CITY OF NEWTON

IN BOARD OF ALDERMEN

POST AUDIT & OVERSIGHT COMMITTEE REPORT

TUESDAY, NOVEMBER 1, 2011

Present: Ald. Swiston (Chair), Johnson, Sangiolo and Rice
Absent: Ald. Lennon, Shapiro, Schnipper and Freedman
Also Present: Ald. Fuller and Baker
City Staff: Ouida Young, Associate City Solicitor

#294-11 ALD. SANGIOLO, requesting discussion with the Law Department and Elections Commission regarding City Charter language relative to eligibility/residency requirements for candidates for both School Committee and the Board of Aldermen as amended by Docket Item #9-02, which resulted in a home rule petition which was approved by the Massachusetts General Court in its Acts and Resolves of 2002, Chapter 368. [10/11/11 @ 4:49 PM]

ACTION: **HELD 4-0**

NOTE: Ald. Sangiolo provided backup material pertinent to this item, attached to this report. She said that she was a member of the Board in 2002 when the City language was amended. She docketed this item because what has transpired with the recent School Committee election regarding residency requirements for both Board of Aldermen and School Committee candidates. She is concerned that the court or Elections Commission determines residents' requirements.

Ald. Sangiolo stated issues arose for Mr. George Foord in 2002, when he announced candidacy for Ward 8 Alderman while residing in Ward 5. It appears issues also arose during the Ms. Kellogg and an Alderman campaign while the City was re-precincting. George Foord, 130 Winslow Road, said that he ran in the 2002 special election for Ward 8 Alderman. At that time the City's Charter language required residency in the ward on which you filed nomination papers. Due to an Alderman who owned a home in Ward 5 and represented Ward 6, re-precincting was effective in 2001 allowing him to campaign in Ward 6. Ms. Kellogg, who was campaigning for School Committee, lived in Ward 5 but succeeded in Ward 6. Ald. Sangiolo stated it is concerning on the importance of determining a representative of a ward. Mr. Foord said the Department of Revenue (DOR) uses a checklist with approximately twenty items establishing domicile purposes to support its decision regarding taxes.

Ms. Young stated today (November 1, 2011), the Appeals Court panel has affirmed the decision made by the Election Commission allowing the School Committee candidate to be on the ballet. Ald. Sangiolo said the dates of interpretation have become known and asked who is responsible for setting deadline dates. Ald. Fuller suggested amending the language in the City Charter Sec. 201; regarding residency requirements and clarity on the definition of a resident. Chairman Swiston stated people interpret the definition many different ways. Ald. Baker and Sangiolo agreed the City Charter should be clarified regarding residency.

Ms. Young stated the real issue is what constitutes domicile for purposes of running for office. The definition of domicile is a fact driven determination having no fact "litmus test". She said legally, the Committee would not be able to bring clarity due to the number of factors used to determine domicile for purposes of election law. She then said the State statute has nothing to confirm to set a date certain.

In Boston, it is specified. She suggested that perhaps the City could follow Boston's lead. It is a statute right for any individual to file an objection on nomination papers.

Ald. Johnson asked what information is required in surrounding communities to determine residency. She then asked what the process is and what the burden of proof is. Ms. Young said the Election Department process would complete to review procedures within the department. The burden of proof is on the person objecting to the election, not the candidate.

Ald. Sangiolo asked does the Board of Aldermen still desire a residency requirement. If not it would be necessary to amend the City Charter. Ms. Young stated if the Board desires to change the Charter, it would have to be completed through a Home Rule Amendment.

Jim Bueche, 235 Islington Road, said that while he was running for Ward Alderman he thought the requirements were clear. At the time, it was required that he attest what Ward he was running in. He requests keeping the dates consistent.

Chairman Swiston suggested holding this item pending the following information:

- How do surrounding communities determine residency, what words are used in their Charter and their experience
- Challenges if any, on residency versus domicile
- Who decides the date certain

Ald. Rice made the motion to hold this item until December pending the requested information. Committee members agreed 4-0.

#323-10 ALD. YATES requesting a report from the Newton Housing Authority (NHA) on the posting of names and contact information of members of the Board of the NHA on bulletin boards in the community centers of NHA developments and on the website of the NHA. [11/01/10 @ 9:44 PM]
HELD 4-0 on 01/25/11

ACTION: NO ACTION NECESSARY 4-0

NOTE: Chairman Swiston said the requested NHA Board of Commissioners contact information has been posted at the NHA residence. Therefore, without discussion, Ald. Sangiolo made the motion for no action necessary. Committee members agreed 4-0.

At approximately 9:05 pm, Chairman Swiston moved to adjourn.

Respectfully submitted,

Greer Tan Swiston, Chairman

#9-02

CITY OF NEWTON

IN BOARD OF ALDERMEN

March 4, 2002

ORDERED:

That the Board of Aldermen hereby requests and authorizes His Honor the Mayor to submit a home rule petition to the General Court requesting amendments to the City Charter, as set out below:

Section 1. Subsection (b) of section 2-1 of the charter of the city of Newton, which is on file in the office of the archivist of the commonwealth as provided by section 12 of chapter 43B of the General Laws, is hereby amended by inserting after the first sentence, the following two sentences :

> Every candidate for the office of alderman shall be a resident of the ward from which he/she seeks election as of the date that the Election Commission makes available blank forms for the nomination of candidates for office. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he/she is elected from the date that the Election Commission made such blank forms available until and including the first day of the term for which he/she is elected.

Section 2. Subsection (b) of section 4-1 of the charter of the city of Newton, which is on file in the office of the archivist of the commonwealth as provided by section 12 of chapter 43B of the General Laws, is hereby amended by inserting after the first sentence, the following two sentences:

> Every candidate for the office of school committeeman shall be a resident of the ward from which he/she seeks election as of the date that the Election Commission makes available blank forms for the nomination of candidates for office. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he/she is elected from the date that the Election Commission made such blank forms available

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MAYOR'S OFFICE

until and including the first day of the term for which he/she is elected.

Section 3. This act shall take effect upon its passage.

Under Suspension of Rules
Readings Waived and Approved
17 yeas 5 nays (Ald. Basham, Bullwinkle, Coletti, Mansfield, and Salvucci)
1 vacancy

EXECUTIVE DEPARTMENT
Approved: March 6, 2002

Edward G. English

(SGD) EDWARD G. ENGLISH
City Clerk

David B. Cohen

(SGD) DAVID B. COHEN
Mayor

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MAYOR'S OFFICE

9.02

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

2002 NOV 15 PM 2:06
CITY CLERK
NEWTON, MA 02159

DATE: November 15, 2002

TO: Full Board of Aldermen

FROM: Daniel M. Funk, City Solicitor

RE: Charter Amendment -- docket #9-02

This is to let you know that the General Court has passed our Charter Amendment. Rep. Peter Koutoujian has advised that the Governor recently signed it into law as Chapter 368 of the Acts of 2002.

This amendment affects sections 2-1 and 4-1 of the City Charter by requiring aldermen and school committee members, respectively, to "have continuously been a resident of the ward from which he is elected from the date that the election commission made such blank forms available until and including the first day of the term for which he is elected."

Board Order #9-02, dated March 4, 2002, authorized the filing of a Home Rule petition for this legislation.

A copy of the full text is enclosed.

enclosure

#294-11
9.02

*2002 Mass. ALS 368, *; 2001 Mass. H.B. 5210*

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STATENET
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MASSACHUSETTS 182ND GENERAL COURT -- 2002 REGULAR SESSION

CHAPTER 368

HOUSE BILL 5210

2002 Mass. ALS 368; 2001 Mass. H.B. 5210

SYNOPSIS: AN ACT RELATIVE TO RESIDENCY REQUIREMENTS FOR CANDIDATES FOR LOCAL OFFICE IN THE CITY OF **NEWTON.**

To view the next section, type .np* TRANSMIT.
To view a specific section, transmit p* and the section number. e.g. p*1

2002 NOV 13 PM 2:02
CITY CLERK
NEWTON, MA 02159

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

[*1] SECTION 1. Subsection (b) of section 2-1 of the **charter** of the city of **Newton,** which is on file in the office of the archivist of the commonwealth as provided by section 12 of chapter 43B of the General Laws, is hereby amended by inserting after the first sentence the following 2 sentences: A candidate for the office of alderman shall be a resident of the ward from which he seeks election as of the date that the election commission makes available blank forms for the nomination of candidates for office. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the election commission made the blank forms available until and including the first day of the term for which he is elected.

[*2] SECTION 2. Subsection (b) of section 4-1 of said **charter** is hereby amended by inserting after the first sentence the following 2 sentences: A candidate for the office of school committeeman shall be a resident of the ward from which he seeks election as of the date that the election commission makes available blank forms for the nomination of candidates for office. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the election commission made such blank forms available until and including the first day of the term for which he is elected.

[*3] SECTION 3. This act shall take effect upon its passage.

HISTORY:
Approved **November** 7, 2002

SPONSOR:
Khan

Source: Legal > States Legal - U.S. > Massachusetts > Statutes & Legislative Materials > MA - Massachusetts Advance Legislative Service
Terms: newton and charter and date(geq (october 20, 2002) and leq (november 12, 2002)) (Edit Search)
View: Full
Date/Time: Tuesday, November 12, 2002 - 4:21 PM EST

matters not admitting of delay, but he shall have no power to make permanent appointments. During any period in which the president or the vice-president of the Board of Aldermen is serving as Acting Mayor, he shall not serve as the presiding officer of the Board of Aldermen.

Sec. 3-10. Vacancy in Office of Mayor.

If a vacancy occurs in the office of Mayor, by death, resignation, removal from office, failure to elect or otherwise, at any time preceding the last nine calendar months of the term for which he was elected, the Board of Aldermen shall forthwith call a special election to fill such vacancy for the remainder of the unexpired term. If a vacancy occurs in the office of Mayor during the last nine calendar months of the term for which he was elected, the Clerk of the Board shall forthwith call a special meeting of the Board of Aldermen, and the Board of Aldermen shall by majority vote of the full Board elect one of its members as Acting Mayor for the remainder of the unexpired term. If the Board of Aldermen fails to elect an Acting Mayor as aforesaid within thirty days of the date of the meeting called by the Clerk of the Board, the president of the Board of Aldermen shall become Acting Mayor, shall exercise all the rights and powers of the Mayor, and shall be sworn to the faithful performance of his duties. Upon the election and qualification of any member of the Board of Aldermen as Acting Mayor under the provisions of this section, a vacancy shall exist in his aldermanic seat.

The restriction contained in Section 3-1 relative to holding other office or actively engaging in a business, occupation or profession shall not apply to an Acting Mayor holding office under this section. The removal from residency within the City shall create a vacancy in such office. (Referendum of 11-4-75)

ARTICLE 4.
SCHOOL COMMITTEE

Sec. 4-1. Composition; Eligibility; Election and Term.

