

Opinion No. 2012-122

December 4, 2012

The Honorable Vann Stone  
Prosecuting Attorney  
Nineteenth Judicial District West  
Benton County Courthouse  
100 NE "A" Street  
Bentonville, Arkansas 72712

Dear Mr. Stone:

This is in response to your request for my opinion on the following questions concerning the residency requirement for elected city attorneys:

1. Can an elected official, such as a city attorney, by refusing to update addresses on a driver's license or other documents, legally continue to serve even though they actually reside outside the city limits?
2. Is Attorney General Opinion No. 2007-302 still the interpretation of the Attorney General on this issue, or have any recent statutes or cases caused that interpretation to change?
3. What legal remedies or procedures are available to a mayor, city council, or any other interested party when it is believed that a city attorney has moved outside the political subdivision to which he or she was elected?
4. Is there any legal authority that allows a city council to declare a vacancy in the office of city attorney?

As background for these questions, you have attached correspondence from the Mayor of Lowell, Arkansas, relating the Mayor's investigation into reports that

Lowell’s city attorney has “moved out of the house he and his family shared with his mother and purchased and moved into a home in or just east of Rogers, Arkansas.”

## **RESPONSE**

It is my opinion in response to your first question that an elected city attorney must continue to reside within the city throughout his or her term of office in order to remain eligible to hold that office. I must stress, however, that I cannot opine on the purely factual question of whether the city attorney at issue in your request is a qualified resident of the city. The residency determination will turn on the specific surrounding facts, and will not be decided based solely on the address listed on a driver’s license or other documents. Your second question requires reference to *State v. Jernigan*, 2011 Ark. 487, \_\_\_S.W.3d\_\_\_ (2011), wherein the Arkansas Supreme Court held that a statute requiring certain municipal officials to “reside” within the city limits does not include a domiciliary requirement. The court did not discuss the “qualifications of an elector” requirement under Article 19, Section 3 of the Arkansas Constitution that was addressed in Op. Att’y Gen. 2007-302.<sup>1</sup> We therefore cannot draw any clear conclusions from this case that would cause a change in that opinion. With regard to your third question, as explained further below, if the elected city attorney in fact no longer meets the residency requirement for holding office, then there are three possible causes of action that might be employed to remove him from office. The answer to your fourth question is “no,” in my opinion. Although the city council of a city of the first class is plainly authorized to fill a vacancy in the office of elected city attorney, it seems equally clear that this authority does not include the power to declare the existence of a vacancy.

## **DISCUSSION**

***Question 1 - Can an elected official, such as a city attorney, by refusing to update addresses on a driver’s license or other documents, legally continue to serve even though they actually reside outside the city limits?***

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<sup>1</sup> Article 19, section 3 states that “[n]o persons shall be elected to, or appointed to fill a vacancy in, any office who does not possess the qualifications of an elector.”

I have previously opined that an elected city attorney must continue to reside within the city throughout his or her term of office.<sup>2</sup> This conclusion was based on Ark. Const. art. 19, § 3,<sup>3</sup> and A.C.A. § 14-43-314. The latter statute authorizes a city to contract with a “nonresident attorney” until a “qualified [resident] city attorney is elected or qualified,” thus demonstrating the continuing nature of the residence requirement.<sup>4</sup> I therefore concluded that the statute’s wording supports the requirement implicit in art. 19, § 3, that all office holders maintain their residence in the political subdivision throughout their service.<sup>5</sup>

This office has previously observed in this regard that the term “residence” as a qualification for office holding is generally deemed to denote “domicile.” As stated by one of my predecessors:

[Q]ualified elector status for office-holding purposes is determined by the officer’s domicile. See A.C.A. § 7-5-201(b) (conditioning voter residence on domicile); *Valley v. Bogard*, 342 Ark. 336, 345, 28 S.W.3d 269 (2000), *Charisse v. Eldred*, 252 Ark. 101, 102-03, 477 S.W.2d 480, 480 (1972) (equating “residence” with “domicile” in determining the qualifications of a public official). Generally, “residence” ordinarily means physical presence within the jurisdiction while “domicile” also includes the subjective intent to maintain one’s permanent home in the jurisdiction. *Hogan v. Davis*, 243 Ark. 763, 422 S.W.2d 412 (1967). A person may have two places of residence, but only one domicile. The Arkansas Supreme Court has stated that “domicile” is dependent to some extent upon the intention of the person involved. *Charisse v. Eldred, supra*,

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<sup>2</sup> Op. Att’y Gen. 2007-302.

