



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 12, 2013</p>	<p>No. I13-003 (R13-005)</p> <p>Re: Vacancy in the Legislature</p>
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To: Honorable Kelly Townsend
Arizona House of Representatives

Questions Presented

You have asked for an opinion on the following questions:

1. Does Arizona Revised Statutes (A.R.S.) § 41-1202(A)(2) and (3) require the nomination of a qualified elector from the same county of residence as that of the person vacating a legislative office in a legislative district that encompasses portions of more than one county within its boundaries?
2. Is an otherwise qualified elector eligible for nomination under A.R.S. § 41-1202(A) if he or she purports to meet the residency requirement by relying on a room above his or her commercial property?

Summary Answers

1. Yes, A.R.S. § 41-1202(A) requires a vacancy to be filled by a qualified elector of the same political party residing in the same county as the person who is vacating the office.

2. As the answer to the first question implies, the answer to the second question depends on actual residency as a matter of fact and law. We cannot answer this question without additional factual information to indicate whether the person actually resides in the room above commercial property.

Background

The Statutory Procedure

In 1999, the Legislature enacted a procedure for filling a legislative vacancy in A.R.S. § 41-1202.¹ The Legislature amended A.R.S. § 41-1202 in 2002 and again in 2012. Under the currently effective version, subsection 1202(A) applies if the officeholder who is leaving the office is a member of a political party organized pursuant to title 16, chapter 5, article 2, if that party has at least thirty elected committeemen who are from precincts that are “in the legislative district and that are in the county in which the vacancy occurred.” A.R.S. § 41-1202(A). Subsection 1202(B) applies if there are fewer than thirty elected committeemen of the appropriate political party. A.R.S. § 41-1202(B).

Under subsection 1202(A), the secretary of state must notify the state party chairperson of the vacating legislator’s political party, who must then provide written notice of a meeting to fill the vacancy to “all elected precinct committeemen of the appropriate political party from precincts that are in the legislative district and that are in the county in which the vacancy occurred.” A.R.S. § 41-1202(A)(1). Those precinct committeemen must then nominate three

¹ A vacancy in the office of United States senator or representative is filled either by the next general election, if held within six months from the date of the vacancy, or by a special election, if the next general election is more than six months in the future. A.R.S. § 16-222.

qualified electors who meet the requirements for service in the legislature and “who belong to the same political party and reside at the time of nomination in the same district and county as the person elected or appointed to the office immediately before the vacancy occurred.” A.R.S. § 41-1202(A)(2). The state party chairman must then forward the three nominees’ names to the “board of supervisors of the county of residence of the person elected or appointed to the office immediately before the vacancy occurred,” and the board of supervisors shall then appoint a successor from those three nominees. A.R.S. § 41-1202(A)(4).

The Maricopa County Attorney’s Advice Letter

In 2012, a vacancy in the Legislature prompted a Maricopa County supervisor to request an opinion from the Maricopa County Attorney regarding whether Ariz. Const. art. 4, pt. 2, § 2 required the Board of Supervisors to fill the vacancy by appointing a qualified elector who had been a resident of Maricopa County for at least one year. Senator Scott Bundgaard, a Maricopa County resident representing Legislative District 4—which includes portions of both Maricopa and Yavapai Counties—resigned. The request focused on the one-year residency requirement, not on which county’s precinct committee persons (and board of supervisors) would nominate and appoint someone to fill the seat. Nonetheless, the responding letter² addressed the latter issue.

Article 4, pt. 2, § 2 of the Arizona Constitution provides:

No person shall be a member of the Legislature unless he shall be a citizen of the United States at the time of his election, nor unless he shall be at least twenty-five years of age, and shall have been a resident of Arizona at least three years and of the county from which he is elected at least one year before his election.

² A deputy county attorney responded to the supervisor’s request for a legal opinion. The letter was not signed by the Maricopa County Attorney himself.

For purposes of Title 16, a “resident” is an “individual who has actual physical presence in this state, or for purposes of a political subdivision actual physical presence in the political subdivision, combined with an intent to remain.” A.R.S. § 16-101(B).

The letter from the Maricopa County Attorney’s Office concluded that the one-year residency requirement set forth in the Arizona Constitution is unenforceable because legislators are no longer elected from counties. The letter recounted the history of apportionment of legislators in Arizona and noted that before 1965 the Legislature consisted of two senators from each county and eighty state representatives apportioned to each county based on the ballots cast in the preceding gubernatorial election. In 1964, the United States Supreme Court ruled that the Equal Protection Clause requires that legislative districts be “as nearly of equal population as is practicable.” *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). Beginning with the 28th Legislature in 1967, the Senate had thirty members and the House of Representatives had sixty members, who are apportioned among thirty legislative districts based on the population rather than county lines. Ariz. Const. art. 4, pt. 2, § 1.