(a) Composition—There shall be a School Committee of nine members, which shall exercise control and management of the public schools of the City. Eight of these members, who shall be known as school committeemen, shall be nominated and elected by the voters at large, one school committeeman to be elected from each of the eight wards of the City. The Mayor shall serve, ex officio, as a member of the School Committee, with full power to vote. The School Committee shall be the judge of the election and qualification of its members.

(b) Eligibility—Only voters shall be eligible to hold the office of school committeeman. A candidate for the office of school committeeman shall be a resident of the ward from which he seeks election as of the date that the election commission makes available blank forms for the nomination of candidates for office. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the election commission made such blank forms available until and including the first day of the term for which he is elected. A member of the School Committee shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.

(c) Election and Term—The terms of school committeemen shall be two years beginning the first secular day of January after their election and until their successors are qualified. No person shall be eligible for election to the School Committee for a fifth consecutive full term. (Referendum of 11-4-75; Acts of 2002, chap. 368)

Sec. 4-2. Organization; Quorum; Rules of Procedure.

(a) Organization—After the Mayor-elect and a majority of the school committeemen-elect have been sworn, the School Committee shall be called together by the Mayor who shall preside. The School Committee shall then elect from among its members a chairman and a vice-chairman, who shall act as chairman during the absence or disability of the chairman. The School Committee shall also elect a secretary who shall not be one of its members. The chairman, vice-chairman, and secretary shall serve at the pleasure of the School Committee.

ARTICLE 2.
LEGISLATIVE BRANCH

Sec. 2-1. Composition; Eligibility; Election and Term.

(a) Composition—There shall be a Board of Aldermen of twenty-four members which shall exercise the legislative powers of the City. Sixteen of these members, to be known as aldermen at large, shall be nominated and elected by the voters at large, two such aldermen at large to be elected from each of the eight wards of the City. The other eight members, to be known as ward aldermen, shall be nominated and elected by and from the voters of each ward, one ward alderman to be elected from each of the eight wards of the City. The Board of Aldermen shall be the judge of the election and qualification of its members.

(b) Eligibility—Only voters shall be eligible to hold the office of alderman. A candidate for the office of alderman shall be a resident of the ward from which he seeks election as of the date that the election commission makes available blank forms for the nomination of candidates for office. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the election commission made the blank forms available until and including the first day of the term for which he is elected. A member of the Board of Aldermen shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.

(c) Election and Term—The terms of aldermen shall be two years beginning the first secular day of January after their election, and until their successors are qualified. (Referendum of 11-4-75; Acts of 2002, chap. 368)

Sec. 2-2. President and Vice-President of the Board of Aldermen.

After the Mayor-elect and a majority of the aldermen-elect have been sworn, the Board of Aldermen shall be called together by the Mayor who shall preside. The Board of Aldermen shall then elect, from among its members, a president and vice-president to serve at the pleasure of the Board of Aldermen. The president shall preside at meetings of the Board of Aldermen and perform such other functions as may be assigned by the charter, by ordinance or by vote of the Board of Aldermen. The vice-president shall act as president during the absence or disability of the president.

Sec. 2-3. General Powers and Duties.

Except as otherwise provided by law or the charter, all powers of the City shall be vested in the Board of Aldermen which shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the City by law.

Sec. 2-4. Prohibitions.

(a) Appointment After Expiration of Term—No former alderman shall hold any compensated appointive City office or City employment until one year after the expiration of his service on the Board of Aldermen. This provision shall not prohibit a former City employee or City officer from resuming his duties as such City officer or City employee at the conclusion of his service as alderman.

(b) Interference in Administration—No member or committee of the Board of Aldermen shall directly or indirectly take part in the conduct of the executive or administrative business of the City.

Sec. 2-5. Filling of Vacancies.

(a) Special Election—If there be a vacancy, by failure to elect or otherwise, on the Board of Aldermen within the first fifteen calendar months of the term for which aldermen are elected, the Board of Aldermen shall forthwith call a special election to fill such vacancy. Such election shall be by the voters of the whole City in the case of aldermen at large, or by the voters entitled to such representation in the case of ward aldermen.

(b) After Regular City Election—If such vacancy shall occur after fifteen calendar months of the term for which aldermen are elected, no special election shall be held. In the case of a vacancy in the office of ward alderman, the person elected at the next regular City election to the seat in which the vacancy exists

#294-11

9-02

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2001 DEC 31 PM 2:06
CITY CLERK
NEWTON, MA. 02159

BOARD OF ALDERMEN

CITY OF NEWTON

DOCKET REQUEST FORM

SUBMIT TO CLERK BY 5:00 PM TUESDAY, PRIOR TO MONDAY BOARD MEETING

To: Clerk of the Board of Aldermen Date: 12/31/01

From: Pres. Lipsitt

Additional sponsors: _____

1. Please docket the following item (edit if necessary):

requesting discussion w/ Election Commission + Law Dept. regarding ~~required~~ residency requirements for Board of Aldermen + School Committee elections.

2. The purpose and intended outcome of this item is:

X fact-finding & discussion	___ Ordinance change
___ appropriation, transfer, expenditure, or bond authorization	___ resolution
___ special permit, site plan approval, zone change	___ license or renewal
___ other (please describe)	___ utility, street, or sewer approval
	___ appointment confirmation

_____

_____

3. I recommend that this item be assigned to the following committee(s):

X Programs & Services	___ Finance	___ Real Property
___ Zoning & Planning	___ Public Safety	___ Special Committee
___ Public Facilities	___ Land Use	___ No opinion

4. This item should be taken up in committee:

___ immediately (emergency only, state nature of emergency:

_____

X as soon as possible, preferably within a month – in conjunction w/ scheduling of ward 8 election

___ in due course, at discretion of chairman

___ when certain materials are made available, as noted in 7 & 8 below

___ following public hearing

(OVER)

#294-11
9.02

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

2002 JAN -4 P1 2:11
CITY CLERK
NEWTON, MA 02159

DATE: January 4, 2002

TO: Ch. Marcia T. Johnson and Members, Programs and Services Committee

FROM: Daniel M. Funk, City Solicitor

RE: Residency requirements for Aldermen and School Committee Members

I am enclosing copies of the Opinion dated November 2, 2001, regarding residency requirements under the City Charter. This may be helpful to the Committee's preparation for the discussion scheduled for the January 9 meeting.

enclosure
cc. Edward G. English, Clerk of the Board

9.02 #294-71

CONFIDENTIAL

CITY OF NEWTON
LAW DEPARTMENT
OPINION

DATE: November 2, 2001

TO: Board of Aldermen
Election Commission and
School Committee

FROM: Daniel M. Funk, City Solicitor
DMF

RE: Implementation of new ward lines and timing of residency requirements

2002 JAN -4 PM 2:11
CITY CLERK
NEWTON, MA. 02159

BACKGROUND

In July 2001, the City adopted Ordinance W-52, which establishes new ward and precinct lines in Newton. A local election for aldermen and school committee members will be held on November 6, 2001.

The Election Commission recently requested legal interpretation of several issues in connection with the new ward lines. President Brooke K. Lipsitt, on behalf of the Board of Aldermen, has requested legal advice on a number of related issues. This Opinion addresses the questions put forth by both boards.[1] Given that the questions involve residency requirements for school committee members, this Opinion is addressed to all three bodies.

QUESTIONS

1. When will the newly enacted ward lines go into effect?

2. With regard to the ward residency requirements for at large aldermen and school committee members –

   (a) Must a candidate be a resident of the ward on the filing date for nomination papers?

   (b) Must a candidate be a resident of the ward on the date of election?

   (c) Must a person who has been elected be a resident of the ward at the beginning of the term of office?

   (d) If the answer to the prior question is "yes," and if Patricia Kellogg is elected to the School Committee from Ward 5, will she be able to take office?

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[1] Some of the information set out in this Opinion was previously provided to the Election Commission in an Opinion dated July 20, 2001.

3. What is the process for a decision on the qualification of a person who has been elected to the Board of Aldermen or School Committee?

4. What process would be followed in order to enact clarification of or a change to the Charter's residency requirements?

5. What are the legal standards by which it is determined whether a person is a ward resident?

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CITY CLERK'S
NEWTON, MA. 02

SHORT ANSWERS

1. Although statutory law calls for an effective date of December 31, 2002, the Secretary of the Commonwealth issued an Official Advisory Opinion to expedite the schedule for municipal "reprecincting" throughout the Commonwealth . As a result, the new ward and precinct lines are likely to become effective on December 31, 2001.

2. (a) There is no requirement that a candidate reside in the applicable ward on the filing date for nomination papers.

(b) A candidate must be a ward resident on the date of election.

(c) As a general rule, a candidate must reside in the ward at the beginning of the term.

(d) Given the present circumstances involving the timing of the "reprecincting," if Patricia Kellogg is elected to the School Committee from Ward 5, barring her from office may violate constitutional principles.

3. The determination of the qualification, including residency, of a person elected to the School Committee (or the Board of Aldermen, as the case may be) would be determined by majority vote of the School Committee (or the Board of Aldermen).

4. Changing the residency requirement would require an amendment to the Charter. The law provides three alternate methods for amending the Charter.

5. Residency, or domicile, is shown by a combination of objective factors that show one's place of residence and the person's intent to make that address his home.

DISCUSSION

1. Effective date for new ward lines:

In November 2000, the voters of Massachusetts approved an amendment to the Massachusetts Constitution, which requires that state redistricting must be completed in time for the election that will be held in 2002. Massachusetts Constitution, Article of Amendment CXIX.

Municipal precincts have traditionally been used as the building blocks for state legislative districts in Massachusetts. The existing statute requires cities and towns to establish

ward and precinct lines in every year that ends with the number "2." The statute further provides that following approval by the Massachusetts Local Election Districts Review Commission (LEDRC), the new lines become effective on the following December 31.

Thus, under the existing statutory language, a vote on new ward and precinct lines would have been required by July 1, 2002 and become effective on December 31, 2002.[2] G.L. chapter 54, sections 1-2. However, in light of the new constitutional amendment, if the new state districts are to be based on local wards and precincts, it became clear that municipal "re-precincting" would have to be done prior to 2002 to allow state redistricting to be in place for the 2002 state election.[3]

In response to these circumstances, Secretary of the Commonwealth William Francis Galvin issued an "Official Advisory Opinion" dated February 8, 2001. The Opinion required municipalities to undertake local "reprecincting" during 2001 and it appears that all municipalities in the Commonwealth complied. The LEDRC reviewed and approved the maps showing the new lines. Newton's officials appeared before the LEDRC and on September 6, 2001, the Massachusetts LEDRC approved the City of Newton's new ward and precinct lines.

