UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

vs.

Case No. 2:14-cv-11296-LPZ-RSW
Hon. Lawrence P. Zatkoff
Magistrate Judge R. Steven Whalen

CITY OF ANN ARBOR and
JACQUELINE BEAUDRY,
ANN ARBOR CITY CLERK,

Defendants.
_____/

Thomas Wieder (P33228)
Attorney for Plaintiff
2445 Newport Rd.
Ann Arbor, MI 48103
(734)769-6100
wiedert@aol.com

Office of the City Attorney
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendants
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170
spostema@a2gov.org
aelias@a2gov.org

_____/

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED

Defendants City of Ann Arbor and Jacqueline Beaudry, City Clerk ("City"), by its attorneys, moves the Court to dismiss Plaintiffs' Complaint pursuant to Fed R Civ P 12(b) (6) because Plaintiffs' Complaint fails to state any claim on which relief can be granted.

1. Plaintiff's complaint alleges that the City cannot enforce its Charter's residency and voter registration requirements for persons seeking to run for City Council.

2. Plaintiff makes this claim based on two prior federal cases that held Section 12.2 provisions unconstitutional.

3. Since those cass were decided, both state and federal law has changed and it is undisputed that one year residency and voter registration requirements are constitutional.

4. A state Circuit Court has held that Section 12.2 of the City Charter is constitutional, despite the prior federal case law.

5. The City is entitled to rely upon the current law, which has been the state of the law for over 30 years.

6. In accordance with Local Rule 7.1(a), concurrence in the relief requested was sought but not obtained. Furthermore, there was an email correspondence in which the City's notion and legal basis was provided. Concurrence was again requested and not provided.

7. The City relies upon the accompanying brief and exhibits thereto for support of this motion.

Wherefore, the City asks that Plaintiffs' Complaint be dismissed in its entirety with prejudice because it is without legal merit but that the Court grant further declaratory relief to the City of Ann Arbor in the form of an order that Section 12.2 of the Charter is constitutional and order an award of costs and attorney fees to the City for having to defend against Plaintiffs' Complaint.

Dated: April 14, 2014

Respectfully submitted,

By: /s/_____
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant City
OFFICE OF THE CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Thomas Wieder and I hereby certify that I have mailed by US Mail the document to the following non-ECF participant: None.

/s/ Jane Allen
Legal Assistant
Ann Arbor City Attorney's Office
City of Ann Arbor
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
(734) 794-6180

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

vs.

Case No. 2:14-cv-11296-LPZ-RSW
Hon. Lawrence P. Zatkoff
Magistrate Judge R. Steven Whalen

CITY OF ANN ARBOR and
JACQUELINE BEAUDRY,
ANN ARBOR CITY CLERK,

Defendants.
_____/

Thomas Wieder (P33228)
Attorney for Plaintiff
2445 Newport Rd.
Ann Arbor, MI 48103
(734)769-6100
wiedert@aol.com

Office of the City Attorney
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendants
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170
spostema@a2gov.org
aelias@a2gov.org

_____/

DEFENDANTS' BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED

STATEMENT OF ISSUES PRESENTED

Should Plaintiff's complaint be dismissed for failure to state a claim and his requests for relief be denied when Plaintiff seeks to be placed on the City of Ann Arbor election ballot when he does not meet the City Charter's one-year voter registration requirement?

The City Answers: Yes
This Court Should Answer: Yes

Should this Court declare that two prior federal court decisions from the 1970's holding the City Charter's eligibility requirements unconstitutional are no longer binding law when these eligibility requirements have been held constitutional since 1980 by both state and federal courts?

The City Answers: Yes
This Court Should Answer: Yes

CONTROLLING AUTHORITY

Barrow v. City of Detroit, 301 Mich App 404 (2013) 3, 6, 7, 9, 10, 12, 18

City of Akron v. Biel, 660 F2d 166 (CA 6 1981) 7, 8, 10,

Joseph v. City of Birmingham, 510 F Supp 1319 (ED Mich 1981).....6, 10, 11,

Socialist Workers Party v. Secretary of State, 412 Mich. 571, 584 (1982).14, 15, 16

Wojack v. City of Ann Arbor, Washtenaw County Circuit Court case no. 01-1142 .....3, 5, 6, 7, 10, 18

