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Local Governments
UPDATE

March 2011

RESIDENCY, ONCE ESTABLISHED, CONTINUES IF NOT ABANDONED: SO EMANUEL STAYS IN – AND WINS – CHICAGO'S MAYORAL RACE

Illinois Supreme Court's decision reinforces (mostly) settled law

An election controversy which spawned headlines and news stories across the country drew to an expedited close late in January, when the Illinois Supreme Court held that former White House Chief of Staff Rahm Emanuel satisfied statutory residency requirements and could remain on the ballot as a Chicago mayoral candidate in the consolidated primary election held on February 22. The race for Mayor ended on that date, with Emanuel celebrating a 55%-of-the vote victory, and Chicago contemplating a post-Daley era.

The decision in *Maksym v. Bd. of Election Commissioners*, __ Ill.2d__ , 2011 WL 242421 (No. 111773, Jan. 27, 2011) conclusively settled that the test for whether a candidate "resides in" the jurisdiction in which he seeks public office is the *same* test used to determine residency for voter eligibility purposes – although a particular statute may prescribe longer qualifying *periods* of residency for candidates than for voters.

Maksym will be a staple citation in future voter or candidate residency disputes. As this *Newsletter* will discuss, the Court's analysis and restatement of the legal test for residency may also become a touchstone in other contexts in which being a "resident" of a particular jurisdiction is a condition of appointment to office, or to public employment or entitlement to governmental benefits dispensed by that jurisdiction.

Emanuel Objectors: He's Gone Away for to Stay at Least a While

Walter Maksym and Thomas McMahon filed written objections to Rahm Emanuel's mayoral candidacy, asserting that he did not "reside in" Chicago for one year preceding the February 22 election as required by the Illinois Municipal Code. The evidence at the Board of Election Commissioners hearing showed that in 1998, Emanuel purchased and lived with his family in a home on Hermitage Avenue on the city's northwest side, in the Congressional district he represented until January 2009. That month, he resigned his U.S. House seat to become President Obama's Chief of Staff, and thereafter lived in Washington, D.C. until October 2010. From June 2009 until October 1, 2010, he and his family lived in a rented house in Washington, D.C.

Candidate: But I'm Coming Back for to Live in Hometown Style

The Emanuel family left various household furnishings and some personal possessions at the Hermitage Avenue house, which was leased to another family for the term September 1, 2009 through June 30, 2011. Emanuel paid property taxes on the Hermitage Avenue house, continued to hold an Illinois driver's license listing it as his address, and continued to vote with it as his registered voting address.

He testified at the hearing that he had always expected to serve as Chief of Staff for 18 to 24 months before returning to Chicago to live in that home.

Rulings Reversed on Appeal; Illinois Supreme Court Takes Case

The objectors argued that Emanuel's renting out the Hermitage Avenue House meant that he had – as a matter of law – "abandoned" it as a residence. The Chicago Board of Election Commissioners dismissed the objections on January 4, determining after a hearing that Emanuel satisfied the residency requirements. The Cook County Circuit Court affirmed the Board's decision, but the Illinois Appellate Court overturned the two earlier rulings on January 24, 2011. The Illinois Supreme Court swiftly agreed to review the case – halting the printing of the February 22 election ballots on January 25, and then reversing the appellate court decision two days later.

"**Residency" of Candidates for Municipal Office, Revisited**

The Municipal Code generally provides that a person is not eligible for an elective municipal office unless that person is a qualified elector of the municipality and "has resided in" the municipality for at least one year next preceding the election. 65 ILCS 5/3.1-10-5(a). Under the Election Code, a "qualified elector" is a person who has resided in Illinois and in the election district for 30 days next preceding any election in that district, and who is a U.S. citizen at least 18 years of age. 10 ILCS 5/3-1. A "permanent abode" is required to constitute a residence within the meaning of Section 3-1. No elector or spouse shall be deemed to have lost his or her residence in any precinct or election district "by reason of his or her absence on business of the United States, or of this State." 10 ILCS 5/3-2.