The LEDRC's letter to the City, dated September 6, 2001 informed the City of such approval and stated that the effective date of the new precincts is December 31, 2001. In discussion with counsel for the Secretary of the Commonwealth, we have been advised that the Secretary takes the position that the new municipal lines throughout the Commonwealth will be effective as of December 31, 2001. The Secretary's conclusion is founded on G. L. chapter 54 section 2, which states "...when new precincts are established, the new division shall take effect on the thirty-first day of December next following [the vote by the board of aldermen].

The Secretary's interpretation of the statute, while not the only one, is not untenable. Unless and until a court rules to the contrary, the Secretary's position appears to have the force of law. "The Secretary is the state official ultimately charged with administration of the election laws; his statement of position is definitive unless a state court, or the state Attorney General, M.G.L. c. 12 §9, should disagree." *Socialist Workers Party v. Davoren*, 378 F. Supp. 1245 (D.Mass. 1974).[4] Accordingly, despite the statutory provision that calls for an effective date of

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2 The statute also provides that in the event that a city or town fails to properly establish such new lines, the Massachusetts Local Election Districts Review Commission shall do so on behalf of the municipality.

3 The other alternative would be for the legislature to create local districts for voting use for the state representatives. In such event, the local districts would not necessarily coincide with the local precincts. The Secretary of State's office believes that such local districts would be confusing to voters and burdensome to local election officials.

4 The contrary interpretation of the statute is based on the provisions of G.L.chapter 54 §1, which directs cities and towns to "reprecinct" in every year that ends with "2." Given the Home Rule Amendment's prohibition against local regulation of elections, there is a strong argument that cities and towns are limited to the statutory reprecincting schedule. Mass. Constitution, Amend. Art. 2, &7. Such an analysis suggests that cities and towns have no authority to vote new ward lines until 2002, and the fact that they may attempt to do so does not automatically make them effective in the year that they are voted.

Secretary William Galvin had sought legislation that would require municipal "reprecincting" in every year that ends with the number "1." House Bill 993, which is pending, would require cities and towns to vote new municipal wards and precincts that would become effective on December 31, 2001. If that legislation becomes law,

December 31, 2002, it is expected that the new ward and precinct lines will take effect on December 31, 2001.

2. Timing for ward residency requirements under Charter: (a & b).

The residency requirements for Newton's elected officials are based entirely on the provisions of the City Charter. Its provisions require the school committee members and at large aldermen to "be elected from each of the eight wards of the City."[5] However, those provisions do not expressly provide that the residency requirement must be met by the filing date for nomination papers.

2002 JAN -4 P 12:12 CITY CLERK NEWTON, MA.

Given the lack of such a requirement in the City Charter, it is instructive to look to caselaw for guidance. The first choice would be the Massachusetts courts. Unfortunately, however, there are no relevant cases that consider the questions at hand. In the absence of Massachusetts cases, we are guided by secondary materials such as legal treatises and articles. The materials show that in the event that the charter or constitution fails to fix a time for meeting the residency requirement, a court will not impose such a requirement in order to file for candidacy. Most cases hold that eligibility will be determined either at the time of election or the date that the term of office begins. *McQuillin Mun Corp* §12.59 (3rd Ed.) and Charles S. Rhyne,

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the ward and precinct lines contained in Ordinance W-52 will become effective on December 31, 2001. However, as of the date of this Opinion, the bill has not passed. An assistant to Rep. Peter Koutoujian has indicated that the Secretary of the Commonwealth is no longer pursuing House Bill 993.

The Secretary of Commonwealth's February 8, 2001 "Official Advisory Opinion," stated that he was seeking legislation to modify the local reprecincting schedule. However, at this time his office is advising that the new wards and precincts will become effective on December 31, 2001, no matter what action is taken (or not taken) by the General Court.

[5] The provision regarding aldermen is found in section 2-1, which provides as follows:

> **Sec. 2-1. Composition; Eligibility; Election and Term.**
> (a) Composition—There shall be a Board of Aldermen of twenty-four members which shall exercise the legislative powers of the City. Sixteen of these members, to be known as aldermen at large, shall be nominated and elected by the voters at large, two such aldermen at large to be elected from each of the eight wards of the City. The other eight members, to be known as ward aldermen, shall be nominated and elected by and from the voters of each ward, one ward alderman to be elected from each of the eight wards of the City. The Board of Aldermen shall be the judge of the election and qualification of its members. (underscoring added to highlight the residency requirement)

The provision regarding school committee members is at Section 4-1 of the Charter, as follows:

> **Sec. 4-1. Composition; Eligibility; Election and Term.**
> (a) Composition—There shall be a School Committee of nine members, which shall exercise control and management of the public schools of the City. Eight of these members, who shall be known as school committeemen, shall be nominated and elected by the voters at large, one school committeeman to be elected from each of the eight wards of the City. The Mayor shall serve, ex officio, as a member of the School Committee, with full power to vote. The School committee shall be the judge of the election and qualification of its members. (underscoring added to highlight the residency requirement)

2002 JAN 14 PM 2:12
CLERK'S OFFICE

The Law of Local Government Operations, Government Law Series, 1980. An article entitled "Time of Determining Eligibility to Office" discusses the various cases that hold either that eligibility must be determined as of time of election or as of the time of commencement of term of office. 143 ALR 1026 (1943).

Thus, in the absence of a specific residency requirement for candidates at the time of filing papers, it appears that courts generally will not require candidates to meet the residency requirement at that time. However, as noted above, the Charter does specify that the officials "be elected from each of the eight wards of the City." The natural reading of that phrase is that a candidate must be a resident at the time of election. Thus, it appears that a candidate must be a resident as of the date of the election. See *Burkhart v. Sine*, 200 W.Va. 328 (1997).

(c) The remaining timeframe to consider is the beginning of the term of office. Although the Charter does not clearly state that the school committee members and at large aldermen must reside in their respective wards at the beginning of the term, it makes provision for a member of the school committee or alderman who has removed from one ward of the City to another. In the case of both the aldermen and the school committee, the Charter provides that such a public official shall serve out his or her term.[6]

By these provisions, the Charter implicitly requires that school committee members and aldermen reside in their respective wards at the beginning of the term of office.[7] Under usual circumstances, the local terms of office begin on January 1st.[8] Thus, under the Charter, such a public official must be a resident of the ward as of the date of election AND at the beginning of the term of office.

(d) However, the recent vote to change the ward and precinct lines raises very unusual circumstances. At the time of the upcoming November election, the new ward and precinct lines will not be in effect. Therefore, the election is being and must be carried out on the basis of the existing ward and precinct lines. For example, candidates are running from their existing wards and voters will vote in their existing precincts. Yet it is anticipated that the new ward and precinct lines will become effective on December 31, 2001, which is one day prior to the beginning of the term of office.

Patricia L. Kellogg resides at 29 Manchester Road. Under the existing wards and precincts, her home address is located in Ward 5. However, once the new wards and precincts

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6 The relevant provision for the School Committee is in section 4-1, which provides: "A member of the School Committee shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office." For the Board of Aldermen, parallel language is found in section 2-1(b).

7 Thus, a candidate must live in the relevant ward on the date of election AND at the beginning of the term.

8 An exception to the January 1st rule will apply to the election for the currently vacant Ward 4 At large position. Pursuant to Section 2-6 of the Charter, the person elected in November will immediately be sworn and shall serve out the balance of the unexpired term.

become effective, it will be located in Ward 6. Ms. Kellogg is a candidate for the Ward 5 position on the School Committee.[9]

As discussed above, the Charter requires that a School Committee member live in the relevant ward as of the first day of the term. However, the application of that rule to the current circumstances would mean that Ms. Kellogg, as well as all other voters who live at addresses affected by ward changes, would simply not be able to run for local office.[10] That very harsh result raises legal questions under principles of the U.S. Constitution.

A line of court cases has examined residency rules that limit candidates' access to the ballot. Unfortunately, we lack any guidance from the Massachusetts courts, as there have been no such cases in the Commonwealth. However, looking to a range of cases from around the nation, the courts have ruled that residency requirements affecting candidates for public office can infringe upon the rights citizens to run for public office as well as the rights of voters to vote for candidates of their choice.[11] *Robertson v. Bartels*, 150 F. Supp.2d 691 (D. New Jersey 2001); *Guzman v. College of Optometrists*, 106 F. Supp. 2d 212 (D. Puerto Rico); also see 65 A.L.R.3d 1048, *Validity of requirement that candidate or public officer have been resident of governmental unit for specified period.*

The courts are in agreement that residency requirements merit review under the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution. However, the courts do not agree on the legal standard for testing their validity. Some courts have determined that the rigorous "compelling state interest" standard is the appropriate standard, while other courts have held that the traditional equal protection standard will be applied. Under the former standard, the court will strike down the requirement in the absence of a compelling interest by the state. The traditional equal protection standard is less rigorous, but if applied will strike down a requirement if it is without any reasonable basis.

Thus, we must look to these equal protection standards to understand whether the Newton Charter requirement as applied to Ms. Kellogg, under current circumstances, would be upheld by a court of law. The reasons often given by government for residency requirements are to allow the candidate to become acquainted with the community and the local issues, as well as to allow the voters to become acquainted with the candidate. The Newton system for school committee elections, which requires ward residency coupled with an at-large election, seems intended to provide for a geographic distribution of the school committee members throughout the City.

Applying the facts to these policies, it seems that the usual policy of promoting acquaintance with the community is simply not relevant here. The fact that Ms. Kellogg's

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9 The School Committee members are elected on an at-large basis, i.e. by all the voters of the City. However, there is a geographic distribution requirement of one member from each of the eight wards. The Mayor serves *ex officio* as the ninth member. Charter, section 4-1.

10 It is crucial to recognize that as a result of the timing of the filing deadline and the preliminary and general elections juxtaposed against the effective date of the new wards, Ms. Kellogg could NOT have run from Ward 6. When she wished to run for school committee the only option available to her was to run from Ward 5.

11 Most of the cases involve durational requirements, i.e. requirements that candidates live in the relevant district for a certain period in order to qualify for candidacy or public office. Although the current question does not involve such a durational requirement, the legal analysis set out in these cases is directly relevant.

Manchester Road home will be included in a different ward does not render her unfamiliar with the City and its issues. Given that the school committee members are elected at-large, Ms. Kellogg would be representing the same constituents. In addition, the principle of geographic distribution will nonetheless be achieved because the election was carried out on the basis of the existing ward lines for all of the candidates.

Finally, I note that the City Charter allows a school committee member who has removed from one ward of the City to another during the term of office to serve out his or her term. Thus, if the new ward and precinct lines were to take effect on or after January 2, 2002, there would be no question whatsoever that Patricia Kellogg could serve out her term. If a court of law were to hear this issue, I would expect it to give significant weight to this fact.