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED ii

CONTROLLING AUTHORITY iii

INDEX OF AUTHORITIES ..... v-vi

INDEX OF EXHIBITS vii

I. INTRODUCTION 1

II. ARGUMENT 4

A. Standard of Review 4

B. City Charter Section 12.2 is Constitutionally Valid 4

1. In 2002, the Washtenaw County Circuit Court Upheld the Constitutionality of Section 12.2 One Year Ward Residency Requirement 4

2. The Michigan Court of Appeals Recently Upheld a One Year Voter Registration Requirement 6

3. *Barrow* and *Wojack* Correctly Reviewed the Shift in Law 7

C. The City May Rely On Material Changes in Applicable Law 13

D. Issuance of Injunctive Relief or a Writ of Mandamus is Not Appropriate In This Case. 17

III. CONCLUSION 19

INDEX OF AUTHORITIES

Cases:

Alexander v. Kammer, 363 F Supp 324 (ED Mich, 1973) 9
Amoco Prod. Co v. V.illage of Gambell, 480 US 531, 546 no. 12, 107 SCt 1396 (1987) 17
Barrow v. City of Detroit, 301 Mich App 404 (2013) 3, 6, 7, 9, 10, 12, 18
Bassett v. National Collegiate Athletic Ass'n, 528 F3d 426 (6th Cir 2008).....4
Bolanowski v. Raich, 330 F Supp 724 (ED Mich 1971).....9
Bullock v. Carter, 405 US 134; 92 Sct 849 (1972) 660 F2d at 169 8
Castner v. City of Grosse Pointe Park, 86 Mich App 482 (1979) 9
Chimento v. Stark, 353 F Supp 1211 (D NH), *aff'd*, 414 US 802; 94 SCt 125 (1973).....10
City of Akron v. Biel, 660 F2d 166 (CA 6 1981) 7, 8, 10, 12
Clements v. Fashing, 457 US 957; 102 SCt 2836, *reh. denied*, 458 US 1133; 103 SCt 20 (1982).....10
Cloverlanes Bowl, Inc. v. Gordon, 46 Mich App 518 (1973) 15
Ditmore v. Michalik, 244 Mich App 569 (2001).....13
Feld v. City of Ann Arbor, C.A. No. 37342 (ED Mich, 1971) 2, 3, 5, 13, 19
Gonzales v. Nat'l Bd. Of Medical Examiners, 225 F 3d 620 (6th Cir. 2000).....17
Green v. McKeon, 468 F2d 883 (CA6, 1972).....7, 9, 11
Joseph v. City of Birmingham, 510 F Supp 1319 (ED Mich 1981).....6, 10, 11, 12
Hill v. State, 382 Mich 398 (1969) 18
Hofmann v. Auto Club Ins. Ass'n, 211 Mich App 55 (1995) 13
Human Rights Party v. City of Ann Arbor, C.A. No. 37852 (ED Mich, 1972) 2, 3, 5, 7, 9, 13, 19
Internal Revenue Comm'r v. Sunnen, 333 US 591; 68 SCt at 720 (1948) 14
Leary v. Daeschner, 349 F3d 888 (6th Cir. 2003).....17
Louisville/Jefferson County Metro Government v. Hotels.com, L.P., 590 F3d 381, (6th Cir 2009).....4
McLeod v. Kelly, 304 Mich 120 (1942).....18
Mogk v. Detroit, 335 F Supp 698 (ED Mich, 1971).....9
Ohio Republican Party v. Brunner, 543 F. 3d 357, 361 (6th Cir. 2008).....17
Overstreet v. Lexington-Fayette, 305 F. 3d 566, 573 (6th Cir. 2002) 17

People v. Gates, 434 Mich 146 (1990) 13, 14
Rondigo, LLC v. Twp. of Richmond, 641 F3d 673 (6th Cir 2011).....4
Socialist Workers Party v. Secretary of State, 412 Mich. 571 (1982).....14, 15, 16
Scheuer v. Rhodes, 416 US 232, 94 SCt 1683, 40 LEd2d 90 (1974) 4
Sununu v. Stark, 383 F Supp 1287, (D NH, 1974), *aff'd*, 420 US 958, 95 SCt 1346 (1975).....10
Tipler v. E.I. du Pont de Nemours, 443 F. 2d 125 (1971) 14
Thournir v. Meyer, 708 F Supp 1183 (D of Colo, 1989).....12
Thournir v. Meyer, 909 F 2d 408 (CA 10 1990).....12
Wojack v. City of Ann Arbor, Washtenaw County Circuit Court case no. 01-1142 .....3, 5, 10, 18
Young v. Detroit City Clerk, 389 Mich 333 (1973) 16

