

CITY AND COUNTY OF SAN FRANCISCO

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April 19, 2005

VIA FAX AND U.S. MAIL

Deputy Attorney General Gregory Gonot  
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Re: **Opinion No. 05-103 Asian Art Museum - Commissioner Residency Requirements**

Dear Mr. Gonot:

We respond on behalf of the Asian Art Commission of the City and County of San Francisco to your request for views on the opinion referred to above. Specifically, you have asked for views on the following issue:

"Is a member of the Asian Art Commission of the City and County of San Francisco required to be a resident of California or may he or she be a resident of another state? (See Cal. Const., art XI, § 5; Gov. Code, §§ 1020, 1770, subd. (e); S.F. Charter, § 4.101(2) [each appoint[ive] board shall '[c]onsist of electors of the City and County at all times during the term of their respective offices'], § 5.102 [commissioners of the Asian Art Museum are 'exempt from the requirement of Section 4.101(2) of this Charter']; *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557, 568; 80 Ops.Cal.Atty.Gen. 331 (1997); 61 Ops.Cal.Atty.Gen. 528 (1978); 57 Ops.Cal.Atty.Gen. 498 (1974))?"

**CONCLUSION**

Under California law and San Francisco's Charter, a member of the Asian Art Commission is not required to be a resident of California and may be a resident of another state.

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## BACKGROUND

### A. The San Francisco Charter Provisions Regarding Composition and Duties of the Asian Art Commission.

San Francisco is a chartered city and county. The Charter of the City and County of San Francisco ("Charter") sets forth the composition, qualifications and duties of several boards and commissions, including the Asian Art Commission. Under Article V of the Charter, the Asian Art Commissioners serve as charitable trustees of the Asian Art Museum, which is a "charitable trust department" of the City and County of San Francisco (S.F. Charter, § 5.101.) Under section 5.104 of the Charter, the Asian Art Commission consists of "twenty-seven trustees appointed by the Mayor." (S.F. Charter, § 5.104.) Although their primary role is as charitable trustees of the Asian Art Museum, Asian Art Commissioners are also City officers under the San Francisco Administrative Code. (S.F. Admin. Code, § 1.50.)

Currently, the Chair of the Asian Art Commission resides in Nevada. The remaining Asian Art Commission members are California residents.<sup>1</sup> Under the Commission's Bylaws, the officers of the Commission, including the Chair, are "selected by the Commission from among its members." (Amended and Restated Bylaws of the Asian Art Commission, art. V, § 1.)

The Asian Art Commissioners serve as trustees in charge of managing and administering the Asian Art Museum of San Francisco ("Museum"), with the Avery Brundage Collection as its nucleus.<sup>2</sup> The Museum's holdings include approximately 15,000 treasures spanning 6,000 years of history, drawn from cultures throughout Asia. The Museum also participates in national and international art exhibitions by loaning and borrowing works for specific exhibitions all over the world.

Under the Charter, Asian Art Commissioners' duties are to:

1. Develop and administer that museum which is known as the 'Asian Art Museum of San Francisco,' or by such other title as may be chosen by not less than two-thirds of the members of the Commission;
2. Control and manage the City and County's Asian art with the Avery Brundage Collection as its nucleus, consistent with the conditions applicable to the Brundage Collection and other gifts;

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<sup>1</sup> Tel. w. Laura Hathhorn, Asian Art Commission Secretary (March 3, 2005.)

<sup>2</sup> From the late 1950's until his death in 1975, Avery Brundage incrementally gave his Asian art collection to the City and County of San Francisco. The Brundage Collection, which comprises approximately half of the Museum's collection, consists of approximately 7,000 objects of Asian art – including valuable bronze, stone and ceramic pieces. As one of several conditions of his gift to the City, he required the City to appoint an "independent Committee of Asian Art and Culture whose primary function would be to develop a Center of Asian Art and Culture in the City and County of San Francisco...." (Second Supplemental Agreement between Avery Brundage and the City and County of San Francisco, et. al., dated July 2, 1969 at Sec. A, subd. (1) pp. 13 – 14.) This Committee is now known as the Asian Art Commission under the San Francisco Charter. (Please note: a copy of the Second Supplemental Agreement, as well as the other Brundage Trust documents, are available from our office upon request.)

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3. Maintain a charitable foundation or other legal entity for the purpose of developing the Asian Art Museum;
  4. Promote, establish and develop an acquisition fund for Asian art objects;
- and
5. Collaborate with other groups and institutions to extend and deepen the activities necessary to establish the Asian Art Museum as the outstanding center of Asian art and culture in the western world." (S.F. Charter, § 5.104.)