In summary, it is hard to understand what legitimate governmental policy could be served by disqualifying a candidate who was elected at-large and qualified at the date of election simply on the basis that the ward lines change the day before the start of the term. Accordingly, in all likelihood, a court would uphold the right of Patricia Kellogg to serve on the School Committee despite the literal reading of the City Charter to the contrary.

2002 JAN -4 PM 2:12
CITY CLERK
NEWTON, MASS. 02156

3. Process for qualification of members

The City Charter sets out the following provisions:

The Board of Aldermen shall be the judge of the election and qualification of its members. Section 2-1.

The School Committee shall be the judge of the election and qualification of its members. Section 4-1.

In light of the plain language of these provisions, it is clear that the determination whether a newly elected candidate is qualified is a matter for vote of the School Committee (or the Board of Aldermen, as the case may be). The residency requirement constitutes a matter of qualification of a member. Thus, the decision whether a particular School Committee member has met the residency requirement must be determined by that body. *Caba v. Probate Court*, 363 Mass. 132 (1973); *Banks v. Election Commissioners*, 327 Mass. 509 (1951).[12]

However, the power of the School Committee is not absolute. For example, the provision would not allow the body to exclude or expel a member on grounds that cannot be a basis for disqualification under law. *Caba v. Probate Court, supra*, citing *Powell v. McCormack*, 395 U.S. 486. In addition, the Election Commission has the powers and duties of determining the results of elections. Up to the point that the Election

[12] The judicial dispute that typically arises under such a provision is whether the School Committee (or other body) is the sole judge of the qualifications of its members. In other words, there is a question whether a court has jurisdiction to hear and determine such a matter. The Massachusetts court historically recognized the power of the elected body as exclusive, full and complete, *Dinan v. Swig*, 223 Mass. 516 (1916), *Peabody v. School Committee of Boston*, 115 Mass. 383 (1874). However, the *Caba* case raised a question whether the court would continue to follow that rule today.

Commission has determined the results and the Certificate of Election has been issued by the City Clerk (see Charter 11-1), the School Committee has nothing to judge. *Banks, supra.*

The Charter does not contain any additional direction regarding the process to be followed by the School Committee (or the Board of Aldermen) in order to consider the qualifications of a person who has been elected. Thus, any such process would be determined by the School Committee (or the Board of Aldermen as the case may be).

2002 JAN -4 PM 2:12
CITY CLERK
NEWTON, MA. 02159

4. Clarification of residency requirements/amendment to the Charter:

Interest has been expressed in enacting a rule that would require candidates to reside in the relevant ward on the date that Nomination Papers are filed. There also may be public interest in other changes to the residency requirements for Aldermen and School Committee members.

Any change of the residency requirements for candidates for School Committee members and Aldermen would require an amendment to the Charter. Under Massachusetts law, there are three methods of charter amendment: 1) by Home Rule petition to the General Court[13]; 2) by a duly constituted charter commission; and 3) by a Mayoral/Aldermanic proposal approved by the voters under G.L. 43B sections 10 and 11[14].

The Home Rule petition is the simplest and swiftest method.[15] It has been used in the City of Newton on several occasions.

5. Legal standards for determining residency:

The law of residency, or domicile[16], is defined by a long line of Massachusetts court decisions. In *Dane v. Board of Registrars of Concord*, 374 Mass. 152 (1978), the Massachusetts Supreme Judicial Court explained the law as follows[17]:

> The word "resided," as it appears in the constitutional and statutory provisions above relating to voter qualification, has long been construed to require that the voter have his "domicil" in the appropriate city or town. *Hershkoff v. Registrars of Voters of Worcester, 366 Mass. 570, 576, 321 N.E.2d 656 (1974).* See Opinion of the Justices, 365 Mass. 661, 312 N.E.2d 208 (1974); *Opinion of the Justices*, 5 Metc. 587, 588 (1843); *Putnam v. Johnson*, 10 Mass. 488, 501 (1813), and cases therein cited. "Every person must have a domicil, and he can have only one

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13 An initiative petition from the voters can be used as a method to require the City to submit its Home Rule petition. Thus, the initiative petition sometimes is described as another method for amending the Charter. However, it is more accurately described as an aspect of the Home Rule petition approach.

14 The procedures under section 10 and 11 also involve submission to the Attorney General and the Department of Housing and Community Development.

15 By tradition, the General Court is not willing to approve charter amendments that involve a major change in local government unless there is a vote of the citizens. However, that rule would not likely be involved in a change of residency requirements for local officials.

16 The older cases use the spelling "domicil" while the more recent cases use the modern spelling, "domicile."

17 While the *Dane* case involved residency for the purpose of registering to vote, it is clear that the legal rules are the same for determining residency for an elected official.

domicil at a time, at least for the same purpose. See *Abington v. North Bridgewater*, 23 Pick. 170, 177 (1839); Opinion of the Justices, 5 Metc. 587, 589 (1843); Restatement 2d: Conflict of Laws, s 11 (1971). 'A person's domicil is usually the place where he has his home.' *Id.* at comment a. 'Home is the place where a person dwells and which is the center of his domestic, social and civil life.' *Id.* at s 12. See *Mellon Natl. Bank & Trust Co. v. Commissioner of Corps. & Taxn.*, 327 Mass. 631, 638, 100 N.E.2d 370 (1951). A change of domicil takes place when a person with capacity to change his domicil is physically present in a place and intends to make that place his home for the time at least; 'the fact and intent must concur.' *Opinion of the Justices*, 5 Metc. 587, 589 (1843). Restatement 2d: Conflict of Laws, ss 15-18 (1971)." *Hershkoff, supra* at 576-577, 321 N.E.2d at 663.

2002 JAN -4 PM 2:12

Whether a person is "domiciled" at a particular address is a question of fact based on existing Massachusetts law. The determination of domicile looks to a wide range of objective factors that show the party's place of residence. *Sullivan v. Rontonidi*, 2000 WL 1474117 (Mass. Super. 2000). However, no single factor is considered conclusive. *Valliere v. Reyes,* State Ballot Law Commission No. 00-1 (2000).

Some of the factors considered by the courts include where the party sleeps, where the party eats meals, where the party's children attend school, the address given on state and federal tax returns, driver's license and motor vehicle registration, and the address of the party's listing in the telephone directory. See *Sullivan, supra, Valliere, supra.* When the party claims to have recently changed his domicile, courts look to the nature of his relationship to the former address, including such factors as whether the party maintained his voting registration, bank accounts, or other formal ties to the prior address. *Hershkoff*, supra at 572.

In addition to objective factors, the determination of domicile must also be based on the party's intent. Thus, the domicile review must consider the party's intent as to making his home, i.e. what address does the party "regard as his home..." *Hershkoff*, supra at 572.

cc. Jeffrey Young, Superintendent of Schools
Karen Griffey, Acting Executive Secretary, Election Commission

#294-11

9-02

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

DATE: February 1, 2002

TO: Programs & Services Committee

FROM: Daniel M. Funk, City Solicitor
DMF

RE: Docket item 9-02 – Charter Amendment/Residency Requirement

2002 FEB -1 PM 4:01
CITY CLERK
NEWTON, MA. 02159

Attached are revised versions of proposed charter amendments creating/clarifying ward residency requirements for the positions of alderman and school committeeman.

Version 1 reflects the majority position of the committee based upon the discussion at the most recent committee meeting.

Versions 2, 3 & 4 reflect the minority position of the committee. These versions set forth an earlier time frame for establishing ward residency than that set forth in Version 1.

cc: Edward English, City Clerk
Newton Election Commission
Karen Griffey, Acting Executive Sec.
Alderman Lisle Baker

#9-02

RESIDENCY REQUIREMENTS FOR BOARD OF ALDERMEN CANDIDATES
DRAFT CHARTER AMENDMENTS

Amend the existing provisions of City Charter section 2-1(b). The existing version is set out below:

> (b) Eligibility—Only voters shall be eligible to hold the office of alderman. A member of the Board of Aldermen shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.

DRAFT VERSION 1 would require residency for candidates as of the date nomination papers are submitted for certification of signatures. This version is substantively the same as the version #2 that was discussed at the prior committee meeting.

> (b) Eligibility—Only voters shall be eligible to hold the office of alderman. Every candidate for the office of alderman shall be a resident of the ward from which he seeks election as of the deadline for submitting nomination papers to the Election Commission for certification of signatures. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he is elected from said deadline for submitting nomination papers until and including the first day of the term for which he is elected. A member of the Board of Aldermen shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.
>
> (language to be added is underscored)

DRAFT VERSION 2 would require residency as of 65 days prior to the date nomination papers are submitted. The period of 65 days was chosen because of recent experience. For the 2001 election, nomination papers were made available on May 1 and required to be submitted for certification of signatures no later than July 5 – a period of 65 days.

> (b) Eligibility—Only voters shall be eligible to hold the office of alderman. Every candidate for the office of alderman shall be a resident of the ward from which he seeks election as of 65 days prior to the deadline for submitting nomination papers to the Election Commission for certification of signatures. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he is elected from the date of the residency requirement described in the prior sentence until and including the first day of the term for which he is elected. A member of the Board of Aldermen shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.
>
> (language to be added is underscored)

#294-11
#9-02

DRAFT VERSION 3 would require residency as of the date that a candidate, or a person acting on his behalf pursuant to signed authorization, actually takes out nomination papers (G.L. chapter 53 section 17 allows a person who has the signed authorization of a candidate to take out blank nomination papers on behalf of such candidate). Thus, under this version the date would vary for different candidates.

> (b) Eligibility—Only voters shall be eligible to hold the office of alderman. A candidate for the office of alderman shall be a resident of the ward from which he seeks election as of the date that he or any person acting on his behalf pursuant to his signed authorization secures blank forms for nomination as a candidate from the Election Commission. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he is elected from the date such blank forms were secured until and including the first day of the term for which he is elected. A member of the Board of Aldermen shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.
>
> (language to be added is underscored)

DRAFT VERSION 4 would require residency as of the date that the Election Commission makes the nomination papers available to candidates.

> (b) Eligibility—Only voters shall be eligible to hold the office of alderman. Every candidate for the office of alderman shall be a resident of the ward from which he seeks election as of the date that the Election Commission makes available blank forms for the nomination of candidates for office. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the Election Commission made such blank forms available until and including the first day of the term for which he is elected. A member of the Board of Aldermen shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.
>
> (language to be added is underscored)

DMF/2-1-02

#9-02

RESIDENCY REQUIREMENTS FOR SCHOOL COMMITTEE CANDIDATES
DRAFT CHARTER AMENDMENTS

Amend the existing provisions of City Charter 4-1(b). The existing version is set out below:

> (b) Eligibility—Only voters shall be eligible to hold the office of school committeeman. A member of the School Committee shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.

