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Defense must prove ballots cast legally

By BUD O'BRIEN

The people trying to overturn last November's Santa Cruz City Council election won a significant victory in Superior Court Monday.

Judge Harry F. Brauer agreed with attorneys representing those challenging the election that the burden of proving that ballots had been cast legally should fall on the defense in the cases of 161 of the voters.

The election is being challenged by Santa Cruz conservatives who charge that at least 472 votes cast at UC-Santa Cruz precincts — mostly by students — were illegal because the voters didn't live on the campus at the time. The challengers are hoping to have the election of progressive Jane Weed overturned and her place taken by Bill Feiberling, which would give the conservatives a 4-3 majority on the City Council.

Despite arguments by defense attorney Mitchell Page that lawyers for the challengers had presented "inferences" and not "facts" in seeking to have the burden shifted to the defense, Judge Brauer ruled that the evidence presented by the plaintiffs that 161 voters in question had not resided on the campus for at least one year prior to the contested election constituted a "presumption" that their domicile was not in the precincts in which they voted, as the law says it must be.

Brauer said that presumption

was "rebuttable" but that the burden for that should, as the challengers' lawyers argued, fall on the defense.

Until now, the responsibility for producing evidence has been on the shoulders of the challengers, who are represented by lawyers Tim Morgan and John Bohrer. They had called 170 of the challenged voters to the stand before winning Monday's ruling and resting their case.

In the course of Monday's arguments, Judge Brauer also gave the defense reason for some hope. He indicated that he agreed with defense lawyers that the evidence in the case must be "clear and convincing" before he would consider overturning the results of the election. That is a higher standard of proof than one calling for simply a "preponderance of the evidence" to prevail.

But the judge also said that if he were to determine that enough of the challenged votes had been cast illegally to affect the election outcome, "at the moment it is my understanding of the law that I would not have the power to take no action . . ." He made it clear, in other words, that unless further research uncovers case law not yet discovered, he would feel bound to change the election results in such a situation.

Defense attorney Page, who said it would be impossible for him to bring all the 161 people to

court (many of them have left the area), sought to get some idea from the judge as to the latter's leanings after having heard 170 witnesses.

But Judge Brauer took pains to assure all concerned that he had made no conclusive decisions about the case. He did say that while he had at least tentatively determined that a number ("more than 20") of those voters who have testified voted illegally, he had made no determination one way or another about the bulk of them. He said that it would require at least 183 illegal votes out of the chal-

lenged 472 to cause Weed's election to be overturned.

Judge Brauer bristled on a couple of occasions at the phraseology used by Page in his arguments, particularly when Page referred to efforts to "disenfranchise" student voters.

The judge interrupted to say with some asperity that "the word 'disenfranchise' is a patently inflammatory" expression in reference to the case at hand.

"There is no question of disenfranchisement," he said, noting that all of the voters in question could have eliminated any challenge to their ballots by simply

sending a postcard to the county clerk containing their newest addresses.

The judge also dashed cold water on the hope that he might view voting in precincts in which the voters are not residents as nothing more than a "technical" violation of the law — the description used by defense lawyers in their briefs.

Brauer noted that there is a Supreme Court case in which an election was overturned when it was ruled that just six people voted in the wrong precincts, even though in that case it was due to an error by the registrar of voters.