



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

March 7, 2000

Jim Ryan
ATTORNEY GENERAL

FILE NO. 00-003

MUNICIPALITIES:

Change in Durational Residency
Requirement for Candidates for
Office in Home Rule Municipality

The Honorable Thomas J. Walsh
State Senator, 22nd District
10544 West Cermak Road
Westchester, Illinois 60154

Dear Senator Walsh:

I have your letter wherein you pose the following
questions:

- (1) Under article VII of the Illinois Constitution, does a home rule municipality have the power by referendum to increase the durational residency requirement for municipal officers imposed by statute from one year to 18 months;
- (2) Would the fact that the municipality is coterminous with a township affect the authority of a municipality to do so; And
- (3) Would the 18 month requirement be applicable to officers elected less than 18 months after the passage of a referendum increasing the durational residency requirement?

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For the reasons hereinafter stated, it is my opinion that:

- (1) Under the Constitution, a home rule municipality may, by referendum, alter the durational residency requirement for municipal officers;
- (2) The existence of a coterminous township will not affect the authority to hold such a referendum; And
- (3) Such a referendum, to the extent that it is otherwise valid, may be made applicable to officers elected at an election held within 18 months of its adoption.

Having so concluded, however, I must caution that the validity of durational residency requirements for municipal officers in excess of one year may be subject to challenge under the provisions of the United States Constitution, as interpreted by the Federal courts.

Article VII, section 6 of the Illinois Constitution of 1970 provides, in pertinent part:

" * * *

* * * Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

* * *

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law * * *. A home rule municipality shall have the power to provide for

its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law. * * *

* * *

Section 3.1-10-5 of the Illinois Municipal Code (65 ILCS 5/3.1-10-5 (West 1998)), which sets out the general qualifications for holding elective office in municipalities, provides that a person is not eligible for elective municipal office unless he or she has resided in the municipality at least one year immediately preceding the election. This residency requirement was held to be valid in Cahnmann v. Eckerty (1976), 40 Ill. App. 3d 180, appeal dismissed, 431 U.S. 934, 53 L. Ed. 2d 252, 97 S. Ct. 2644 (1977), and reh'g denied, 434 U.S. 882, 54 L. Ed. 2d 166, 98 S. Ct. 247 (1977).

In Boytor v. City of Aurora (1980), 81 Ill. 2d 308, it was held that a home rule municipality could, by referendum, change from a partisan to a non-partisan method of electing municipal officers pursuant to article VII, section 6(f) of the Constitution. Similarly, in Clarke v. Village of Arlington Heights (1974), 57 Ill. 2d 50, it was held that a home rule municipality could, by referendum, change the number of its trustees and make the office of village clerk appointive. The discussion of the issues in these cases indicates that the referendum requirement of section 6(f) operates as a limitation

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on the general home rule authority granted in article VII, section 6(a) of the Constitution, which authorizes a home rule municipality to "exercise any power and perform any function pertaining to its government and affairs". Thus, while in appropriate circumstances an ordinance enacted pursuant to the grant of power in section 6(a) will supersede a conflicting statute enacted prior to the effective date of the Constitution (Stryker v. Village of Oak Park (1976), 62 Ill. 2d 523, 527, cert. denied, 429 U.S. 832, 50 L. Ed. 2d 97, 97 S. Ct. 95 (1976), reh'g denied, 429 U.S. 988, 50 L. Ed. 2d 600, 97 S. Ct. 511 (1976)), when the subject matter concerns changing the form of government or the manner of selection or terms of office of municipal officers a statutory provision may be superseded only by referendum.

It is my opinion that the durational residency requirement for municipal officers is a provision relating to the manner of selection of those officers, for purposes of article VII, section 6 of the Constitution. The eligibility criteria for public office determine not only who can be a candidate but also the right of the electors to vote for the person of their choice. Such criteria must be at least rationally related to a legitimate State goal, and in some cases must serve a compelling State interest. (See Cahnmann v. Eckerty (1976), 40 Ill. App. 3d 180,

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181, appeal dismissed, 431 U.S. 934, 53 L. Ed. 2d 252, 97 S. Ct. 2644 (1977), and reh'g denied, 434 U.S. 882, 54 L. Ed. 2d 166, 98 S. Ct. 247 (1977); John D. Perovich, Annotation, Validity of Requirement that Candidate or Public Officer Have Been Resident of Governmental Unit for Specified Period, 65 A.L.R. 3d 1048 (1972).) The establishment of qualifications for public office is a key component of the manner in which elected officers are selected. Therefore, like the statutes which were superseded by referenda in Boytor v. City of Aurora and Clarke v. Village of Arlington Heights, it is my opinion that the statutory qualifications for office established by section 3.1-10-5 may be altered by a referendum adopted in a home rule municipality pursuant to article VII, section 6 of the Constitution.

