CITY OF PACIFIC GROVE

OFFICE OF THE CITY ATTORNEY
606 FOREST AVENUE
PACIFIC GROVE, CALIFORNIA 93950
TELEPHONE (831) 648-3187
FAX (831) 646-0377
dave@laredolaw.net

February 9, 2007

The Honorable Stephen A. Sillman
Presiding Judge
Superior Court, County of Monterey
Civil Grand Jury Office
P.O. Box 414
Salinas, CA 93902

Re: Response to 2006 Monterey County Civil Grand Jury Final Report

Dear Judge Sillman:

This letter was approved upon the unanimous vote of the Pacific Grove City Council at its meeting of February 7, 2007 and is forwarded as the response of the City of Pacific Grove to the Final Report of the 2006 Monterey County Civil Grand Jury (hereafter "Final Report") with respect to Section 7, "Elected Officeholder's Residency Requirements", set forth beginning at page 22.

The City of Pacific Grove disagrees wholly with the finding that "a Pacific Grove City Council member… listed a business address that could not possibly be a residence."

As to the recommendation that "if any Mayor or City Council member is found not to meet the residency requirements for elected public office as required by the city's charter or general law, the Mayor or Council member should be required to vacate his or her office." The City of Pacific Grove agrees, but has found that each of its seated members meets the applicable residency requirement.

Background

The Final Report sets forth the following passage under the caption, "Summary": "Several citizen complaints concerning alleged non-compliance with election practices and requirements for candidates to run for or to hold office as elected public officials in Monterey County. The Grand Jury investigated these complaints. Results of this investigation indicate that several County or city elected officials use business addresses as residences."

Under the caption "Findings", paragraph F. 7.2 of the Final Report states the following: "Visual surveys of residences of all Supervisors, Mayors, and City Council members who listed their business address as their address of residence indicated that all but one appeared to be a residence in addition to being a business. The one exception was a Pacific Grove City Council member who listed a business address that could not possibly be a residence."

Under the caption, "Recommendations", paragraph R 7.1 of the Final Report states the following: "The City Attorney of each city in conjunction with the Monterey County District Attorney should review and determine the residency of its Mayor and City Council members. If any Mayor or City Council member is found not to meet the residency requirements for elected public office as required by the city's charter or general law, the Mayor or Council member should be required to vacate his or her office."

This response is occasioned by the "Response Required" element of the Final Report that references, "All City Councils within Monterey County – All Findings and Recommendation R 7.1."

Residency Requirement

The Municipal Charter for the City of Pacific Grove sets forth residential qualifications for its elected officials at Article 7, stating, "No person shall be eligible to hold any elective office in said City unless he or she be a resident and elector herein, and shall have resided in said City for at least one year, next preceding the date of his or her election." (Amended in the November 6, 1990 general election.)

Case law and standard legal treatises such as the California League of Cities Municipal Law Handbook § 3.3.01 (Residence) make it clear that a candidate for a municipal legislative body must maintain a legal residence or domicile within the city in which he or she is elected. Cal. Gov't Code § 34882; see 87 Cal. Op. Att'y Gen. 30 (2004). The candidate must be a registered voter of the city at the time nomination papers are issued. Cal. Gov't Code § 34882. See also Cal. Elec. Code §§ 201, 349.

The Pacific Grove Charter, as amended by the electorate in 1990, appears to set a one-year residency qualification, as referenced above. This criteria, however, is restricted by the "privileges and immunities" clause of the United States Constitution as interpreted under the equal protection doctrine by *Johnson v. Hamilton*, 15 Cal. 3d 461, 125 Cal. Rptr. 129 (1975). In that case, the California Supreme Court determined that a durational residency requirement in excess of thirty (30) days before the filing period is not enforceable. Accordingly, the City of Pacific Grove construes Article 7 of its Charter to require that any person shall reside in the City for at least thirty (30) days before the filing period for his or her election in order to be eligible to hold elective office in the City. Revision of this requirement shall be submitted to the voters in conjunction with the next proposed Charter Amendment.

Residency Affirmation

The Mayor and each council member has been asked to affirm, as evidenced by their affirmative vote authorizing this response to Section 7, "Elected Officeholder's Residency Requirements", of the Final Report, that he or she fully meets the legally enforceable residential qualification criteria applicable by reason of the Pacific Grove Municipal Charter as interpreted under the equal protection doctrine by *Johnson v. Hamilton, supra*. Each qualified for elected office as a resident and elector of the City at least thirty (30) days before the filing period for his or her election.

Response to Conclusion of Non-Residency

In the instance applicable to the City of Pacific Grove cited in the Final Report, the Grand Jury concluded that "a Pacific Grove City Council member… listed a business address that could not possibly be a residence."

