

OFFICE OF THE PROSECUTING ATTORNEY  
KING COUNTY, WASHINGTON  
CIVIL DIVISION

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15 November 2005

**CONFIDENTIAL**  
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**NOT SUBJECT TO PUBLIC DISCLOSURE OR DISCOVERY**

**MEMORANDUM**

**TO:** King County Canvassing Board

**FROM:** Janine Joly, Sr. Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office

**SUBJECT:** **Voter Registration Challenges**

You are scheduled to hear a number of voter registration challenges that were filed by Lori D. Sotelo on October 26, 2005. The first two sets of hearings will be on Thursday, November 17, at 4:30 and 6:30 p.m. at the King County Temporary Elections Annex, 9010 East Marginal Way South in Tukwila. I prepared this overview to familiarize you with some of the legal issues related to the hearings.

**Voter Registration Challenges**

Pursuant to RCW 29A.08.810, a registered voter may challenge the registration of another voter. Such a challenge may be based upon the assertion that the challenged voter "does not meet the requirements of Article VI, section 1 of the state constitution or that the voter no longer maintains a legal voting residence at the address shown on his or her voter registration record." RCW 29A.08.830(1).<sup>1</sup>

If such a challenge is filed within thirty days of an election, the canvassing board is responsible for hearing and determining the challenge. RCW 29A.08.830(2). However, if a challenged voter does not vote in the election, the county auditor (King County Elections Director) rather than the canvassing board, hears and decides the challenges. RCW 29A.08.830(2). Therefore, prior to certification of the November 8 election, the canvassing board will hear and decide those challenges filed by Ms. Soletto where the voter did vote. The Elections Director will hear and decide the remainder of the challenges after certification.

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<sup>1</sup> Article VI, section 1 provides that:

All persons of the age of eighteen or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of the Constitution, shall be entitled to vote at all elections.

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Both the challenger and the challenged voter are afforded the opportunity to appear at the hearing with or without an attorney or to file an affidavit in lieu of personal appearance. If both choose to present their cases by affidavit, then the canvassing board's examination of the affidavits constitutes the hearing and the canvassing board can vote on the outcome of the hearing at one of its scheduled public meetings.

### **The Challenge Forms Filed By Ms. Sotelo**

As stated in the challenge forms she filed, Ms. Sotelo alleges that each of the challenged voters "is registered at an address that is not a 'valid residence address' as required by RCW 29A.08.110(1)." Ms. Sotelo states that the factual basis for her challenges is that the voters are registered to vote at addresses that are not physical residences.

In filing her challenges, Ms. Sotelo challenges the registration addresses of the challenged voters alleging that they are invalid. However, she does not indicate where she believes the challenged voters actually reside. This omission conflicts with the requirements of RCW 29A.08.830(1). The statute states, "The person filing a challenge must furnish the address at which the challenged voter actually resides." (Emphasis added.) There is an argument that the challenges could be rejected solely on the fact that the actual address was not alleged on the challenge form. However, though the requirement for the actual address appears in the section of the statute that addresses the requirements of the initial affidavit, there is no explicit requirement that the actual address be provided at the time the challenge is filed and the provision of the address on the initial challenge form does not appear to be a jurisdictional requirement. As a result, a credible argument can be made that the challenger is allowed to provide the actual address at the hearing.

In order to give effect to the language of RCW 29A.08.830 that the challenger must furnish the actual address, if the challenger still does not provide the actual address at the hearing, the challenge should be denied. ~~The challenger's failure to allege an actual address either in her challenge form or at the hearing is a fatal flaw and should invalidate the challenge.~~ Any other decision would be contrary to the plain language of the statute even if it appears from the other evidence provided that the challenged voter is not registered at a valid residence address.