Court Rules

Federal Rules of Civil Procedure 12(b)(6) 4

Statutes:

MCL 168.321(1) 1

Ann Arbor City Charter:

Section 12.2.....*passim*

INDEX OF EXHIBITS

Exhibit 1: *Human Rights Party v. City of Ann Arbor*, C.A. No. 37852 (ED Mich, 1972)

Exhibit 2: *Feld v. City of Ann Arbor*, C.A. No. 37342 (ED Mich, 1971)

Exhibit 3: Plaintiff's Complaint for Writ of Mandamus and for Preliminary and Permanent Injunctive Relief, *Wojack v. City of Ann Arbor, Case no. 01-1142*

Exhibit 4: Plaintiff's Motion for Injunctive Relief and Writ of Mandamus, *Wojack v. City of Ann Arbor, Case no. 01-1142*

Exhibit 5: Brief in Support of Plaintiff's Motion for Injunctive Relief and Writ of Mandamus, *Wojack v. City of Ann Arbor, Case no. 01-1142*

Exhibit 6: City of Ann Arbor and Yvonne Carl's Answer to Complaint and Counterclaim for Declaratory Judgment, *Wojack v. City of Ann Arbor, Case no. 01-1142*

Exhibit 7: Plaintiff's Answer to Counterclaim for Declaratory Relief, *Wojack v. City of Ann Arbor, Case no. 01-1142*

Exhibit 8: Opinion and Order, *Wojack v. City of Ann Arbor, Case no. 01-1142*

I. INTRODUCTION

The Plaintiff has filed this complaint requesting that this Court order the Ann Arbor City Clerk to place his name on the August primary ballot as a Democratic candidate for Third Ward City Councilmember in the City of Ann Arbor, even though he does not meet at least one of the eligibility requirements for that position established by the Ann Arbor City Charter.

Michigan law provides that a City's charter governs qualifications for persons seeking election to office. MCL 168.321(1). Section 12.2 of the Ann Arbor City Charter provides that a person seeking election as Councilmember must meet two requirements:

> Except as otherwise provided in this charter, a person is eligible to hold a City office if the person has been **a registered elector of the City**, …, **and, in the case of a Council Member, a resident of the ward from which elected, for at least one year immediately preceding election or appointment** (emphasis added).

Plaintiff admits that he was not a registered elector (voter) in Ann Arbor until January 15, 2014. (Exh. 3, Plaintiff's complaint at Para. 2.) Failure to meet this requirement alone makes him ineligible under the Charter. Plaintiff admits that he was informed by the City Clerk's Office that he was ineligible based on the Charter requirement. For the purposes of this motion only, the City will assume that Plaintiff meets the one year residency requirement and that he has been a resident since September 15, 2012, as stated in his complaint (Exh. 3 Plaintiff's

complaint at Para 1.)[1]

It cannot be seriously disputed that one year durational election requirements are constitutional in Michigan under both federal and state law. Plaintiff's complaint, by neglecting to cite all of the current law on this issue, implicitly recognizes that any city in Michigan could constitutionally have such one year election eligibility requirements. But Plaintiff's complaint argues that only in Ann Arbor are such eligibility requirements unconstitutional. Plaintiff makes this argument based on the fact that in 1972 a federal court judge held the Ann Arbor Charter voter registration provision unconstitutional, and thus unenforceable, according to the law at the time. *Human Rights Party v. City of Ann Arbor*, C.A. No. 37852 (ED Mich, 1972) (Exh. 1). Likewise, Plaintiff relies upon *Feld v. City of Ann Arbor*, CA No. 37342 (ED Mich, 1971) (Exh. 2) for the claim that the City Charter's ward residency requirement was held unconstitutional and thus unenforceable by a federal court judge in 1971.

