City of Hesperia
STAFF REPORT

DATE: September 3, 2019

TO: Mayor and City Council Members

FROM: Eric Dunn, City Attorney

SUBJECT: Council Member Residency, Quo Warranto, and Vacating an Office

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RECOMMENDED ACTION

It is recommended that the City Council consider the issues and take action or no action as deemed appropriate.

BACKGROUND

At the August 20, 2019 City Council meeting, Mayor Pro Tem Holland requested an agenda item to discuss and possibly vote on vacating the Council seat of Council Member Brosowske based on allegations that Council Member Brosowske does not live in the City. This memorandum discusses the law on residency/domicile and a few Attorney General ("AG") Opinions and court cases that have dealt with the issue. Two recent AG Opinions that reached opposite conclusions are attached to illustrate the AG's interpretation of "domicile" and whether the allegations raised a substantial question of law or fact as to whether a council member actually resided in his city.

ISSUES / ANALYSIS

I. Discussion of Law.

A. Statutory Law.

The relevant sections of the Government Code on residency and vacancy are Sections 36502(a), 34882, 1770 (d) & (e), 243, and 244 (a), (b), (c) & (f), printed below:

Section 36502(a).

(a) A person is not eligible to hold office as councilmember, city clerk, or city treasurer unless he or she is at the time of assuming the office an elector of the city, and was a registered voter of the city at the time nomination papers are issued to the candidate as provided for in Section 10227 of the Elections Code.

If, during his or her term of office, he or she moves his or her place of residence outside of the city limits or ceases to be an elector of the city, his or her office shall immediately become vacant.

Section 34882 (for elections by District).

A person is not eligible to hold office as a member of a municipal legislative body unless he or she is otherwise qualified, resides in the district and both resided in

the geographical area making up the district from which he or she is elected and was a registered voter of the city at the time nomination papers are issued to the candidate as provided for in Section 10227 of the Elections Code.

Section 1770.

An office becomes vacant on the happening of any of the following events before the expiration of the term:

(d) His or her removal from office.

(e) His or her ceasing to be an inhabitant of the state, or if the office be local and one for which local residence is required by law, of the district, county, or city for which the officer was chosen or appointed, or within which the duties of his or her office are required to be discharged.

Section 243.

Every person has, in law, a residence.

Section 244.

In determining the place of residence the following rules shall be observed:

(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.
(b) There can only be one residence.
(c) A residence cannot be lost until another is gained.
(d) The residence can be changed only by the union of act and intent [emphasis added].

B. <u>Quo Warranto Proceedings</u>.

There have been a number of instances where a private party has challenged an elected official's right to hold office for various reasons, including residency. Under California Code of Civil Procedure ("CCP") Sections 803 through 810, the private party must seek permission from the AG to sue the officeholder in the local Superior Court for a determination of residency, or "domicile." This is called a "quo warranto" action. The AG reviews the allegations and grants or denies permission to sue. If the AG grants permission to sue, the Court makes the ruling on residency and the right to hold the office.

Section 811 of the CCP authorizes a local legislative body to sue in quo warranto without first obtaining the AG's consent.

In at least four instances since 1990 the legislative body did not seek permission from the AG or pursue its own action to sue in Superior Court under the quo warranto process, but instead took action to vacate the seat and appoint a replacement on the theory that the officeholder's seat automatically became vacant under the statutes listed above. In three of those cases the former official then pursued his or her own quo warranto action to challenge the

appointee's right to hold the office, and the AG gave permission to sue because the former official had raised substantial issues of fact or law that should be determined by the Court. In the other case the former official sued the City directly, but the Court held that the former official's sole remedy was the quo warranto process. These AG Opinions and case are:

1. 73 Ops.Cal.Atty.Gen. 197 (1990) [a school personnel commissioner].
2. 79 Ops.Cal.Atty.Gen 21 (1996) [an elected mayor].
3. 82 Ops.Cal.Atty.Gen 78 (1999) [a water district board member].
4 *Nicolopulos v. City of Lawndale et al.* (2001) 91 Cal.App. 4th 1221 [an elected city clerk].