You have also inquired whether the fact that the municipality is coterminous with a township will affect the authority of the city to adopt the proposed referendum. In my opinion, it will not. In a coterminous township, the city council exercises the powers of the town board and highway commissioner. (60 ILCS 1/15-50 (West 1998).) As I discussed in opinion No. 97-025, issued November 12, 1997, however, the city council does not sit as a separate township board to exercise township powers, nor do city officers become township officers. Rather, the city council exercises the township's powers as part

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of its duties as the corporate authorities of the municipality. Since the manner in which its members are selected does not affect the powers or duties of the corporate authorities, a change in the manner of selection of municipal officers will have no impact upon the township.

Lastly, you have inquired whether a referendum to extend the durational residency requirement for municipal officers to 18 months may be made applicable to officers elected at an election held less than 18 months following its adoption. Although not precisely on point, reference may be had to Boytor v. City of Aurora (1980), 81 Ill. 2d 308, with respect to this issue. In Boytor v. City of Aurora, the city council voted on December 7 to submit a referendum to the citizens on January 11 concerning whether municipal elections should be conducted on a non-partisan basis. On January 11, the proposal was adopted. A non-partisan primary was conducted the following March, and a general election followed in April. The plaintiff in the case had, on December 11, filed his nominating petition for the primary to determine the Democratic candidate for mayor. He did not re-file as a non-partisan candidate following the adoption of the referendum a month later, and his name did not appear on the non-partisan primary ballot. The court refused to overturn the election, rejecting the plaintiff's due process claim that the

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city could not change from a partisan to a nonpartisan election procedure once the period for making partisan nominations opened.

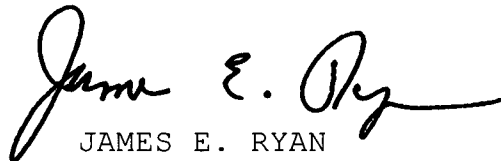
You have suggested that in the present case the first opportunity for conducting a referendum would be at the general primary election to be held in March, 2000, and that the next municipal election is scheduled for April, 2001, less than 18 months later. Based upon the reasoning of Boytor v. City of Aurora, it is my opinion that the extended durational residency requirement could be made applicable to officers to be elected at an election held less than 18 months after its adoption.

Although it is my opinion that a home rule municipality has been granted the authority under the Illinois Constitution to alter, by referendum, the durational residency requirements of section 3.1-10-5 of the Municipal Code, I must point out that lengthy durational residency requirements, particularly for municipal offices, have frequently been ruled unconstitutional under the United States Constitution. The annotation cited above collects numerous cases in which residency requirements for local governmental offices longer than one year have been struck down on the basis of equal protection of the laws, the right to travel interstate, rights of association and expression, the right to vote and the right to run for public office. There appears to be no case, however, which has specifically discussed the validity

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of a residency requirement of 18 months. The one year requirement in section 3.1-10-5 has been approved (Cahnmann v. Eckerty (1976), 40 Ill. App. 3d 180, appeal dismissed, 431 U.S. 934, 53 L. Ed. 2d 252, 97 S. Ct. 2644 (1977), and reh'g denied, 434 U. S. 882, 54 L. Ed. 2d 166, 98 S. Ct. 247 (1977)), while two year requirements in other States have been held to be invalid. (See, e.g., Thompson v. Mellon (1973), 9 Cal. 3d 96, 507 P.2d 628; Berger v. Friese (1974), 45 A.D.2d 734, 356 N.Y.S.2d 648, appeal dismissed, 35 N.Y.2d 712, 320 N.E.2d 276 (1974).) In the absence of a reported decision specifically addressing the validity of an 18 month residency requirement, it cannot be concluded that such a requirement would clearly be invalid. It should be recognized, however, that the validity of such a requirement may be subject to challenge.

Sincerely,

A handwritten signature in cursive script that reads "James E. Ryan". The signature is written in dark ink and is positioned above the typed name and title.

JAMES E. RYAN
ATTORNEY GENERAL