

**CHAPTER 40-02**  
**INCORPORATION OF MUNICIPALITIES IN UNORGANIZED TERRITORY**

**40-02-01. Requisites for incorporation as city.**

Any contiguous territory in this state, not exceeding four square miles [1036.00 hectares] in area, not already included within the corporate limits of any incorporated municipality, may become incorporated as a city whether such territory is located in one or more counties, under the following conditions:

1. If the territory has residing therein a population of not more than five hundred inhabitants, it may become incorporated as a city under the council or modern council form of government. If the territory has residing therein a population of not less than five hundred inhabitants, it may become incorporated as a city under the council or modern council form of government, or as a city under the commission system of government.
2. If the proposed municipal corporation has, in the view of the board of county commissioners of the county in which the proposed municipal corporation is located, all the qualities necessary to ensure continued viability as a functioning unit of municipal government.

**40-02-02. Census required.**

Prior to the commencement of any proceedings to incorporate territory as a municipality, the persons intending to submit the petition for incorporation shall cause a census of the resident population of the territory to be taken not more than sixty days previous to the time when the petition is submitted to the board of county commissioners as provided in this chapter. The census shall show the name of every elector and of every head of a family residing within the territory on that day and the number of persons then belonging to that family, and the census shall be verified by the affidavit of the person taking it.

**40-02-03. Survey required.**

The persons intending to make application for the incorporation of a municipality as provided in this chapter shall cause to be made an accurate survey and map of the territory intended to be embraced within the limits thereof. The survey shall be made by a practical surveyor and shall show the courses and distances of the boundaries and the quantity of land contained therein. The accuracy of such survey and map shall be verified by the affidavit of the surveyor written thereon or annexed thereto.

**40-02-04. Survey, map, and census subject to examination - Notice.**

The survey, map, and census required under the provisions of this chapter, when completed and verified, shall be left for a period of not less than thirty days at some convenient place within the territory described therein for examination by those having any interest in the application for incorporation. There shall be attached to such survey, map, and census a notice which explains:

1. The purpose of the map, survey, and census.
2. That a petition for incorporation is to be circulated and will be submitted to the board of county commissioners at a time certain as specified in the notice.
3. That upon receipt of the petition the board of county commissioners will designate a time and place to consider the petition.
4. That a notice of the time and place for the hearing will be published once a week for two weeks prior to the hearing in the official county newspaper and in other newspapers as the board of county commissioners may deem appropriate.

Copies of such notice, together with a statement showing where the survey, map, and census may be examined, shall be posted for at least thirty days in three conspicuous and public places within the territory to be affected.

**40-02-05. Petition for incorporation - Contents - Census and survey to accompany - Hearing - Notice.**

A petition for the incorporation of a municipality under this chapter shall be addressed to the board of county commissioners of the county in which the proposed municipality is located and if such municipality is located in more than one county, to the board of county commissioners of the county wherein the greater part of the territory is situated, and shall be signed by not less than one-third of the qualified electors residing within the territory described in such petition, and by the owners of not less than fifty percent in assessed value of the property located within the territory described in such petition.

1. The petition shall show:
  - a. The boundaries of the proposed municipality, and the assessed valuation of all property located within such boundaries.
  - b. The number of inhabitants residing within such boundaries.
  - c. The name of the proposed municipality, which shall be different from that of every other municipality in this state.
  - d. A request that the question of incorporating the territory described in the petition as a city under the council form of government or a city under the commission system of government, as the case may be, be submitted to the qualified electors residing within the territory.
2. The petition, when submitted, shall be accompanied by:
  - a. An incorporation plan showing how municipal services, including fire and police protection, street construction and maintenance, sewers, water, garbage disposal, planning, zoning, accounting, assessment, financing, and legal services, will be provided; and
  - b. Any other information that may reasonably be required by the board of county commissioners to whom the petition is addressed including, but not limited to, population, population density, per capita assessed valuation, proximity to populated areas, likelihood of significant growth, need for services, present cost and adequacy of services, and effect of proposed action and alternative actions on adjacent areas.

