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Mayor appeals decision invalidating her election

mayors
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SANTA CRUZ — The court record makes it "impossible to determine" whether there were enough out-of-precinct votes in the November 1983 City Council election to affect the results of that election, argue lawyers for Mayor Jane Weed in a request for a reconsideration of an appellate court decision invalidating her election.

Weed's San Francisco lawyers, John Kecker and Gary Cohen, have filed arguments with the 1st District Court of Appeal in San Francisco to convince three appellate justices to reconsider their Nov. 21 decision.

Justices ruled there were enough illegal votes at UC-Santa Cruz precincts to overturn the election results, giving victory to former city Public Works Director Bill Fieberling.

Weed has continued in office pending a decision on her request for rehearing and possible appeal to the state Supreme Court.

At the very least, say her lawyers, the case should be returned to Santa Cruz County Superior Court to decide the number of illegal votes.

Justices will rule by Dec. 22 on the rehearing request, said an appeals court clerk on Thursday.

Under normal circumstances, Weed's term would expire in 1988. However, if the appellate decision sticks and Fieberling replaces her, the council's political makeup would change from an existing progressive majority to a moderate-conservative majority.

Defense lawyers base their rehearing request on two points:

- "The number of illegal votes cast under the court's standard cannot be determined on the present court record."

- "The court should clarify that it did not intend to overturn the long-standing principle that a voter cannot lose a voting domicile (a permanent legal residence) until a new one is established."

The appellate court's ruling reversed an April 1984 decision by former Superior Court Judge Harry

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Brauer — now an appellate justice in San Jose — that upheld the election results but left open a legal door for the appeal.

Former Councilman and Mayor Norman Walters and 21 other plaintiffs had challenged the election results, hiring staunch Republican and conservative lawyer, Tim Morgan of Santa Cruz.

The case hinged on whether 460 challenged votes were illegal. Brauer decided 113 votes were illegal. Appellate justices ruled 193 votes were illegal.

A crucial point was whether voters in university precincts — where Weed and other progressives had won by a 9-1 voting ratio — had violated residency requirements.

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That being so, the election outcome would have been the same whether they had voted at their correct precinct or on campus, argued trial-court defense lawyer Mitchell Page.

Brauer decided that "even if a voter has left his residence with the intention not to return to it, that residence remains his domicile as long as he has not acquired a new one." This was one of the main contentions of the defense.

The case spotlighted conflicts in the law on the issue of legal residence, or domicile.

The state Government Code provides that a person's domicile is a place where habitation is fixed,

where the person intends to remain and to which they intend to return.

But the Elections Code provides that "a residence cannot be lost until another is gained."

In the rehearing request, Kecker and Cohen dispute the court's conclusion regarding the 193 voters identified in the trial court as "persons who expressed a clear resolve not to return to campus to live."

The defense says appellate justices "apparently" concluded that each of those voters "had established a new voting domicile and thereby lost his or her previous one."

This conclusion is "completely unsupported by the record before the court," the defense maintains.

Among the 193 voters, are 33 persons who the trial court said proved their "intention not to establish a post-campus domicile and whose testimony on that point was credible," according to the defense.

The defense maintains there is "simply no evidence in the record" to show how many of these 33 voters, if any, had established a new fixed habitation "in which they had no intention to leave presently."

In addition, the defense maintains the appellate justices "misinterpreted" the Superior Court findings on this group of voters.

The justices "assumed the trial court upheld the votes of some persons, when it in fact rejected them," says the defense.

If but 12 of these 33 voters had not established new voting domiciles under the court's standards, "Jane Weed's election would have to be confirmed," according to the defense.