DRAFT VERSION 1 would require residency for candidates as of the date nomination papers are submitted for certification of signatures. This version is substantively the same as the version #2 that was discussed at the prior committee meeting.

> (b) Eligibility—Only voters shall be eligible to hold the office of school committeeman. Every candidate for the office of school committeeman shall be a resident of the ward from which he seeks election as of the deadline for submitting nomination papers to the Election Commission for certification of signatures. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he is elected from said deadline for submitting nomination papers until and including the first day of the term for which he is elected. A member of the School Committee shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.
>
> (language to be added is underscored)

DRAFT VERSION 2 would require residency as of 65 days prior to the date nomination papers are submitted. The period of 65 days was chosen because of recent experience. For the 2001 election, nomination papers were made available on May 1 and required to be submitted for certification of signatures no later than July 5 – a period of 65 days.

> (b) Eligibility—Only voters shall be eligible to hold the office of school committeeman. Every candidate for the office of school committeeman shall be a resident of the ward from which he seeks election as of 65 days prior to the deadline for submitting nomination papers to the Election Commission for certification of signatures. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he is elected from the date of the residency requirement described in the prior sentence until and including the first day of the term for which he is elected. A member of the School Committee shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.
>
> (language to be added is underscored)

#294-11
#9-02

DRAFT VERSION 3 would require residency as of the date that a candidate, or a person acting on his behalf pursuant to signed authorization, actually takes out nomination papers (G.L. chapter 53 section 17 allows a person who has the signed authorization of a candidate to take out blank nomination papers on behalf of such candidate). Thus, under this version the date would vary for different candidates.

> (b) Eligibility—Only voters shall be eligible to hold the office of school committeeman. A candidate for the office of school committeeman shall be a resident of the ward from which he seeks election as of the date that he or any person acting on his behalf pursuant to his signed authorization secures blank forms for nomination as a candidate from the Election Commission. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he is elected from the date such blank forms were secured until and including the first day of the term for which he is elected. A member of the School Committee shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.
>
> (language to be added is underscored)

DRAFT VERSION 4 would require residency as of the date that the Election Commission makes the nomination papers available to candidates.

> (b) Eligibility—Only voters shall be eligible to hold the office of school committeeman. Every candidate for the office of school committeeman shall be a resident of the ward from which he seeks election as of the date that the Election Commission makes available blank forms for the nomination of candidates for office. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the Election Commission made such blank forms available until and including the first day of the term for which he is elected. A member of the School Committee shall, notwithstanding his removal from one ward of the City to another, continue to serve and to perform his official duties during his term of office. The removal from residency within the City shall create a vacancy in such office.
>
> (language to be added is underscored)

DMF/2-1-02

CITY OF NEWTON

MASSACHUSETTS

INTER-OFFICE CORRESPONDENCE

To: Honorable Members of the Board of Aldermen

Date: February 28, 2002

From: Peter D. Karg, Executive Secretary

Subject: Residency Survey
Docket #9-02

At the request of Alderman Marcia Johnson, Chair of the Programs and Services Committee, the Election Commission staff conducted the attached survey to assist you in your consideration of residency issue requirements.

I hope this information is of assistance.

PDK/jn

2002 MAR -1 PM 1:30
CITY CLERK
NEWTON, MA. 02159

CITY OF NEWTON

ELECTION COMMISSION

RESIDENCY REQUIREMENT SURVEY

WARD BASED CITY COUNCILS

REQUIREMENTS

	1 YEAR RESIDENCY	NOMINATION PAPERS SUBMITTED FOR CERTIFICATION (DRAFT #1)	NOMINATION PAPERS PULLED (DRAFT #3)	NOMINATION PAPERS AVAILABLE (DRAFT#4)	*NONE
MALDEN				X	
BOSTON	X				
QUINCY			X		
LOWELL					X
WORCESTER	X				
SPRINGFIELD					X
WALTHAM				X	

Residency requirement draft numbers referenced above from City Solicitor's memo dated February 1, 2002 to Programs & Services Committees.

None of the cities requirement(s) comparative to Draft #2 (Residency as of 65 days prior to the date nomination papers are submitted).

*Lowell and Springfield elections are voted citywide, only requirements: resident of the city and a registered voter.

This was a random survey of cities with city councils.

#294-11

#294-11

City of Newton

David B. Cohen
Mayor

ELECTION COMMISSION

PETER D. KARG • EXECUTIVE SECRETARY
1000 Commonwealth Avenue
Newton Centre, MA 02459-1449

David J Mofenson, Chairman
Frances E. Shaer • Fay G. Cohen • Steven R. Smith

Telephone
(617) 552-7041
Fax:
(617) 965-9074

2002 MAR -1 PM 1:30
CITY CLERK
NEWTON, MA. 02159

Date: February 28, 2002

To: Honorable Members of the Board of Aldermen

From: David J. Mofenson, Chairman D.J.M.

Subject: Charter Amendment/Residency Requirement
Docket Item #9-02

At the request of Alderman Marcia Johnson, Chair of the Programs and Services Committee, I want to offer my opinion regarding the Charter Amendment/Residency Requirement now before you for consideration.

I believe that the Board of Aldermen should give favorable consideration to a definitive and fixed residency requirement time line. By addressing this issue we will avoid any unnecessary challenges to a candidate's residency.

Thank you for your consideration of my position.

Zoning & Planning Committee Scheduled for Public Hearing 7 - 0 (Mansfield Absent) on 2/11/02

#317-01 ALD. JOHNSON, O'HALLORAN, TATTENBAUM proposing that Sec.30-11(d)(9), requiring a special permit for "businesses of whatever size which hold a Common Victualler-All Alcoholic or Common Victualler-Wine/Malt Beverages liense issued by the licensing authority of the city;" be amended by deleting such provision.

P.H 2/25/02

Referred to the Zoning & Planning Committee on 12/31/01
Zoning & Planning Committee Scheduled for Public Hearing 7 - 0 (Mansfield Absent) on 2/11/02

REFERRED TO PROGRAMS & SERVICES COMMITTEE

February 6, 2002

Present from Program & Services: Ald. Johnson, (Chair), Ald. Gentile, Sangiolo, Coletti, Parker, Lipsitt, Fischman

Absent from Program & Services: Ald. Merrill

Other Aldermen present: Ald. Baker, Stewart, Mansfield, Schnipper, Yates, Basham and Lennon

#56-02 Reported under Finance Committee Pg. 12 Sinkie, KC & Tues

#9-02 PRESIDENT LIPSITT requesting discussion with Election Commission and Law Department regarding residency requirements for Board of Aldermen and School Committee elections.

2nd Call Sangiolo

Item Chartered by Ald. Sangiolo

VERSION I APPROVED-SEE REPORT

Referred to the Programs & Services Committee on 1/7/02
Programs & Services Committee Held 5 - 0 (Sangiolo Not Voting, Gentile and Merrill Absent) on 1/9/02
Awaiting Committee Recommendation 22 - 0 (Ciccone Absent) on 1/22/02
Programs & Services Committee Held 6 - 0 (Merrill and Fischman Absent) on 1/23/02
Awaiting Committee Recommendation 23 - 0 on 2/4/02
Programs & Services Committee Recommended for Approval 3 - 2 (Sangiolo and Gentile Nay, Johnson and Fischman Abstaining, Merrill Absent) on 2/6/02

#20-02 PRESIDENT LIPSITT recommending, pursuant to Sec. 2-7 of the City Charter, the reappointment of EDWARD G. ENGLISH as City Clerk/Clerk of the Board for a term of two (2) years or until a successor is duly qualified.

2nd Call Johnson

OK voice vote

Referred to the Programs & Services Committee on 1/22/02
Programs & Services Committee Recommended for Approval 7 - 0 (Merrill

#294-11

(10)

Roll Call Vote Sheet
Board of Aldermen, Newton, MA
2002-2003

First Call ✓
Second Call
Docket Item No. 9-02
Page No. 10

Lipsitt
Subject: By Title Residency requirements for members of Bldg Insp and School Committee
Date FEB-19, 2002
Committee Public Services

	Absent	Yeas	Nays	Exceptions
Baker				
Basham				
Bryson				
Bullwinkle				
Ciccone				
Coletti				
Fischman				
Gentile				
Gerst				
Johnson				
Lennon				
Linsky				
Lipof				
Mansfield				
Merrill				
Parker				
Salvucci				
Samuelson				
Sangiolo				
Schnipper				
Stewart				
Yates				
Pres. Lipsitt				
Vacancy				
Totals				