<sup>3</sup> The Arkansas Supreme Court has interpreted Article 19, Section 3’s so-called “qualified elector” requirement to include residence in the political subdivision to be served, including a municipality. *Benton v. Gunter*, 342 Ark. 543, 29 S.W.3d 719 (2000); *Davis v. Holt*, 304 Ark. 619, 804 S.W.2d 362 (1991); *Charisse v. Eldred*, 252 Ark. 101, 477 S.W.2d 480 (1972); *Thomas v. Sitton*, 213 Ark. 816, 212 S.W.2d 710 (1948); *McClendon v. Board of Health of City of Hot Springs*, 141 Ark. 114, 216 S.W. 289 (1919).

<sup>4</sup> A.C.A. § 14-43-314(c)(2)(A) (Supp. 2011). This statute applies to mayor-council cities with a population of 50,000 or more. The statutes applicable to cities with populations under 50,000 and 5,000, respectively, contain identical language identifying attorneys residing in the city as “qualified” to be city attorney. A.C.A. §§ 14-43-315 and 14-43-319 (Supp. 2011).

<sup>5</sup> Op. 2007-302 at 5.

citing *Phillips v. Melton*, 222 Ark. 162, 257 S.W.2d 931 (1953); *Ptak v. Jameson*, 215 Ark. 292, 220 S.W.2d 592 (1949); *Wilson v. Luck*, 201 Ark. 594, 146 S.W.2d 696 (1941); and *Wheat v. Smith*, 50 Ark. 266, 7 S.W. 161 (1887). See also *Pike Co. Sch. Dist. No. 1 v. Pike Co. Ed. Bd.*, [247 Ark. 9, 444 S.W.2d 72 (1969)]; Op. Att’y Gen. Nos. 95-222A and 92-112. The determination of a person’s domicile is a question of fact in each instance. *Phillips v. Melton*, [*supra*].<sup>6</sup>

You state under your question that the elected city attorney “actually reside[s] outside the city limits.” But a finder of fact intent on determining whether he is a “qualified elector” of the city might well explore the factual question whether he nevertheless remains “domiciled” within the city. As noted in the above excerpt, domicile is the relevant inquiry under the statute that defines “voting residence” for purposes of determining whether one is a qualified elector:

“Voting residence” shall be a voter’s domicile and shall be governed by the following provisions:

- (1) The domicile of a person is that place in which his or her habitation is fixed to which he or she has the intention to return whenever he or she is absent;
- (2) A change of domicile is made only by the act of abandonment, joined with the intent to remain in another place. A person can have only one (1) domicile at any given time;

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<sup>6</sup> Op. Att’y Gen. 2002-105 (addressing Ark. Const. art. 19, § 3’s qualified elector requirement as applied to the office of city treasurer). See also Op. Att’y Gen. Nos. 2008-012; 2007-055; 2006-166; 2004-125; 2003-278; 97-288; 96-265; 94-236; 95-057; Op. 88-208. As one of my predecessors aptly observed:

The determination that a person must have his domicile in a jurisdiction, rather than simply his residence, in order to be a qualified elector is consistent with the Arkansas Supreme Court’s conclusion that the constitution “excludes the notion that a person may be qualified to vote in two or more counties at the same time.” *Harris v. Textor*, 235 Ark. 497, 361 S.W.2d 75 (1962).

Op. Att’y Gen. 94-164. *Accord Clement v. Daniels*, 366 Ark. 352, 355, 235 S.W.3d 521 (2006) (noting that “for the purpose of a voter or a public official, a person does not have two domiciles with a right to choose between them; his domicile is either at one place or the other.”)

(3) A person does not lose his or her domicile if he or she temporarily leaves his or her home and goes to another country, state, or place in this state with the intent of returning;

(4) The place where a person’s family resides is presumed to be his or her place of domicile, but a person may acquire a separate residence if he or she takes another abode with the intention of remaining there;

(5) A married person may be considered to have a domicile separate from that of his or her spouse for the purposes of voting or holding office. For those purposes, domicile is determined as if the person were single; and

(6) Persons who are temporarily living in a particular place because of a temporary work-related assignment or duty post or as a result of their performing duties in connection with their status as military personnel, students, or office holders shall be deemed residents of that place where they established their home prior to beginning such assignments or duties.<sup>7</sup>

