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January 7, 1980

91-39

MEMO TO: Charter Review Ad Hoc Committee  
F R O M: Corporation Counsel Paul Mancini  
SUBJECT: Residency Requirement,  
Determination of Residency

This is in response to the question posed to this department, asking whether it would be possible to impose a residency requirement in the Charter of the County of Maui for candidates seeking County public office. Further, you asked that we identify whether standards exist which can be used in determining what constitutes residency.

RESIDENCY REQUIREMENT FOR ELECTIVE PUBLIC OFFICE

With regard to the first question, we answer in the affirmative subject to the qualifications identified herein.

Currently, Hawaii Revised Statutes provides for a residency requirement of three months for candidates for primary elections. However, we are of the opinion that such provision is inapplicable to elections for County offices.

HRS, Section 12-1.5, states:

"No person shall be a candidate for any primary election unless at the time of filing of his nomination papers he is and shall have been a resident of the district from which he seeks election for a period of at least three months."

Charter Review Ad Hoc Committee  
Page Two  
January 7, 1980

An Attorney General Opinion dated March 29, 1977, stated that the subject three-month residency requirement was in conflict with Article III, Section 7 of the Hawaii State Constitution as to State Constitutional officers and was therefore invalid.

The rationale was that the statutory residency requirement imposed a requirement in addition to those stated in the Constitution. Where a Constitution sets forth specific eligibility requirements for a particular office, the Constitutional specifications are exclusive and the Legislature may not require additional or different qualifications. The opinion further stated that:

"Prescribing qualifications for eligibility to elected county officers may also be questionable."  
(Citing A.G. Opinion 75-22.)

Article VII, Section 2 of the Hawaii State Constitution states that:

"Each political subdivision shall have the power to frame and adopt a Charter for its own self government."

Furthermore:

"Charter provisions with respect to a political subdivision's executive, legislative and administrative structure, and organization shall be superior to statutory provisions, subject to the authority of the Legislature to enact general laws allocating and reallocating powers and functions." Article VII, Section 2, Hawaii State Constitution."

In a 1975 opinion (75-22), the Attorney General was "inclined to view that prescribing qualifications for eligibility to county offices did not fall within the constitutional authority to allocate or reallocate powers and functions . . . ."

Therefore, we are of the opinion that the State statutory provisions regarding the three months' residency requirement

Charter Review Ad Hoc Committee  
Page Three  
January 7, 1980

is invalid as to County elections. In the same way as a statute cannot provide requirements for election to State offices in addition to the provisions of the State Constitution, a statute also cannot provide requirements for the election to county offices in addition to the provisions of the county charter. This is especially so in view of the County Charter supremacy in matters involving the county's structure and organization.

However, even though HRS, Section 12-1.5 may be inapplicable to elections for County offices, the question remains as to whether the inclusion of a residency requirement in the County Charter would be constitutionally valid. The resolution of the question must address whether the right to be considered for public elective office is of a nature that enjoys constitutional protection equal in scope to that afforded the exercise of the right to vote, the right to work, the right to travel and other fundamental rights.

The issue is a traditional equal protection issue--does a residency requirement for candidates for public office violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. The equal protection clause invalidates certain types of legislative classifications. This clause does not automatically rule out legislative classifications. Substantially all legislation involves classification of some sort. The Government, in the classification of a particular group as a subject for regulation, must proceed upon a rational basis and may not resort to arbitrary classification. In reviewing statutes under the equal protection clause, the character of the classification in question, the individual interests affected by the classification, and the governmental interests asserted in support of the classification must be examined. The clause appears to require that any classification be reasonably relevant to the recognized purposes of good government and that no distinction be made on the sole basis of race or alienage as to certain rights.

Courts have used a number of approaches in analyzing legislative classifications regarding residency requirements for constitutional validity.

Cases reviewed in this area indicates four different approaches to the problem:

1. In California and New York (Phelem v. City of Buffalo, 54 App. Div.2d 262, 388 N.Y.S.2d 469), the Courts have held that the strict scrutiny (compelling State interest) test applies because durational residency requirements infringes on the rights to travel, the right of free association and the right to vote. The courts in these jurisdictions state that the durational residency requirements for political candidates do not serve a compelling state interest and are therefore unconstitutional.

2. Some jurisdictions focus upon the traditional and wide spread use of such residency requirements and find that there are no constitutional restraints on such. These jurisdictions take note of the fact that the U.S. Constitution requires that the President and members of both legislative houses be citizens of the United States for certain periods of years. See Gralike v. Walsh, 483 S.W.2d 70 (Mo. 1972).