The following explanation is taken directly from the Attorney General's website on quo warranto proceedings, with a few redactions to focus on residency and make it shorter:

> Quo warranto is a special form of legal action used to resolve a dispute over whether a specific person has the legal right to hold the public office that he or she occupies.
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> Quo warranto is used to test a person's legal right to hold an office, not to evaluate the person's performance in the office. For example, a quo warranto action may be brought to determine whether a public official satisfies a requirement that he or she resides in the district; or whether a public official is serving in two incompatible offices.
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> The term "quo warranto" (pronounced both *kwoh wuh-**rahn**-toh*, and kwoh ***wahr**-un-toh*) is Latin for "by what authority"—as in, "by what authority does this person hold this office?" The term "quo warranto" is still used today, even though the phrase no longer appears in the statutes.
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> Quo warranto originated in English common law as a process initiated by the crown to find out whether a person was legitimately exercising a privilege or office granted by the crown, or whether the person was instead intruding into a royal prerogative.
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> Early California law abolished the writ and substituted a statutory action, identical in purpose and effect to the common-law writ. Current California law provides that the action may be brought either by the Attorney General or by a private party acting with the consent and under the direction of the Attorney General.
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> **How Does a Quo Warranto Action Get Filed?**
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> A quo warranto action may not be filed without the approval of the Attorney General (except in those cases where a public agency is authorized to file for itself).
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> The remedy of quo warranto is vested in the People, and not in any private individual or group, because the question of who has the right to hold a public office is a matter of public concern, not a private dispute. The requirement of obtaining approval also serves the important purpose of protecting public officers from frivolous challenges.
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> In order to obtain the Attorney General's approval, a private person or a local agency must file an application pursuant to the rules and regulations issued by the Attorney General. The application and supporting documents must be prepared by a licensed attorney.
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> The party who files the application with the Attorney General is called the "relator." The responding party is called the "proposed defendant" or "the defendant."

An application must include a verified complaint; a verified statement of facts; a memorandum of points and authorities; and a notice to the proposed defendant giving him or her at least 15 days to show cause to the Attorney General why the application should not be granted. The application must be properly served on the proposed defendant, and filed within five days of service with the Attorney General.

The proposed defendant is given 15 to 20 days to respond, depending upon where service is made. The relator may then file a reply within 10 days. The Attorney General may prescribe a shorter period of time in special cases or upon a showing of good cause.

After all of the papers are filed, the Attorney General's Office evaluates the facts and the law in order to determine whether to grant leave to sue. Because this approval process is an administrative function, not a judicial one, there is no opportunity for formal discovery proceedings between the parties at this stage. From time to time, the Attorney General may ask one party or another for additional information in order to make a full evaluation of the application and responses.

After sufficient time to evaluate the matter, the Attorney General will render a decision either to grant leave to sue, or not to grant leave to sue. The decision whether or not to grant leave to sue involves an exercise of discretion, and will rarely if ever be disturbed by a court.

How Does a Quo Warranto Action Work?

If leave to sue is granted, then the relator may file a quo warranto action in the appropriate superior court. From that point on, the matter is a judicial proceeding, subject to the procedures and rules of the court. However, the relator must proceed under the direction and supervision of the Attorney General throughout the action.

Before filing a complaint in the superior court, the relator must make any changes or amendments that the Attorney General directs. At any stage of the proceeding, the Attorney General may withdraw, discontinue or dismiss the case, or any part of it. Additionally, the Attorney General may assume management of the litigation at any stage.

In the quo warranto action, the superior court will decide whether the defendant is lawfully entitled to the office in question. If the defendant is not entitled to hold the office, the court may decide who does have that right. If the court decides that the defendant unlawfully usurped the office, the court will exclude the defendant from the office and assess costs. The court may also, at its discretion, impose a fine on the defendant of up to $5,000.

If the rightful holder of the office has suffered damages, those may be recovered in a separate action.

II. Residency (or "Domicile").

A number of AG Opinions have discussed the meaning of residency in quo warranto actions. Two recent AG Opinions from 2018 and 2019 involved situations where a private party sought permission from the AG to sue a city councilmember on the grounds that the councilmember did not live in the city. The AG denied permission to sue in one case and granted permission to sue in the other case. These AG Opinions are described briefly below and are attached for reference. Together these AG Opinions highlight the AG's focus on the "union of act and intent" as being the critical factor in establishing residency.