Article 4, pt. 2, § 2 has not been amended to keep pace with the changes in legislative apportionment set forth in the preceding section. The letter from the Maricopa County Attorney’s Office indicated that the one-year residency requirement is unenforceable because it is a vestige of the previous apportionment process. Thus, the letter concluded that individuals considered for appointment to fill the vacancy in Legislative District 4 need not have resided in Maricopa County for at least one year prior to their nomination or appointment.

Analysis

The Legislative History of A.R.S. § 41-1202 Reflects the Legislature's Intent to Impose the County of Residence Requirement.

The original version of A.R.S. § 41-1202 vested responsibility for filling legislative vacancies solely in the county boards of supervisors. When House Bill 2586 was introduced in 1999 to enact a new section 41-1202, it did not mention the residency of the vacating legislator, but instead provided the following:

A. If a vacancy occurs in the legislature and the vacant seat was represented by a political party that has precinct committeemen organized pursuant to title 16, chapter 5, article 3, the secretary of state shall notify the state party chairman of the appropriate political party of the vacancy. Within three business days after notification of the vacancy by the secretary of state, the state party chairman of the appropriate political party or the chairman's designee shall give written notice of the meeting to fill the vacancy to all elected precinct committeemen of the appropriate political party *from precincts that comprise the legislative district in which the vacancy occurred*. The elected precinct committeemen of the appropriate political party who are *from the precincts that comprise the legislative district in which the vacancy occurred* shall appoint, within twenty-one days after notification of the vacancy by the secretary of state and by a majority vote, a qualified elector to fill the vacancy who meets the requirements for service in the legislature and who belongs to the same political party and resides at the time of appointment *in the same district* as the person elected to or appointed to the office immediately before the vacancy.

(Emphases supplied). The House Federal Mandates & States' Rights Committee voted to pass the bill without amendment. Public testimony praised the bill for putting the responsibility in the hands of the precinct committeemen, who were more familiar with the needs of the community. There were no opposing comments. The House passed it as introduced and transmitted it to the Senate.

The Senate Committee on the Judiciary discussed at length the fact that some legislative districts are comprised of portions of more than one county. This led to a conference committee that amended the bill. The version of HB 2586 ultimately enacted by the Legislature and signed by the Governor provided the following:

A. If a vacancy occurs in the legislature and the vacant seat was represented by a political party that is organized pursuant to title 16, chapter 5, article 2 and that has at least thirty elected committeemen who are from precincts that are in the legislative district *and that are in the county in which the vacancy occurred*, the secretary of state shall notify the state party chairman of the appropriate political party. Within three business days after notification of the vacancy by the secretary of state, the state party chairman or the chairman's designee shall give written notice of the meeting to fill the vacancy to all elected precinct committeemen of the appropriate political party from precincts that are in the legislative district *and that are in the county in which the vacancy occurred*. Those elected precinct committeemen shall nominate, within twenty-one days after notification of the vacancy by the secretary of state if the legislature is not in regular session or within five days if the legislature is in regular session and by a majority vote, three qualified electors to fill the vacancy who meet the requirements for service in the legislature and who belong to the same political party and reside at the time of nomination *in the same district and county* as the person elected to or appointed to the office immediately before the vacancy.

(Emphases supplied). In light of the conference committee's amendments, the county of residence requirement cannot be disregarded as an overlooked, anomalous vestige of the old apportionment regime. The 44th Legislature affirmatively added the reference to county of residence for the vacating legislator well after the change to the new population-driven apportionment regime. The legislators deliberated and decided to include residency in the vacating legislator's county as a qualification for the nominees to fill the vacancy.

The 2002 amendments, embodied in House Bill 2124, confirm the continuing vitality of the county of residence requirement. The introduced version removed the county-of-residence

requirement. Representative Gary Pierce, one of the bill's sponsors, explained that it was more desirable to allow all precinct committeemen in a district select the three nominees. Under the bill, the board of supervisors from the county in which the vacating legislator resides would still decide which of the three nominees to appoint for the vacancy. Senator Jack Brown proposed a floor amendment to undo the deletion of the county-of-residence references. Adopting the floor amendment, the Legislature passed a final version that kept the county-of-residence language.

The Legislature again amended § 41-1202 in 2012 through House Bill 2033, and again kept the county-of-residency requirement.

The Legislature affirmatively added the county-of-residency requirement as a qualification for potential nominees to fill a vacancy well after the change to population-based redistricting. The statutory language is unambiguous and requires nominees to fill a vacancy to reside in the same county as the vacating legislator.

Eligible Nominees Must Meet the Residency Requirement as a Qualification for Office.

The answer to the second question presented—whether a person can indicate a room over a commercial property as his or her residence for purposes of establishing residency for appointment to fill a vacancy—depends upon whether the person actually resides in the room, rather than whether the room is above commercial property. We cannot answer the second question without addressing facts and circumstances that are not set out in the question.

Conclusion

Under A.R.S. § 41-1202, nominees to fill a legislative vacancy in districts encompassing portions of more than one county must be residents of the same county in which the vacating legislator resides. How and whether a prospective nominee may establish residency for purposes of this statute encompasses factual questions beyond the scope of this opinion.

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