In *Maksym*, the appellate court noted that these provisions require a candidate to be qualified elector of the municipality *and* to have "resided in" the municipality for at least one year prior to the election or appointment. The court looked to the Election Code to analyze whether Emanuel was a qualified elector. However, it employed statutory construction rules to conclude that the phrase "resided in" must have a different meaning. The court suggested it must mean "actually living" or "actually residing", interpreting the Municipal Code language to require actual physical presence for one year before the election.

Supreme Court Reinstates Board of Elections Ruling

The Supreme Court reversed, in a sharply worded opinion which rejected the appellate panel's interpretation of the term "reside". It held that under the Election Code, "residency" and "permanent abode" mean the same thing, and the Municipal Code phrase "reside in" should be interpreted in keeping with the concept of residency in the Election Code.

Moreover, according to the Supreme Court, Illinois law on what it means to be a resident for election purposes "has been consistent...since at least the 19th century." To *establish* residency, two elements are required: (1) physical presence, and (2) an intent to remain in that place as a permanent home. Once residency has been established, the test is no longer physical presence but rather, *abandonment*:

> ...[T]he presumption is that residency continues, and the burden of proof is on the contesting party to show that residency has been abandoned. Both residence and abandonment are a question of intent, and while intent is gathered primarily from a person's acts, a candidate is absolutely competent to testify as to his intention, though such testimony is not necessarily conclusive.

Concurring Justices Freeman and Burke agreed that Emanuel had not abandoned his residency or lost his permanent abode by renting it out during the statutory pre-election residency period. However, they criticized the harsh tone and breadth of the Court majority's opinion, cautioning that the opinion

> ... will raise questions beyond the facts of this case. Because the court holds that residency has one settled meaning, and that meaning rests on a person's intent, today's decision will have implications for residency requirements for in-state tuition, residency requirements for municipal employees such

as police officers and firefighters, residency requirements for school districts and other similar situations.

Does the Court's decision muddy the waters for municipalities, school districts, and colleges called upon to make residency determinations in other contexts? Or will it actually help to dispel confusion?

Residency Qualifications for Municipal Appointees

Maksym clearly prescribes the test for residency qualifications for elected municipal offices. What about residency qualifications for individuals appointed to fill *vacancies* in elected offices, or other appointed municipal positions?

The Municipal Code requires that "[n]o person shall be eligible for any appointive municipal office unless that person is a qualified elector of the municipality or [as] otherwise provided by law." 65 ILCS 5/3.1-10-6(a). Thus, the general requirement is that elected *and* appointed municipal positions must be filled by "qualified electors" – which under *Maksym*, should be understood as referring to individuals who meet the Election Code residency test described above.

Residency in the jurisdiction – or lack of it – may also control whether a person may *continue* in his or her elected or appointed position. Thus, the Municipal Code provides that a vacancy in office occurs by reason of (among other circumstances) "more than temporary removal of residence from the municipality" or, in the case of a ward alderman or district councilman or trustee, "more than temporary removal of residence from the ward or district". 65 ILCS 5/3.1-10-50(c)(1).

In light of the *Maksym* Court's observation that a removal of long duration may not always signify abandonment of an established residency (intent is always key), a municipality could encounter difficulty in declaring an office to be vacant on the ground that its holder had "more than a temporary removal" of residence. Rather than relying only upon this provision, a municipality may want to consider invoking other pertinent provisions of the Municipal Code as the basis for declaring that an officeholder has vacated his or her position, when such other authority is available.

The Municipal Code contains exceptions to residency requirements for officers who require technical training or knowledge, such as municipal engineers, health officers, attorneys, and appointed village treasurers, appointed village clerks, and appointed village collectors. 65 ILCS 5/3.1-10-6(b).

Municipal Employees

Municipalities can generally require non-bargaining unit employees to reside within the applicable municipal corporate limits by ordinance. Municipalities with populations of under 500,000 *may* adopt ordinances allowing policemen and firemen to reside outside the corporate limits. 65 ILCS 5/3.1-10-6(c). Absent such an ordinance, police and fire employees must in theory reside in the municipality they serve. Exceptions can be created by collective bargaining agreements. Most police/fire residency requirements are addressed in such agreements, as residency is a mandatory topic of bargaining. Municipalities which retain residency requirements for police/fire or other employees can contractually define what they mean by "reside in" so as to avoid the complications of the *Maksym* decision.