Charged by Ald. Sangiolo

2002 FEB 19 PM 10:46
CITY CLERK
NEWTON, MA 02159

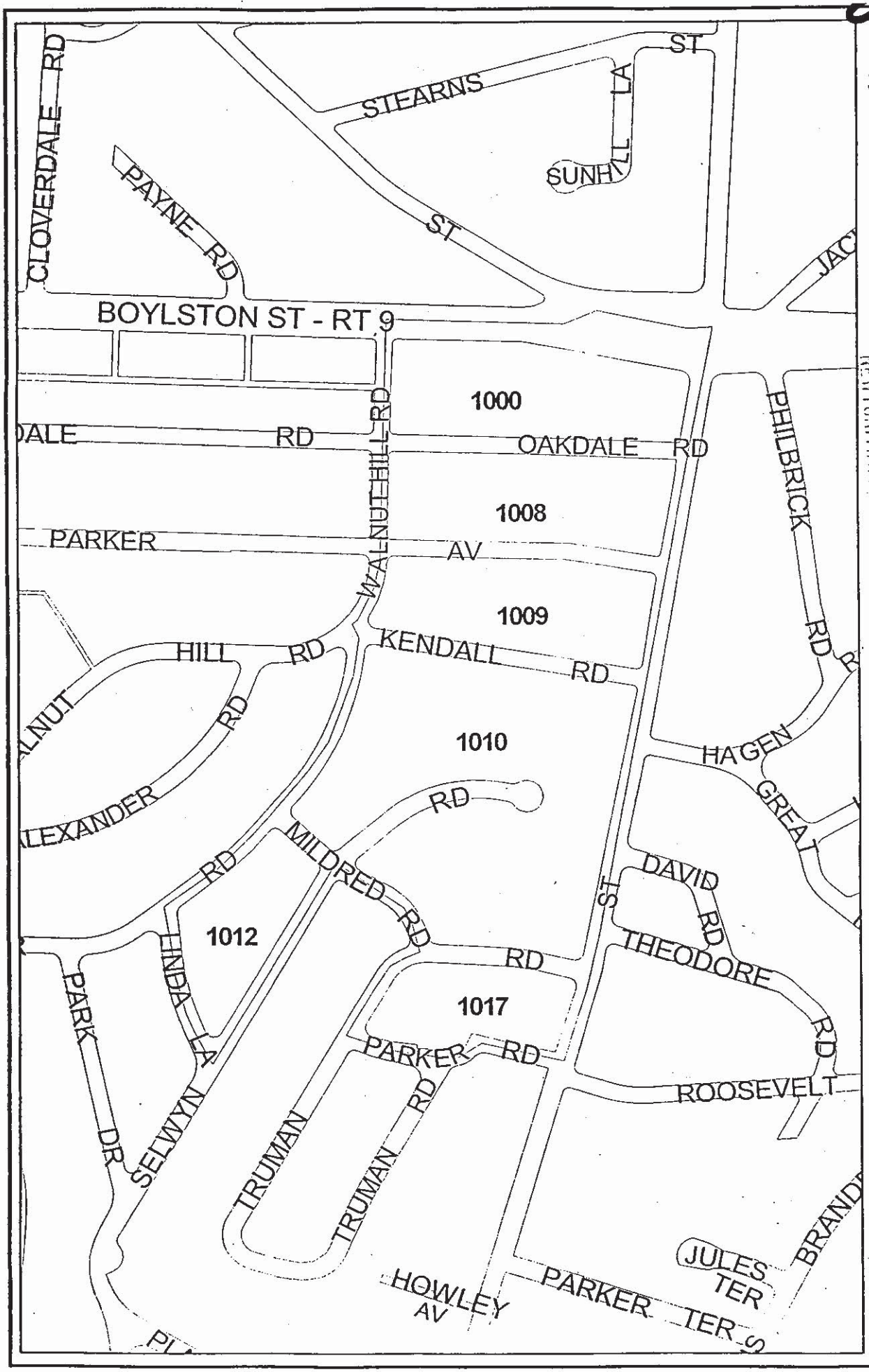
9.00

#294-11

Proposed Sub-Precinct

Ward 6 Precinct 2

Census Tract 374000



2002 MAR 15 PM 2:56
CITY CLERK
NEWTON, MA. 02159

1" : 322.9'

The information on this map is from a digital data base accessed using the Newton Geographic Information System (GIS). Newton cannot guarantee the accuracy of the information contained on this map. Each user of this map is responsible for determining its suitability for his or her intended use or purpose. City departments will not necessarily approve applications based solely on GIS data. Applicants for city permits and licenses must inquire of the relevant city department for applicable requirements. City staff correct errors in these data as they are identified. Newton's GIS Administrator maintains records regarding the source materials and methods used to create the digital data and will disclose this information upon request.

DATA SOURCES (Not all Horsemanly apply to this map)

15 Mar 2002

#9-02

CITY OF NEWTON

IN BOARD OF ALDERMEN

March 4, 2002

ORDERED:

That the Board of Aldermen hereby requests and authorizes His Honor the Mayor to submit a home rule petition to the General Court requesting amendments to the City Charter, as set out below:

Section 1. Subsection (b) of section 2-1 of the charter of the city of Newton, which is on file in the office of the archivist of the commonwealth as provided by section 12 of chapter 43B of the General Laws, is hereby amended by inserting after the first sentence, the following two sentences :

> Every candidate for the office of alderman shall be a resident of the ward from which he/she seeks election as of the date that the Election Commission makes available blank forms for the nomination of candidates for office. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he/she is elected from the date that the Election Commission made such blank forms available until and including the first day of the term for which he/she is elected.

Section 2. Subsection (b) of section 4-1 of the charter of the city of Newton, which is on file in the office of the archivist of the commonwealth as provided by section 12 of chapter 43B of the General Laws, is hereby amended by inserting after the first sentence, the following two sentences:

> Every candidate for the office of school committeeman shall be a resident of the ward from which he/she seeks election as of the date that the Election Commission makes available blank forms for the nomination of candidates for office. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he/she is elected from the date that the Election Commission made such blank forms available

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MAR 2 2 2002
MAYOR'S OFFICE

until and including the first day of the term for which he/she is elected.

Section 3. This act shall take effect upon its passage.

Under Suspension of Rules
Readings Waived and Approved
17 yeas 5 nays (Ald. Basham, Bullwinkle, Coletti, Mansfield, and Salvucci)
1 vacancy

EXECUTIVE DEPARTMENT
Approved: March 6, 2002

Edward G. English

(SGD) EDWARD G. ENGLISH
City Clerk

(SGD) DAVID B. COHEN
Mayor

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7 #29-14

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

2002 NOV 15 PM 2:06
CITY CLERK
NEWTON, MA. 02159

DATE: November 15, 2002

TO: Full Board of Aldermen

FROM: Daniel M. Funk, City Solicitor

RE: Charter Amendment -- docket #9-02

This is to let you know that the General Court has passed our Charter Amendment. Rep. Peter Koutoujian has advised that the Governor recently signed it into law as Chapter 368 of the Acts of 2002.

This amendment affects sections 2-1 and 4-1 of the City Charter by requiring aldermen and school committee members, respectively, to "have continuously been a resident of the ward from which he is elected from the date that the election commission made such blank forms available until and including the first day of the term for which he is elected."

Board Order #9-02, dated March 4, 2002, authorized the filing of a Home Rule petition for this legislation.

A copy of the full text is enclosed.

enclosure

#294-11
9.02

MASSACHUSETTS ADVANCE LEGISLATIVE SERVICE
STATENET
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MASSACHUSETTS 182ND GENERAL COURT -- 2002 REGULAR SESSION

CHAPTER 368

HOUSE BILL 5210

2002 Mass. ALS 368; 2001 Mass. H.B. 5210

SYNOPSIS: AN ACT RELATIVE TO RESIDENCY REQUIREMENTS FOR CANDIDATES FOR LOCAL OFFICE IN THE CITY OF **NEWTON.**

To view the next section, type .np* TRANSMIT.
To view a specific section, transmit p* and the section number. e.g. p*1

RECEIVED
CITY CLERK
NEWTON, MA 02159
2002 NOV 15 PM 2:08

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

[*1] SECTION 1. Subsection (b) of section 2-1 of the **charter** of the city of **Newton,** which is on file in the office of the archivist of the commonwealth as provided by section 12 of chapter 43B of the General Laws, is hereby amended by inserting after the first sentence the following 2 sentences: A candidate for the office of alderman shall be a resident of the ward from which he seeks election as of the date that the election commission makes available blank forms for the nomination of candidates for office. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the election commission made the blank forms available until and including the first day of the term for which he is elected.

[*2] SECTION 2. Subsection (b) of section 4-1 of said **charter** is hereby amended by inserting after the first sentence the following 2 sentences: A candidate for the office of school committeeman shall be a resident of the ward from which he seeks election as of the date that the election commission makes available blank forms for the nomination of candidates for office. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the election commission made such blank forms available until and including the first day of the term for which he is elected.

[*3] SECTION 3. This act shall take effect upon its passage.

HISTORY:
Approved **November** 7, 2002

SPONSOR:
Khan

Source: Legal > States Legal - U.S. > Massachusetts > Statutes & Legislative Materials > MA - Massachusetts Advance Legislative Service
Terms: newton and charter and date(geq (october 20, 2002) and leq (november 12, 2002)) (Edit Search)
View: Full
Date/Time: Tuesday, November 12, 2002 - 4:21 PM EST

H 5210

Chapter 368

#294-11

9.02

THE COMMONWEALTH OF MASSACHUSETTS

In the Year Two Thousand and Two

AN ACT RELATIVE TO RESIDENCY REQUIREMENTS FOR CANDIDATES FOR LOCAL OFFICE IN THE CITY OF NEWTON.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Subsection (b) of section 2-1 of the charter of the city of Newton, which is on file in the office of the archivist of the commonwealth as provided by section 12 of chapter 43B of the General Laws, is hereby amended by inserting after the first sentence the following 2 sentences: A candidate for the office of alderman shall be a resident of the ward from which he seeks election as of the date that the election commission makes available blank forms for the nomination of candidates for office. In order to hold the office of alderman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the election commission made the blank forms available until and including the first day of the term for which he is elected.

SECTION 2. Subsection (b) of section 4-1 of said charter is hereby amended by inserting after the first sentence the following 2 sentences: A candidate for the office of school committeeman shall be a resident of the ward from which he seeks election as of the date that the election commission makes available blank forms for the nomination of candidates for office. In order to hold the office of school committeeman, a candidate shall have continuously been a resident of the ward from which he is elected from the date that the election commission made such blank forms available until and including the first day of the term for which he is elected.

SECTION 3. This act shall take effect upon its passage.

House of Representatives, October 28, 2002.

Passed to be enacted, Thomas J. O'Brien, Acting Speaker.

#294-11

In Senate, October 31, 2002.

Passed to be enacted, [signature], President.

November 7th, 2002.

Approved,

at 2 o'clock and 45 minutes, P. M.

[signature]

Acting Governor.

#9-02

Held: 5-0 (Ald. Sangiolo Not Voting)

Note: Ald. Lipsitt explained that the Law Department's opinion of the residency requirement being set as Election day had raised an issue for her and the public as the previous understanding and practice was that a candidate needed to be a resident of a given ward at time of filing papers, along with Inauguration Day. It was the time to determine if this was the time at which to clarify if this was the desired situation. The question she wants to put before the Board whether this is the result we want or do we want another alternative. If another alternative, how do we get from here to there. Dan Funk stated that what was before the Board was a policy decision. How do we want to run our elections? We are faced with an interpretation of our own City Charter. The State does not dictate requirements in a Home Rule City Charter. He did caution that there are limitations as to "how much" restriction may be placed on residency requirements. Ald. Baker favored having the residency requirement at the time you take out papers, election day, and Inauguration Day as practiced in the past. He thought that this enabled the City to maintain diversity on the Board. Dan Funk stated that this could be done through a Charter Amendment via a Home Rule Petition but this change would not be available for the upcoming Ward 8 Alderman election. David Moffenson, stated that he agreed with the overwhelming majority that the residency requirement should be as of the filing date and that this policy should be codified by the Board.

Then there was time for citizens to comment:

Jim Epstein, 110 Manchester Rd. – He favored the date of when nomination papers were submitted. His opinion was to change the City Charter was a laborious effort and did not see why the Election Commission could not just set the date. In response, Ald. Lipsitt stated that if the Election Commission as the administrative body did this ,it would open up the possibility of having the date change each time membership of the Commission changed. Therefore the only way is to amend the City Charter. Ald. Coletti suggested that the Election Commission vote to adopt the state law of filing date as the requirement. Dan Funk explained that on the application it indicates the ward in which the candidate currently lives, it is not a statement that the candidate must live in the ward from which s/he is running.

Jack Porter, 117 Cross Street – asked What is the definition of residency? Dan Funk responded that it is where the person is registered to vote, where s/he pays taxes, where s/he has his/her license registration and their intention in the future.