It should perhaps also be emphasized that while the court has recognized that intention is relevant to the question of residence when determining qualifications of voters and public officials, the person’s conduct must be consistent with their asserted residency.<sup>8</sup> This principle is succinctly expressed in the following excerpt from *Clement v. Daniels*, *supra* n. 6, involving the constitutional seven-year residency requirement for holding the office of Lieutenant Governor:<sup>9</sup>

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<sup>7</sup> A.C.A. § 7-5-201(b) (Repl. 2011). The term “office holders” under subsection 7-5-201(b)(6) reasonably has reference to those whose official duties require residence in another jurisdiction. *See, e.g., Wheat v. Smith*, 50 Ark. 266, 7 S.W. 161, 166 (1888) (noting that it is “well settled that when an ambassador or consul is sent by one government to represent his state in a foreign land, his continuous residence in the foreign land, if referable to his official duties, does not work a change of his domicile.”)

<sup>8</sup> *See Valley v. Bogard*, 342 Ark. 336, 345, 28 S.W.3d 269 (2000); *Womack v. Foster*, 340 Ark. 124, 8 S.W.3d 854 (2000); *Jenkins v. Bogard*, 335 Ark. 334, 980 S.W.2d 270 (1998); *Pike Co. Sch. Dist. No. 1 v. Pike Co. Ed. Bd.*, 247 Ark. 9, 444 S.W.2d 72 (1969); *Williams v. Dent*, 207 Ark. 440, 181 S.W.2d 29 (1944).

<sup>9</sup> Ark. Const. amend. 6, § 5 provides that “[t]he Lieutenant Governor shall possess the same qualifications of eligibility for the office as the Governor.” Pursuant to Ark. Const. art. 6, § 5, “[n]o person shall be

As previously discussed, “[n]o person shall be eligible for the Office of Governor or Lieutenant Governor except a citizen of the United States who . . . shall have been seven years a resident of Arkansas.” In determining the qualifications of voters and public officials, the word “residence” has usually been treated as if it were synonymous with “domicile” and dependent to some extent upon the intent upon the person involved. *See Jenkins v. Bogard*, 335 Ark. 334, 980 S.W.2d 270 (1998). In other words, the determination of residence is a question of intention, to be ascertained not only by the statements of the person involved, but also from his conduct concerning the matter of residence. *Id.* (citing *Phillips v. Melton*, 222 Ark. 162, 164, 257 S.W.2d 931, 932 (1953)).<sup>10</sup>

The Arkansas Supreme Court has further admonished that “[w]hen acts are inconsistent with a person’s declarations, the acts will control, and declarations must yield to the conclusions to be drawn from the facts and circumstances proved.”<sup>11</sup>

In sum, for purposes of holding office, “residence” has generally been treated as if it were synonymous with a person’s domicile. And fact questions can arise in determining a person’s domicile.<sup>12</sup> With regard to your particular question, the reference to a refusal to update addresses on certain documents could suggest that the official maintains he has not changed his domicile. However, it is highly unlikely that the issue will turn on that fact. Instead, a court faced with the question will probably look to a number of factors, including the exercise of political rights, payment of personal taxes, a house of residence and a place of business.<sup>13</sup>

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eligible for the office of Governor except a citizen of the United States who . . . shall have been seven years a resident of this State.”

<sup>10</sup> 366 Ark. at 355.

<sup>11</sup> *Charisse, supra*, n. 3, 252 Ark. at 105. *See also Hogan v. Davis*, 243 Ark. 763, 422 S.W.2d 412 (1967).

<sup>12</sup> *See, e.g.*, Op. Att’y Gen. 2004-203 (observing that an alderman might qualify as maintaining his domicile in the ward he represents in circumstances where he sold his former home and proposed to rent a home outside the ward while constructing a new house in the ward).

<sup>13</sup> *See generally* Op. Att’y Gen. 94-208; *Clement, supra* n. 6.

***Question 2 - Is Attorney General Opinion No. 2007-302 still the interpretation of the Attorney General on this issue, or have any recent statutes or cases caused that interpretation to change?***

I opined in this 2007 opinion that an elected city attorney must, pursuant to Ark. Const. art. 19, § 3, continue to reside within the city throughout his or her term of office. I am unaware of any statute or case that calls that interpretation into question.