Additionally, though RCW 29A.08.830(1) requires a challenger to file a signed affidavit regarding the challenge, Ms. Sotelo did not date the forms she filed nor did she individually sign them as one would do for a proper affidavit. (Ms. Sotelo's electronic signature appears on each of the forms.) Again, though there is an argument that the challenges could be dismissed based solely on these technical deficiencies, ~~that argument favors form over substance. Instead of dismissing the challenges based on this technicality, the issue could be addressed with Ms. Sotelo at the hearings.~~ The chair of the canvassing board could confirm with Ms. Sotelo on the record that the challenges were filed and signed by her on October 26.

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### Residence

The issue in these challenge hearings is whether the challenged voters are registered to vote at their residential addresses. RCW 29A.04.151 defines residence. It states:

'Residence' for the purpose of registering and voting means a person's permanent address where he or she physically resides and maintains his or her abode. However, no person gains residence by reason of his or her presence or loses his or her residence by reason of his or her absence:

- (1) While employed in the civil or military service of the state or of the United States;
- (2) While engaged in the navigation of the waters of this state or the United States or the high seas;
- (3) While a student at any institution of learning;
- (4) While confined in any public prison.

Absence from the state on business shall not affect the question of residence of any person unless the right to vote has been claimed or exercised elsewhere.

(Emphasis added.)

~~There are no Washington cases that interpret RCW 29A.04.151 (formerly RCW 29.01.140). However, case law in other contexts provides guidance on what constitutes one's residence. These cases generally hold that residence requires physical presence in fact plus the present intent to make that place one's home. See *Fruend v. Hastie*, 13 Wn. App. 731, 734-35 (1974); *In re Lassin's Estate*, 33 Wn.2d 163, 165 (1949); *Sasse v. Sasse*, 41 Wn.2d 363, 365-66 (1952).~~

~~In general, a person can have only one residence. See *Fiske v. Fiske*, 48 Wn.2d 69, 71 (1955). Once established, residence is presumed to continue. *Lassin* at 165; *Marriage of Stohmaier*, 34 Wn. App. 14, 17 (1983). A residence will not be terminated unless a new residence is established by residence in fact and a present intention to make that new place one's home. *Sasse* at 365-66; *Lassin* at 165-66.~~

Residency is a fact specific inquiry. In determining a person's residence, courts look at all the surrounding facts to determine if residence in fact and the necessary intent to make that place one's home exist. Courts generally determine intent by reviewing objective facts and events, not the party's subjective state of mind. *Strohmaier* at 15.

~~In deciding the challenges filed by Ms. Sotelo, you may wish to consider the facts and argument presented at the hearings in light of the definition of residence as provided in RCW 29A.04.151 and the above-mentioned case law.~~

### The Challenger's Burden of Proof

Registration of a person is presumptive evidence of that person's right to vote at any election. RCW 29A.08.810. As the challenger, Ms. Sotelo must prove by "clear and convincing evidence" that the

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challenged voters' registrations are improper. The Washington Supreme Court has described clear and convincing evidence as sufficient to convince the trier of fact (the canvassing board) ~~that the fact in issue is highly probable~~ *Colonial Imports v. Carlton N.W.*, 121 Wn.2d 726, 735 (1993).

If you determine that the challenger has failed to meet her burden in any of the cases, the challenged voter's registration will remain as is and the voter's ballot for the November 8 election will be counted. If you find the challenger has met her burden, the challenged voter's registration will be cancelled and his or her ballot for the November 8 election will not be counted.

### The Hearing

RCW 29A.08.840 does not provide the exact procedure to be followed in conducting this type of hearing. Therefore, you have discretion as to how the proceeding should be conducted. The following are some general comments and suggestions.