George Foord, 130 Winslow Road. It was his understanding from Florence Rubin that though the City Charter does not spell out in detail the residency requirement and she was not sure why the state law did not apply. He agreed with Ms. Rubin. He also had concerns about the process of the City Solicitor being a voting member of the Election Commission during the challenge in July 2001 to the Ward 6 Alderman-At-Large election. The Chair informed Mr. Foord that the only issue before the Committee is the residency requirement.

Len Mead 27 Camden Road spoke in support of the filing date as the residency date. He also agreed that the Election Commission had the authority to set this date.

Ald. Fischman spoke in favor of the residency requirement be the date that the candidate initially "pulls" his/her papers.

Ald. Coletti also raised concerns regarding the process for securing papers and submitting them as well. Since it is now possible for those, other than the candidate him/herself to do this on behalf of the candidate. He recommends that we go back to the process that only the candidate him/herself be able to take out and file the papers and sign them. Note: This will be brought up with the Election Commission when the Committee once again takes up Docket # 442-00.

Ald. Lipsitt asked for a straw vote of the Committee as to creating a Charter Amendment in order to specify the residency requirement as of the last day and hour to file nominations papers for certification by the Election Commission, traditionally around July 5th for an Election in November. All members of the Committee were in agreement that this is the correct date. Therefore, she made a motion to follow the advice of our Law Department and submit Home Rule Petition to amend charter in order to specify residency requirement for candidacy for Board of Alderman and School Committee as the date of submission of papers. Dan Funk added that what he is hearing is that there are three points that count: submission of papers, election date, and Inauguration Day to lock in the ward of the candidate, at an earlier time. Ald. Coletti expressed reservation of a Charter Amendment. His thoughts were that changing the charter should not be taken lightly. Dan Funk did explain that a Charter Amendment does require a vote of the Legislature and they would not change the Charter without what they saw as the will of the voters. There was a straw vote on this of 5-0 for approval for this concept - Sangiolo not voting. We voted to hold so that the Law Department can bring a draft of an amendment at our next meeting.

 # 8-02
Note:
Setti Warren [Approved 5-0, Sangiolo not voting]
He is the Former Regional Director FEMA, for the 6 New England states Part of his responsibility was to approve every project for federal disaster relief funding and mitigation. Part of the requirement for approval for this funding was preservation of open space and historic sites and to make sure that the project was environmentally sound. He also was in Clinton's Administrative Office of Cabinet Affairs. In this capacity he was liaison to the EPA and Housing & Urban Development that worked to fund low income housing. As a life long resident of Newton, he is very concerned with maintaining open space as was a focus when he worked for FEMA.

Claudia Sauermann Wu [Approved 6-0]
She is resident of Newton for 8 years. She is an Alternate Member of the Newton Historical Commission. Currently is a Consultant to non-profit historic preservation organizations. For ten years, she worked for the National Trust for Historic Preservation. When working on the Trust, she was involved in trying to get the CPA passed at the State level.

Doug Dickson – unable to attend

CITY OF NEWTON

IN BOARD OF ALDERMEN

PROGRAMS AND SERVICES COMMITTEE REPORT

WEDNESDAY, JANUARY 23, 2001

Present: Ald. Johnson, Sangiolo, Coletti, Gentile, Parker, Lipsitt,

Absent: Ald Fischman and Merrill

Other Alderman present: Ald. Lennon, Gerst, Mansfield, Basham, and Baker

Officials Present: Dan Funk, Gayle Smalley, Elizabeth Dromey, Joe Russo Principal, Horace Mann School]

#9-02 PRESIDENT LIPSITT requesting discussion with ElectionCommission and Law Department regarding residency requirements for Board of Aldermen and School Committee elections.

Action: Held: 5-0 (Ald. Sangiolo Not Voting)

Note: Dan Funk presented three options that addressed the will of the Committee as decided on January 9th. There was much discussion regarding whether the date should be at the time the candidate takes out papers. Ald. Baker, Gentile, and Lipsitt spoke in favor of the residency requirement being set at this point in the election cycle. It was important that we set the date at the point of taking out papers, as the candidate should be "living" in the Ward from which s/he would be running when s/he collects signatures. Ald. Basham was concerned with this date being the one that was when a candidate established his/her residency as it was about 8 months prior to Inauguration and this is a long time, if someone was planning to run but had not yet moved. Ald. Parker thought by having the date being when one pulls papers is a very unclear date, as a candidate might pull the papers only a few days before they are due or s/he might pull them several weeks before they are due or s/he may pull the papers when they first become available. He preferred a date that is clear and by using the filing date, it is very clear. Mr. Funk had a concern regarding the residency date being the date when a candidate "pulls nomination papers." The City would need to have a very clear record of residency on the date when a candidate pulled his/her papers so that we could clearly determine residency should there be a legal challenge. There was consensus that the Election Commission needs to tighten its procedures and ensure that *only* the Candidate is able to take out nomination papers. Ald. Mansfield pointed out that until nomination papers are filed and certified, the candidate is not an official candidate. In a straw vote of 4-0 [Gentile and Sangiolo voting no] the Committee approved Version 2 submitted by the Law Department which sets the

residency requirement as of the date of filing papers. The Law Department will return with a Charter Amendment wording as requested by the members of the Committee.

 # 8-02 HIS HONOR THE MAYOR appointing Mr. Doug Dickson, 17 Oxford Road, 02459 to the Community Preservation Act Committee n January 7, 2002 Recreation – term to expire on 01/01/93.

(C) Doug Dickson **Approved 5-0, (Coletti not voting)**

Note: Mr. Dickson worked actively to ensure the passage of the Community Preservation Act (CPA). He wants to ensure that this gets off to a strong start. Through his work on the Conservators, he is concerned with open space and land use development along with both passive and active parks. He has worked extensively with the Parks and Recreation Commission on maintenance and design of recreation space. Ald. Gentile was confused as to the CPA designation of open space vs. recreation. Within the City, there seems to be a competition between open space and recreation. Mr. Dickson, agrees that there should not be competition, but the two should be integrated. Also, given Mr. Dickson's background, there was confusion as to why he had the recreation designation. He explained that he is not representing the Conservators and that he had been very actively involved in the renovation of Weeks field. Ald. Gentile requested that Mr. Dickson and the CP committee not lose sight of the need to unify open space and recreation. Mr. Dickson also stated that all Mayoral Appointees have a mixture of interests and that they will work together to develop the proposals for how to utilize the CPA money. Ald Gentile also expressed concern that new people get involved in this process. Since the other three members, previously approved, of the CP committee are new comers, it was felt that Mr. Dickson's experience would be an asset mixed with the new ideas and experiences of the other members.

 # 440-01 ALD. GENTILE & MEMBERS OF THE JOHN M. BARRY BOYS & GIRLS CLUB requesting the establishment of a smoke free zone around and within the perimeter of the Horace Mann School and the Boys & Girls Club.

ACTION: Held 5-0 (Coletti Not Voting)

NOTE: Ald. Gentile was contacted by the Boys & Girls Club regarding the establishment of a Smoke Free Zone. They invited him and Mr. Russo to enlist their assistance to make the zone become a reality. Mr. Rick Meek, Director Teen Programs for the Club received a grant from the American Cancer Society through the hard efforts of the children along with the assistance of Mr. Russo and the Horace Mann School. They are hoping that the work that they are doing regarding the anti smoking message driven through education programs up to and including the political spectrum, will eventually become a program for Boys and Girls Clubs nation-wide. There were about a dozen children present to support this item. They had the following questions that they raised as they look toward the establishment of this Smoke Free Zone:

CITY OF NEWTON

IN BOARD OF ALDERMEN

PROGRAMS AND SERVICES COMMITTEE REPORT

WEDNESDAY, FEBRUARY 6, 2002

Present: **Ald. Johnson, Sangiolo, Coletti, Gentile, Parker, Lipsitt, Fischman**

Absent: **Ald Merrill**

Other Aldermen Present: **Ald. Baker, Stewart, Mansfield, Schnipper, Yates, Basham and Lennon**

Officials Present: **City Solicitor, Dan Funk, Assoc. City Solicitor Gayle Smalley, Election Commissioners Smith and Moffenson, Acting Executive Secretary of the Election Commission, Karen Griffey and new appointee Peter Karg, Commissioner of Parks & Recreation, Fran Towle, City Clerk/Clerk of the Board, Edward English. Chief Budget Officer Sandy Pooler, Mayor Cohen, Asst. Superintendent Jim Marini, former School Committee members, Susie Heyman, Verne Vance, and Andy Vizilus**

#9-02 **Approved**
Voting Yes: Ald. Coletti, Parker, Lipsitt;
Voting No: Ald. Gentile and Sangiolo;
Abstaining: Ald Johnson and Fischman

Note: President Lipsitt thought the date should be the latest date possible, Version 1 (referring to the several versions presented by the City Solicitor) with the goal being to maximize the availability to all who want to run as possible. President Lipsitt is not unalterably opposed to Version 4. Ald. Baker prefers version 4 as it provides a level of certainty to the process. Ald. Sangiolo preferred Version 4 over version 1. It is important that candidates to be forthright about their place of residence. Also she has a concern regarding the fact that in Version 3 allows others to take out nomination papers on the behalf of someone else - "any person acting on his [the candidate's] behalf pursuant to his signed authorization secures blank forms for nomination as a candidate…" Ald. Fischman thought that Version 4 was better than Version 1. Ald Johnson spoke in favor of the set date of Version 4. Ald. Parker thought those Versions 2 & 3 seem rather arbitrary and difficult to enforce. Version 4 limits the availability for those who want to run for office so prefers Version 1. Ald. Mansfield reiterated his support for Version 1, seeing that it is our current practice, and agrees that it should be codified in our City Charter. Ald. Gentile cannot support Version 4, as it does not allow enough flexibility for those who want to run for office. However, he did sate that what is most important is that a candidate is a resident, when collecting signatures, of the Ward from which s/he states s/he is running. He has faith in our Election Commission and office that they will effectively administer the process and

therefore supports Version 3. Ald. Colletti thinks that the date for submitting papers, Version 1, presents the best opportunity for flexibility. Ald. Baker believes that Version 4, rather than 1, actually represents our current practice and that a floating date, Version 3, is more difficult to administer. The two major points, though very different, made by the Committee are as follows:

- The date for determining residency should be as flexible as possible to encourage more not less people from running for office – Version 1
- The date for setting residency should in fact ensure that when a candidate is collecting signatures s/he should be a resident of the Ward from which s/he says s/he is running.

#20-02 Approved 7-0

Note: President Lipsitt was honored to be able to recommend Edward English for reappointment as it is one of the great pleasures she has as President of the Board. Mr. English is honored and grateful for the opportunity that he has had to support the Board of Aldermen. Mr. English spoke a moment on his accomplishments, most notably the integration of Legistar. Ald Parker and Johnson spoke of Mr. English's contribution to the Board and the city.