3. Other jurisdictions follow the California's view requiring that the compelling state interest standard be applied. These jurisdictions, however, find that durational residency requirements do serve a compelling state interest.

In Gilbert v. State, 526 P.2d 1131 (Alaska 1974), the court upheld a three-year residency requirement for state legislative offices based upon the compelling state interest standard. The court held that a durational residency requirement merely delays entry into a political race and therefore is only a minimum infringement of the rights involved. See also Hatcher v. Bell, 521 S.W.2d 799 (Tenn. 1974), and Chimento v. Stark, 353 F.Supp. 1211 (D.C.N.H.) aff'd mem, 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39 (1972). (Note: Chimento dealt with a seven year residency requirement for governor.)

Other variations of this approach have been used. In Henderson v. Fortworth Independent School District, 526 F.2d 286 (5th Cir. 1976), a three-year residency requirement for

school board members was struck down. The strict scrutiny analysis was applied and a compelling state interest was found by the court to exist. However, the court ruled against the requirement because it completely restricted access to the school board and thus was not a lesser drastic alternative. The court distinguished this case from the Chimento case, in that in Chimento the candidate was prohibited from only the governor's seat leaving him the opportunity to participate in other offices which allowed him to affect state policies. In Henderson, the court argued, the school board was the only organ available to the candidate to affect school policy and therefore to restrict his access would be unreasonable.

4. Hawaii's rule: rational basis.

In Hayes v. Gill, 52 Haw. 251, 473 P.2d 872 (1970), the Hawaii Supreme Court rejected the compelling state interest and found that the rational basis test as the standard be used. The court reasoned that because there is no showing of invidious discrimination the rational basis standard would be applied. The court also found that the practice of durational residency requirements was wide spread and therefore added validity to the practice. (Note: In Hayes the court seemed to take for granted that residency requirements for candidates serve some state interest. The court, however, did not state what those interests are.)

The rational basis standard is probably still the rule in Hawaii today. In Nachtwey v. Doi, 583 P.2d 955 (1978), the court decided the constitutionality of a statute requiring an indigent to file a petition containing .5 per cent of the registered voters' signatures in the district to be a candidate. The court noted that candidacy per se lacks status as a fundamental right. However, the court went further to indicate that the restriction may affect voters rights. This being the case, the court stated the test as:

"If a reasonably diligent candidate can satisfy the signature requirement, then the right to candidacy is not infringed. (Nachtwey at 962)."

A durational requirement would eventually allow all persons to be candidate and therefore the right to be a candidate would not be infringed.

One limitation may exist because of the court's use of the word reasonably. In Antonio v. Kirkpatrick, 579 F.2d 1174 (8th Cir. 1978), the court used a rational basis test but found that the ten year residency requirement was unreasonable when applied to the job of state auditor. The court noted that the requirement may be reasonable if applied to a policy-making office such as the governorship, but that a ten year period was too long for the ministerial position of State auditor.

Therefore, we are of the opinion the rule in Hawaii is that durational residency requirements for candidates for elective public office are valid as long as they are (1) reasonable in length, and (2) reasonably related to the position involved.

We must note that this opinion is contrary to the opinion of the County Attorney contained in a letter to James S. Ushijima, County Clerk, dated June 23, 1972. With regard to said opinion, we do not believe that York v. State, 53 Haw. 557, 498 P.2d 644 (1972) as referenced in that opinion is precedent on the instant issue. We distinguish that case as one dealing with the right to pursue employment as opposed to the right to be a candidate for public elective office. This interpretation appears consistent with the court's holding in Nachtwey, supra. We attach that opinion for your reference.

#### DETERMINATION OF RESIDENCY

HRS, Section 11-13, sets forth the rules for determining residency as the term is used in the HRS chapter on elections. It is essentially a codification of the common law definition of residency, which definition is synonymous with domicile. As stated in HRS, Section 11-13(1):

"The residence of a person is that place in which his habitation is fixed, and to which, whenever he is absent, he has the indication to return."

Therefore, while the statutes do not refer to domicile, in the absence of evidence of a contrary legislative intent, "residence" in a statute is generally interpreted as being the equivalent of domicile. This interpretation is further supported by the comments to the restatement of the conflict of laws Second, Section 11.

