



MEMORANDUM

TO: Honorable Mayor & Oregon City Commission

CC: David Frasher, City Manager
Nancy Ide, City Recorder
Ed Sullivan, City Attorney
J. Kevin Hunt, Attorney for M. Berman

FROM: William K. Kabeiseman

DATE: September 3, 2012

RE: Agenda Item 6(c) - Request from Michael T. Berman to Demonstrate his
Compliance with the Residency Requirement for Candidates for the City
Commission

INTRODUCTION

Section 13 of the Oregon City Charter¹ requires candidates for elective offices in the City to have resided in the City for the twelve months preceding an election. In performing the routine check on candidates for the upcoming November election, the City Recorder determined that there was a question as to the residency of one of the candidates for Position No. 3. The City Recorder contacted the candidate and asked for additional documentation or information to establish residency. After reviewing all of the additional information provided by the candidate, the City Recorder determined that the candidate had not established that he had been a resident for the requisite twelve months and informed the candidate that his name would not be placed on the ballot. In accordance with the terms of the Charter, the City Recorder also noted that the Charter provided that the Commission is the “final judge” of the qualifications for elective office and offered the candidate the opportunity to bring the question to the Commission, which the candidate has opted to pursue.

The Commission has not faced a question similar to this before, so there is no established process for the Commission acting as a judge in such a case. However, there are some basic due process rights that should be followed, including allowing the prospective candidate to address the Commission, whether himself or through counsel.

¹ The full text of section 13 is provided later in the body of this memorandum.

However, because the Commission does not typically swear in witnesses, nor is there a method to allow cross-examination, after consulting with the Mayor, who presides over Commission meetings, the City Attorney's office has recommended that the Commission allow for the unlimited submission of written materials, including sworn affidavits, as well as oral argument from the potential candidate regarding this issue.

DISCUSSION

1. Background Information.

Article 13 of the Oregon City Charter provides as follows:

"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." (Emphasis added.)

That provision imposes two qualifications on candidates for elective office in Oregon City. First, the candidate must be a "qualified elector within the meaning of the state constitution," and, second, the candidate must have "resided in the city during the twelve months immediately preceding the election." For every election, upon receiving a nomination for election or filing for office, the City Recorder calls the County Elections Division to determine their voter registration. Prior to this election, the County Elections Division has confirmed that each potential candidate has been registered to vote in the City for at least twelve months prior to the election date.

For this Commission election, the City Recorder received a candidate filing form from Michal T. Berman on August 28, 2012, the final day on which someone could file as a candidate. Upon receiving the form, the City Recorder immediately called the County Elections Division that same day for a routine check on residency. The County Elections Division informed the City Recorder that Mr. Berman's most recent registration was at 316 Hedges Street² in Oregon City and had been registered there since February 2, 2012. Prior to February 2, 2012, and since at least August of 2011, Mr. Berman was registered at 505 Main Street, which is Mr. Berman's business address, which does not appear to contain a residence. Because Mr. Berman's voter registration

² Apparently, this residence is located at the corner of Hedges and S. McLoughlin and the candidate has since changed the registration to 316 S. McLoughlin. This change in address does not appear to represent a change in residence but a simple correction.

from November 2011 until February 2, 2012, was a business location that did not appear to contain a residence, the City Recorder was sufficiently concerned about the second qualification in Article 13 of the City Charter, i.e., whether Mr. Berman had been a resident of Oregon City for the requisite twelve months.

The City Recorder informed Mr. Berman of the potential issue on the evening of August 28th and sent him a letter on August 30th, 2012, inviting him to provide additional information and documentation of his residency from November 2011 through February 2012. The City Recorder provided Mr. Berman with a number of options that he could provide to the City in order to resolve any residency concerns. (See Exhibit 1 to this Memorandum, letter from City Recorder to Mr. Berman dated August 30, 2012.) Those options were drawn from ORS 249.052(1)³ which directly addresses residency requirements for election to the state legislature, not the City Commission. However, the provision at Article IV, section 8 of the Oregon Constitution⁴ is nearly identical to the

³ ORS 249.052(1) provides as follows:

“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.”

