



## City of Lowell - Law Department

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### MEMORANDUM

TO: Eileen Donoghue, City Manager *EMD*

FROM: Christine P. O'Connor, City Solicitor

DATE: April 9, 2020

SUBJECT: **Motion Response – C. Nuon Req. Opinion relative to the Feasibility of Residential Requirements for Public Employees**

I write in response to Councilor Nuon's request for an opinion relative to the feasibility of residential requirements for public employees. Lowell could advance a residency requirement, however, it could not be applied to existing employees or members of the school department. Residency requirements could be enacted for new employees, but such requirements would need to be supported by a rational reasons tied to a legitimate governmental interest. In the case of employees working pursuant to a collective bargaining agreement, a residency requirement would also need to be bargained with all union groups.

#### Opinion Summary

- I. Residency requirements may be a valid condition placed on employment, subject to certain restrictions.
- II. The purpose of the ordinance must be rationally related to a legitimate governmental interest.
- III. Reasons advanced by municipalities are generally given deference by the courts, but still may be subjected to a factual investigation.
- IV. A preferential treatment policy advanced by the Council would likely raise constitutional concerns and may very well conflict with state law.
- V. Residency requirements are mandatory subjects of collective bargaining.
- VI. Grandfathering clauses work to protect current employees from changes in the law that would destroy established reliance on previously valid regulations and laws.
- VII. With the exception of Boston, most other regional, similarly sized, or Plan E communities do not have an enforced residency requirement.

## Discussion

### I. Residency requirements may be a valid condition placed on employment, subject to certain restrictions.

Since the mid-seventies, following a decision by the Supreme Court, both state and federal courts have uniformly held that "it is undisputedly the right of [municipalities] to require residency of those who actually . . . become city employees." *Grace v. City of Detroit*, 760 F.Supp. 646, 649 (1991). In *McCarthy v. Philadelphia Civil Service Commission*, the Supreme Court held that the Court "has never questioned the validity of a condition placed upon municipal employment requiring that a person be a resident at the time of his application."<sup>1</sup> *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 646 (1976); *See also: Detroit Police Officers Assn. v. Detroit*, 405 U.S. 950 (1972)(an ordinance requiring all policeman to live in the City of Detroit was found by the Supreme Court to be a classification which bore a reasonable relationship to the legislative purpose). The Court recognized that a public agency's relationship with its own employees may justify greater control than that over the citizenry at large. *McCarthy*, 424 U.S. at 647.<sup>2</sup> Based on the *McCarthy* decision, lower courts have generally held that, "residency requirements are rationally related to a legitimate state interest." *In re Cranston\_City Charter*, Not Reported in A.2d 5 (2004); *See also: Reynolds v. Lamb*, 232 A.2d 375, 378 (1967)("We cannot fail to recognize as significant the fact that the residency requirements are part of the organic law of the city..."); *Loiselle v. City of East Providence et al*, 359 A.2d 345, 348-349 (1976)("Municipalities that require their employees to live within the city or town limits are acting rationally and within the constitutional framework.")

Residency ordinances can have implications on certain constitutionally protected rights such as the right to travel, equal protection clause, and the privilege and immunities clause of the constitution. U.S. Const. Amend. XIV (Equal Protection Clause); U.S. Const. Art. IV (Privileges and Immunities Clause; Right to Travel.) In determining the validity of a residency requirement courts have applied both the strict scrutiny test for some ordinances and the rational relation test in other instances when determining whether the law is justified. Instances which have triggered the heightened scrutiny have typically involved a pre-employment residency requirement. These ordinances, commonly referred to as a durational residency requirement, involve a requirement that the prospective employee establish residency for a substantial duration of time prior to competing for a public position. Under these circumstances, courts have typically employed a strict scrutiny analysis, "requiring the law to be necessary to further a compelling state interest." *Walsh v. City and County of Honolulu*, 423 F.Supp.2d at 1101. In instances not involving a durational residency requirement,

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<sup>1</sup> It has been argued, based on the dicta of *McCarthy* that application of residency requirements is literally beyond question. Courts, however, have viewed the above language as being more restrictive, and may best be interpreted as differentiating between the legal question the court was ruling on, "and those that it is leaving open." *Walsh*, 423 F.Supp.2d at 1106.

<sup>2</sup> In *McCarthy*, the Court examined whether a residency ordinance violates the federally protected right of interstate travel when applied to a police officer who changed his residency after several years of working for the municipality.

courts have applied the rational basis test. *Walsh*, 423 F.Supp.2d at 1102 ("Where the law at issue is merely a bona fide residence requirement, the court need only apply the rational relation test to determine whether the law is justified.") In this case, the motion being considered by the Council is a non-durational residency requirement, and therefore, would be subject to the much less rigorous standards of review under a rational basis test.

