MEMO

To: Susana Martin, City Secretary, City of Mansfield; E. Allen Taylor, Betsy Elam, TOASE

From: James Donovan, TOASE

Date: February 15, 2021

Re: Determination of Eligibility for Place 5 Candidate for Mansfield City Council

Mansfield's Qualifications for City Council

Section 3.02 of the Home Rule Charter of Mansfield sets forth the required qualifications for a person to be elected to and maintain a City Council position. A person shall be a resident citizen of the City of Mansfield for a period of not less than twelve (12) months immediately preceding his election [or] a resident of any of the territory not formerly within the corporate limits of the City but which is annexed under the provisions of this Charter for twelve (12) months preceding his election; a qualified voter of the State of Texas; and shall not be indebted to the City.

Administrative Declaration of Ineligibility

Section 145.003 of the Texas Election Code covers the administrative declaration of ineligibility by a city. The city secretary's role is to review the application to determine whether it complies as to form, content, and procedure. The city secretary, as the authority with whom the candidate's application for a place on the ballot is filed, has the authority to declare a candidate ineligible only if:

(1) The information on the candidate's application for a place on the ballot indicates that the candidate is ineligible for office; or

(2) Facts indicating that the candidate is ineligible are conclusively established by another public record.

Tex. Elec. Code Ann. § 145.003(f).

The Election Code allows the city secretary to declare a candidate ineligible up to the beginning of early voting by personal appearance and the mayor is authorized to declare a candidate ineligible after the polls close on Election Day up to the time for issuing certificates of election after the election results are canvassed. Tex. Elec. Code Ann. § 145.003(c)-(d). The Election Code seems to indicate that an administrative declaration of ineligibility ought not be made while voting is in progress. Id. The standard found in section 145.003 – outlined above – is the standard that the mayor would use to declare a candidate ineligible as well. The candidate's ineligibility must be conclusively established by public records if the information on the face of the candidate's application for a place on the ballot does not indicate ineligibility.

Residency

In general, the key to determining residency is **the intent** of the person to reside in a certain location. The intent must be a stated present intent to live or return to the city, and must be evidenced by some overt act or acts such as accepting employment of a non-temporary nature, buying a home, opening a bank account, affiliating with a local church, and similar activities. Texas courts have been very liberal in determining residence, but each case is fact specific. For example, in 1964 the Texas Supreme Court stated that the definition of residence is an **"elastic one"**, and held that even though a candidate had actually only lived in Van Zandt County for 4½ months instead of the required 6 months, **he had stated his intent to live there**, and had signed a binding contract to enter into a partnership with an attorney in town more than 6 months prior to the election day, and therefore was legally a resident of the county for the requisite period. *Mills v. Bartlett*, 377 S.W.2d 636 (Tex. 1964).

There is no bright line definition of residence. Most reported cases involve the eligibility of voters to vote in election contests. For example, a voter who received vacant land from a county commissioner candidate and registered to vote in the county prior to the election was not a resident of the county and thus ineligible to vote in the county commissioner election. He did not keep his personal belongings in the county, and held an out of state driver's license, and stated that "one day" he would build his home on the land, but had no present intent to do so. Conversely, the same court held that the candidate's sister could vote and was a proper county resident, even though she had two houses, one inside the county and one outside, with the one outside being her declared homestead. **Because she stated that she intended the home in the county would be her residence**, the home was fully decorated and she considered the county home her residence, the court determined she was a resident of the county. *Kiehne v. Jones*, 247 S.W.3d 259 (Tex. App–El Paso 2007). **Courts have repeatedly determined that one element alone is insufficient to determine residency; rather, there must be a nexus amongst the elements to fix and determine a residence.**

"Conclusively Established by another Public Record"