It cannot be disputed that the federal law relied upon by the courts in the *Feld* and *Human Rights Party* is no longer applicable law, as the standard of

[1] While now claiming residency since September 2012, it is important to note that Plaintiff changed both his voter registration and driver's license to an Ann Arbor address on January 15, 2014. Moreover, when filing a City of Ann Arbor application on December 1, 2013 to be on a City Board or Commission, he gave a City of Grass Lake **address for his home address and specifically marked "No" in response to a question whether he was a City of Ann Arbor resident**. See, Exhibits 9 and 10 attached to Defendant's Response Brief.

review changed by the 1980s, as set forth below in Section II.A.3.

In fact, Plaintiff's complaint fails to inform the Court that the constitutionality of the Charter's residency requirement, and the effect of these prior federal decisions, was raised, litigated, and decided in *Wojack v. City of Ann Arbor*, Washtenaw County Circuit Court case no. 01-1142 (Pleadings attached as Exs. 3 - 7; 2002 final order attached, Exh. 8). The Court in *Wojack* specifically upheld the constitutionality of the Charter Sec. 12.2 residency requirement. (Attorney Thomas Wieder, counsel in the present case, was the attorney for Mr. Wojack.)

Further, Plaintiff's complaint also fails to inform the Court that just last year the Michigan Court of Appeals in *Barrow v. City of Detroit*, 301 Mich App 404 (2013) fully reviewed the history of the applicable Michigan and federal law and held that Detroit's one year voter registration Charter requirement was constitutional under Michigan law. In fact, the *Barrow* Court held that a City has a substantial interest in prescribing and upholding such a candidate eligibility requirement.

Therefore, for all of the reasons set forth below, Plaintiff's complaint should be dismissed and, moreover, the City Charter provisions Section 12.2 should be upheld and declared constitutional, and the prior *Feld* and *Human Rights Party* cases should be held to be no longer applicable law as was done in the *Wojack*

case.

II. ARGUMENT

A. Standard of Review

Under Fed R Civ P 12(b)(6) the court must accept as true all well-pleaded allegations in a complaint and construe them in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 US 232, 236, 94 SCt 1683, 40 LEd2d 90 (1974); *Louisville/Jefferson County Metro Government Hotels.com, L.P.*, 590 F3d 381, 384 (6th Cir 2009) (citation omitted). The Court also "may consider 'exhibits attached [to the complaint], public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein,' without converting the motion to one for summary judgment." *Rondigo, LLC v. Twp. of Richmond*, 641 F3d 673, 680-681 (6th Cir 2011) (alteration in original) (quoting *Bassett v. National Collegiate Athletic Ass'n*, 528 F3d 426, 430 (6th Cir 2008).

B. City Charter Section 12.2 is Constitutionally Valid

Both one year residency and voter registration requirements are constitutional under Michigan and federal law.

1. In 2002, the Washtenaw County Circuit Court Upheld the Constitutionality of Section 12.2 One Year Ward Residency Requirement

Plaintiff's complaint fails to provide the Court with the most basic

information related to the continued applicability of the cited *Feld* and *Human Rights Party* cases. Virtually this same lawsuit (most of it copied word for word from prior pleadings, see Exhs. 3 - 7) was fully litigated in Washtenaw County Circuit Court in 2002, *Wojack v. City of Ann Arbor*, Case No. 01 1142 CZ. As here, the complaint alleged that the prior cases of *Feld* and *Human Rights Party* were controlling precedent and that the Charter Section 12.2 requirements were invalid. (Exh. 3).

In *Wojak*, Attorney Wieder filed pleadings requesting injunctive relief and specifically requested the Circuit Court to "permanently enjoin the Defendants from taking any action in reliance upon the provisions of Section 12.2 of the Charter previously ruled unconstitutional and void." (Exh. 3 p. 5, same relief requested also at Exh. 5 p. 10) The City filed a counter-claim for declaratory relief. (Exh. 6). Attorney Wieder again sought declaratory relief in response to this counterclaim: "Plaintiff asks this Court to deny Defendant's request for relief and **issue a declaratory ruling that the former provisions of Section 12.2 regarding qualifications for persons seeking the officer of member of the City Council are of no force and effect and may not be enforced by Defendant as to any person**." (Exh. 7, p. 2)

Because the pleadings were filed so close to the November election, and to allow the Court to fully consider the declaratory issues, the parties agreed to allow

