

**Nancy Ide**

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**From:** J. Kevin Hunt, Esq. [jkheshq@comcast.net]  
**Sent:** Sunday, September 02, 2012 7:44 PM  
**To:** Nancy Ide; Betty Mumm; City Manager; Doug Neeley; kroth211@gmail.com; Rocky Smith, Jr.; Carol Pauli; esullivan@gsblaw.com  
**Cc:** Michael Berman  
**Subject:** City Recorder's Challenge to Berman City Commission Candidacy  
**Attachments:** 9-3-2012 let to Ide FIN.docx

TO: Oregon City Recorder; Mayor & City Commission; City Attorney; City Manager

FROM: J. Kevin Hunt, Attorney for Michael Berman

DATE: 3 September 2012

RE: Eligibility of Mr. Berman for City Office

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Greetings:

Attached (*Word* file) please find my 6-page letter concerning the candidacy of Oregon City resident MICHAEL TRISTAN BERMAN for the City Commisison seat currently occupied by incumbent Commissioner Carol Pauli.

Please enter this email and said attachment into the official record of the City Commission's September 5, 2012 regular meeting proceedings.

Sincerely,

/s/ J. Kevin Hunt  
Attorney for Michael Berman

**J. Kevin Hunt**  
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September 3, 2012

Ms. Nancy Ide  
City Recorder of Oregon City  
625 Center Street  
Oregon City, OR 97045

Information Copies: City Attorney; City Managers; City Commissioners; Mayor

**VIA EMAIL**

**RE:** Candidacy of Michael Tristan Berman

To the aforesaid persons, Greetings:

Within hours after Michael Tristan Berman filed for the seat of incumbent appointed Commissioner Pauli on the deadline for same, Mr. Dan Fowler inquired of Mr. Berman whether Mr. Berman lived in Oregon City, stating to Mr. Berman: "You live in West Linn, don't you?" (although Mr. Berman never resided in West Linn).

On the heels of that encounter, Mr. Berman received notice from the City Recorder via letter dated August 31, 2012 that his name would not appear on the November 6, 2012 general election ballot unless he submitted further proof of his residency in Oregon City for at least 12 months prior to the election.

Article VI of the Oregon City Charter provides, in relevant part:

**Section 26 - Regulation of Elections.**

Except as this charter provides otherwise and as the commission provides otherwise by ordinances relating to elections, the general laws of the state shall apply to the conduct of all city elections, recounts of the returns therefrom, and contests thereof.

ORS 249.052, in turn, provides:

**249.052 Determination of inhabitancy of candidate for Legislative Assembly; verification of residence. (1)** For purposes of determining whether a candidate for the office of state Representative or state Senator has been an inhabitant of the district from which the Senator or Representative may be chosen as required by section 8, Article IV of the Oregon Constitution, an elections official may consider, but is not limited to considering, the following factors:

- (a) Where the candidate receives personal mail;
- (b) Where the candidate is licensed to drive;
- (c) Where the candidate registers motor vehicles for personal use;
- (d) Where any immediate family members of the candidate reside;
- (e) The address from which the candidate pays for utility services;
- (f) The address from which the candidate files any federal or state income tax returns; and
- (g) The candidate's voter registration, if any.

**(2)(a)** If the county clerk determines that the property indicated by the address information provided on a nominating petition or declaration of candidacy for nomination or election to the office of state Senator or state Representative is located less than 100 radial yards from the boundary of the district in which the candidate has filed for nomination or election, the Secretary of State shall verify the location of the residence of the candidate to determine whether the candidate is an inhabitant of the district.

**(b)** The Legislative Administration Committee shall make available to the secretary any mapping software and hardware used by the Legislative Assembly for redistricting to aid the secretary in verifying a candidate's residence under this section. [2009 c.625 §2; 2011 c.691 §1]

It initially appears that ORS 249.052 does not control. That statute is not a general one addressing all statewide elections, but rather, by its own express terms, applies only to candidates "for the office of state Representative or state Senator." In addition to those state offices, Oregon voters elect the Governor, Supreme Court justices, Secretary of State, Treasurer, and Bureau of Labor and Industries Director, among others.

ORS 221.180, however, provides, in relevant part:

**221.180 Procedure for nomination of candidates for city offices**

(1) This section and ORS chapters 249 and 254 govern the manner of nominating and electing candidates for municipal offices in all cities.

Additionally, ORS 249.200 provides that “ORS chapters 246 to 260 govern the conduct of all city elections.”

**ORS 221.110** provides: “Any resident of a city shall be eligible to hold an office of the city.”

Finally, Chapter III, Section 13 of the City Charter provides:

**Section 13 - Qualifications of Officers.**

No person shall be eligible for an elective office of the city unless at the time of his election he is a qualified elector within the meaning of the state constitution and has resided in the city during the twelve months immediately preceding the election. The commission shall be the final judge of the foregoing qualifications and election of its own members.

Pursuant to the foregoing statutes, then, the sole consideration regarding Mr. Berman’s eligibility to be a candidate for the City Commission is whether he is a “qualified elector” who “has resided in the city during the twelve months immediately preceding the election.”

Mr. Berman’s attestation that he is, and for at least twelve months has been, a resident of Oregon City, is sufficient. No provision of law provides for a presumption that a person filing for city office does not meet the qualifications for such candidacy. A rebuttable presumption that the candidate does meet the qualifications for office should therefore be applied.