Texas courts have generally been resistant to enumerate the public documents or recitals which may comprise the public record. However, **there have been cases which detail what is not a sufficient public record to conclusively declare a candidate ineligible.** The Texas Supreme Court has held that sworn testimony given by the candidate in district court that he had not completely moved into the city limits until after a date which would show he had not met the one-year residence requirement was not sufficient to establish a public record. *Garcia v. Carpenter*, 525 S.W.2d 160, 161 (Tex. 1975). Likewise, the Waco court of appeals has held that the voting record which showed that the candidate voted in a different district within the last year is not a public record that conclusively established the candidate's ineligibility. *In re Jackson*, 14 S.W.3d 843, 847 (Tex. App.--Waco 2000, no pet.). Even the fact that there was no house located on the property where the candidate said he resided was held to be insufficient to conclusively establish that he did not reside in the proper precinct. *In re Tolliver*, 05-02-00109-CV, 2002 WL 92919 (Tex. App.--Dallas Jan. 25, 2002, no pet.).

Blacks Law Dictionary, Abridged Eighth Edition, 2005 defines "public record" as "[a] record that a government unit is required by law to keep, such as land deeds kept at a county courthouse[,] [p]ublic [r]ecords are generally open to view by the public." While no case offers a definition for "public record" for §145.003 of the Election Code, some cases do offer insight on what types of items could qualify. In order for the public records to be relied upon, the records must be properly sworn or certified, or contain some verification as to authenticity. See *In re Cullar*, 320 S.W.3d 560, 567 (Tex. App. –Dallas 2010). The items at issue in *In re Cullar* were voting registration records and a fishing license. Id. Items that are not public record are, a memorandum prepared by Party County Chair detailing a candidate's ineligibility (Party Chair was the respondent in the lawsuit), and a news article. See *Witherspoon v. Pouland*, 784 S.W.2d 951, 954 (Tex. App. –Dallas 1990). There are other Texas statutes that provide definitions for terms similar to "public record."[1] But none of these definitions are informative in interpreting "public record" in light of the text of §145.003 and the corresponding case law. These other definitions are particularized to fit with their corresponding laws.

The Secretary of State's website states that "[n]o public record conclusively establishes residency[,] [o]nly a court of law may make a ruling on a person's residency."[2] While this assertion is not supported by any other authority, it does reflect the current collection of case law on the question. It is possible that residency could be conclusively proven through a public record, but to date, no court has found a public record that is up to the task.

Conclusion

The facts set forth in Ms. Self's email regarding the residency of the Place 5 candidate do not rise to the level needed to have the candidate administratively declared ineligible for the upcoming election. The deed, a certified copy of which would be public records, do not rise to the level to have the candidate administratively declared ineligible. The listing information for the candidate's prior home provided is not a public record, therefore cannot be the basis of declaration of ineligibility. Even without verifying the accuracy of the dates mentioned in Ms. Self's email, the dates alone are not enough to conclusively prove residency. The closing date fails to show the full scope of the candidate's intent and actions to be a resident of Mansfield. It would be reasonable to conclude that, with a closing date of June 22, 2020, that the candidate was searching for, made an offer on, and contracted to purchase the home well before the June 22, 2020 date. A court would examine the facts to make a determination of as to what date the candidate's intent and actions rose to the level of the candidate being a resident of Mansfield. Should conclusive information be discovered from public records regarding the candidate's residency, the City Secretary has until the beginning of early voting by personal appearance to administratively declare the candidate ineligible. After that the Mayor would be authorized to declare the candidate ineligible, based on conclusive facts established by public record, after the polls close on Election Day up to the time for issuing certificates of election after the election results are canvassed.

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[1] §37.01(2) Penal Code (defining "government record"); §441.031 Government Code (defining "state record"); §552.002 Government Code (defining "public information")

[2] Candidacy Filing - Local Political Subdivisions, III. Filing for Public Office in Local Political Subdivisions, C. Administrative Declaration of Ineligibility, NOTE. http://www.sos.state.tx.us/elections/laws/candidacy.shtml