

July Q&A

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Q What are the residency requirements for running for or appointment to an elective city office?

A Generally, in order to be eligible to run for an elective city office, an individual must have resided continuously in the state for 12 months and in the territory from which the office is elected for six months immediately preceding the date of the regular filing deadline for an application for a place on the ballot. Tex. Elec. Code §1.005(9); §141.001(a)(5)(B). A write-in candidate must have resided continuously in the territory from which the office is elected for six months immediately preceding the date of the election. *Id.* §141.001(a)(5)(C). An appointee to an elective office must have resided continuously in the state for 12 months and in territory from which the office is elected for six months immediately preceding the date the appointment is made. *Id.* §141.001(a)(5)(E).

H.B. 831, adopted during the 2019 legislative session, provides that for the purpose of satisfying the continuous residency requirement, a person who claims an intent to return to a residence after a temporary absence may establish that intent only if the person: (1) has made a reasonable and substantive attempt to effectuate that intent; and (2) has a legal right and the practicable ability to return to the residence. However, the requirements of this bill do not apply to a person displaced from the person's residence due to a declared local, state or national disaster. H.B. 831 will take effect on January 1, 2020.

A home rule city may provide for different residence requirements in its charter, provided that the minimum length of residence in the state or city limits may not exceed more than 12 months immediately preceding election day. Tex. Elec. Code §141.003.

Type A and Type B general law cities have different residency requirements. *Id.* §141.001(b) (“[a] statute outside [the Election Code] supersedes [Section 141.001(a)] to the extent of any conflict.”). To be eligible for the office of mayor of a Type A general law city, an individual must have resided within the city limits for at least 12 months preceding the election date. Tex. Local Gov’t Code §22.032(a). In addition to continuously residing in the territory from which the individual is elected for at least six months before the application filing deadline, a candidate for the office of alderman of a Type A general law city must also reside in the ward from which the person may be elected on election day. *See id.* §22.032(b); *Brown v. Patterson*, 609 S.W. 2d 287 (Tex. App.–Dallas Nov. 20, 1980) (finding no conflict between a specific statute requiring residency in a school district and the Election Code’s general six-month durational residence requirement) (*cf.* Tex. Att’y Gen. Op. No. JM-909 (1988) (finding specific statute with no in-district residency requirement supersedes Election Code’s general in-district residency requirement)).

In a Type B general law city, an individual running for any city office must have resided within the city limits for at least six months prior to election day. Tex. Local Gov't Code §23.024.

Q How is residency for purposes of eligibility for holding an elective city office determined?

A For purposes of Texas election law, a person's residence means a "domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence." Tex. Elec. Code §1.015. A person neither loses his or her residence merely "by leaving the person's home to go to another place for temporary purposes only" nor "by acquiring a residence in a place to which the person has come for temporary purposes only and without the intention of making that place the person's home." *Id.* §1.015(c), (d). If a person resides on property located in more than one territory, the person shall choose in which territory the residence of the person is located. *Id.* §11.001(b).

Additionally, residence in an area while the area was not a part of the city is considered as residence within the city if the area is part of the city on the date that is the basis for determining the applicable period of residence. *Id.* §141.004. The Secretary of State has determined that residency in territory afterwards annexed to a city that otherwise complies with the residency requirements of the Election Code is deemed residence within the city for the purpose of computing the period residence necessary to make one eligible to hold city office. *See* Tex. Sec'y State Op. No. DAD-5 (1982).

A person's residence is determined in accordance with the common-law rules, as articulated by Texas courts, unless those rules are in conflict with the Election Code. Tex. Elec. Code §1.015(b). The courts have determined that term "residency" is an elastic one and is extremely difficult to define. *See Mills v. Bartlett*, 377 S.W. 2d 636, 637 (Tex. 1964). Residency depends upon the circumstances surrounding the person involved and largely depends upon an individual's present intentions. *Id.* Accordingly, volition, intention, and action are factors to consider in determining where a person resides and such factors are equally pertinent in denoting a person's permanent residence or domicile. *Id.* Additionally, only a court can make a ruling on whether a person has satisfied the residency requirements. *See State v. Fischer*, 769 S.W. 2d 619 (Tex. App.—Corpus Christi March 23, 1989, reh'g denied).

