S.E.2d at 812. Likewise, "any expressed intent on the part of a person must be evaluated in the light of his conduct which is either consistent or inconsistent with such expressed intent." Ravenel, 265 S.C. at 379, 143 S.E.2d at 528.

Petitioner concedes that Respondent owns and occupies the subject property. However, Petitioner observes that South Carolina law distinguishes between ""actual

residence" and "legal residence" and argues that Respondent, because of her lack of immigration status, cannot be a legal resident of South Carolina.

Domicile or legal residence requires intent, to be demonstrated by actions and, therefore, by factual findings based on evidence presented by the applicant. In addition to the application and its accompanying certification, S.C. Code Ann. § 12-43-220(c)(2)(iv) (2014 & Supp. 2017) puts the burden of proof to establish eligibility on the applicant, who "must provide proof the assessor requires including, but not limited to:

(A) a copy of the owner-occupant's most recently filed South Carolina individual tax return;

(B) copies of South Carolina motor vehicle registrations for all motor vehicles registered in the name of the owner-occupant;

(C) other proof required by the assessor necessary to determine eligibility for the assessment ratio allowed by this item.

To establish her intent, Respondent presented her driver's license, which uses the property address. She testified that she works and registers her vehicle in Richland County, pays state and federal income taxes, and actually occupies the premises as her only residence. . . . She also presented a Social Security card with a limiting inscription and an Employment Authorization Card. The statute's explicit terms do not specify citizenship or legal immigration status as a requirement, but the assessor is statutorily authorized to ask for other proof as may be required. The documents presented suggest that further information about Respondent's immigration status would be relevant to the assessor's determination.

No South Carolina appellate decisions have addressed the issue raised in this case.... Although Petitioner has cited a number of cases relating to DACA itself and to its role in determining whether individuals could obtain public benefits in other states, the Court finds the persuasiveness of these cases limited by the governing statutes in the jurisdictions where the cases arose. Moreover, S.C. Code Ann. § 8-29-10 (Supp. 2017) answers the state-and-local-public-benefit question for South Carolina. However, this is a tax exemption question, not an issue of entitlement to public benefits.

Nevertheless, Petitioner has cited two cases involving aliens seeking to obtain homestead exemptions under Florida law. . . . The Court finds that those and a related Florida case provide persuasive guidance.

The first case cited by Petitioner, DeQuervain v. Desguin, 927 So.2d 232 (Fla. Dist. Ct. App. 2006), defines its key term, "permanent residence," with language virtually identical to South Carolina's definition of domicile:

that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning.

Id. at 233-234.

In considering an application for the homestead tax exemption, a property appraiser can consider, in addition to the factors statutorily listed, other information including the homeowner's immigration status. The DeQuervain court concluded that an alien with a temporary visa (that is, without a permanent visa) "does not have the legal ability to determine for himself his future status" (quoting Juarrero v. McNayr, 157 So.2d 79, 81 (Fla. 1963)) and without a permanent visa could not prove his intention to become a permanent resident for the purposes of the homestead tax exemption.

In the Matter of John L. Cooke, 412 So.2d 340 (Fla. 1982), the Florida Supreme Court answered a certified question from the United States Court of Appeals, Fifth Circuit. The question presented was whether an alien tourist can place a residence in Florida beyond the reach of creditors under Florida's homestead exemption. Although this question is different from the one before this Court, and is to be liberally construed under Florida law in favor of the taxpayer, the factual context here is similar. Cooke, a Canadian citizen, filed a voluntary bankruptcy petition in which he claimed a homestead exemption on his Florida residence. The bankruptcy trustee disallowed the claimed exemption. Appeals followed that finally resulted in the question being certified to the Florida Supreme Court.

The Florida Supreme Court's analysis, after disposing of tangential issues, focused on the question of Cooke's intent to make the property his family's permanent residence. Under the law at the time, Canadian citizens were not required to obtain a visa to enter the United States as visitors. . . . However, they were required to have a permanent visa if they intended to reside in this country indefinitely. A tourist without a permanent visa cannot be a permanent resident, "and regardless of what his intent is to do in the future, he is incapable of declaring a home in [Florida] as his permanent residence." Cooke, 412 So.2d at 342. The Court finds the discussions in these cases to be helpful in resolving the issue before the ALC.

First, the Canadian citizen (Cooke) with no visa is similarly situated to Respondent in this case. Petitioner can consider Respondent's immigration status. DACA allows her to remain in the United States without documentation that would define her immigration status. Consequently, without that documentation, Respondent cannot form the requisite intent to make the property in South Carolina her domicile for the purposes of the tax exemption in question. As a result, Respondent does not meet the statutory requirements of S.C. Code Ann. § 12-43-220(c)(2)(i) (2014 & Supp. 2017) and thus cannot qualify for the special property tax assessment ratio of four percent on residential property allowed by this code section.

Conclusion

As we concluded in the June 12, 2009 Opinion, discussed above, "[i]n order to receive either the four-percent special assessment ratio or a homestead exemption, the property in question must be the legal residence of the taxpayer. According to South Carolina law, a person's legal residence is where they are domiciled." Domicile, as we have explained, is based upon "'an indefinite time in such place.'" Such intent "'is primarily a question of fact, determined on a case by case basis.'" Id.

Accordingly, we agree with you that there is no "hard and fast" or "bright line" rule with respect to the establishment of domicile for purposes of the four-percent special assessment ratio or homestead exemption. Such determination must be made on a case by case basis, after full investigation by the officials of the county (i.e. Assessor, etc.) and ultimately by the courts.

We have discussed herein a number of cases in other jurisdictions and a decision of our Administrative Law Court which have addressed the question of whether a noncitizen may establish domicile in this country or a particular state or county thereof. While these decisions have reached varying conclusions, depending upon the particular facts, it is clear that by the very nature of the requirements of domicile, only a unique set of facts will meet the test. As one court has stated, "[t]he absence of an alien from his [own] domicile often makes it difficult to determine whether he should be held to have intended to abandon such domicile." In re Zenzola, 43 F.2d 648, 649 (E.D. Mich. 1930).

Generally speaking, those aliens who are here illegally are deemed unable to establish domicile in the United States. As the Fifth Circuit has recognized, "[a]n illegal alien is not a lawfully resident alien." But see Plyler v. Doe, supra. On the other hand, courts elsewhere have held that those noncitizens who are present in the United States lawfully, may or may not establish domicile, depending upon the legal basis for their presence here. For example, in Elkins v. Moreno, 435 U.S. 647, 665 (1978), the Supreme Court recognized that "Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication not to seek domicile in the United States." And, as another court has summarized, "'[i]f aliens are here for a temporary purpose, they cannot establish domicile. Conversely, if they intend to stay, they violate the terms of their admission and are no longer here lawfully.'" Melian v. I.N.S., 987 F.2d 1521, 1525 (11th Cir. 1993).

While our appellate courts have not addressed this issue, our Administrative Law Court (ALC) has concluded in the Herrera decision that "DACA allows [the alien] to remain in the United States without documentation that would define her immigration status . . . and thus cannot qualify for the special property tax ratio of four percent on residential property...." The ALC cited with approval a decision of the Florida Supreme Court, which stated that a "'tourist without a permanent visa cannot be a permanent resident.'"

Again, the ultimate decision of domicile depends upon the facts, rests with each county following a full investigation, and, of course, any such determination is subject to judicial review. Because the determination of domicile is ultimately a fact-based decision to be made by county officials, we cannot go beyond what we have said here.

Sincerely,

Robert D. Cook
Solicitor General