Harder questions may arise if, for example, a firefighter summers at the family cottage in Wisconsin, Indiana, or Michigan: has he or she violated the village's residency requirement? Again, this may depend upon the bargaining agreement's definition of residence – which should perhaps be reviewed and modified in light of *Maksym*, even if a village is not seeking to change the substance of its residency requirement.

Schools and Colleges: Residence Requirements for Students...

Under Illinois law, only children who reside in a school district are entitled to attend the schools of that district on a tuition-free basis, except when provisions of the Education for Homeless Children Act apply. *See* 105 ILCS 5/10-20.12a (requiring districts to charge non-resident pupils tuition in an amount not to exceed 110% of the preceding year's *per capita* cost of maintaining the district schools). Courts presume that a minor's residence is that of her or her parents or guardians.

Although some residence disputes involve claims that a student resides in the district even though his or her parents do not, student residency questions more commonly arise when there is doubt that the family actually makes its home in the school district where the child is attending school. In those cases, the key issue may be whether the parents ever established residence in the district, or it may be whether they have abandoned a previously established residence there. Either way, the facts of the case would be evaluated using essentially the same tests for resident status reiterated by the Illinois Supreme Court in *Maksym*.

Most post-secondary school students have attained age 18 and may establish residence in their own right. Community colleges must make and track residency classifications to calculate tuition charges for individual students, because the Public Community College Act requires differential tuition charges for those who reside outside the college district they are attending, as well as for out-of-state and out-of-country residents. The Illinois Community College Board's implementing rules say that to be classified as a resident of the State of Illinois or of the community college district, a student "shall have occupied a dwelling" within the State or district for at least 30 days immediately before the date set by the district for classes to begin. Thus, in the community college setting, the statutorily specified criteria for student residency (occupancy of a dwelling in Illinois or the district for at least 30 days immediately preceding the start of classes) displaces the older, intent-based common law tests described and applied in *Maksym.*

...And for Governing Board Members

Just as the Illinois Municipal Code prescribes a one-year residency requirement for candidates for municipal office, The School Code requires that a board of education member be (among other qualifications) a "resident of the district for at least one year immediately preceding his or her election. 105 ILCS 5/10-10. The intent-based tests applied in *Maksym* would apply in determining whether a school board candidate satisfies this residency requirement. They would also apply if a sitting board member's right to continue in office were challenged on the ground that the board member's seat had become vacant because he or she had "ceased to be an inhabitant of the district," *see* 105 ILCS 5/10-11.

The Public Community College Act requires that a member of the board of trustees be, for at least one year immediately before the election date, a resident of the State and territory which is included in the college district as of the date of the election. 110 ILCS 850/3-7(e). Again, the *Maksym* standards for determining residency would be relevant and controlling if a college board candidate's residency qualifications were challenged.

Interestingly, however, residency in the college district is *not* required to stand as a candidate in the campus-wide referendum held annually to elect a non-voting student representative to the college board of trustees. Section 3-7.24 of the Act requires only that the candidate for that position be "a student enrolled in the community college under the jurisdiction of the board..." 110 ILCS 850/3-7.24.

Now and then, a residency controversy of one sort or another is likely to land on your local government's doorstep. When a non-residency is alleged – whether as a ground for disqualifying a candidate, declaring an office vacant, or declaring a student ineligible for free attendance in the schools of a particular district – be prepared. Know what statutory provisions apply, what facts must be developed, and what procedures may be required to give the affected parties their say. When in doubt, seek advice of legal counsel. Not all cases will involve stakes as high as a big city mayor's race, but an early consult may help to avoid unnecessary confusion and set the stage for a fair resolution of the dispute.

This *Client Newsletter* was prepared by RSNLT attorneys Todd Hayden, Heidi Katz, and Susan Nicholas, with input from other members of the firm's Local Government Practice Group.

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