The petition shall be filed in the office of the county auditor, accompanied by a verified copy of the census required under this chapter and by a duplicate map of the survey of the proposed municipality, and shall be submitted to the board of county commissioners at the time indicated in the notice described in section 40-02-04 or as soon thereafter as the board can receive and consider the same. The board of county commissioners to whom the petition is addressed shall designate a time and place for consideration of the petition and shall notify the petitioners of that time and place. The petitioners shall then cause a notice containing the substance of the petition, and the time and place it will be heard, to be published once a week for two consecutive weeks in the official county newspaper or newspapers of the county or counties and in other newspapers as deemed appropriate by the board of county commissioners of each county embracing the territory to be incorporated.

**40-02-06. Board of county commissioners to consider petition.**

Before hearing the petition, the board of county commissioners shall require proof, either by affidavit or by oral examination of witnesses before it, that notice as required by section 40-02-05 was given and that the survey, map, and census were subject to examination in the manner and for the period required by this chapter. All interested persons shall have the opportunity to comment at the hearing. The board shall have the authority to approve or disapprove, with or without amendment, the petition for incorporation. Before taking action on a petition, the board may consider such factors as the permanent nature of the community, the necessity for incorporation shown by the community, the ability of the community to assume municipal responsibilities, and the showing that the burdens and benefits of incorporation will be equal and just.

The board of county commissioners shall make a written record of its findings on each of the assertions contained in the petition and shall provide any interested person with a copy of those findings. If the board is satisfied that the petition should be approved, it shall make an

order fixing the time and the places within the boundaries of the proposed municipality at which an election may be held to determine the question of incorporation as requested in the petition. If the territory described in the petition is located in more than one county, the board shall, after consultation with the board of the other county involved, designate a separate election place in each county in which any part of the territory described in the petition is situated. The board shall name the persons to act as judges of the election in each such election place.

**40-02-06.1. Appeal of board of county commissioners' action - Scope of review.**

Any final action taken by a board of county commissioners on a petition for incorporation may be appealed to the district court in accordance with the procedure provided in section 28-34-01. The review on appeal extends only to the determination of whether the board of county commissioners has pursued its authority regularly and has not exceeded its jurisdiction or abused its discretion under the provisions of this chapter.

**40-02-07. Notice of election.**

The board of county commissioners to which a petition is submitted under this chapter shall give notice of the election on the question whether or not the municipality described in the petition shall be organized. The notice shall be published in one issue of a newspaper or newspapers published within the territory described in the petition, and such publication shall be made at least ten days prior to the date set for the election. If no newspaper is published within the territory, the notice shall be published in the official county newspaper or newspapers and in other newspapers as deemed appropriate by the board of county commissioners of each county embracing the territory to be incorporated.

**40-02-08. Polling hours at election on question of incorporation.**

At the election called to vote on the question of incorporation of a municipality under this chapter, the polls shall be opened at nine a.m. on the day specified in the notice and shall be kept open until seven p.m. At such election, the voters first shall proceed to the election of three inspectors, who, after being chosen and qualified and one of their number elected clerk, without delay shall proclaim that the polls are open.

**40-02-09. Form of ballot.**

The ballots to be used at an election to pass upon the question of the organization of a municipality under the provisions of this chapter shall be in substantially the following form:

Shall \_\_\_\_\_ (city under the council form of government, or city under the commission system of government, as the case may be) be organized out of the following described territory \_\_\_\_\_ (describe territory involved)?