Mr. Wojack to be on the ballot, with the understanding that the Court would take the necessary time to issue a further ruling on the declaratory issue. (Mr. Wojack lost the election.) The Court reviewed the briefs on this issue and reviewed the change in law since the 1970's. The Court held that "…the analysis of the constitutionality of a one-year durational residency requirement for a city council position that Judge Pratt so thoroughly and thoughtfully articulated in *Joseph* [510 F Supp 1319 (ED Mich 1981)] is persuasive." The Court adopted the "**reasoning and the holding of *Joseph* in finding that section 12.2 is constitutional**." (The *Joseph* case, and others cited by the Court are analyzed below in Section II.A.3.) The Court held that "the City of Ann Arbor's one-year durational residency requirement for city council positions articulated in section 12.2 of the City's Charter is constitutional. (Exhibit 2)[2].

2. The Michigan Court of Appeals Recently Upheld a One Year Voter Registration Requirement.

The Court in *Barrow* upheld a one year voter registration requirement in the Detroit charter. The Court reviewed the equal protection arguments under the Michigan constitution, and noted that the equal protection clauses of the United States and Michigan Constitutions are coextensive. *Barrow*, 301 Mich App 404, 418. In its review of federal case law, the Court recognized that that the case relied

[2]The appeal in that case was ultimately not pursued.

upon by the federal court in *Human Rights Party (Green v. McKeon,* 468 F. 2d 883 (6th Cir. 1972)) was disavowed by the 6th Circuit Court of Appeals and "is no longer considered controlling precedent" and that "strict scrutiny" did not apply to the analysis of this voter registration requirement. *Barrow* at 420 - 421.

The *Barrow* court recognized that the interests of the City residents in adopting the charter must be taken into account. *Barrow* at 425. The Court also held that "there is no constitutional right to vote for an individual who did not meet the eligibility requirements to have their name placed on the ballot. *Barrow* at 425. The Court held that the voter registration requirement was not an infringement on a "right to travel" within the state and there is not a "basic right" to be a candidate. *Barrow* at 425 – 426.

3. *Barrow* and *Wojack* Correctly Reviewed the Shift in Law

The Court of Appeals for the Sixth Circuit upheld a one-year durational residency requirement in *City of Akron v. Biel,* 660 F2d 166 (CA 6 1981) and changed the applicable analysis in the Sixth Circuit. In that case, the aspiring candidate for a seat on the Akron city council challenged the constitutionality of a city charter provision requiring candidates for city council to have resided in the ward they hoped to represent for one year immediately prior to the election. The petitioner challenged the charter provision on equal protection grounds, as violating his right to travel. The Court of Appeals refused to apply a strict

scrutiny standard and held that in intermediate standard of review, involving "close scrutiny," but for which only a showing that the requirements were "reasonably necessary to the accomplishment of a legitimate state objective" was required, citing *Bullock v. Carter*, 405 US 134, 142-43; 92 SCt 849 (1972) 660 F2d at 169. This intermediate standard is clearly less exacting than a "strict scrutiny" standard of review which would have required the city to show a compelling interest in the residency requirement.[3]

The Court held that because the city had demonstrated that the residency requirement was "reasonably necessary to effectuate an important municipal interest," the provision was constitutional. 660 F2d at 169. The Court also determined that the City of Akron's one year durational residency requirement would be upheld even under a strict scrutiny standard.

The decision in *City of Akron v. Biel* is a reflection of how the law regarding durational residency requirements for candidates changed in the 1980's. A review of durational residency cases during this time period also reveals that the choice of standard applied by the court in a case is practically determinative of the outcome of the case.

[3] The intermediate standard also is more exacting than the "reasonable basis" or "rational basis" standard also used in equal protection cases when a fundamental right or protected class is not in issue.