1. The issue at these hearings will be whether the challenged voters are registered to vote at their residences. To open the hearing, the chair can read a prepared statement concerning the issue and the proceeding. If any or all of the canvassing board members need to place matters on the record, such as potentially *ex parte* contact by challenged voters, they can do so after the chair reads the prepared statement and before the hearings begin.
2. The hearing will be recorded by a court reporter and all witnesses will be sworn in by the chair. Each challenge will be handled separately, though if possible, hearings related to similar addresses will be grouped together.
3. The challenger is required to appear in person or submit an affidavit. RCW 29A.08.840. For each challenge, the challenger will present her case first. She may be represented by counsel and may call witnesses. ~~She must show by clear and convincing evidence that the challenged voters are not registered at a valid residential address.~~
4. Each challenged voter will present his or her case after the challenger has completed her case for that particular challenge. The challenged voters may be represented by counsel and may call witnesses. They may appear in person or by way of affidavit.
5. At your discretion, the parties may cross-examine the other's witnesses. You may question witnesses at any time.
6. At your discretion, the rules of evidence are not strictly applied. You may allow evidence that would be objectionable at a regular court hearing, such as hearsay. You should then consider the inherent unreliability of such evidence in determining how much weight you will give the evidence.
7. The canvassing board must issue its decision on each of the hearings prior to certification on November 29. RCW 29A.08.820 seems to contemplate that the canvassing board will rule on the challenged ballots at the hearing. ("The county auditor shall notify the challenger and

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the challenged voter, by certified mail, of the time and place at which the county canvassing board will meet to rule on the challenged ballots.") However, due to the volume of hearings, if the canvassing board members need time to review the evidence prior to ruling, the rulings could be continued to one of the canvassing board's regularly scheduled meetings as long as that is clearly stated on the record at the challenge hearings.

I hope the foregoing information is helpful. Please do not hesitate to contact me at 205-1234 if you have any questions.

**Logan, Dean**

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**From:** Joly, Janine  
**Sent:** Wednesday, November 16, 2005 9:49 AM  
**To:** Logan, Dean  
**Subject:** Challenge Hearings and the Failure to Provide an Actual Address

ATTORNEY-CLIENT COMMUNICATION  
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Canvassing Board Members,

This e-mail is a follow-up on the memorandum I provided to you yesterday regarding the voter challenge hearings. In particular, I wanted to provide with you with some additional information on the question of whether it is a fatal flaw for the challenger to fail to provide (in the original challenge form or at the hearing) the address of where the challenged voter actually resides. My recommendation is still as stated in my memorandum, that it is a fatal flaw. However, there is another position that you could take and I wanted to be sure you were aware of it.

One could argue that the requirement for an actual address only relates to the type of challenge hearings where the allegation is that the voter has moved from one residence to another without changing his registration. Since case law supports the position that a residence is not terminated until a new one is established, in this context it makes sense why an actual address needs to be provided -- you are showing the voter does not live at the old address by proving he lives at the new address. One could argue that this is the type of case where the Legislature intended to require the challenger to provide an actual address. These types of cases could be distinguished from the Sotelo cases since Sotelo is not arguing that the voters moved. Instead, she is arguing that they never should have been registered at the address in question in the first place since it is allegedly not a valid residence.

I spoke with Jeff Even at the Attorney General's Office late yesterday. He said that he did not know what Sam Reed's position is on these two alternate arguments, but it was at least possible that the Secretary of State's Office might agree with the argument in the paragraph above, that the actual address is only required for certain cases and not the Sotelo challenges. The main reason would be to avoid the situation where Sotelo provides adequate evidence to show that a person is registered at a mailbox, but she does not provide the address where the voter actually resides and the board denies the challenge. The result would be that a person who is registered at a mailbox, rather than a residence, is allowed to vote and remain on the registration rolls.

(Jeff also told me that the Secretary of State's Office is planning to introduce legislation this year that would remove the actual address requirement.)

While I agree that the alternate argument above is plausible, and that you can distinguish the Sotelo cases from the situation where the voter moves from one house to another, the provision of an actual address in both types of cases would seem to be equally useful. In the Sotelo cases, if the challenger provided evidence that a challenged voter lived at an address other than where he was registered, it would show that the registration was improper. Moreover, the alternate argument essentially writes a sentence out the statute based on speculation of what the Legislature's intent must have been. Looking at the language of the statute alone, it is difficult to make the argument that the actual address requirement does not apply to the Sotelo hearings. Ms. Sotelo is alleging that the voter "does not actually reside at the address given on his or her registration record". As a result, the requirement that "[t]he person filing the challenge must furnish the address at which the challenged voter actually resides" would seem to apply. (Both citations are to RCW 29A.08.830(1) with emphasis added.)

