



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 6, 2023

Senator Brian Boquist
900 Court Street NE S311
Salem OR 97301

Re: Enforcement process for legislator inhabitancy requirements

Dear Senator Boquist:

You asked four questions concerning legislator inhabitancy requirements and the enforcement process to be used to ensure that inhabitancy requirements are being satisfied. Your specific questions and our answers are set forth below. Some questions have been modified for clarity.

Question: Is there a constitutional clause that requires a legislator to live in their district during their term of office?

Answer: Yes. Article IV, section 8 (7)(a), of the Oregon Constitution, provides that:

[A] person may not be Senator or a Representative if the person at all times during the term of office of the person as a Senator or Representative is not an inhabitant of the district from which the Senator or Representative may be chosen or which the Senator or Representative has been appointed to represent.¹

In other words, to remain qualified to serve as a Senator or a Representative, the legislator must continuously be an inhabitant of the district that they were elected or appointed to represent for the entirety of their term of office. This parallels a similar constitutional requirement applicable as of the time the Senator or Representative is elected to office; namely that the person be an inhabitant of the district for one year preceding the election.² There is a special rule for when a reapportionment occurs. That rule provides that the person who is being elected Senator or Representative must have been an inhabitant of the district from January 1 of the year following the deadline for making the final reapportionment.³ The last reapportionment was an anomaly because the federal decennial census on which reapportionments are based was delayed. As a result of that delay, the Oregon Supreme Court established an alternative deadline by which persons needed to establish inhabitancy in the district to which they would be elected Senator or Representative that could have been later than January 1, 2022, if, pursuant to a challenge to the legislatively adopted reapportionment plan, the court had determined that changes to the plan

¹ We note that there is an exception to the general rule quoted above following a reapportionment of districts, that provides that a Senator or a Representative may be an inhabitant of any district until the expiration of the term of office of that person. Article IV, section 8 (7)(b), of the Oregon Constitution. For example, if a Representative was an inhabitant of District 1 and represented District 1, but a reapportionment caused the Representative to become an inhabitant of District 5, section 8 (7)(b) permits the Representative to validly remain the Representative of District 1 even though no longer an inhabitant of District 1, until the Representative's two-year term of office is complete.

² Article IV, section 8 (1)(a)(B), of the Oregon Constitution.

³ Article IV, section 8 (1)(b), of the Oregon Constitution.

were needed.⁴ The Supreme Court upheld the legislatively adopted plan, causing the deadline by which persons needed to establish inhabitancy in the district to remain January 1, 2022.⁵

Both section 8 (1) and section 8 (7) provide that a person must “inhabit” their district to qualify for Senator or Representative. Inhabitancy is not defined by the Oregon Constitution or in election law, and we are unaware of any Oregon court case interpreting the term for purposes of Article IV, section 8. We believe the inhabitancy requirement will probably be construed to require a member to establish a residence in the district. The legal standards for determining the location of a person’s residence or domicile may be different depending on the context, but generally, the key requirements for establishing inhabitancy in a district are: (1) physical presence; and (2) intent to remain, reside or inhabit a certain location.⁶ The Supreme Court has considered residence and domicile to mean the same thing for purposes of determining whether a candidate for Governor has satisfied the three-year state residence requirement of Article V, section 2, of the Oregon Constitution.⁷

Although you requested that we describe constitutional provisions that apply to members of the Legislative Assembly, we note the existence of a statute, ORS 249.052, that governs how candidates for the office of Representative or Senator determine inhabitancy. The nonexclusive factors that are listed in the statute could be used by a court as contextual evidence of what is meant by inhabitancy as a qualification for legislative office.⁸

Question: What are the constitutional provisions employed to enforce a requirement that a member inhabit a district?

Answer: Article IV, section 11, of the Oregon Constitution, provides, in relevant part, that “[e]ach house when assembled, shall . . . judge . . . the . . . qualifications . . . of its own members[.]” By reason of this provision, we conclude that the legislative chamber in which a member serves is the only entity that can determine that a member no longer qualifies to be a Senator or a Representative. A member of the public or an individual member of the Legislative Assembly may not challenge another member’s continued service in the Legislative Assembly in court, because courts lack jurisdiction to make judgment on a member’s qualification for office.⁹ We finally note that a determination by a legislative chamber that a member has ceased to possess the qualifications of the office is a judgment made under Article IV, section 11, and is not an expulsion under Article IV, section 15, of the Oregon Constitution. It follows that a judgment under Article IV, section 11, is made by a simple majority vote of the legislative chamber making the determination, and does not require the concurrence of two-thirds of the chamber, which an expulsion requires.

Question: What are the processes and procedures for making a complaint that a member is not an inhabitant of their district, for investigating the complaint and for adjudicating the complaint, including an explanation of remedies, if the member is adjudged to not be an inhabitant of the district they represent.

⁴ *State ex rel Kotek v. Fagan*, 367 Or. 803, 821-822 (2021).

⁵ *Sheehan v. Oregon Legislative Assembly*, 368 Or. 739 (2021).

⁶ 16 Op. Att’y Gen. 225 (1933); see also *Elwert v. Elwert*, 196 Or. 256, 265 (1952) (intention is dominant factor in determining change of domicile).

⁷ *State ex rel Kristof v. Fagan*, 369 Or. 261, 277 (2022).