A. Costa Mesa AG Opinion.

On July 20, 2018 the AG issued Opinion 18-302 (101 Cal.Ops.Atty.Gen. 42). In this instance, Allan Mansoor ("Mansoor") was a Costa Mesa city councilmember. Art Perry ("Perry") sought permission from the AG to challenge Mansoor's right to hold office. Perry alleged, and Mansoor admitted, that Mansoor had lived in Newport Beach for a few months while serving on the Costa Mesa city council.

The AG denied permission to sue in this case because Mansoor had presented evidence of his intent to remain in Costa Mesa, notwithstanding that he had moved out of Costa Mesa for a few months. Perry had not presented evidence creating a substantial question of law or fact overcoming Mansoor's evidence of intent to remain in Costa Mesa. The AG cited to the Government Code Sections noted above, then turned to a discussion of the meaning of residency, or "domicile" [footnotes and citations omitted]:

> "The residence of a public official in this context is his or her legal residence, also referred to as "domicile." [….] The determination of domicile is a mixed question of fact and law that may involve various factors, including acts and declarations by the official, as well as the official's mailing address, voter registration, car registration, and tax returns. But the critical element is intent. As we have recently observed, "Because a determination of domicile is based not only on physical conduct, but also intent, the requirement that a substantial showing be made before we authorize judicial resolution is particularly pertinent."[...]"The burden of proving a change of domicile is on the party asserting it, here proposed relator Perry."

Perry alleged Mansoor had moved to a house in Newport Beach owned by Mansoor's in-laws for a few months in 2017. Perry presented declarations of neighbors and other individuals who observed Mansoor's and his wife's cars parked frequently at the Newport Beach house, and observed Mansoor behaving as though he lived in the Newport Beach house, by, for instance, entering the home without knocking, and giving fruit from one of its trees to a neighbor.

Mansoor did not deny that he lived in the Newport Beach house for a few months, but provided a sworn declaration explaining his intention to live in Costa Mesa. According the declaration, Mansoor's lease on their Costa Mesa apartment was about to expire and they wanted to move to a larger apartment for their three children. They had trouble finding a suitable apartment in Costa Mesa. They worked with a realtor, visited many apartments, and submitted applications, to no avail. Their lease expired in June 2017 and they moved to the Newport Beach house. However, within a couple of months they found a new apartment in Costa Mesa and were able to move in on October 17, 2017, which means Mansoor lived in Newport Beach for about three or four months while serving on the Costa Mesa city council.

The AG examined the record and concluded there was no "union of act and intent" to change Mansoor's domicile: "[T]he acquisition of a new domicile is generally understood to require an actual change of residence accompanied by the intention to remain either permanently or for an indefinite time in the new locality" [emphasis added]. The AG concluded Perry had not presented evidence that Mansoor intended to remain in Newport Beach either permanently or indefinitely. The AG stated: "Mansoor must have a domicile, he cannot lose his [old Costa Mesa] domicile until another is acquired, and there is no evidence he intended to

remain in Newport Beach any longer than it took to acquire a new Costa Mesa domicile." The AG concluded that Perry did not raise "a substantial question of law or fact" as to Mansoor's domicile, and thus denied Perry permission to sue in quo warranto.

B. Ridgecrest AG Opinion.

On June 13, 2019 the AG issued Opinion 18-1103 (102 Cal.Ops.Atty.Gen. 56). In this instance, Wallace Martin ("Martin") was a Ridgecrest city councilmember elected in 2016. Scott Leahy ("Leahy") was another candidate in the 2016 election and sought permission from the AG to challenge Martin's right to hold office on the ground that Martin did not legally reside in the city at the time his nomination papers were issued, at the time of his election, and during his term of office. Leahy alleged that Martin had leased some property from a friend and later purchased a duplex for the purpose of establishing residence in the city, but Martin actually continued to live in a house owned by him and his wife in the unincorporated area outside of the city.

The AG granted permission to sue in this case because the evidence submitted raised a substantial question as to whether Martin had legally changed his domicile to Ridgecrest. The AG noted that for nearly 15 years prior to June 2016, it was uncontested that Martin's domicile was his house in unincorporated Kern County outside the City of Ridgecrest. The allegations were that Martin leased some property in the city on a temporary basis beginning July 1, 2016 to be eligible for city council, and used that address to register to vote and for his nominating papers. Martin subsequently purchased a duplex in Ridgecrest in October 2016, won election in November 2016, and moved into the Ridgecrest duplex in April 2017. Leahy alleged that Martin never actually lived in either the rental property or the Ridgecrest duplex.