As outlined in *Barrow* also, cases decided in 1973 and earlier used a strict scrutiny standard to measure the constitutionality of durational residency requirements for candidates and all determined those residency requirements to be unconstitutional. See, cases cited in the *Human Rights Party* case, e.g., *Mogk v. Detroit,* 335 F Supp 698 (ED Mich, 1971) (three-year residency rule for candidates for the city's Charter Commission struck down), *Bolanowski v. Raich*, 330 F Supp 724 (ED Mich 1971) (three-year residence rule for the office of mayor of Warren, Michigan, held invalid), *Green v. McKeon*, 468 F2d 883, 885 (CA6, 1972) (two-year durational residency requirement for City Commissioner in Plymouth, Michigan, held invalid); and also *Alexander v. Kammer*, 363 F Supp 324 (ED Mich, 1973) (City of Pontiac's requirement that candidates for City Commissioner be residents of Pontiac for five years and residents of the particular commissioner's district for two years struck down). The Michigan Court of Appeals continued to apply the strict scrutiny standard to invalidate a two-year durational residency requirement for municipal judge as late as 1979. *Castner v. City of Grosse Pointe Park*, 86 Mich App 482 (1979).

In contrast, once the courts started applying an intermediate standard of review to durational residency requirements, the results of those decisions has been to uphold those eligibility requirements. In governor and state senator races, the United States Supreme Court affirmed, albeit summarily, durational residency

requirements of seven years. *Chimento v. Stark*, 353 F Supp 1211 (D NH), *aff'd*, 414 US 802; 94 SCt 125 (1973) (durational residency requirement of seven years for gubernatorial candidates upheld), and *Sununu v. Stark*, 383 F Supp 1287, (D NH, 1974), *aff'd*, 420 US 958, 95 SCt 1346 (1975) (durational residency requirement of seven years for state senator candidates upheld). In *Clements v. Fashing*, 457 US 957; 102 SCt 2836, *reh. denied*, 458 US 1133; 103 SCt 20 (1982), a plurality of the United States Supreme Court held that restrictions on candidacy demand only rational review to survive equal protection challenges. 457 US at 967.

As outlined above, in 1981 the Court of Appeals for the Sixth Circuit rejected strict scrutiny as the standard of review for a candidate durational residency requirement and applied, instead, an intermediates standard of review, with the result that the residency requirement was upheld. *City of Akron v. Biel*, 660 F.2d at 169, citing with approval the decision of the United States District Court for the Eastern District of Michigan in *Joseph v. City of Birmingham*, 510 F Supp 1319 (ED Mich 1981).

The decision in *Joseph v. City of Birmingham, supra*, also cited by the courts in *Wojack* and *Barrow*, provides a complete analysis of how the law regarding candidate eligibility had changed or should change and why an intermediate standard rather than strict scrutiny is the proper standard of review. 510 F Supp

1323-24. The court rejected the strict scrutiny analysis that had been applied in 1973 and earlier. It also distinguished durational residency requirements in excess of one year from residency requirements of one year or less. In reaching its conclusion that the strict scrutiny/compelling state interest analysis should not be applied, the Court said,

> "The most compelling cases relied on by plaintiff the Sixth Circuit's decision in *Green v. McKeon* [468 F2d 883 (CA6 1972)] and the other decisions from courts in this Circuit were all decided in 1973 or earlier. *Since then the theoretical foundation of these opinions has been eroded and their position regarding candidate residency requirements has become tenuous*." 510 F Supp at 1327 (emphasis added).

As the Court of Appeals did later, the Court in *Joseph* applied an "intermediate" test, less exacting than strict scrutiny, and upheld Birmingham's residency requirement. The Court also went on to hold that even if it had used a strict scrutiny test, the one year durational residency requirement would have been valid. 510 F Supp at 1339.

The Court in *Joseph* noted that the "great majority" of cases which had looked at one-year durational residency requirements in other states had upheld them. 510 F Supp at 1326. Further, the Court also pointed out that most of the cases which applied a strict scrutiny standard were cases which involved durational residency requirements in excess of, or "much" in excess of, one year. 510 F Supp at 1327. The Court analyzed and rejected all of the claims that might have

triggered strict scrutiny, including the rights of voters and the candidate's right to travel. 510 F Supp 1328-33.

Another relevant decision which applied intermediate scrutiny and addressed a voter registration requirement for candidates seeking office is *Thournir v. Meyer*, 708 F. Supp. 1183 (D. of Colo. 1989). In that case, the court upheld a statute which required a candidate running unaffiliated to be registered in Colorado as an unaffiliated voter for at least one year prior to filing a nominating petition. The Tenth Circuit Court of Appeals affirmed this decision in *Thournir v. Meyer*, 909 F.2d 408 (CA10 1990).