If Ms. Sotelo does fail to provide an actual address for the challenged voters at the hearing, it is the board's decision whether or not that is a fatal flaw. By this e-mail I wanted to be sure that you were aware that there is more than one position on this issue and also that it is unclear at this time whether the Secretary of State's Office would necessarily agree that it is a fatal flaw in the Sotelo cases.

Please feel free to contact me if you have any questions or if you would like to discuss this issue further.

Thank you,  
Janine

**Logan, Dean**

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**From:** Joly, Janine  
**Sent:** Wednesday, November 16, 2005 6:25 PM  
**To:** Logan, Dean  
**Subject:** RE: Letter Regarding Proof at Tomorrow's hearings

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Dean,

I do not think it is appropriate for you to take testimony from anyone other than the parties or someone representing them. Unless David McDonald is representing a voter, I do not think you should consider his letter or allow him to present argument. However, it's not as if the issue was not there prior to him raising it. The canvassing board has the statute in front of it and if a board member wants to ask the challenger (or her attorney) what effect she thinks the board should give to the sentence at issue, he can.

This raises another issue that I briefly addressed in the memo. The canvassing board members should state on the record what information they have received and reviewed from parties to the hearing and third parties related to the challenges. I don't think you need to read it all into the record, but you should have copies of the correspondence available in case the parties wish to see it.

I'll try to give you a call in the morning.

Thanks,  
Janine

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**From:** Logan, Dean  
**Sent:** Wednesday, November 16, 2005 2:21 PM  
**To:** Joly, Janine  
**Subject:** FW: Letter Regarding Proof at Tomorrow's hearings

Janine -

Can we discuss how we're going to handle attorneys who wish to "appear" before the canvassing board at the hearings? Is it appropriate to take testimony from someone other than the parties challenged or someone who is representing them?

FYI - I much prefer your advice memos - especially since we actually ask you for advice when you give it.

-- Dean

**Dean Logan**, Director  
Records, Elections and Licensing Services Division  
King County Department of Executive Services

-----Original Message-----

**From:** McDonald, David (SEA) [mailto:davidm@prestongates.com]  
**Sent:** Wednesday, November 16, 2005 1:59 PM

11/16/2005

**To:** Logan, Dean; Constantine, Dow; Satterberg, Dan  
**Cc:** Joly, Janine  
**Subject:** Letter Regarding Proof at Tomorrow's hearings

Attached is a pdf of a letter I am sending you by regular mail today in connection with tomorrow afternoon's hearings. Thank you for your consideration.

11/16/2005



**Logan, Dean**

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**From:** Joly, Janine  
**Sent:** Thursday, November 17, 2005 12:51 PM  
**To:** Logan, Dean  
**Subject:** RE: Questions

Dean, the questions look fine. It may be more a question for Diane Tebelius, but you could also ask the challenger if she thinks the law requires her to provide an actual address. On the questions about the application be "complete", I assume she will just say no it was not if the address was the same -- Elections should have verified that it was a residence. So, I don't know if those two questions get you anywhere, but I don't see a problem with asking the questions. I guess to me it seems like those questions are focused on the process of voter registration, not the specific issue for this challenge -- whether this is a PO Box or a residence. I don't know, maybe I'm wrong.

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**From:** Logan, Dean  
**Sent:** Thursday, November 17, 2005 12:20 PM  
**To:** Joly, Janine  
**Subject:** Questions

For your review and comment -- thanks.

