

MEMORANDUM OF LAW

DATE: March 9, 1988

TO: Charles G. Abdelnour, City Clerk
FROM: City Attorney
SUBJECT: Residency/Voter Registration Requirements for
Mayoral Candidates

This is in response to your memorandum of February 17, 1988, regarding the eligibility of two potential candidates for Mayor, Messieurs Rick Anderson and Edwin Emery, to qualify for the June 7, 1988, primary election ballot. The facts, questions and responses regarding each individual as set forth in your memorandum and supplemented by your Assistant Mikel Haas are set out separately below.

Eligibility of Mr. Rick Anderson

FACTS

Mr. Rick Anderson appeared in the Clerk's office on February 16, 1988, to obtain nomination papers and petitions. He noted his residence as 3685 Highland Avenue, City of San Diego, however, he informed you that on his voter affidavit he lists his residence as 405 W. Washington Street, no. 442, and lists no other mailing address. (Copy of voter registration since obtained, attached.) You have determined that this address constitutes a post office box. A check with the County Registrar confirmed that Mr. Anderson has been listed as a resident at this Washington Street address since 1986 and has no other mailing address. (Copy of voter registration affidavit since obtained, attached.) Mr. Anderson stated he was told by the proprietor of this privately-owned "contract" station that it was legal to use the address for voter registration. The last date to file nominating papers for the June 7 primary is March 10, 1988.

QUESTION

Under the circumstances described above, is Mr. Anderson legally registered to vote and does he, or can he, meet the residency and registration requirements for candidates established by San Diego Municipal Code (SDMC) Section 27.2023?

ANSWER

Yes, absent facts indicating a fraudulent intent to avoid the election laws.

LEGAL ANALYSIS

SDMC Section 27.2023(a) sets forth the eligibility requirements for candidates for the office of Mayor of the City of San Diego. This section reads in pertinent part as follows:

No person shall be eligible to or hold the office of Mayor . . . either by election or appointment, unless that person is, at the time of assuming such office, a resident and elector thereof and was a registered voter of the City at least thirty (30) days prior to the date nominating papers were filed by the candidate pursuant to Section 27.2111 governing the filing of nominating papers or 27.3209 governing the time of filing nominating papers of this Article Emphasis added.

Under the Municipal Code, the critical time to determine Mr. Anderson's residency is at the time he takes the office of Mayor, if elected to that office. This question is not before us at this time. However, the question of residency also arises in the context of determining voter registration status. Voter registration status is determined under state law (California Constitution, Article II, Section 2, and Elections Code Section 1 et seq.), not the Municipal Code. The constitution merely requires that a person be eighteen (18) years old and a state resident.

Proper registration under the Elections Code is a requirement to vote in this State. Elections Code Section 100; *Collier v. Menzel*, 176 Cal.App.3d 24 (1985). Elections Code Section 17 requires an elector to be eighteen (18) years of age and a resident of an election precinct at least twenty-nine (29) days prior to an election.

Mr. Anderson's residence as given on his voter registration affidavit is a post office box. That post office box is within The City of San Diego and, therefore, within a determinable election precinct.

The next question, then, is whether Mr. Anderson is a resident of 405 W. Washington Street, no. 442, within the meaning of the law. Under the Elections Code a person's residence is his

domicile. Elections Code Section 200(a). A person's domicile is "that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning."

Elections Code Section 200(b). A person may have only one domicile, but more than one residence, for purposes of the Election Code. Elections Code Section 200(b) and (c).

For voting purposes, state law requires two elements to be present to establish residency: 1) a fixed habitation, and 2) an intention to remain in that place and return to it after temporary absences. *Collier v. Menzel*, 176 Cal.App.3d 24, 31 (1985). In other words, there must be union of act and intent to

establish residency. See Elections Code Section 205; *Sherman v. Reynolds*, 83 Cal.App. 403, 407 (1927).