As noted above, I also opined, consistent with previous Attorney General opinions and case law in the subject area, that the term “residence” as a qualification for office holding is generally deemed to denote “domicile.” A recent case that bears some discussion on this point is *State v. Jernigan*, 2011 Ark. 487, \_\_\_S.W.3d\_\_\_ (2011). As framed by the court, the issue in *Jernigan* was “whether Jernigan [the mayor-elect of Lepanto] met the residency requirements of section 14-42-201(c)(1)[.]”<sup>14</sup> The State, through the prosecuting attorney,<sup>15</sup> argued that the mayor-elect did not reside within the city, as required by this statute, because “the evidence suggested ... he had no intention of abandoning his home outside the city limits.”<sup>16</sup> It seems the prosecuting attorney was arguing that there had been no change of domicile, but the court held that the statute contains no domiciliary requirement:

The term “reside” is not defined in the statute. According to *Black’s Law Dictionary*, “reside” means “[l]ive, dwell, abide, sojourn, stay, remain, lodge.” *Id.* at 1176 (5th ed. 1979). Similarly, this court has stated that the act of residing in a particular area means “‘living’ there [or] being ‘physically present’” there. *Jenkins v. Bogard*, 335 Ark. 334, 342, 980 S.W.2d 270, 274 (1998); *see also Hogan v. Davis*, 243 Ark. 763, 766, 422 S.W.2d 412, 414 (1967) (stating that, generally, “residence” means physical presence in a particular location).

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<sup>14</sup> Section 14-42-201(c)(1) (Supp. 2011) states that candidates for mayor, clerk, recorder, and treasurer “must reside within the corporate municipal limits at the time they file as candidates and must continue to reside within the corporate limits to retain elective office.”

<sup>15</sup> The prosecutor filed a petition for a writ of *quo warranto* seeking to remove the mayor from office.

<sup>16</sup> 2011 Ark. 487, at 5.

***We are not persuaded by the State’s contention that section 14-42-201(c)(1) requires that a candidate intend to be domiciled within the corporate municipal limits.***<sup>17</sup>

The court concluded that “for the purposes of section 14-42-201(c)(1), the legislature intended for “reside” to mean “live” or “be physically present.””<sup>18</sup> The court reasoned that the legislature would not have used the word “reside” in the statute had it intended to include a “domiciliary requirement.”<sup>19</sup> It further compared section 14-14-201(c)(1) to the statute governing the residency requirement for county officers, commenting that “the legislature could have defined [reside] to include domiciliary intent, as it did in Arkansas Code Annotated 14-14-1306....”<sup>20</sup>

As framed by the court, therefore, *Jernigan* “involve[ed] an issue of statutory interpretation”<sup>21</sup> – specifically, the question of legislative intent under A.C.A. § 14-42-201(c)(1). Under the court’s interpretation of this statute, a person qualifies as a mayoral candidate if he is physically present, i.e., lives, in the city he wishes to serve. Significantly, the court in no way based its holding on any discussion of constitutional residency requirements, which were apparently not at issue at the trial level or on appeal. We therefore cannot draw any clear conclusions from this case that would cause a change in Attorney General Opinion 2007-302, or similar

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<sup>17</sup> *Id.* at 7 (emphasis added).

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* Section 14-14-1306 states:

(a) All county, county quorum court district, and township officers shall reside within their respective townships, districts, and counties.

(b) An office shall be deemed vacant if a county officer removes his legal residence from the county or if a district or township officer removes his legal residence from the district township from which elected.

(c) For purposes of this section, legal residence shall be defined as the domicile of the officer evidenced by the intent to make such residence a fixed and permanent home.

<sup>21</sup> 2011 Ark. 487, at 6.

opinions of my predecessors that have addressed the constitutional qualified elector requirement for holding office.<sup>22</sup>

One aspect of the case that potentially relates to the constitutional requirement nevertheless bears noting. For reasons that are not entirely clear, immediately after affirming the trial court’s application of statutory law, the court in dictum offered various comments regarding what the court itself clearly considered the parties’ irrelevant debate about the relationship between “residence” and “domicile” outside the immediate statutory context. The court specifically expressed its desire to clarify its declaration in another case that “[i]n determining qualifications of voters and public officials, the word ‘residence’ has usually been treated as if it were synonymous with ‘domicile’ and dependent to some extent upon the intention of the person involved.”<sup>23</sup> *Charisse* involved the qualified elector requirement under Ark. Const. art. 19, § 3. The court thus appears to have had the *constitution* in mind when, in terms of the issues on appeal, it made a clearly gratuitous effort to clarify this principle by offering the following:

A better statement of the law is that, in determining the residency of voters and public officials, this court has considered (1) whether a person was physically present in a particular location, or (2) whether a person intended to establish a domicile in a particular location. In other words, if a candidate was unable to establish residency by showing physical presence in the requisite location, this court has allowed a candidate to establish residency by showing domiciliary intent in the requisite location. [Footnote omitted.]<sup>24</sup>

