

ADVISORY 2008-25

September 24, 2008

To: All County Boards of Elections

Re: Voting Rights of Persons Facing Home Foreclosure

In response to numerous questions received by the Secretary of State's office, this advisory addresses how Ohio election law may affect persons who are the subject of foreclosure actions. Although primarily focused upon the rights of Ohioans who are facing or have lost their homes due to foreclosure, the information contained within this advisory applies generally to situations where an elector has changed residences, on or before Election Day, without updating his or her voter registration.

As a preliminary matter, boards of elections are advised that they may **not** cancel an Ohioan's voter registration based **solely** on the fact that the person is involved in the foreclosure process. The filing of a foreclosure action is not determinative until there is a final judgment entry, including the passage of at least 30 days from the date of the entry because of the right of appeal, and the person no longer resides at the property. Due to the protracted nature of legal foreclosure proceedings, mere involvement in a foreclosure action does not, by definition, mean that an elector no longer resides at the address that is the subject of the foreclosure. An elector might continue to reside at an address throughout the pendency of a foreclosure action, a legal process that may take several months or even more than a year.

Therefore, boards are advised that evidence of a foreclosure action is, on its own, insufficient to sustain a voter registration challenge. Under the federal National Voter Registration Act, a county board of election may cancel a voter's registration for reasons of residency **only if** the elector has either (1) confirmed in writing that he or she has moved to a different jurisdiction, or (2) failed to respond to a forwardable notice sent by a board of elections *and* failed to vote at the two subsequent general elections for federal office. For additional information regarding the administration of voter challenges, please review Directive 2008-79.

Under R.C. 3503.19(A), any Ohio elector may update his or her voter registration by completing a change of registration form and returning it in person to the board of elections, the Secretary of State, or any designated agency, or by mail to the board of elections or Secretary of State. Updated voter registration forms postmarked or received at least thirty (30)¹ days before an election qualify that elector to vote a regular ballot.

¹ If an otherwise valid voter registration application that is returned by mail does not bear a postmark or a legible postmark, the registration shall be valid for that election if received by the office of the Secretary of State or the office of a board of elections no later than twenty-five days preceding any special, primary, or general election.

Even if a change of address form is postmarked or received after the thirtieth day before the election, Ohio law allows electors to update their voter registrations to reflect a change of address through Election Day and cast a provisional ballot as provided in R.C. 3503.16 and Directive 2008-81.

R.C. 3503.16 requires electors who wait until Election Day to update their address to comply with different voting procedures that will depend upon whether the elector moves within the same precinct, within the same county but to a different precinct, or to a different county in Ohio.

Where, due to foreclosure, eviction, or for any other reason, an Ohio elector changes residences within the same voting precinct on or before Election Day, R.C. 3503.16(B)(1) allows that elector to appear at his or her regular precinct polling location on Election Day and vote a **regular ballot**. The elector must complete a change of address form and provide identification that reflects the elector's current (new) address. If the elector provides an Ohio driver's license or state issued identification card that does not show the elector's current address, the elector may still vote a regular ballot if he or she provides the last four digits of his or her driver's license or state identification card number for the poll worker to record. In this case, the poll worker must mark in the pollbook that the elector provided a driver's license or state identification card number with a former address and then record the last four digits of the elector's driver's license number or state identification card number.

When an elector moves to a different voting precinct but remains within the same county, R.C. 3503.16(B)(2) allows that elector to appear at his or her new polling location on Election Day or at the county board of elections on or before Election Day and vote a **provisional ballot**. The elector must complete a change of address form and a statement attesting that the elector: moved on or before Election Day, voted a provisional ballot at either the polling location or the board office, and will not vote or attempt to vote at any other location for that particular election.

R.C. 3503.16(C) allows electors, who move from one Ohio county to another, to appear on or before Election Day at the office of their new county board of elections and vote a **provisional ballot**. These electors must complete a change of address form and a statement attesting that the elector: moved on or prior to Election Day, voted a provisional ballot at either the polling location or the board office, and will not vote or attempt to vote at any other location for that particular election.

Directive 2008-79 prohibits the cancellation of an elector's voter registration for the sole reason that a 60-day notice sent pursuant to R.C. 3501.19 was returned. Similarly, a challenge based on a foreclosure action cannot be sustained without first holding a hearing on such a challenge before Election Day that meets the requirements of due process as set forth in Directive 2008-79.

When a challenge is made on the basis of an elector being a defendant in a foreclosure action or residing at a property that is the subject of a foreclosure action, in addition to meeting all other requirements of Directive 2008-79, the board of elections must determine:

- 1) Whether the foreclosure action is for property that is the residence of the elector, as that residential address is reflected in the records of the board of elections;
- 2) If the foreclosure action is for the property that is the residence of the elector, the status of the foreclosure action; i.e. whether the action is still pending in court, whether there is a judgment entry from the court action granting foreclosure, and if there is a judgment granting foreclosure, whether the time to appeal the judgment has expired (appeal must be filed no later than 30 days after the judgment);
- 3) Regardless of the status of the foreclosure action, whether the elector resides at the property;
- 4) If the foreclosure action or judgment is for property that is the residence of the elector and the action is still pending or the time to appeal a judgment granting foreclosure is not yet expired, whether the elector has the intention of returning (R.C. 3503.02(A)) or if the elector has left the residence for temporary purposes only with the intention of returning (R.C. 3503.02(B)).

Please note that R.C. 3503.02(I) provides:

If a person does not have a fixed place of habitation, but has a shelter or other location at which the person has been a consistent or regular inhabitant and to which the person has the intention of returning, that shelter or other location shall be deemed the person's residence for the purpose of registering to vote.

Therefore, if an elector's residence is property that is the subject of a foreclosure action, and his or her residency, upon challenge, either at a hearing held before the election or at the polling place, cannot be established as that which appears in the records of the board of elections, the elector may use his or her current location of residence as his or her residence for the purposes of voting. In such a case, however, the elector must be directed to the proper precinct polling location (in the case of moving from one precinct to another within the county) or to the board of elections (in the case of moving from one precinct to another in the county or from one county to another in Ohio) in order to complete the requisite change of address form and attestation statements that will allow the elector to vote a provisional ballot for his or her new voting precinct.

When a challenge is made on the bases of (a) a returned 60-day notice under R.C. 3501.19, and (b) an elector being a defendant in a foreclosure action or residing at a property that is the subject of a foreclosure action, the same determinations must be made as set forth in 1) through 4) above and in compliance with Directive 2008-79.

If you have any questions about this advisory, you may contact the elections attorney assigned to your board of elections.

Sincerely,

Jennifer Brunner