Under the present facts, the first step is to determine whether Mr. Anderson has a fixed habitation within the meaning of the Elections Code. Mr. Anderson listed his residence on his Nominating Petition Statement and Affidavit as 3685 Highland Avenue, San Diego. On his voter registration affidavit, however, he listed his residence as 405 W. Washington Street no. 442. He left blank the line on the voter registration card asking for a person's mailing address if different from the residential address. Mr. Anderson apparently relied on the contract station owner to list the post office box as his residence. It is not clear from the facts where Mr. Anderson actually resided (had his habitation) at the time he registered to vote, but he essentially admitted to your staff that he did not reside at the Washington Street address at the time. There are no facts indicating where Mr. Anderson intended to reside at the time of voter registration. From the above facts, it appears that technically Mr. Anderson did not comply with the voter registration requirements, but he made an apparent good faith attempt to do so.

The right to vote is a fundamental right enjoyed by citizens of this country and is a principle embodied in the federal and state constitutions. A review of the case law in this area indicates that the courts are extremely reluctant to disenfranchise voters. See, for example, *Pitts v. Black*, 608 F.Supp. 696 (S.D.N.Y. 1984) (upholding voter registration of class of "homeless" people in New York City, one of whom listed his residence as a park bench); *Collier v. Menzel*, 176 Cal.App.3d 24 (1985) (holding that couple residing illegally in Santa Barbara park legally entitled to register to vote, listing park as their residence); and, *Smith v. Thomas*, 5 Cal.Unrep. 976 (1898) (holding that transient woodchopper who made a particular

place in an election ward his home whenever he was in town and who always went to that spot when ill and who voted in the same ward for eleven years was a legal voter of that ward).

"The exercise of the right to vote is a fundamental right, which is preservative of all other rights in a democracy and deserves the strictest constitutional protection." *Pitts v. Black*, supra, 608 F.Supp. at p.708, citing *Reynolds v. Sims*, 377 U.S. 533, 564 (1964). See also *Collier v. Menzel*, supra, 176 Cal.App.3d at p.32, also citing *Reynolds v. Sims*, supra.

Although the above cited cases deal with voter, not candidate, residence, there is a close interlocking conceptual and functional relationship between voter and candidate

recognized by the courts. *Johnson v. Hamilton*, 15 Cal.3d 461, 470 (1975). Also, registration is not treated as "a qualification of an elector and cannot add to the qualifications fixed by the constitution; but is to be regarded as a reasonable regulation by the legislature for the purpose of ascertaining who are qualified electors in order to prevent illegal voting." *Collier v. Menzel*, supra, 176 Cal.App.3d at p.33, citing *Minges v. Board of Trustees*, 27 Cal.App. 15, 17-18 (1915). Therefore, the voter registration requirements in Municipal Code Section 27.2023 should be viewed as a means of ascertaining who is a qualified candidate for mayor, not as a separate qualification to establish eligibility for candidacy.

Also the law requires voter residency requirements to be viewed with flexibility. "A versatile concept of residency harmonizes with the 'fundamental statutory policy' in California of effectuating and maintaining at the highest possible levels voter registration and voting." *Collier v. Menzel*, supra, 176 Cal.App.3d at p.31, citing Elections Code Section 302 and 304. In keeping with this fundamental policy, the San Diego Municipal Code requires substantial compliance, not strict compliance, with its election provisions. SDMC Section 27.2002. This includes the voter registration requirements for potential mayoral candidates under SDMC 27.2023.

Although Mr. Anderson's voter's affidavit may technically be inaccurate as to his residency because he does not physically reside at the post office box address, he has made a good faith attempt to comply with the voter registration requirements by giving his post office box as his residence on his voter registration. Apparently he did so in reliance on the mistaken information provided to him by the contract station owner. Absent facts indicating fraud, a voter's registration made under a good faith attempt to comply with the voter registration law

will not be held illegal even if technical requirements are not met. *Huston v. Anderson*, 145 Cal. 320, 323-4 (1904). There is no hint of fraud among the facts presented. Therefore, the general rule should prevail here.

Assuming Mr. Anderson files his nominating papers on March 10, 1988, we conclude that Mr. Anderson was a registered voter in the precinct which includes the address of 405 W. Washington Street, San Diego, California, thirty (30) days prior to the date of filing the papers and, therefore, meets the requirement of SDMC Section 27.2023. Mr. Anderson, should be informed, however, that he should register to vote listing his current actual domicile as his residence to come into technical compliance with the voter registration laws. He may continue to list his post

office box address as his mailing address on his voter registration affidavit to ensure that he receives voting materials. Elections Code Section 500(d).