The city secretary or other authority with whom an application is filed in a home rule city is charged with administratively determining whether an application for a place on the ballot complies with the requirements as to form, content, and procedure. Tex. Elec. Code §§143.006 and 141.032. A candidate can be administratively declared ineligible only if: (1) the information on the candidate's application for a place on the ballot indicates that the candidate is ineligible for the office; or (2) the facts indicating that the candidate is ineligible are conclusively established by another public record. *Id.* §145.003(f)(1). Notwithstanding these provisions, courts have determined that residency cannot be conclusively established or disapproved by one fact or assertion and no one public record conclusively establishes residency. *See Texas Democratic Party v.*

Benkiser, 459 F.3d 582, 593 (5th Cir. 2006); *In re Jackson*, 14 S.W.3d 843, 848-49 (Tex. App.—Waco 2000, no pet.); *State v. Fischer*, 769 S.W. 2d 619 (Tex. App.—Corpus-Christi 1989). As such, a city secretary or other city official reviewing an application for a place on the ballot should generally accept the information on the face of the application, and if questions regarding residency arise, the city official should seek the guidance of the city attorney.

Q Is an application for a place on the ballot releasable to the public upon filing?

A An application for a place on the ballot, including any accompanying petition, is an election record and becomes public information immediately upon its filing. Tex. Elec. Code §1.012(d)(3); §141.035. However, the release to the public of an election record is subject to the Texas Public Information (the “Act”). *Id.* §1.012(c). This means that an application for a place on the ballot may not be released to the public in its entirety if the Act otherwise prohibits the disclosure of certain information contained therein. For example, under the Act, the home address and the home telephone number of a current or former city official or employee who has requested that this information be kept confidential may not be disclosed to the public. *See* Tex. Gov’t Code 552.117; *see e.g.* Tex. Atty. Gen. Op. OR2007-14243. Additionally, dates of birth are considered confidential under Section 552.101 of the Government Code. *See e.g.* Tex. Atty Gen. Op. OR2018-28753. Similarly, certain private e-mail addresses are deemed confidential under Section 552.137 of the Government Code. A city official who has questions on whether information contained in the application for a place on the ballot is releasable to the public should consult with the city attorney.

Q May an individual run for or be appointed to an elective city office if the individual’s spouse or close relative is currently a paid employee of the city?

A Yes. Nepotism does not prohibit an individual from running for or being considered for appointment to an elective city office if the individual’s spouse or close relative is currently an employee of the city. However, if the individual is elected, the employee must resign before the individual can be qualified for office unless the employee has been continuously employed by the city for at least six months before the elected official is sworn in and qualified for office. Tex. Gov’t Code §573.062(a); *see Bean v. State*, 691 S.W. 2d 773, 775 (Tex. App.—El Paso May 8, 1985). Additionally, before an individual may be appointed to an elective city office, the city employee to whom the individual is related in a prohibited degree must have continuously been employed by the city for at least 30 days before the individual may be appointed. Tex. Gov’t Code §573.062(a). For purposes of nepotism, prior continuous employment means immediately prior and uninterrupted employment. *See* Tex. Atty Gen. Op. Nos. GA-1024 (2013); JC-442 (2001); and JC-0185 (2000).

If the city employee qualifies to continue in his or her employment with the city, the elected or appointed official to whom the city employee is related in a prohibited degree may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change

in status, compensation, or dismissal of the city employee if that action apply only to that particular city employee and is not taken regarding a class or category of city employees. Tex. Gov't Code §573.062(b). Thus, an elected or appointed member of the governing body may not participate or vote on the relative's employment status or compensation if that action only applies to the relative, but he or she may participate if the action is taken regarding a bona fide class or category of employees.