## **II. The purpose of the ordinance must be rationally related to a legitimate governmental interest.**

One of the essential elements of a valid residency ordinance is whether its purpose is rationally related to a legitimate governmental interest. In the case of *Ector v. City of Torrance*, the Supreme Court of California articulated a number of legitimate state purposes advanced by a residency ordinance, such as: "the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress; diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries." *Ector v. City of Torrance*, 514 P.2d 433, 436 (1973). The court concluded that "[w]e cannot say that one or more of these goals is not a legitimate state purpose rationally promoted by the municipal employee residence requirement here in issue." *Id.* Courts have generally provided deference to the stated purposes advanced by residency ordinances. *City of Lima v. State of Ohio*, 2007-Ohio-6419, 4 ("It is not the function of the reviewing court to assess the wisdom or policy of a statute but, rather, to determine whether the General Assembly acted within its legislative power.")

Here, the initial reasons advanced thus far for consideration behind such a policy includes: assisting the economics in the city and expanding the downtown tax base by injecting consumer spending into local businesses and helping create new jobs. Such policy considerations would likely be viewed as being rationally related to a legitimate governmental purpose. While there is a presumption of regularity, such a presumption is open to challenge.

## **III. Reasons advanced by municipalities are generally given deference by the courts, but still may be subjected to a factual investigation.**

One avenue of challenges has been by means of examining the legislative history behind such a policy, should such legislative history exist. In *Walsh*, the court examined the legislative history of the residency statute and found that "the history of this statute makes it clear that the State has continued to perpetuate the original improper purpose." *Walsh*, 423 F.Supp.2d 1094, 1106 (2006) ("Furthermore, even if this legislative history demonstrating an impermissible purpose did not exist, Defendants' newly alleged legitimate interest of finding loyal, committed employees to prevent quick turnover is not rationally related to a pre-employment residency requirement.") In our case, the City does have a legislative history, which could be subject to examination. Unlike

the case of *Walsh*, however, there is nothing in the City's prior enactment which, on its face, would fail to constitute a rationally related governmental purpose.

In 1992, the City passed a residency ordinance, entitled "Residency Requirements for New Employees." Article V, Section 15-169 (October 6, 1992). The Ordinance provided, in pertinent part, that "every person who is initially appointed to employment with the City in any capacity, in both civil service and non-civil service positions . . . shall be a bona fide resident of the City of Lowell and if not such a resident of the City at the time of such appointment or employment, shall within one (1) year following such appointment or employment, establish such residence as principal domicile, or such appointment or employment may be terminated for "just cause" for any such employee who does not establish and maintain bona fide residence within the City of Lowell."<sup>3</sup> Art.V, §15-169(a). The Ordinance defined "bona fide resident" to mean: "a person having a permanent principal domicile and residence within the City of Lowell and one which has not been adopted with the intention of taking up or claiming a residence outside the City of Lowell. It shall further mean the actual principal residence of the individual where such individual normally eats and sleeps and maintains such individual's normal personal and household effects." Art.V, §15-169(b).

At the time of its passage, the reason advanced in support of the ordinance was that "the city could earn an additional Two Million to Three Million in annual property tax revenues if half of the employees currently living out of town bought houses in Lowell." *Lowell Sun*, October 6, 1992 at p. 7. These estimates were based on the salaries of approximately 941 employees of the city, who were not residents of the city.<sup>4</sup> The yearly salary for the 941 employees was estimated to total \$30,429,000, which represented roughly one fourth of the total city budget at the time. *See*: City Council meeting, October 6, 1992. The intent was to bring revenue back to the City. Specifically, it was argued that "if the out-of-town employees lived in Lowell, the City would benefit from having them pay property taxes, municipal fees, and excise taxes from the employee's occupancy of Lowell's housing stock." *Lowell Sun*, October 7, 1992 at p. 4. All of these arguments were presented at a time when the City was facing a deficit of approximately 13 Million and its "revenues were believed to be shrinking, not growing." *See*: City Council meeting, October 6, 1992.<sup>5</sup>

In 1993, the City amended the residency ordinance by adding a new subsection (d) which provided that "[i]n the event that the City Manager, with the approval of the City Council, determines it to be in the best interest of the public to do so, the provisions hereof may be waived with respect to a particular person or position, and such waiver shall not act to defeat the application of this section to every other person or position." Art.V, §15-169(d) (December 7, 1993). At the time, then-City

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<sup>3</sup> The ordinance specifically exempted all persons hired prior to passage of the ordinance, as well as persons "employed by the School Committee of the City of Lowell." Mass. Gen. Laws c.71, §38 specifically prohibits the imposition of a local residency requirement upon any teacher or professional employee of a school district.