⁴ Article IV, section 8 of the Oregon Constitution provides as follows:

“Section 8. Qualification of Senators and Representatives; effect of felony conviction. (1)(a) Except as provided in paragraph (b) of this subsection, a person may not be a Senator or Representative if the person at the time of election:

“* * * * *

“(B) Has not been for one year next preceding the election an inhabitant of the district from which the Senator or Representative may be chosen.”

provision in the City's Charter, so the documentation used to address one should be helpful in determining the other. Mr. Berman met with the City Recorder on Thursday August 30, 2012, but provided only a limited number of documents that addressed his residency. (See Exhibit 2 to this Memorandum, letter from City Recorder to Mr. Berman dated August 31, 2012.) None of those documents addressed Mr. Berman's residency during the period from November 2011 to February 2012. The City Recorder decided, based on Mr. Berman's representation that the 505 Main Street address was his business address, not his residence, and that his voter registration at 316 Hedges/McLoughlin did not occur until February 2, 2012, Mr. Berman had not established residency for the one year period required by Oregon City Charter section 13 and found that he was not qualified for the ballot and informed him of that fact and offered him the opportunity to seek this Commission's review.

The deadline to submit the City's certified ballot to the County Election Division is Thursday, September 6, 2012, so this matter was immediately put on the Commission's September 5th agenda.

2. Question before the Commission.

Under Section 13 of the Oregon City Charter, this Commission is "final judge . . . of the qualifications . . . of its members." Thus, this Commission must determine whether Mr. Berman has met the one-year residency requirement in the City's Charter. There is no single test or document that the Commission may rely on, but as noted above, in interpreting a similar state constitutional test, the Secretary of State will look to a number of factors. Those factors include, but are not limited to, the following:

- "(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."

Mr. Berman has provided a limited number of documents that do not address his residency for the critical period from November 2011 to February 2012. In addition to the material listed in the City Recorder's August 31, 2012, letter, Mr. Berman has provided a Form SEL 101, which does not specifically require a statement of residency for a year preceding the election, but does indicate that he "will qualify for said office if

elected.” (A copy of Mr. Berman’s Form SEL-101 is attached to this Memorandum as Exhibit 3.)

The Commission should review the documents already submitted by Mr. Berman, as well as any other written submissions provided to the Commission and make its determination of whether Mr. Berman has established residency “in the city during the twelve months immediately preceding the election.” If so, the Commission should order the City Recorder to place Mr. Berman's name on the ballot; if not, the Commission should order the City Recorder to leave Mr. Berman’s name off of the ballot.

3. Additional Questions That May Arise.

The rest of this Memorandum will address a variety of questions that already have been raised or may be raised in the course of this proceeding.

A. Are durational residency requirements for elective office allowed?

As noted, both the Oregon City Charter and the Oregon Constitution impose a one year residency requirement to hold certain elective offices. To the best of the City Attorney’s knowledge, neither provision has been challenged; however, other such provisions have withstood challenges. For example, in *Kanapaux v. Ellisor*, 419 U.S. 891 (1974), and *Sununu v. Stark*, 420 U.S. 958 (1975), the US Supreme Court sustained durational residency requirements of five and seven years respectively for persons seeking elective office. This allowance of residency requirement has been struck in different instances, e.g., for the right to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972), and the right to receive welfare benefits, *Shapiro v. Thompson*, 394 U.S. 618 (1969), but the courts have treated the right to hold elective office differently and upheld such requirements, although it does not appear that such a case has arisen in Oregon. See *Geary v. Renne*, 880 F.2d 1062 (9th Cir. 1989) (noting in *dicta* that a seven year durational residency requirement to serve as a candidate is constitutional).⁵

⁵ See also 39 Or. Op. Atty. Gen. 70 (1978), in which the Oregon Attorney General noted:

“We note that the United States Supreme Court has approved requirements for office holding that are substantially more stringent than the conditions which may be attached to the right to vote. For example, durational residency requirements for voting (beyond those administratively necessary for preparation of voters' lists) are invalid under *Dunn v. Blumstein*, [405 US 330 (1972)], but extended durational residency requirements for office holding have been approved. *Sununu v. Stark*, 420 US 958 (1975) (seven years for state senator); *Kanapaux v. Ellisor*, 419 US 891 (1974) (five years for governor).”

B. Does ORS 221.110 require the City to allow anyone to run for office, notwithstanding the residency requirement in the Charter?