Additionally, a candidate is prohibited from taking any affirmative action to influence an employee of the city, an employee of the office to which the candidate seeks to be elected, or an officer of the governmental body to which the candidate seeks to be elected to employ or otherwise affect the employment status or compensation of an individual whoa is related to the candidate within a prohibited degree. *Id.* §573.042(a). This prohibition does not apply to a candidate's actions taken regarding a bona fide class or category of employees or prospective employees. *Id.* §573.042(b).

Q May an individual run for or be appointed to city office if the individual's spouse or close relative is also running or currently serving on city council?

A Yes. Nepotism does not prohibit individuals who are related to one another from running or serving together on city council.

Q What is the difference between a "majority" vote and a "plurality" vote?

A In an election that requires a majority vote, a candidate for a particular office must receive more than 50 percent of the votes cast for that office. Tex. Elec. Code §2.021. A majority vote is required in the following three instances: (1) elections in a city with a population of 200,000 or more (Tex. Elec. Code §275.002); (2) an election for the members of a governing body in a city that has increased the terms of office for its elected officials to more than two years (Tex. Const. Art. XI, §11); and (3) a home rule city with a charter provision requiring a majority vote (Tex. Const. Art. XI, §11). If no candidate receives the vote necessary to be elected to a particular office in an election requiring a majority vote, a runoff between the two candidates with the highest number of votes in that particular race is required. *Id.* §2.021.

In all cities except those described above, candidates are elected by plurality vote. This means that a candidate for a particular office must receive more votes than any other candidate running for that office. *Id.* §2.001. No runoff election is required in an election that requires a plurality vote unless two or more candidates for the same office tie for the number of votes required to be elected. *Id.* §2.002(a). A runoff election is not required if the tying candidates agree to cast lots to resolve the tie or a tying candidate files a written, signed, and acknowledged statement of withdrawal. *Id.* §2.002(f) and (g).

Q When can a newly elected city official assume the duties of office?

A Generally, a newly elected city officer can begin to perform the duties of the office that the officer is elected to anytime following the canvass of the election results and after

qualifying for office. A city is required to canvass the results of an election in an open meeting of the governing body; but, only two officers of the governing body are required to be present in order to conduct the canvass. Tex. Elec. Code §§67.003(b) and 67.004(a). Once the canvass is complete, a newly elected officer may then qualify for office by: (1) the presiding officer of the governing body issuing such officer a certificate of election (Tex. Elec. Code §67.016); (2) signing the statement of officer (Tex. Const. Art. XVI, §1(b)); and (3) taking the oath of office (Tex. Const. Art. XVI, §1(a)). The governing body of a Type A general law city may, by ordinance, require a municipal officer to take any additional oath that the governing body considers is best calculated to secure the faithful performance of the officer's duties. Tex. Local Gov't Code §22.005(b).

In a Type A general law city, a newly elected officer may not assume the duties of the office until beginning on the fifth day after the date of the election, excluding Sundays. *Id.* §22.006. Additionally, on the fifth day after the date of the election, excluding Sundays, or as soon as possible after the fifth day, the newly elected governing body of a Type A general law city must meet at the usual meeting place and be installed. *Id.* §22.036. If a newly elected officer in a Type A general law city fails to qualify for office within 30 days after the officer's election, the office is considered vacant. *Id.* §22.007.

Additionally, before an elected or appointed marshal in a Type B general law city may begin to perform the duties of the office of marshal, the marshal must execute a bond within five days after the date the marshal is elected or appointed. *Id.* §23.024(b). If the marshal fails to execute the bond within the prescribed time frame, the governing body may appoint another person to the office. *Id.* §23.024.

Further, an unopposed candidate who is declared elected shall be issued a certificate election in the same manner and at the same time as provided for a candidate at the election. Tex. Elec. Code §2.053(e). The candidate also must qualify for office in the same manner as provided for a candidate elected at the election. *Id.* This means that an unopposed candidate who is declared elected may not qualify for office until after the results of the election would have been canvassed if the election had taken place.