Section 12.2 of the Ann Arbor City Charter is no different than the one-year durational residency requirements upheld in *Barrow*, *Biel* and in *Joseph*, and in the several cases cited in *Joseph*. 510 F Supp at 1326. No protected class of persons is adversely impacted by the durational residency requirement; nor are any fundamental rights adversely impacted. The durational voter registration requirement is a reasonable eligibility requirement for a candidate.

In short, Section 12.2 of the Ann Arbor City Charter is a valid provision when analyzed under current law. Using any standard of review, including the intermediate standard of review, it withstands all attacks on constitutional grounds.

C. The City May Rely on Material Changes in Applicable Law

The Plaintiff, by focusing only on two prior cases, implicitly raises the doctrines of res judicata and collateral estoppel. Those doctrines do not strictly apply in this case because the parties in this action are not all the same parties as were involved in the *Feld and Human Rights Party* cases, see, e.g., *Ditmore v. Michalik*, 244 Mich App 569, 577 (2001); *People v. Gates*, 434 Mich 146, 154-55 (1990). However, the concept embodied in the in the exception to both collateral estoppel and res judicata for material changes in the law bear directly on the issue before the court and are important to review.

The doctrines of res judicata and collateral estoppel act to remove redundant litigation from the court's docket on issues previously decided. Both doctrines also act to make judgments final.

Collateral estoppel (or "issue preclusion") bars re-litigation of only the claims already decided by the court, where res judicata (or "claim preclusion") bars both the claims actually litigated by the court and those arising out of the same transaction that could have been litigated but were not. *Hofmann v. Auto Club Ins. Ass'n*, 211 Mich App 55, 92 (1995); *Ditmore v. Michalik*, 244 Mich App 569, 577 (2001). "The doctrine of collateral estoppel bars the relitigation of issues previously decided where such issues are raised in a subsequent suit by the same

parties based upon a different cause of action." *People v. Gates*, 434 Mich 146, 154-55 (1988).

An exception to res judicata and collateral estoppel principles exists in cases where the applicable law has materially changed. The United States Supreme Court has interpreted the doctrines as having this exception.

> "The principle [of res judicata and collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided ***and which have remained substantially static, factually and legally***. ***It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities...*"**

Internal Revenue Comm'r v. Sunnen, 333 US 591, 599; 68 SCt at 720 (1948) (Emphasis added.) See also, *Tipler v. E.I. du Pont de Nemours*, 443 F. 2d 125, 128 (1971) ("Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice.")

The Michigan Supreme Court has been even more explicit:

> "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances. . . The issue is one of law and. . . [a] new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws. . ."

Socialist Workers Party v. Secretary of State, 412 Mich 571, 584 (1982), quoting Restatement Judgments, 2d (Tentative Draft No. 1, 1973), § 68.1, pp. 170-171.

In *Socialist Workers Party*, the plaintiff contested the constitutionality of a Michigan statute that acted to restrict access to the ballot. The federal district court held that the statute was constitutional, and the United States Supreme Court summarily affirmed. Three years later, the same plaintiff again challenged the statute on identical equal protection grounds, and the Circuit Court granted the defendant accelerated judgment citing res judicata. The Michigan Supreme Court reversed, focusing on the fact that there had been an intervening change in the applicable legal standard, and holding that res judicata did not bar the subsequent action under such circumstances. The Court held,

> "A rule of law declared in an action between two parties should not be binding on them when other litigants are free to urge that the rule should be rejected. **Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position**." 412 Mich at 584, quoting *Restatement Judgments, 2d* (Tentative Draft No. 1, 1973) § 68.1, pp. 170-171. (Emphasis added).

As in *Socialist Workers Party*, the Charter section at issue in this case involves a candidate eligibility restriction that was challenged on equal protection grounds and contested until a final judgment. In *Socialist Workers Party* the applicable legal standard changed after the initial judgment, and there was an attempt to re-litigate the identical issue after the change. There appear to be no obvious grounds upon which to distinguish that case from this one for purposes of

allowing an exception to res judicata and collateral estoppel principles, particularly where different parties are involved.