The structure, although used as a business location, was constructed and formerly used as a single family home. The applicable zoning for the structure is R-4, meaning this is a residential area in which businesses are also allowed to exist through a use permit. The structure presently listed as a residence is also the location of the council member's business office.

This location has been listed as a place of abode and mailing address for the Councilmember for a period exceeding ten (10) years before the individual's declaration of candidacy. The location has consistently been referenced during that period as the place of residence on the individual's driver's license, as the place of residence for purposes of professional licensing, and for the purposes of voter's registration for elections preceding the one in which the individual declared candidacy. Since election to office, this location has been referenced by the individual as a basis for recusal from governmental decision-making under the Fair Political Practices Act conflict-of-interest requirements.

This matter has been investigated by the undersigned City Attorney and also by staff of the Office of the Monterey County District Attorney. The City Attorney and staff of the District Attorney independently entered into the structure. Each determined that the structure, although not primarily intended for use as an abode residence by reason of its current office use, is capable of supporting residential activity. Rooms and furnishings at the site can be used for eating and sleeping. Areas exist that can be used for the storage of food, clothing and toiletries. Business activity is limited to conventional "office hours".

During the lengthy period in which the individual has claimed residence at this location, the Councilmember has at times also maintained a second abode. The location of the second living quarters has changed from time to time, variously located at other addresses in Pacific Grove and Carmel. Throughout this time, for a period exceeding ten (10) years, the individual has claimed

primary abode at the Pacific Grove location listed to satisfy the Municipal Charter residency criteria.

A careful analysis and definition of the term "legal residence" is needed in light of the facts and circumstances noted above. The Municipal Law Handbook provides, at section 1.3.05,

> Legal residence is defined as physical presence combined with an intent to remain. *Fenton v. Board of Directors*, 156 Cal. App. 3d 1107, 1113-15, 203 Cal. Rptr. 388 (1984). A person has a legal residence at all times and retains a prior legal residence until a new residence is established. *Walters v. Weed*, 45 Cal. 3d 1, 7-8, 246 Cal. Rptr. 5 (1988). A number of statutes provide aids to determining residency. See, e.g., Cal. Elec. Code § 2031 (homeowner's property tax exemption and renter's credit can create rebuttable presumption of residence); Cal. Gov't Code § 244 (states a number of rules regarding residency); Cal. Elec. Code § 2021 (temporary departure or stay does not affect residence).

Case law demonstrates that the place where one sleeps is not necessarily conclusive on the determination of one's residence. *Gray v. O'Banion,* 23 Cal.App 468; 138 P 977 (1913). *Penn Mut. Life Ins. v. Fields*, 81 F.Supp.54 (1948) provides an example as to the sort of proof that demonstrates residency – the act of registering to vote. That case holds that registration to vote implies an intention to reside at that location on a permanent basis. *Collier v. Menze,* 221 CalRptr 110 (1985) held that a voter even had a right to register by listing a city park as that voter's residence. The court found this sufficient for voting purposes, even though it was unlawful to camp or sleep on the grounds of the city park referenced as a residence. In the instant matter, the Councilmember not only listed the office location as a residence for voter registration, candidacy, professional licensing, and motor vehicle operation purposes, but has consistently referenced the residence for conflict-of-interest purposes and has been recused from participating in governmental decisions in the vicinity of that location.

Election Code § 2028 provides that "If a person has a family fixed in one place, and he or she does business in another, the former is his or her place of domicile, but any person having a family, who has taken up an abode with the intention of remaining and whose family does not so reside with him or her, is a domiciliary where he or she has so taken up the abode." Election Code § 349 provides that the term "residence" or "abode" has the same meaning as the term "domicile" and that the term "domicile" means the fixed place which one uses for habitation. It is clear that a person may have only one domicile. Accordingly the terms "residence" and "domicile" are given the same definition. *Smith v. Smith,* 45 Cal.2d 235 (1955). "Domicile" generally refers to the one location with which for legal purposes a person is considered to have the most settled and permanent connection.

With all due respect to the findings and conclusions made in the Final Report, the conclusion that "a Pacific Grove City Council member… listed a business address that could not possibly be a residence" is not supportable by fact or law. The Councilmember has consistently asserted

residence at the questioned location, and appears to have a sound and reasoned basis for the claimed intent to permanently reside at that location. *Walters v. Weed, supra,* provides that one's legal residence is maintained until a new residence is established.

In the absence of conclusive proof that the Council member has vacated the claimed residence and established the intent to permanently reside at another, there is no basis to conclude that the listed address fails to fully satisfy the legally enforceable residential qualification criteria applicable by reason of the Pacific Grove Municipal Charter.

I trust the foregoing response shall close this matter. Please contact the undersigned should with any questions or concerns.

Sincerely.

David C. Laredo
City Attorney