The AG reviewed the timeline of events and evidence submitted by the parties and said: "we have no cause to doubt that [Martin] intended that his rental property […] would function as his domicile for purposes of his nomination to city council, effective July 2016, but there remains a question whether it actually became his new domicile—that is, a place of physical presence joined with the intent to make it his permanent home" [emphasis added]. Martin had "not declared that he spent any time there, let alone lived there, nor that he took any concrete steps to make it his home." The AG concluded there was a substantial question as to whether Martin had changed his long time domicile to Ridgecrest at the time of his nomination.

The AG also noted that Martin's purchase of the Ridgecrest duplex after the nomination but prior to the election showed that Martin intended his domicile be legally considered as Ridgecrest for the purpose of the election. However, Martin had stated he did not move into the Ridgecrest duplex until April 2017. The AG concluded there was no "corroborating evidence of his physical inhabitation, or even his physical presence, at his temporary rental […] between the nomination and election." Therefore, the AG concluded there was a substantial question as to whether Martin had changed his domicile to Ridgecrest before the election.

Finally, the AG concluded there was a substantial question whether Martin's domicile had been in Ridgecrest at all times while serving as a councilmember. There was no evidence that in the period from the election in November 2016 to his moving into the Ridgecrest duplex in April 2017 that Martin "had a fixed habitation in Ridgecrest beyond his statements that he entered into a rental agreement with a friend in order to become eligible for city council."

The AG thus granted Leahy permission to sue on all three timelines: the time of nomination, the time of the election, and the time while serving as a councilmember. Note the AG granting permission to sue does not resolve the issues, it just allows Leahy to file a lawsuit in the local Superior Court.

C. Union of Act and Intent.

As noted in Government Code Section 1770(f), "a residence can be changed only by a union of act and intent." Contrasting the Costa Mesa and Ridgecrest AG Opinions, in those cases the AG acknowledged Mansoor's intent to remain in Costa Mesa and Martin's intent to move to Ridgecrest. The difference was in the evidence of actions taken to carry out that intent. Mansoor presented enough evidence that he only temporarily moved to Newport Beach; Martin did not present enough evidence that he physically moved to Ridgecrest.

D. Factors Considered in Determining Domicile.

AG Opinions considering what constitutes residency/domicile over the years have considered a number of factors that were asserted by either the challenger or the defendant to corroborate the union of act and intent, including but not limited to:

1. Intent.
2. Acts and declarations by the official.
3. The official's mailing address.
4. Voter registration address.
5. Vehicle registration address.
6. Tax returns.
7. Buying a house in another jurisdiction.
8. Declarations, photographs, maps, voting records, telephone book pages, and other documents presented by others.
9. Where a car is frequently parked.
10. Statements of where an official said he "lives."
11. Filing for a homeowner's or renter's tax exemption.
12. Address on the official's driver's license.
13. Address on a concealed weapons permit.
14. Utility bills.
15. Ownership of a business.
16. Grant deeds and trust deeds securing loans on property.
17. Reports of witness interviews concerning the official's presence or absence from his claimed residence.
18. Acceptance of service of process at one location or another.

III. Declaring a Vacancy.

The majority of AG Opinions on quo warranto nonresidency allegations involve a private party seeking permission from the AG to challenge a sitting official's right to hold office. Section 811 of the Code of Civil Procedure authorizes a local legislative body to file its own action in Superior Court without the AG's consent. However, at least three AG Opinions and one court case involved situations where the legislative body simply declared the seat vacant due to nonresidency and appointed a replacement. Courts have held that where "a former officeholder has been ousted by a declaration the office is vacant due to his nonresidency, and

a successor has been appointed or elected to fill the vacant term, quo warranto is the ousted official's sole remedy for challenging the alleged vacancy." (*Nicolopulos v. City of Lawndale et al.* (2001) 91 Cal.App. 4th 1221; citing *Klose v. Superior Court* (1950) 96 Cal.App.2d 913.) The burden shifts to the former official to go through the quo warranto process to challenge the appointee's right to hold office.

FISCAL IMPACT

Unknown at this time.

ATTACHMENT(S)

1. Two Attorney General Opinions