In determining whether a person is a domiciliary of the State of Hawaii, the Hawaii Supreme Court has looked toward two factors: (1) physical presence at the particular place, and (2) intention of the party to reside there permanently, i.e., to make the place his home with no intent to leave at any foreseeable future time. Arakaki v. Arakaki, 54 Haw. 60 (1972).

Furthermore, the Court requires that in order to recognize a new domicile, not only must the above requirement be met, but there must also be an intent to abandon former domicile. Yamane v. Piper, 51 Haw. 339 (1969). In doing so, the Court determines a person's intent by his acts viewed in their totality. In the Arakaki case, one of the parties attempted to establish that his domicile had been Hawaii. In determining his domicile, the Court looked at the party's job, home, and family's financial obligations in the State. In the Yamane case, the person was found to have abandoned his Hawaii domicile by not having left any real or personal property, no bank account, and having sold his automobile, television and his household furnishings.

That the Legislature intended to adopt the common law definition of domicile for "residence," is clear from the apparent codification of Re Lee Yit Kyau Pang, 32 Haw. 699 (1933). In Pang, the Hawaii Supreme Court distinguished residence from domicile in that, "residence is used to indicate the place of dwelling, where the permanent or temporary; while domicile is used to define the fixed and permanent residence to which when absent, one has the intention of returning." Pang, supra, Haw. at 704, quoting from in re Brannock, 131 F. 819, 822.

An actual resident includes one who has moved into a county and rented a house there with the intention of remaining until he has completed a certain job although he did not need to reside there permanently. Therefore, a person may be an actual resident of one county and have a legal residence in another. When a man buys or rents a house or sets housekeeping with his family with the design of remaining there until he has completed certain work, he becomes an actual resident there although his domicile is in another country to which he intends to return upon the completion of the job. See Pang, supra.

Finally, the United States Supreme Court has listed the factors that it considers relevant when determining a person's domicile:

"All facts which go to show the relations retained to one's former place of abode are relevant in determining domicile. What bridges have been kept and what have been burned? Does he retain a place of abode there, or is there a family home with which he retains identity? Does he have investments in local property or enterprise which attach him to the community? What are his affiliations with the professional, religious, and fraternal life of the community, and what other associations does he cling to? How permanent was his domicile in the community from which he came? Had it been a family fief or was he there by bird of passage? Would a return to the old community pick up shreds of close association or has he severed his relations that his old community is as strange as another? Does he pay taxes in the old community because of his retention of domicile which he could have avoided by giving it up?" District of Columbia v. Murphy. 314 U.S. 441, 457-58 (1941).

#### PREVIOUS INQUIRIES

By your communication dated December 5, 1979, you asked for clarification on two matters contained in my May 15, 1978 memo to the then Councilman Alvin Amaral. The issues concerned Section 3-6(4) and Section 4-2(4) of the Revised

Charter Review Ad Hoc Committee  
Page Nine  
January 7, 1980

Charter of the County of Maui. My suggestion to Mr. Amaral regarding Section 3-6(4) was that the phrase in line 1 of said section, "on procedural motions" be clarified.

You asked that I explain what is meant by procedural motions. Your question was precisely my request to Councilman Amaral. The reason I asked for clarification was that the term is not subject to any precise definition. The record of the Charter Commission does not define the term nor does it provide any precise objective sought by the term through the application of Section 3-6(4). Without clarification in the Charter or by an ordinance, any action pursuant to the provision could be subject to challenge.

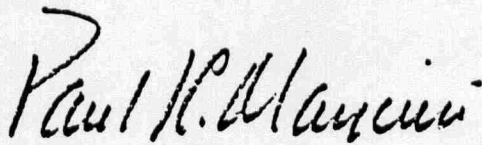
With regard to Section 4-2(4), I asked Councilman Amaral to consider whether the Section could be amended to authorize a public hearing on any matter and not just matters dealing with ordinances and resolutions.

You asked that I elaborate and provide an example of what is meant by "any matter and not just matters dealing with ordinances and resolutions."

I used the term "any matter" to raise the issue as to whether it serves any purpose to require that a subject matter be proposed in the form of an ordinance or a resolution prior to bringing such for a public hearing. Any matter would refer to any subject which was not in the form of a proposed ordinance or a proposed resolution.

Your inquiry concerning the potential conflict between the Water Board's power to promulgate rules and the Council's power to levy special assessment will be treated in a separate memorandum.

If any of this matter needs clarification, please do not hesitate to contact me.

  
PAUL R. MANCINI  
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PRM:jkm  
Enclosure