Mr. Berman's attorney has asserted that ORS 221.110 requires the City to allow "any resident" to hold office. ORS 221.110 provides as follows:

"221.110 City officers; eligibility. The officers of a city created under ORS 221.010 to 221.100 shall be five councilors, a municipal judge and such other officers as the council deems necessary. Any resident of a city shall be eligible to hold an office of the city."

This provision does not apply to the City for several reasons. First, the statute is part of a series of statutes, ORS 221.010 to 221.100 that apply to cities incorporated under those statutes. Oregon City did not incorporate under those statutes, but under its own City Charter, thus, by its very terms, ORS 221.110 does not apply to the City. Moreover, issues such as the qualifications for elected officers are the quintessential matter of local political forms that are protected under the "home rule" provisions of the Oregon Constitution. *La Grande/Astoria v. PERB*, 281 Or 137 *aff'd on rehearing* 284 Or 173 (1978). In that case, the Oregon Supreme Court held that the state could not adopt statutes that impinge on local government's choice of political form:

"[A] general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, *unless the law is shown to be irreconcilable with the community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.*" *La Grande/Astoria*, 281 Or at 156 (emphasis added).

In 37 Or. Op. Atty. Gen. 1232 (7270) (1976), the Oregon Attorney General confirmed that residency requirements are matters of local concern and cannot be conclusively established by the state legislature:

"[T]he legislature cannot determine qualifications for city officers [by state statute]. Whether a city officer is a resident of the city or a voter of the city is not, as far as we can discern, a matter of outside concernA requirement that the appointed officers of a city, or of a county having a charter, be residents or voters thereof, would have to be adopted locally."

Thus, the City's decision to impose a residency requirement, because it is a matter of its "political form" would likely prevail over a more general default provision in state statute and ORS 221.110 does not require the City to ignore the residency requirement in its Charter.

- C. Must the Commission determine the eligibility of candidates for office prior to an election, or must that determination await the election results?

Mr. Berman's attorney has asserted that the Commission is not authorized to determine the qualifications of candidates for elective office prior to the election occurring. Under his interpretation, because it is not possible to determine full qualification of a person to hold office prior to certifying the ballot to the County Elections Division, the determination of a candidate's qualifications must await the results of the election and the seating of the presumptive commissioner.

Mr. Berman's attorney is correct that the determination of the qualifications may await the election results, but nothing precludes the Commission from making that determination prior to the campaign and election either. Certainly if a candidate changes his or her residency in the two months *after* filing for office, the City cannot make that determination prior to certifying the ballot. However, in a situation such as this, where the issue is already known and capable of determination the Commission may determine a candidate's eligibility prior to determining if the candidate is eligible for office.

City staff believes that a determination at this time, rather than after an election, better serves the interests of the community by avoiding the effort and expense of a campaign that may ultimately be for naught, as well as the potential disappointment of a majority of voters, should an ineligible candidate win the election. Ultimately, the Commission may choose to avoid this question and wait for the results of the election, but the Commission may also avoid a later challenge by making its decision at this time.

CONCLUSION

Under Section 13 of the Oregon City Charter, the Oregon City Commission is the "final judge" of the qualifications of its members. The City Recorder, in her role as the City Elections Officer has determined that a potential candidate for the Commission has not demonstrated that he is eligible for that office and, accordingly, notified the candidate of that result. The Commission's role is to review the documents, affidavits and other material submitted into the record, as well as the oral argument provided by the potential candidate and/or his attorney, and determine whether the Commission is satisfied that the

potential candidate has established that he has “resided in the city during the twelve months immediately preceding the election.” If so, the Commission should direct the City Recorder to submit Mr. Berman’s name on the City’s certified ballot to the County Elections Division. If not, the City Commission should direct the City Recorder to submit the City’s certified ballot to the County Elections Division without Mr. Berman’s name on it. The deadline for that submittal is Thursday September 6, 2012.



Office of the City Recorder

625 Center Street | Oregon City OR 97045
Ph (503) 657-0891 | Fax (503) 657-7026

August 30, 2012

Michael T. Berman
505 Main Street
Oregon City, OR 97045

RE: Eligibility to run for City Commission

Dear Mr. Berman:

The City of Oregon City has received your candidate filing, form SEL 101, to register as a candidate for Position #3 on the City Commission for the upcoming November 6, 2012 election. The City Charter, Section 13, states the following regarding candidate eligibility:

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.