⁸ The nonexclusive factors listed in ORS 249.052 (1) are: (a) where the candidate receives personal mail; (b) where the candidate is licensed to drive; (c) where the candidate registers motor vehicles for personal use; (d) where immediate family members of the candidate reside; (e) the address from which the candidate pays for utility services; (f) the address from which the candidate files tax returns; and (g) the candidate’s voter registration.

⁹ *Lessard v. Snell*, 155 Or. 293 (1937) (Oregon Supreme Court was without jurisdiction to determine qualifications of candidate elected to Senate, in view of direction of Article IV, section 11, that each house be sole judge of qualifications of its own members).

Answer: At the outset we note that answers to this question concern matters of parliamentary procedure for which the Secretary of the Senate and the Chief Clerk of the House have primary responsibility and should be consulted to determine specific procedural steps to be undertaken.

Both Senate and House rules are silent on how a member's inhabitancy of the district they represent is challenged. Senate and House rules adopt by reference *Mason's Manual of Legislative Procedure* (2020 edition) (*Mason's Manual*), to be used to address cases not provided for in the Oregon Constitution or in Senate or House rules.¹⁰ Section 560 of *Mason's Manual* provides the following guidance relevant to your question:

- Section 560 (1) to (3) confirm that “by constitutional provision” each legislative chamber is the exclusive judge of the qualifications of its members and the authority to make that judgment cannot be vested in any other tribunal or office. Further, the judgment of a legislative chamber of the qualifications of its members is conclusive and is not subject to review by the judiciary.
- Section 560 (11) provides that a legislative chamber's right to judge the qualifications of its members includes “the right to decide finally whether a member has become disqualified during a term of office; this decision is not subject to judicial review.”
- Section 560 (14) provides that “the authority of a house of a legislature to pass upon its membership is a continuing power, and the question of the election and qualification of members is never finally decided . . . until final adjournment.”
- Section 560 (14) also provides that “[a] member at any time may be seated or unseated upon the same facts.”

As was noted above, being an inhabitant of the district one represents is an ongoing constitutional qualification for a member. Section 560 confirms that the legislative chamber in which the member serves has an ongoing right to examine whether a member continues to satisfy that qualification throughout the entirety of the member's term of office. Although not entirely free from doubt, we believe that section 560 also establishes a procedure a legislative chamber may use to determine a member's continuing satisfaction of the inhabitancy qualification. Specifically, section 560 (5) provides that in the event of an election contest, the chamber may appoint a committee to take testimony and report the facts and evidence to the body. While section 560 (5) is expressly about election contests, we believe a similar approach would be appropriate to investigate whether a member continues to satisfy district inhabitancy requirements. Specifically, a special committee could be created, either by order of the presiding officer or by resolution of the body.¹¹ The order or resolution could set forth the tasks of the special committee and a timeline by which the special committee is to complete its tasks and report a recommendation to the body. Under section 560 (4), any investigation the special committee undertakes must comply with due process and other applicable constitutional requirements that, for example, would require an accused member to be provided notice and an opportunity to explain their compliance with inhabitancy requirements. Following receipt of the committee's report, the body would take up the committee's recommendation.

¹⁰ Senate Rule 2.01 (which also limits the use of *Mason's Manual* to cases not provided for under custom of the Senate or by statute); House Rule 2.01.

¹¹ Senate Rule 8.05 and House Rules 8.01 and 8.05 authorize each presiding officer to create special committees and direct their function. Section 643 (2) of *Mason's Manual* authorizes the creation of special committees “for the consideration of special proposals or the performance of special functions[.]” Section 644 (1) of *Mason's Manual* authorizes the creation of special committees by resolution or motion of the body or by order of the presiding officer.

A member of the Legislative Assembly who believes another member is not maintaining district inhabitancy requirements and who wishes to initiate the process described in the preceding paragraph may do so in two alternative ways. First, the member could informally discuss the situation with the presiding officer and request the presiding officer to establish a special committee to investigate and report on the matter. Alternatively and independently of the presiding officer, the member could draft a single chamber resolution setting forth the member's understanding of the other member's inhabitancy situation and directing that a special committee be formed to investigate and report on the matter to the body. The resolution would be introduced like other legislative measures and would establish the special committee upon being adopted by the body. Note, however, that a member of the other legislative chamber could not introduce a resolution in that chamber to form a special committee in the chamber in which the member does not serve. This is because only the legislative chamber in which the member accused of failing to inhabit their district is authorized to judge the accused member's qualifications.¹²

There may be other parliamentary processes available to challenge a member's inhabitancy of their district. As noted previously, the Secretary of the Senate, if the accused member is a Senator, or the Chief Clerk of the House, if the accused member is a Representative, would be resources to consult with on this question.

If a legislative chamber determines that an accused member is not an ongoing inhabitant of the district the member represents, that determination automatically causes the accused member to cease being a member of the Legislative Assembly.

Question: If the legislative chamber in which the accused member serves chooses to take no action, are there other options that a complainant may pursue.

Answer: No. As discussed above, the legislative chamber in which the accused member serves is the exclusive forum to judge the qualifications of its members.¹³

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dexter A. Johnson", with a long horizontal flourish extending to the right.

Dexter A. Johnson
Legislative Counsel

¹² Article IV, section 11, of the Oregon Constitution.

¹³ *Id.*, see also footnote 9.