Eligibility of Mr. Edwin Emery

FACTS

Mr. Edwin Emery obtained his nominating papers and petitions in the City Clerk's office on February 17, 1988. On his nominating petition affidavit Mr. Emery listed his residence as 8612 Frobisher Street, San Diego. (Copy since obtained, attached). He stated to your staff that he has resided at this address, the home of his mother, since September, 1987. On Mr. Emery's voter registration affidavit, however, Mr. Emery noted his residence as 5520 Kearny Villa Road, San Diego. (Copy since obtained, attached). The registrar received this registration affidavit on February 9, 1988. Mr. Emery listed no separate mailing address on his voter registration card. Mr. Emery, however, also informed your staff that the Kearny Villa address is actually his business address. He stated that he used this address as his voter registration address because he is frequently out of the City for extended periods of time. The last day for filing nominating papers for the June 7 primary is March 10, 1988.

QUESTION

Under the circumstances described above, is Mr. Emery legally registered to vote and does he, or can he, meet the residency and registration requirements for candidates established by San Diego Municipal Code (SDMC) Section 27.2023?

ANSWER

Yes, absent facts indicating a fraudulent intent to avoid the election laws.

LEGAL ANALYSIS

The law governing eligibility for candidacy as relating to voter registration requirements is set forth in detail above and will not be repeated here. The question presented by Mr. Emery's situation is simply whether he was a registered voter thirty (30) days before he filed his nominating petition. As of the present date, March 9, 1988, Mr. Emery has not filed his petition. The last date for filing petitions, however, is March 10, 1988. Assuming Mr. Emery files on that date, the question is: Is his voter registration received by the Registrar on February 9, 1988, a valid registration for purposes of voting and therefore candidacy?

In the present instance, Mr. Emery states that his current actual residence is 8612 Frobisher and that it has been since

September, 1987. On his voter affidavit, however, he stated that his residence was at 5520 Kearny Villa Road, although he admitted to your staff that he does not actually reside there. He merely used that address--his business--as a convenience to receive mail. This is not a case in which a person actually lives at his business address, which is clearly contemplated as a legitimate voter registration address under Elections Code Section 208. Rather, Mr. Emery apparently actually lives at one address but prefers to use his business address as his nominal residence address.

It is not clear from these facts why Mr. Emery listed the Kearny Villa address as his residence on the voter registration affidavit, since there is clearly another space on that same form to list a mailing address if different from above. To establish eligibility for running for mayor of The City of San Diego in the primary, there seems to be no particular advantage to Mr. Emery to list the Kearny Villa address in lieu of Frobisher Street as his residence on voter registration forms.¹

Therefore, there seems to be no intent to defraud the voters by listing Kearny Villa Road as his residence on voter registration forms. Nonetheless, technically Mr. Emery appears not to have complied with the voter registration requirements because he did not list his actual residential address as of February 9, 1988, on his voter registration form.

¹ The same would not necessarily be true for a person trying to establish eligibility to run for City Council in the primary. SDMC Section 27.2023(b). That section requires the candidate to be a registered voter of the district from which nomination is sought at least thirty (30) days prior to the date nominating papers were filed. Therefore, the fact that the Frobisher Street and Kearny Villa Road addresses might be in different districts is irrelevant to this analysis.

Even though there appears to have been a technical violation of the voter registration laws, that alone is insufficient to find that Mr. Emery is not a duly registered voter as of February 9, 1988. *Huston v. Anderson*, 145 Cal. 320, 323-4 (1904) Absent facts indicating an intent to defraud the voters, and given the strong public policy embodied in our constitution protecting the fundamental right to vote, we find that Mr. Emery was a registered voter in this City on February 9, 1988. Assuming Mr. Emery files his nominating papers on March 10, 1988, he appears to be eligible to run for mayor of this City in the upcoming primary election. Under SDMC Section 27.2002, he has substantially complied with the voter registration requirements of SDMC Section 27.2023.2

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

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Attachments 4

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2 Again, it is premature to determine whether, under the other requirement of SDMC Section 27.2023, Mr. Emery will be a resident of this City on the date he assumes the office of mayor, assuming he is elected to that post.