Certainly the factors recited in ORS 249.052(1) are reasonable ones to consider when determining whether a candidate’s presumptive qualification for office is rebutted, although of course, as even that statute itself provides, such factors are not exclusive. A

person is not required to have a bank account, to possess a driver's license or to receive one's mail at the person's residence, in order to run for office. Therefore, not providing such proof to the City recorder cannot *ipso facto* result in the person's disqualification as a candidate.

Mr. Berman's voter registration is *prima facie* evidence that he is an elector. Apparently the City Recorder has chosen to contest whether Mr. Berman meets the one-year city residence requirement.

It appears from the City Recorder's letter that Mr. Berman's prior voter registration address of 505 Main Street within the last 12 months militates, in the City Recorder's mind, against concluding that Mr. Berman resided in Oregon City because that address is the location of Mr. Berman's Oregon City business and is not a residence. It is common for a sole proprietor to receive mail at his/her business address, in order that it is personally received prior to the end of the business day. That Mr. Berman owns and operates a business within Oregon City tends to corroborate, rather than vitiate, his claim of Oregon City residence. See, ORS 249.052(g): "...an elections official may consider...the following factors: ... The candidate's voter registration, if any." Because Mr. Berman was not previously aware that a voter registration is supposed to reflect the elector's residence address, he updated his registration to 316 S. Hedges, Oregon City, which is where he has resided for at least the last 12 months. He was, of course, free to list 505 Main Street as his mailing address for elections purposes, as noted below.

It should be noted *arguendo* that even if Mr. Berman were a homeless person, he nonetheless could not be prevented from registering to vote. For example, in the 1984 case **Pitts v. Black**, 608 F.Supp. 696 (S.D.N.Y. 1984), a federal court in New York explicitly found that homeless persons could not be denied the right to vote just because they did not live in a traditional residence. Courts deciding subsequent cases from around the country came to similar conclusions and this is now the law of the land and in all fifty states. When registering to vote, homeless voters only need to designate their place of residence, which can be a sidewalk heating grate location, a street corner, a park, a shelter, or any other location where an individual stays at night. *Designation* of a residential address or *location of residence* is required to ensure the voter lives within the district in which she/he wishes to register, to assign the voter to the appropriate polling location, and to ensure that the voter is provided the proper ballot. Usually, the location of a residence may be indicated by drawing a map or by providing a general descriptive location, if not the address of a shelter. Some states also require a mailing address (especially important in Oregon, a vote-by-mail state). In many states that require a mailing address, such as Oregon and Pennsylvania, a county clerk's office, shelter, or other location may be used for homeless individuals as a

mailing address. Oregon voters may also procure and cast ballots in person at any County Clerk's office. (Mr. Berman was of course free to provide 505 Main Street as his voter registration mailing address). *Durational requirements* pose additional problems for persons such as the homeless who have to frequently relocate. Under such circumstances, *intent to reside in the jurisdiction* has been deemed sufficient. This is because such rights of citizenship may not be impinged without compelling reasons.

By analogy, the City of Oregon City cannot deny Mr. Berman a place on the ballot solely on the basis of his not having provided sufficient "proof" of having lived at a regular residence address within the city limits for the last twelve months, where he attests that he has, for that period of time, resided within the city. Rather, Mr. Berman contends that it is incumbent upon the City to prove that Mr. Berman maintains a regular and continuous residence somewhere other than within the City of Oregon City, if the City is going to deprive him of his right to file for the elective office in question. The City is incapable of doing so in this instance, and accordingly must place Mr. Berman's name on the ballot based upon his attestation that he has, for the last twelve months, resided in Oregon City.

The rights to vote and to run for elective office are fundamental, core rights of citizenship that cannot be abridged except for compelling reasons. The City will be violating those rights of citizenship in which Mr. Berman has both Fourteenth Amendment property and liberty interests, if his name is withheld from the ballot.

But without resort to Constitutional analysis, the controlling state statute is ORS 221.110, *infra* which provides that "[a]ny resident of a city shall be eligible to hold an office of the city."

By virtue of ORS 221.110, Mr. Berman does not have to provide any evidence that for the last twelve months, he has resided at any particular address. As long as he is a resident of Oregon City, he is eligible to run for any City office. He attests that he is a resident of Oregon City. It matters not whether he is nomadic within the city limits, owns a house in Oregon City, pays rent to a landlord in Oregon City, directly pays a utility provider for residential service in Oregon City, sleeps at multiple residences within Oregon City, or is a roommate of an Oregon City resident. Absent proof to the contrary, Mr. Berman is a resident of Oregon City if he attests that he sleeps overnight in Oregon City, having the intent to return to Oregon City during such periods as he may be outside the city limits. Mr. Berman is not registered to vote outside the city limits, and has not been within the last twelve months. There is no basis for questioning his eligibility.

Typically, when a legislative body is the judge of the qualifications of its own members, this means that the body may on grounds found by the body refuse to seat an

**City Recorder, et al, of Oregon City**  
**Re: Candidacy of Michael Tristan Berman**  
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elected candidate, not that the body may prevent a person's name from appearing on a ballot. Certainly, for an incumbent to vote on whether the incumbent's would-be challenger shall be permitted to run, would be unseemly and for that reason, Commissioner Pauli should recuse herself from consideration of this question.

Mr. Berman may choose to submit for the Recorder's (and if necessary, the Commission's) consideration an affidavit from a person with personal knowledge of where Mr. Berman has resided for the last twelve months. Whether or not he does so, neither the Commission nor the Recorder has any legal justification for barring Mr. Berman from the ballot, and in that eventuality Mr. Berman will promptly invoke judicial recourse to vindicate his constitutional rights as a citizen.

Very truly yours,

**J. Kevin Hunt**  
Attorney for Michael T. Berman