**Dean Logan**, Director

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King County Department of Executive Services  
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11/26/2005

**Logan, Dean**

**From:** Joly, Janine  
**Sent:** Monday, November 21, 2005 2:12 PM  
**To:** Constantine, Dow; Logan, Dean; Satterberg, Dan  
**Subject:** Interpretation of WAC on Nontraditional Addresses

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Canvassing Board Members:

You asked for legal advice regarding interpretation of WAC 434-208-100, which reads as follows:

**WAC 434-208-100 Registering to vote -- Nontraditional address.** No person registering to vote, who meets all the qualifications of a registered voter in the state of Washington, shall be disqualified because of a nontraditional physical address being used as a residence address. Nontraditional addresses may include shelters, parks or other identifiable locations which the voter deems to be his/her residence. Voters using such an address will be registered and precincted based on the location provided. Voters without a traditional address will be registered at the county courthouse, city hall or other public building near the area that the voter considers his/her residence. Registering at a nontraditional address will not disqualify a voter from requesting ongoing absentee voter status provided the voter designates a valid mailing address.

(The provisions of WAC 434-208-100 have been adopted by the Legislature as a statute. The language of the statute is almost identical to the WAC. The statute does not go into effect until January 1, 2006, so for purposes of the current voter registration challenge hearings, the language of the WAC controls.)

In connection with the Sotelo voter registration challenge hearings, the question has arisen whether under this WAC, there is a factual scenario where a person can legally be registered at a personal mailbox facility, such as a UPS Store. More specifically, if a person asserts that he lives in a car in the parking lot of the mailbox facility, may he be registered to vote at that facility, or must he be registered at the "county courthouse, city hall or other public building near the area."

The wording of this WAC is not clear. In the first sentence it states that a person who meets all qualifications of a registered voter, cannot be disqualified because of a nontraditional physical address. The WAC goes on to describe nontraditional addresses to include "shelters, parks or other identifiable locations which the voter deems to be his/her residence." The WAC then states, "Voters using such an address will be registered and precincted based on the location provided."

Under this portion of the WAC, a mailbox facility could be a nontraditional address since it is an "identifiable location." Therefore, if a voter deemed that facility to be his residence, that voter should be "registered and precincted based on the location provided." As an example, if a voter deems a mailbox facility in Queen Anne as his residence, he should be registered in that precinct and receive a ballot containing the corresponding measures and offices.

However, the WAC goes on to include apparently contradictory language that "[v]oters without a traditional address will be registered at the county courthouse, city hall or other public building near the area that the voter considers his/her residence." Pursuant to this language, in the above example, the voter would not be registered in the Queen Anne precinct that he deems to be his residence. He would be registered at the King County Courthouse, Seattle City Hall or other public building nearest to the nontraditional address location. The problem with this interpretation is that none of these public buildings may be in the Queen Anne precinct that the voter has attested he resides.

These contradictory provisions of the WAC cannot be read in a way that gives effect to the plain language of both. A voter can only be registered to vote in one place. Therefore, a voter with a nontraditional address must either be registered and precincted at that nontraditional address or he must be registered at a public building near the area of residence.

Though the WAC could be read to require those with nontraditional addresses to be registered at public buildings, that interpretation would conflict with one of the purposes of the voter registration statutes and rules, which is to ensure that voters only vote for the candidates and measures that correspond to the area in which they reside and consequently affect them. A voter who lives in County Council District 1, should not be permitted to cast a vote for a candidate in District 2. Likewise, a voter who resides in King County Precinct SEA 36-2146 should not help select the precinct committee officer for Precinct SEA 37-1559. Based on this principle which has been incorporated in Washington State election laws, the apparent contradiction in the WAC should be resolved in favor of registering a person to vote where he resides -- the nontraditional address or mailbox facility.

This interpretation of the WAC does not leave the second provision regarding registration at public buildings entirely superfluous.

There may be voters who do not identify a residential address but instead list their address as "homeless" in Kent, Seattle or King County. These individuals could fall under the second provision of the WAC and be registered at the "county courthouse, city hall or other public building" in the city they identified as their residence.

The above discussion does not entirely answer the question whether a person who lives in his car in the parking lot of a mailbox facility can be registered to vote at the address of that facility with a mailbox number. Obviously, the individual does not live in the mailbox, so the address with the mailbox number is not actually his residence. It is a technical point, but one I believe you are being asked to address at the Sotelo hearings. It does not seem to be possible that 1234 Main Street, Mailbox 4 can be a valid residential address.