Yes

No

**40-02-10. Election returns - To whom made - Duty of board of county commissioners.**

The election officials acting in each place in which votes are cast in an election held under this chapter shall return to the board of county commissioners which ordered the election a verified statement of the results of the election showing the number of votes cast for and against incorporation at their voting place. The returns shall be verified by the affidavit of the election officials. The returns shall be canvassed by the board of county commissioners, and the results of the canvass and of the election shall be entered upon the minutes of the proceedings of such board. If a majority of the votes cast on the question at the election favored incorporation, the board shall make an order declaring that the territory described in the petition has been incorporated as a city under the council form of government or as a city under the commission system of government, as the case may be, by the name described in the petition, stating that name, and shall cause the order to be entered in the minutes of its proceedings. If the territory is located in more than one county, a certified copy of such order shall be submitted immediately to each of the other counties within which a portion of the territory described in the order is

situated. The auditor of each county to which a certified copy of the order is submitted shall make a record thereof in the minutes of the board of county commissioners of such county.

**40-02-11. Division into wards.**

If a majority of the votes cast on the question at the election provided for in this chapter favored incorporation as a city, the board of county commissioners that ordered the election shall, if the territory has been incorporated as a city under the council form of government, divide the city into wards. The city may not be divided into wards unless it has more than six hundred inhabitants. If the city has more than six hundred inhabitants, one ward must be formed for each two council members to which the city is entitled. In cities of more than fifteen thousand inhabitants, however, the number of wards is limited to seven originally, and that number may be increased thereafter as provided in this title. Each ward must be formed from contiguous territory, and all wards must be numbered consecutively and must have, as nearly as practicable, the same number of inhabitants. After the election of council members, the governing body of the city shall form or establish wards pursuant to law.

**40-02-12. Order of incorporation - Recording - Filing - As evidence.**

An order of incorporation of a city under the council form of government, under the provisions of this chapter, as made by the board of county commissioners to which the petition for incorporation is addressed, shall be conclusive evidence of the incorporation of the territory described in the order in all suits by or against the municipality described therein. The board shall cause a certified copy of the order to be filed for record in the office of the recorder of each county affected and a certified copy shall also be filed in the office of the secretary of state.

**40-02-13. Procedure in the case of incorporation of city under the commission system of government.**

If the municipality organized under the provisions of this chapter is a city under the commission system of government, the board of county commissioners shall make returns to the secretary of state, and a patent shall be issued by the governor in accordance with the applicable provisions of chapter 40-04, and with like effect.

**40-02-14. Board of county commissioners to establish election precincts.**

The territory embraced within the boundaries of a municipality organized under this chapter shall be divided by the board of county commissioners which made the order of incorporation into election precincts. If the municipality is situated in more than one county, there shall be at least as many election precincts as there are portions of counties embraced within such municipality.

**40-02-15. Division of property and indebtedness between municipality and township.**

If a municipality is organized under the provisions of this chapter from territory which has been a part of a civil township, any property owned, and any debts owed, by the township prior to the separation shall be divided between the municipality and the township in the proportion which the valuation of the property in the municipality bears to the valuation of the property in the township. The valuations used shall be the valuations as equalized by the board of county commissioners at the last equalization previous to the separation. Real estate which is owned jointly shall belong to the municipality if it is situated therein, and in such case, the municipality shall pay to the township its proportion of the value thereof and shall assume its just proportion of any indebtedness thereon.

**40-02-16. Arbitration of differences between township and newly organized municipality upon division of property and indebtedness.**

If the officers of a township and of a municipality which has been organized from territory situated therein cannot agree upon the valuation of any real estate, or of any indivisible property which is held jointly, or upon the just apportionment of the joint indebtedness, the officers of the township or municipality, upon five days' notice of the time and place, may apply to the district

court serving the county in which the township or municipality is located for arbitration of such differences. Thereupon, the district judge shall appoint three freeholders of the county, not residents or taxpayers of the municipality or township involved, to act as arbitrators. After being duly sworn to perform the duties imposed upon them, the arbitrators shall view and appraise the property and fix the valuation thereof for the purpose of making the division. If the property to be divided is personal property and no satisfactory arrangement can be made otherwise, it must be sold at public auction to the highest bidder, and the municipality and township may bid at the sale.