<sup>4</sup> At the time, the city employed approximately 2,200 employees.

<sup>5</sup> Interestingly, the two periods in which the push for a Boston residency ordinance was the strongest were in the mid 1970's and 1993. As noted in "Civic Boston," both dates represented periods where there were slumps in the Boston housing market. . . "City Workers and City Limits," February 21, 2007.

Manager R. Johnson requested this waiver citing difficulties in retaining police officers hired under the new residency requirements, as well as filling a position in the Health Department which required a Master's degree in Public Health. He also cited difficulty retaining a newly-hired employee of the Pollard Memorial Library who fell under the protection of the ADA. The residency requirements for this employee were extremely difficult to satisfy because she lived with her parents in a home converted to meet ADA standards.<sup>6</sup>

Less than a year later, the residency ordinance was repealed in its entirety. Art.V, §15-169 (March 8, 1994). At the time of its repeal, the council reviewed the objectives set forth two years earlier and concluded that they had been largely unmet. Specifically, the council found that "there was no vast economic windfall."<sup>7</sup> See: City Council meeting, March 8, 1994. This "public coffer theory," was similarly discounted in a *Yale Law Journal*, entitled "Municipal Employee Residency Requirements and Equal Protection." The public coffer theory is essentially that resident workers are "presumed to support the local economy." 84 *Yale L.J.* 1684, 1697 (1975). In completing a survey of residency ordinances, the following findings were made with respect to the public coffer theory in light of . . . judicial attacks: "[n]onresidents often are subject to other forms of municipal taxation, such as sales or excise taxes. Residents do not invariably buy more goods and services in the city than do nonresidents. In addition, city residents who live close to the city limits may prefer shopping in suburban areas because prices and sales taxes are lower or stores are less crowded. In short, the assumption that city residents alone bear the tax burden of the city and advance the local economy must be subjected to factual investigation; residency requirements may lack a substantial relation to the purported public coffer rationale." 84 *Yale L.J.* at 1697. Courts, however, have clearly recognized that there well may be an "interest in those paid by the public residing and spending their money within the jurisdiction." 16*B Corpus Juris Secundum* §1288 (December 2007)(quoting, *Winkler v. Spinnato*, 530 N.E.2d 835 (1988).

#### **IV. A preferential treatment policy advanced by the Council would likely raise constitutional concerns and may very well conflict with state law.**

In place of the residency ordinance, the Council adopted a policy of giving Lowell applicants "preferential treatment" when the applications are in all other relevant aspects "equal." The policy would have given "hiring preference in all City jobs to persons who have lived in Lowell for at least one year before applying for a job." *Lowell Sun*, March 7, 1994 at p. 6. Such a policy, if implemented and enforced, would have arguably resulted in a de facto durational residency requirement, which has largely been deemed unconstitutional. Another problematic issue raised by

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<sup>6</sup> A very similar issue was successfully litigated by a City of Boston employee challenging its residency requirements under the ADA. *McDonald v. Menio*, Not Reported in F.Supp (D.Mass 1997)(The court found that the City failed to explain the specific hardship the City would endure if this employee was exempted from the provisions of its residency requirement. The court noted that this was particularly true where "many City employees are presently exempt from the residency requirement under provisions of their collective bargaining agreements."

<sup>7</sup> Implementation of the ordinance did result in roughly 12 out of 124 new hires moving to the City over the two-year period of enactment. The Council also heard testimony from a number of department heads regarding the difficulty of filling some positions under the restrictions of the ordinance.

such a policy is that something as fluid as a "hiring preference" may run contrary to the principle that residency requirements must be "appropriately defined and uniformly applied." *In re Cranston City Charter*, A.2d, 2004 WL 2821645 (R.I. Super.) at 6. Municipalities must not discriminate among employees in a way that is arbitrary or irrational. Moreover, such a policy would likely interfere with the role of the City Manager under Mass. Gen. Laws c.43, §§ 104-105.<sup>8</sup> Where such a policy is largely discretionary in its application, it may very well conflict with the discretionary decision making the City Manager exercises when selecting candidates to fill positions based on "ability, training and experience." See: MGL c.43, §105. It appears that the policy has been largely, if not completely, unenforced for years.<sup>9</sup>