Despite the court’s characterization of its formulation as “[a] better statement of the law,” the formulation could be easily misread. It might at first glance suggest that the court believes being physically present, i.e., living, in the relevant jurisdiction will, standing alone, in all circumstances establish one’s residence for purposes of the constitutional qualified elector imperative. Upon further review, however, I believe it is more likely that the court is simply observing that

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<sup>22</sup> Cf. *Benton v. Gunter*, *supra* n. 3, 342 Ark. at 547 (Glaze, T., concurring) (“Whether a person who is running to fill a municipal court vacancy must be a qualified elector of the municipality is a constitutional issue, not just a statutory one.”).

<sup>23</sup> 2011 Ark. 487, at 9, quoting *Charisse v. Eldred*, *supra* n. 3, 252 Ark. at 102-03.

<sup>24</sup> *Id.* at 9-10.

domiciliary intent is not invariably at issue in the constitutional inquiry. If, for instance, there is no dual residence issue, then there will be no real dispute as to domicile; and it will be unnecessary to inquire into domiciliary intent – or at least the person’s statement of intent will be irrelevant. Where the person is living will determine their residence in that instance.

I believe this is reflected in the cases cited in the omitted footnote in the above “better statement of the law.” Each of these cases involved a candidate for public office. Intent was deemed immaterial in these cases in light of the fact that the candidate had never been physically present, i.e., lived in the jurisdiction at all, or for the requisite period. The court simply declined in those cases to elevate the party’s expressed “intent” to the point of deciding the residency issue.

One of the cited cases, *Jenkins v. Bogard*,<sup>25</sup> is illustrative. *Jenkins* involved the one-year durational residency requirement for state senators and representatives under Ark. Const. art. 5, § 4. It was contended that Mr. Jenkins was ineligible because he had not resided in the relevant district for one year. The court quoted *Charisse* regarding “residence” as usually synonymous with “domicile” and dependent to some extent upon intent.<sup>26</sup> Mr. Jenkins presented evidence that he intended for the district to be his residence throughout the year preceding the election.<sup>27</sup> But he did not actually move into the district until spring of the election year, and his expression of domiciliary intent could not make up for the lack of physical presence. Being “physically present” was the “essential ‘conduct’” in that case.<sup>28</sup>

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<sup>25</sup> 335 Ark. 334, 980 S.W.2d 270 (1998).

<sup>26</sup> 335 Ark. at 341 (also quoting *Phillips v. Melton*, 222 Ark. 162, 164, 257 S.W.2d 931, 932 (1953): “The determination of residence is a question of intention, to be ascertained not only by the statements of the person involved, but also from his conduct concerning the matter of residence.”).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (observing that “[t]he essential ‘conduct’ that is missing is the act of ‘residing’ in District 10, i.e., ‘living’ there, being ‘physically present’ there beyond work and civic activities. We cannot ignore the fact that Mr. Jenkins lived in District 11 until March 1998.”) *See also Cummings v. Washington County Election Comm’n*, 291 Ark. 354, 724 S.W.2d 486 (1987) (also cited in the *Jenkins* footnote, holding that a woman who lived on land located partly in one school district and partly in another was not eligible to serve on the school board of the school district in which the home was not located.)

In another case cited in the *Jenkins* footnote, however, the court plainly recognized that in some instances domicile will be in question, and intent will be relevant to the residency determination, notwithstanding the fact that the person is physically present in the particular location. In *Davis v. Holt*, the court observed that “intent is relevant to the question of domicile when a party has more than one residence....”<sup>29</sup> The court in *Davis* also noted that intent is relevant if a person “has departed from a residence for a temporary stay elsewhere with the intention of returning....”<sup>30</sup> Thus, the presence or absence of the “essential conduct” of living in the requisite location will not be sufficient in all circumstances to determine the residency issue.

I can only surmise in light of the cases cited in *Jernigan* that the court’s limited objective in attempting to clarify its previous declaration in *Charisse* was to disabuse the parties of the notion that any inquiry into residence will of necessity involve an inquiry into domiciliary intent. As noted, I view this as a “limited objective.” It may be that at some point in the future the court, faced with a constitutional objection, will elaborate upon this statement. But I see no clear basis in *Jernigan* for modifying the constitutional analysis set forth in Attorney General Opinion 2007-302, and other similar opinions of this office.