The City is obligated to review the qualifications for each candidate to determine compliance with its Charter. One part of that process includes contacting the Clackamas County Elections Division to obtain voter registration. During the City's routine call to the Clackamas County Elections on 08/29/12, the elections division indicated that you are currently registered at 316 Hedges St. in Oregon City as of 02/02/2012 (the elections division indicated that you had contacted them that day to update your registration and that you would access the County's voter registration system to make a correction to the address). Prior to being registered at 316 Hedges, the County stated you registered in August 2011 at 505 Main St., which you indicated is your business address in Oregon City. Prior to this registration, your registration was in Multnomah County from 2004 to August 2011.

Because of the above history, and the fact that a business address typically does not play a role in determining residency, the City needs proof of your residency in Oregon City from at least November 6, 2011 to the present. This residency issue will need to be resolved before September 6, 2012, which is the deadline for the City to certify its ballot to Clackamas County Elections.

Proof of residency can be shown in a variety of ways, such as:

- (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;
- (g) The candidate's voter registration, if any.

Please provide proof of residency in an expedient manner so that we can resolve this issue. I look forward to hearing from you soon.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nancy Ide".

Nancy Ide
City Elections Official
City of Oregon City



Office of the City Recorder

625 Center Street | Oregon City OR 97045
Ph (503) 657-0891 | Fax (503) 657-7026

August 31, 2012

Michael T. Berman
505 Main Street
Oregon City, OR 97045

RE: Eligibility to run for City Commission

Dear Mr. Berman:

Thank you for visiting City Hall yesterday to discuss residency issues. As you know, Section 13 of the City Charter requires all candidates for elective office to have been a resident of the City for at least 12 months prior to election. In our meeting, you provided the following documentation to confirm that you met the requirement:

- a. Copy of mail received at 316 S. McLoughlin Blvd., Oregon City, OR 97045 (The postmark date was missing from the copy.)
- b. Certified voter registration report from Clackamas County Elections Division showing your registration on 08-21-2011 at 505 Main Street, Oregon City, OR 97045 (you indicated this is your business address)
- c. Certified voter registration report from Clackamas County Elections Division showing your registration on 02-02-2012 at 316 Hedges, Oregon City, OR 97045
- d. Registration receipt from the Clackamas County Elections Division acknowledging the online changes to your voter registration on 08-29-2012.
- e. Certified voter registration report from Clackamas County Elections Division dated 08-30-2012 updating your registration to 316 McLoughlin Blvd., Oregon City, OR 97045

After consultation with the City Attorney, the documentation provided is not sufficient to prove your residency in Oregon City from November 6, 2011 to the present. Accordingly, without further action on your part, your name will not appear on the ballot for a position on the City Commission.

The City encourages citizen participation in City government and believes that is key to a successful City; however, the City is also obligated to ensure compliance with the Charter requirements for residency. If you want to appear on the ballot, it is imperative that you provide proof of residency before the September 6, 2012 deadline in order to include your name on the November 6th election ballot. You may also seek review of this action by the City Commission as the Charter provides that "The commission shall be the final judge of the foregoing qualifications and election of its own members." If you wish to pursue that option, please let me know as soon as possible so the item can be added to the Commission's agenda.

Sincerely,

Nancy Ide
City Elections Official
City of Oregon City

Candidate Filing

Major Political Party or Nonpartisan

SEL 101

rev. 1/12 ORS 249.031

i This information is a matter of public record and may be published or reproduced. ☐ Original ☐ Amendment

Filing Officer:

☐ Secretary of State

☐ County Elections Official of

County

Mail or Deliver to County Elections Office

☒ City Recorder (Auditor), City of CITY OF OREGON CITY

Candidate Information

☐ Democratic Party

☐ Republican Party

☒ Nonpartisan

☐ Incumbent Judge

Candidate Legal Name*

MICHAEL TRISTAN BERMAN

Candidate Name (As it should appear on ballot)*

(SAME) MICHAEL TRISTAN BERMAN

Filing for Office of*

CITY COMMISSIONER

District and/or Position (if applicable)*

#3

Residence Address, Street/Route*

316 S M'LOUGHLIN BLVD

City*

OREGON CITY

State*

OR

Zip*

97045

County of Residence*

CLACKAMAS

Home Phone

503 -

Work Phone

503 655 4321

Cell Phone

971-645-9169

Fax

Email*

MICHAELTBERMAN@GMAIL.COM

Website

Mailing Address (All correspondence will be sent to this address)*

505 MAIN ST. OREGON CITY OR 97045

City*

State*

Zip*

* Indicates a required field. At least one phone number is also required.