## V. Residency requirements are mandatory subjects of collective bargaining.

While residency requirements when rationally related to a legitimate state interest have been consistently deemed constitutional, there remain other considerations. For example, residency requirements are mandatory subjects of collective bargaining. In a Massachusetts appellate court decision, the court supported the determination of the Labor Relations Commission that the town of Lee was required to collectively bargain a residency requirement for police officers. *Town of Lee v. Labor Relations Commission*, 21 Mass. App. Ct. 166 (1985)(the town's insistence that a police officer remain a resident of the town or forfeit his job was a departure from its prior practice.) *See also*: *City of Worcester and Local 495 SEIU, AFL-CIO MLC* (1978). Likewise, there are many other states and localities where a residency requirement "is a negotiable term and condition of employment and, therefore, such a rule cannot be unilaterally imposed by an employer. "Residency Requirements: Sometimes a Litigation Issue, More Often a Legislative One," at p.2, citing: *City of Chester v. Fraternal Order of Police Lodge 19*, 615 A.2d 893 (Pa. Cmwlth. 1992)(ruling that "residency requirements were traditionally considered a term and condition of employment and, as such, they were subject to collective bargaining under Pennsylvania law.") Many cases challenged have involved municipalities which have taken sudden action to enforce existing residency requirements. "Residency Requirements for Public Employees," Horwitz. (February 2006)("Unions are therefore faced with various legal issues. . . Generally dormant residency requirements can be enforced despite a history of non enforcement or lax enforcement; such lax enforcement does not establish a clear and unequivocal intention on the part of the employer to forever relinquish its contractual rights with respect to residency. However, individuals who moved believing that they were not required to be residents might be permitted to remain non-residents on a reliance theory."), citing *Lynn Police Association and City of Lynn*, (L. Katz, Arbitrator). In our case, implementation of a residency ordinance would

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<sup>8</sup> Section 105, entitled "City Officers and Employees; Appointments and Removals," provides in pertinent part, "all appointments by, or under the authority of, the city manager, shall be on the basis of executive and administrative ability and training and experience in the work to be performed." Section 104, entitled: "Powers, Rights and Duties of City Manager," provides in pertinent part, that the manager "shall make all appointments and removals in the departments, commissions, boards and offices of the city for whose administration he is responsible."

<sup>9</sup> That is not to say that a City Manager may, in his own discretionary hiring practices, give consideration to candidates who live in the city in which they are applying to work.

require that the matter be taken up through collective bargaining. If adopted, a city's residency requirements would take precedence over civil service residency requirements. *See: Mulrain v. Board of Selectmen of Leicester*, 20 Mass. App. Ct. 950, 951 (1985)(Section 99A, by its terms, is superseded by the Leicester by-law [residency requirement]).<sup>10</sup>

**VI. Grandfathering clauses work to protect current employees from changes in the law that would destroy established reliance on previously valid regulations and laws.**

It should be noted that courts have not found it problematic for residency ordinances to apply to new hires only. The Supreme Court has approved "grandfathering clauses" which work to "protect individuals and interests from changes in the law that would destroy established reliance on previously valid regulations and laws." *Salem Blue Collar Workers Association v. City of Salem*, 33 F.3d 265, 272 (1994), citing *City of New Orleans v. Dukes*, 427 US 297 (1976). Following that decision, at least three other appellate circuits, 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> have likewise concluded that grandfathering provisions are constitutional. *Lorenz v. Logue*, 611 F.2d 421 (2d. Cir. 1979)("By not applying the residency requirement to pre-1978 employees who never received any warning of a residency requirement when they took their jobs, the City protected these employees' legitimate expectations"); *Simien v. City of San Antonio*, 809 F.2d 255, 257 (5<sup>th</sup> Cir. 1987)("The grandfathering of other employees based on the length of their employment is a constitutional means to gradually achieve a workforce that resides in the city."); *Salem Blue Collar Workers Association*, 33 F.3d at 272 ("We conclude that the exemption of those employees who were employed prior to the adoption of the ordinance and who lived outside the City does not render the ordinance unconstitutional. We find no irrationality in this grandfather clause.")

**VII. With the exception of Boston, most other regional, similarly sized, or Plan E communities do not have an enforced residency requirement.**

Lastly, in preparing its response to the Council, the Law Department inquired with other communities in the Commonwealth regarding residency ordinances. Cambridge only briefly had a residency requirement. Worcester's Human Relations Department stated that the residency requirement applied only to certain positions, such as fire and police, but it did not apply to administrative positions. While Somerville has a residency requirement, it is unclear whether it is enforced. Lawrence had a residency requirement, but like Lowell, had repealed it years ago. The most well-known municipal residency requirement is Boston's. In 2016 Mayor Walsh revised it after a review and recommendation from seven-member Residency Policy Commission. The primary change appears to be the inclusion of 2 new waivers to the requirement-- an absolute one – the position is exempt from the residency requirement for the incumbency of the appointee – and one with a grace period – the waiver can last up to 36 months and is granted by the mayor to allow a sufficient amount of time for the appointee to take up residency within the city. This change seems to increase the ability to grant waivers of this requirement.

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<sup>10</sup> The Collective Bargaining Agreement (Art. XXXV, §4B) only requires keeping the Superintendent and the Detail Officer apprised of an officer's current address and telephone number.