Michigan courts have been unwilling to bar particular plaintiffs from taking advantage of changes in the law which others can freely exploit, simply because they litigated the matter before the law changed. See, *Young v. Detroit City Clerk*, 389 Mich 333 (1973). The Michigan Court of Appeals has also held, "It is fundamental that where a material change in circumstances occurs after a judgment has been rendered, the doctrine of res judicata will not operate to bar a subsequent relitigation of issues affected by the altered conditions." *Cloverlanes Bowl, Inc. v. Gordon*, 46 Mich App 518 (1973).

In present case, the same parties are not in litigation as in the above cases, yet this Court should consider the equities of the passage of time, the material change in the law regarding durational residency and voter registrations requirements, the fact that other cities can maintain such requirements, and the fact that the *Wojak* Court upheld the constitutionality of the Charter provision. The Court should allow the City to take advantage of those changes in the law and maintain the one-year durational residency and voter registration requirements.

The plaintiffs in *Feld* and the *Human Rights Party* were able to obtain relief from the federal court, based on the law at the time. However, there has been a material change in the applicable law which would dictate a different result in the

case. It would be a manifest injustice to bar the City from applying today's law and the City should not be denied the opportunity to obtain a determination of the constitutionality of City Charter Section 12.2.

D. Issuance of Injunctive Relief or a Writ of Mandamus is Not Appropriate in This Case.

Plaintiff bears the burden of demonstrating entitlement to preliminary injunctive relief and the burden is substantial. *Leary v. Daeschner,* 349 F 3d 888 (6th Cir. 2003). Such relief will only be granted where "the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette,* 305 F. 3d 566, 573 (6th Cir. 2002). When considering a motion for a preliminary injunction, the Court must balance the following factors: "(1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent a stay, (3) whether granting the stay would cause substantial harm to others, and (4) whether the public interest would be served by granting the stay." *Ohio Republican Party v. Brunner,* 543 F. 3d 357, 361 (6th Cir. 2008). "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. Of Medical Examiners*, 225 F 3d 620, 625 (6th Cir. 2000). The standards for a permanent injunction are essentially the same as for a preliminary injunction, although for a permanent injunction the plaintiff must show actual success on the

merits rather than likelihood of success on the merits. *Amoco Prod. Co v. Village of Gambell*, 480 US 531, 546 no. 12, 107 SCt 1396 (1987).

Plaintiff is not entitled to either preliminary or permanent injunctive relief requested. Plaintiff cannot demonstrate actual or likelihood of success on the merits because the Ann Arbor City Charter Section 12.2 is constitutional, as held by the state Circuit Court in *Wojack.* Further, both residency and voter registration requirements have been upheld as constitutional by other state and federal courts as outlined above. Enforcing the Charter requirements does not cause irreparable harm to the Plaintiff as there is no entitlement to be placed on the ballot when those eligibility requirements are not met. Plaintiff is certainly able to run for City Council in the election of 2015. The balance of equities favors the City. As held in *Barrow*, at 425, the public expects that the candidates on the ballot have met the eligibility requirements.

A writ of mandamus is also not merited. Mandamus ordinarily will not issue to compel a public officer to perform a duty dependent upon disputed and doubtful facts; it will issue only if the defendant is under a clear legal duty to act and complainant has a clear legal right to have that duty performed. Mandamus is designed to enforce a plain, positive duty when requested of one who has a clear legal right to have it performed. *Hill v. State*, 382 Mich 398 (1969); *McLeod v. Kelly*, 304 Mich 120 (1942). In light of the constitutionality of Charter Section

12.2., there is no such clear legal duty in this case. A writ of mandamus is, therefore, not appropriate.

III. CONCLUSION

Plaintiff's claim that the City of Ann Arbor is the only city in Michigan that cannot enforce their one year election eligibility requirements is without legal merit. This Court should dismiss Plaintiff's complaint and deny his request for writ of mandamus and for injunctive relief and should, instead, hold specifically that the *Feld* and *Human Rights Party* cases are no longer binding precedent and issue an order that Section 12.2 of the Ann Arbor City Charter is constitutional and enforceable.

Dated: April 14, 2014

Respectfully submitted,

By: /s/ Stephen K. Postema
Stephen K. Postema (P38871)
Attorney for Defendants
Office of the Ann Arbor City Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Thomas Wieder and I hereby certify that I have mailed by US Mail the document to the following non-ECF participant: None.

/s/ Jane Allen
Legal Assistant
Ann Arbor City Attorney's Office
City of Ann Arbor
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
(734) 794-6180