***Question 3 - What legal remedies or procedures are available to a mayor, city council, or any other interested party when it is believed that a city attorney has moved outside the political subdivision to which he or she was elected?***

There are three possible causes of action that might be employed to remove an elected city attorney from office based upon his or her failure to meet the residency requirement for holding office.

A petition for a common law writ of *quo warranto* may be filed by a prosecuting attorney seeking on behalf of the state to remove to remove a person from office if they are ineligible to hold the office.<sup>31</sup> An ineligible elected city attorney is also

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<sup>29</sup> 304 Ark. 619, 623, 804 S.W.2d 362 (1991).

<sup>30</sup> *Id.*

<sup>31</sup> *See Robinson v. Jones*, 194 Ark. 445, 447, 108 S.W.2d 901 (1937) (“We are of the opinion that ... the prosecuting attorney, as the representative of the state, is authorized to maintain actions in the nature of proceedings *quo warranto* to oust any and all persons from offices to which they are not eligible, or the right to hold which they may have forfeited.”).

subject to removal from office through a usurpation action under the provisions of A.C.A. § 16-118-105 (Repl. 2006).

The third possible cause of action to remove an ineligible elected city attorney is a taxpayer suit under the provisions of Ark. Const. art. 16, § 13, sometimes called the “illegal exaction” provision. A somewhat similar action was instituted in *White, Governor v. Hankins*, 276 Ark. 562, 637 S.W.2d 603 (1982), wherein a gubernatorial appointment to the Arkansas Highway Commission was challenged on grounds that the appointee’s residence made him ineligible to serve. The court held that, as the Commission is responsible for spending tax monies, a citizen and taxpayer is entitled under Ark. Const. art. 16, § 13, to bring a action challenging an appointment that might cause the composition of the Commission to be unlawful.<sup>32</sup> Although a taxpayer lawsuit of this nature would not technically have the effect of ousting the elected city attorney, it could have this practical effect. For a discussion of this issue, see Wills, *Constitutional Crisis: Can the Governor (Or Other Officeholder) Be Removed From Office In a Court Action After Being Convicted of a Felony?*, 50 Ark. L. Rev. 221 (1997).

***Question 4 - Is there any legal authority that allows a city council to declare a vacancy in the office of city attorney?***

Although the city council of a city of the first class is given authority to fill vacancies in the office of elected city attorney by A.C.A. 14-43-412,<sup>33</sup> that authority does not include the power to declare the existence of a vacancy. My predecessors have noted, and I agree, that where no statute expressly provides that a vacancy is created upon an incumbent’s subsequently becoming ineligible to hold an office, the mere existence of the ineligibility does not create a vacancy if the incumbent was eligible to hold the office upon assuming it.<sup>34</sup> According to my

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<sup>32</sup> See also *Spradlin v. Arkansas Ethics Commission*, 314 Ark. 108, 858 S.W.2d 684 (1993) (taxpayer suit utilized to challenge an appointment to the Ethics Commission); *Beshear v. Ripling*, 292 Ark. 79, 728 S.W.2d 170 (1987) (taxpayer suit challenging the payment of salary to one allegedly unlawfully in office); *Jones v. Clark, Attorney General*, 278 Ark. 119, 644 S.W.2d 257 (1983) (taxpayer suit challenging the Attorney General’s holding of a military position in violation of the Constitution of Arkansas).

<sup>33</sup> Subsection 14-43-412(a) (Supp. 2011) provides: “In case any office of an elected officer, except aldermen of the ward, becomes vacant before the expiration of the regular term, then the vacancy shall be filled by the city council until a successor is duly elected and qualified.”

<sup>34</sup> E.g. Op. Att’y Gen. 2008-012 (citing *May v. Edwards*, 258 Ark. 871, 529 S.W.2d 647 (1975) and *Stafford v. Cook*, 159 Ark. 438, 252 S.W. 597 (1923)). See also Op. Att’y Gen. Nos. 95-296; 89-251; 88-208.

review, there is no statute specifying the existence of a vacancy if an elected city attorney no longer resides in the city. In such a case, the subsequent ineligibility may afford grounds for removal under one of the causes of action noted above in response to Question 3. But it must be concluded that the lack of eligibility does not create an automatic vacancy that can be declared by the council.<sup>35</sup>

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM/EAW:cyh

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<sup>35</sup> A vacancy may be created by the officer’s abandonment of the office, although a clear intention to abandon must be shown. *Id.* (citing *City of Berryville v. Binam*, 222 Ark. 926, 264 S.W.2d 421 (1954) and *State v. Green*, 206 Ark. 361, 175 S.W.2d 575 (1944)).