However, even if the individual cannot be registered at the mailbox facility's address with a specific box number, he could be registered at the mailbox facility's address assuming he actually deemed that location (including a parking space at that address) to be his residence. Whether the voter actually does reside at that address (as opposed to actually residing at a parking space in front of another business with a different address) is a factual issue for the challenger to address and the board to resolve. (It is immaterial that parking in that space or sleeping at the door step of the building is either prohibited by law or by the building owner if the individual does actually reside there. *See Collier v. Menzel*, 176 Cal.App.3d 24, 32 (1985)(California Court of Appeals found a city park where camping was prohibited could still be a residence if the appellants actually resided there and had the statutorily required intent to remain).

Please feel free to contact me if you have any questions.

Thank you.

**Logan, Dean**

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**From:** Joly, Janine  
**Sent:** Monday, November 21, 2005 2:12 PM  
**To:** Constantine, Dow; Logan, Dean; Satterberg, Dan  
**Subject:** Registration Challenge Hearings - Burden of Proof

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION  
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Canvassing Board Members:

At the challenge hearings last week, the challenger indicated that she did not believe her burden of proof was clear and convincing evidence. RCW 29A.08.820 addresses procedure and the burden of proof for voter registration challenge hearings heard and decided by the canvassing board. It states in relevant part, "The challenging party must prove to the canvassing board by clear and convincing evidence that the challenged voter's registration is improper."

If you have questions or need further information, please do not hesitate to contact me.

**Logan, Dean**

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**From:** Joly, Janine  
**Sent:** Tuesday, November 22, 2005 12:13 PM  
**To:** Logan, Dean  
**Subject:** Registration Hearings - Advice Regarding Voters Located Outside King County

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION  
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King County Canvassing Board Members:

At one of last night's hearings the Board was presented with a case where the voter appears to be physically located in Japan, but maintaining his voter registration in King County. The challenger alleges that this voter is improperly registered at a personal mailbox facility rather than a residence. The Chair asked me to provide a legal opinion concerning voters who physically leave King County, but do not establish a new residence elsewhere for voting purposes. The specific question is whether the voter can be registered at a mailbox, rather than his former physical residence.

The state constitution and state statute provide that for voting purposes no person shall be deemed to have lost his residence by reason of his absence, while in the civil or military service, while a student, while kept in a poor house, public institution or prison, or while engaged in the navigation of the waters of the United States or high seas. Art. VI, sec. 4; RCW 29A.04.151. Case law further provides that a residence will not be terminated unless a new residence is established by residence in fact and a present intention to make that new place one's home. *Sasse v. Sasse*, 41 Wn.2d 363, 365-66 (1952). ~~Based on these authorities, if a person leaves his physical location, he will not necessarily lose his residency at that location for voting purposes. Residency will only be lost when there is an intent to establish a new residence at a new place.~~

Under state law, voters must be registered to vote at their residential addresses. RCW 29A.08.010; 29A.04.151. ~~In the situation described above, the voter who has physically left King County but has not established a new residence elsewhere is still a resident at his former address for voting purposes.~~ The fact that he does not live at that address and is not able to receive mail there does not exempt him from the requirement of being registered to vote at his residential address. His voter registration must reflect the former address since it is his residence for voting purposes.

Voters who no longer reside at their residence as described above, may use a personal mail box address as their mailing address, but they must be registered at their residential address. This ensures that voters are permitted to vote only for those races and measures that correspond to their residential addresses, not their mailing addresses.

Jeff Cox, an attorney for Lori Sotelo, asked for a copy of this advice last night after the hearings. I told Mr. Cox that my communications with the Board were privileged, but it was the Board's privilege to waive. Therefore, I will leave it up to the Board whether or not you wish to release a copy of this e-mail to Mr. Cox. If you would like me to follow up with Mr. Cox either way, please let me know.

Please feel free to contact me if you have any questions or concerns.

Thank you,  
Janine