#56-02 Approved 6-0, Ald. Sangiolo not voting

Commissioner Towle explained that there has been very little snow and that the city has done an excellent job to do as much work in-house [without the use of Contractors] for the two storms that we have had. They have been dealing with trees, both in preparation for storms as well as dealing with trees and limbs that have fallen during a storm. The seed money of $24,000 plus Overtime, $10,000 is immediately gone after the first storm. A 2-inch storm uses up the seed money. Ald. Coletti expressed concern of freezing this $176,442 that could be otherwise used for another purpose, while we wait for a storm. It seems premature and she should request on 50% of this amount. Ald. Parker expressed his concern about the seed money year, after year, being too low – as Parks & Recreation always need to come in for an additional appropriation. They should budget more realistically.

#59-02 Held 7-0

Note: Mayor Cohen presented the history as to how he arrived at his decision to request that the override question be placed on the ballot. He also expressed that Newton is not unique and that other communities are in a similar situation. Since 1992 virtually all of the surrounding communities have had an override and a number of communities are considering pursuing one as well. Newton will have new revenue of $4.9M [$35.M for the schools and $1.4M for the city side] The schools need the additional funding to address, security, makeup of certain structural deficits and to keep pace. On the city side Newton has to allocate funds for its security initiatives, that were not needed prior to September 11th, 2001. If the city went with a level-funded budget, he thought that the cuts that would be necessary would be too much for the city. Mayor Cohen stated that 65% of the city-side of the budget is allocated to the DPW, Fire, and Police. So if we have to make cuts,

Term

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

DANIEL L. **FAHEY &** another [FN1] *vs.* NEWTON ELECTION COMMISSION & others. [FN2]

11-P-1822

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Daniel L. Fahey and James W. Bueche (plaintiffs) sought judicial review in the Superior Court of a decision by the Newton election commission (commission) which determined that Jonathan Yeo was domiciled in Ward 2 for the purposes of his school committee candidacy. Reviewing the matter pursuant to G. L. c. 249, § 4, and G. L. c. 56, § 59, the judge allowed the plaintiffs' motion for judgment on the pleadings and ordered Yeo's name struck from the ballot. A single justice of this court, pursuant to G. L. c. 231, § 118, (first par.), vacated the judgment of the Superior Court, and ordered the city [FN3]

to not strike Yeo's name. The plaintiffs' appeal of the single justice's order was dismissed by a panel of this court. When final judgment entered for the defendants in the Superior Court, the instant appeal followed. [FN3] We affirm.

1. *Standard of review.* We review de novo a decision on a motion for judgment on the pleadings pursuant to Mass.R.Civ.P. 12(c), 365 Mass. 756 (1974). *Wheatley v. Massachusetts Insurers Insolvency Fund,* 456 Mass. 594, 600 (2010). We will affirm administrative determinations challenged under G. L. c. 249, § 4, if the record meets the substantial evidence test; that is, if 'evidence exists in the administrative record that a reasonable mind might accept as adequate to support a conclusion.' *Allen v. Department of Correction,* 69 Mass. App. Ct. 682, 684 (2007) (quotations and citation omitted). In addition, pursuant to G. L. c. 56, § 59, the Superior Court has jurisdiction to review the decision of the commission to determine whether the evidence 'was sufficient as matter of law to warrant [its] decision.' *Dane v. Board of Registrars of Voters of Concord,* 374 Mass. 152, 157 (1978). Again, the question presented is whether the commission had 'substantial evidence.' *Hershkoff v. Board of Registrars of Voters of Worcester,* 366 Mass. 570, 574 (1974).

2. *Burden of proof.* The Superior Court judge had determined that the commission erred, as a matter of law, by assigning the burden of proof to the plaintiffs. We disagree. [FN4] In general, the burden of showing a change of domicile is upon the party asserting the change. *Commonwealth v. Davis,* 284 Mass. 41, 49 (1933). But *Davis* can be understood to put the burden on the party making the challenge. [FN5] In *Mellon Natl. Bank & Trust v. Commissioner of Corps. and Taxn.,* 327 Mass. 631, 638 (1951), the Supreme Judicial Court placed the burden of proof on the tax commissioner because he had brought the challenge to the decedent's estate's claim that the decedent was not domiciled in the Commonwealth.

What emerges from these cases is that the burden of proof 'falls where general principles of law would naturally and logically cause it to fall.' *New England Trust Co.* v. *Commissioner of Corporations and Taxation,* 315 Mass. 639, 642 (1944), cited in *Mellon, supra.* Here, it is the plaintiffs who have brought the challenge to Yeo's domicile in Ward 2. That domicile had been accepted by the city clerk when Yeo filed the necessary documentation to be a school committee candidate from Ward 2. General principles of law would place the burden of proof on the party bringing the challenge to support the allegation, not on the party against whom the challenge is made. The administrative decisions of the State Ballot Commission are in accord with our conclusion.

Finally, even if the burden of proof was allocated to Yeo, we conclude that the commission's decision was properly supported by substantial evidence. In addition to the deference that is owed to the commission in its interpretation of the operation of the city charter, see *Capezzuto v. State Ballot Law Commn.,* 407 Mass. 949, 952 (1990), the determination of a person's domicile is primarily a question of fact. *Tuells v. Flynt,* 282 Mass. 106, 109 (1933). Without rehearsing the facts, that are largely not disputed, the commission was supplied with substantial evidence to have supported a conclusion, reached by reasonably minded people, that once Yeo had acquired the new home in Ward 2, and sold his old home in Ward 4, the old home became a temporary residence and no longer his domicile. *Ibid.* The judge's conclusion to the contrary was in error.

3. *Compelling evidence.* 'Domicil once acquired is not lost until a new one is obtained . . . and the original domicil is presumed to have continued in the absence of compelling evidence that it was changed.' *Dane v. Board of Registrars of Voters of Concord,* 374 Mass. 152, 162 (1978). *Horvitz v. Commissioner of Rev.,* 51 Mass. App. Ct. 386, 395 (2001). From this statement of the law, the plaintiffs argue, and the judge accepted, that 'compelling evidence' is quantifiably greater than 'substantial evidence.' We disagree. Had the Supreme Judicial Court or this court intended to endorse a heightened burden of proof, the opinions surely would have done so in a less oblique way. A far more reasonable explanation of the phrase 'compelling evidence' is that it refers to the quality and not the quantity of evidence required to prove a change in domicile.

4. *Application of the Newton charter.* Because the material subsidiary facts of the case are not disputed, an independent and adequate ground of decision is the correctness, as a matter of law, of the commission's application of charter section 4-1(b) requiring that a school committee 'candidate shall have continuously been a resident of the ward from which he is elected from the date [of the availability of nomination papers from the commission, here March 7, 2011] until and including the first day of the term for which he is elected.' In the very unusual circumstances of this case, [FN6] the commission concluded that Yeo resided at the Ward 2 home as of March 7, 2011, within the meaning of the charter provision. If the commission had concluded that he had continued to reside at his former house (sold on January 31, 2011, but still occupied by him by special arrangement until renovations of his newly purchased house in Ward 2 reached completion in June, 2011), his residency would have become irretrievably split between the former house on March 7 and the later house on the day of office taking (if elected) after June, 2011. That conclusion would have precluded the continuous residency necessary for candidacy despite his substantial presence at the later house throughout the first six months of 2011. It would have deprived him of access to the ballot and deprived the voters of the opportunity to consider his candidacy.

Amid these circumstances, the commission functions as the competent local body charged with implementation of the election provisions of the charter. Its application and interpretation of those provisions, although not binding, are entitled to consideration by a reviewing court. *Board of Educ.* v. *Assessor of Worcester,* 368 Mass. 511, 515-516 (1975). *Taylor v. Housing Appeals Comm.,* 451 Mass. 149, 154 (2008). If its interpretation of the provision is reasonable, the court should not supplant it. *Boston Retirement Bd.* v. *Contributory Retirement Appeal Bd.,* 441 Mass. 78, 82 (2004). In particular, the court will reject an application producing an irrational or ineffectual result. *Insurance Rating Bd.* v. *Commissioner of Ins.,* 356 Mass. 184, 189 (1969). *Commonwealth v. Millican,* 449 Mass. 298, 303-304 (2007). In this instance the commission chose against an interpretation casting Yeo into an anomalous residential vacuum barring him from the ballot and the voters from his candidacy. That determination was not irrational and will receive our respect. [FN7]

Conclusion. The commission's decision was based on a correct application of the law, and supported by substantial evidence. The Superior Court judgment for the defendants is affirmed. The clerk of the city of Newton shall not strike Jonathan Yeo's name from the ballot for election for school committee from Ward 2.

So ordered.

By the Court (Meade, Sikora & Hanlon, JJ.), Clerk

Entered: November 1, 2011.

FN1. James W. Bueche.

FN2. Clerk of the city of Newton, and Jonathan Yeo.

FN3. The plaintiffs also sought relief from a single justice of the Supreme Judicial Court pursuant to G. L. c. 211, § 3. As final judgment had entered in the Superior Court, the single justice determined that the plaintiffs had a right to appeal in this court.

FN4. The plaintiffs claim that the single justice of this court lacked jurisdiction under G. L. c. 231, § 118 (first par.) because the Superior Court judge's memorandum and order constituted a final order for purposes of Mass.R.Civ.P. 54(*a*), 365 Mass. 820 (1974), and Mass.R.Civ.P. 58(*a*)(2), as amended, 371 Mass. 908 (1977). However, we need not resolve the issue of the single justice's jurisdiction because final judgment has entered, and the propriety of that judgment is properly before us without regard to the single justice's order.

FN5. The judge relied on *Commonwealth v. Davis, supra,* but there it was the defendant who made the assertion that he was not domiciled in the Commonwealth to avoid the payment of taxes. Having made that challenge, he bore the burden of proof.

FN6. Yeo purchased a house in Ward 2 as of December 27, 2010, paid for its taxes, insurance, utilities, and substantial renovations throughout the first six months of 2011; regularly visited the house and supervised its renovation and upkeep; and shifted his mailing address there; but by special arrangement occupied his former house in Ward 4 until completion of the renovations in June of 2011.

FN7. We respect, as well, the rigorous analysis of the rules and case law of domicile conducted by the motion judge. The unprecedented circumstances of this dispute and the role of the commission as a first-hand arbiter of access between candidate and electorate have led us to a different conclusion.

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MEMO

Harvey Epstein, Executive Director
Newton Housing Authority
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Newton Highlands, MA 02461

To: All Residents of the Newton Housing Authority
Subject: NHA Board of Commissioners

October 18, 2011

The following is a list of the current Board of Commissioners of the Newton Housing Authority and their contact information.

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