☒ Filing by Declaration, with the required filing fee

Office

Filing Fee

Office

Filing Fee

United States President

n/a

County Judge

\$50

United States Vice President

n/a

MSD Executive Officer, MSD Auditor

\$100

United States Senator

\$150

MSD Councilor

\$25

United States Representative

\$100

County Office

\$50

Statewide Offices

\$100

City Office

set by charter or ordinance

State Senator or Representative

\$25

Justice of the Peace

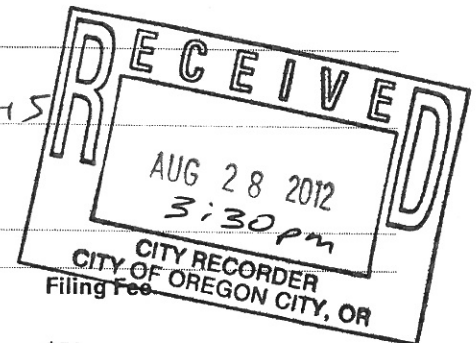
n/a

Circuit Court Judge

\$50

District Attorney

\$50



☐ Prospective Petition with proposed signature sheet

Petition circulators will be paid (Mark One)

☐ Yes

☐ No

☐ Completed Petition with certified signature sheets

2012 Filing Dates

Primary Election May 15, 2012

Candidate Filing

September 8, 2011 to
March 6, 2012

State Voters' Pamphlet Filing

September 8, 2011 to
March 8, 2012 (for paper filing)
or March 12, 2012 (for electronic filing)

Candidate Withdrawal

March 9, 2012

General Election November 6, 2012

May 30, 2012 to
August 28, 2012

May 30, 2012 to
August 28, 2012 (for paper filing)

or August 30, 2012 (for electronic filing)

August 31, 2012

(continued)

Required Information (If no relevant information list none or n/a)

Occupation (present employment – paid or unpaid) (required)

SMALL BUSINESS OWNER ; 505 TAVERN

Occupational Background (previous employment – paid or unpaid) (required)

HOSPITALITY MANAGEMENT 10 YEARS

REGIONAL MANAGER "BANCARD INC." 7 YEARS

Educational Background (schools attended, if necessary use attachment) (required)

Name of School (no acronyms)

Last grade Level Completed

Diploma/Degree/Certificate
(AA, BA, BS, MA, PhD accredited)
Not honorary

Course of Study
(optional)

OREGON CITY HIGH SCHOOL

Prior Governmental Experience (elected or appointed) (required)

CITIZEN INVOLVEMENT COMMITTEE - "MAIN ST." REPRESENTATIVE

By signing this document, I hereby state that:

- I will accept the nomination for the office indicated above
- I will qualify for said office if elected
- if not nominated, I will not accept the nomination or endorsement of any political party other than the one named
- I have been a member of said political party, subject to the exceptions stated in ORS 249.046, for at least 180 days before the deadline for filing a nominating petition or declaration of candidacy (ORS 249.031)
- all information provided by me on this form is true to the best of my knowledge **and**
- no circulators will be compensated based on the number of signatures obtained by the circulator on a prospective petition

Check the applicable box (not applicable to candidates for federal office - US Senate and US Representative):



By marking this box, I certify I do not have an existing candidate committee and I do not expect to spend more than \$750 or receive more than \$750 during each calendar year. I understand I must still keep records of all campaign transactions and if total contributions or total expenditures exceed \$750 during a calendar year, I must follow the requirements detailed in the 2012 Campaign Finance Manual.



By marking this box, I certify that I have already filed or will soon file a Statement of Organization for Candidate Committee (SEL 220). For detailed instructions, see the 2012 Campaign Finance Manual.



Warning

Supplying false information on this form may result in conviction of a felony with a fine of up to \$125,000 and/or prison for up to 5 years. (ORS 260.715). A person may only file for one lucrative office or not more than one precinct committee person at the same election. Unless the person has withdrawn from the first filing, **all** filings are invalid. (ORS 249.013 and ORS 249.170)

Candidate's Signature

Date Signed

8-28-12

For Office Use Only

Vote registration

Initials

Approval Code/Receipt Number