#### **B. General State Law Citizenship Requirements for Civil Officers.**

The California Government Code sets forth general rules regarding citizenship requirements for holding and retaining a civil office. Section 1020 provides that: "A person is incapable of holding a civil office if at the time of his election or appointment he is not 18 years of age and a citizen of the state." (Gov. Code, § 1020<sup>3</sup>.) Similarly, section 1770 provides that an "office becomes vacant" upon "[h]is 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." (§ 1770, subd. (e).) In order to be a citizen of the State of California, in turn, one must be a resident. (§ 241.)

Although sections 1020 and 1770, subdivision (e) define the residency requirements for state law officers and officers of non-chartered cities and counties,<sup>4</sup> the general rules in sections 1020 and 1770, subdivision (e) do not apply on their face to charter cities, and it is not clear that the Legislature intended them to so apply. Further, even if the Legislature did intend to apply these requirements to charter cities, they should not be applied to Asian Art Commissioners in light of San Francisco's constitutional authority over its municipal affairs as a chartered City.

#### **C. Asian Art Commissioner Qualifications and Exemption from Residency Requirements under the Charter.**

The San Francisco Charter specifies the manner and method of mayoral appointments to this specialized Asian Art Commission. The Charter states that the Mayor "shall solicit nominations from the Commission and shall give due consideration to such nominees in filling

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<sup>3</sup> All further statutory references are to the Government Code unless otherwise indicated.

<sup>4</sup> See *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557, 568 (noting that section 1020 sets forth the basic qualifications for holding office for members of the *state* policy body established under California Government Code, sections 66600, et. seq. [known as the San Francisco Bay Conservation and Development Commission]); 57 Ops.Cal.Atty.Gen. 498, 498-499 (1974) (stating that pursuant to section 1020, persons under age 18 are prohibited from serving on the Youth Services Bureau created by agreement among several counties in accordance with state law); 80 Ops.Cal.Atty.Gen. 331 (1997) (stating that a general law county's board of supervisors may not waive the requirement that the appointed district attorney be a citizen of the State of California [Alpine County is a general law county – see [www.csac.counties.org](http://www.csac.counties.org)].) These authorities are cited in the Attorney General's inquiry concerning Asian Art Commissioners but, because they do not concern the application of section 1020 to a *chartered city*, we find that they are inapplicable to the issue of residency requirements for the San Francisco Asian Art Commissioners.

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such vacancies to the end that the members of the Commission shall be *representative of the fields of Asian art and culture by reason of their knowledge, experience, education, training, interest or activity therein.*" (S.F. Charter, §5.104, italics added.) As will be discussed below, the Charter allows the Mayor to select the most qualified candidates to manage this international art collection without regard to geographical limitations. (S.F. Charter, §§ 5.102, 5.104.)

Although the Charter establishes a general residency requirement for City commissioners, the Charter expressly exempts Asian Art Commissioners from that requirement. Section 4.101, subdivision (2) of the Charter states a general rule that the composition of each appointive board, commission or advisory body of any kind established by the Charter shall "[c]onsist of electors of the City and County at all times during the term of their respective offices, *unless otherwise specifically provided in this Charter.* . . ." (S.F. Charter, § 4.101, subd. (2), italics added.) Under the Charter, an "elector," in turn, means "a person registered to vote in the City and County." (S.F. Charter, art. XVII [Definitions].) In order to be registered to vote, one must be "a United States citizen 18 years of age and resident" of the State of California. (Cal. Const., art. II, § 2 [Voters-qualifications].) To vote in San Francisco, one must also be a resident of San Francisco. (See Elec. Code, § 10000.)<sup>5</sup> Therefore, City Commissioners generally must be City residents.

But under San Francisco Charter Section 5.102, commissioners of the Asian Art Museum are "*exempt* from [the City and state residency] requirement of Section 4.101(2) of this Charter . . ." (S.F. Charter, § 5.102, italics added.) As a result, neither the California Constitution nor the Charter imposes any city or state residency requirement on San Francisco's Asian Art Commissioners.

## ANALYSIS

### A. Laws Applicable to Chartered Cities and to the Asian Art Commission.

The California Constitution grants charter cities sovereignty over "municipal affairs" ("home rule power".) Article XI, section 5 addresses this home rule power in two distinct subdivisions: (a) and (b). "Whereas subdivision (a) of article XI, section 5 articulates the general principle of self-governance, subdivision (b) sets out a nonexclusive list of four 'core' categories that are, by definition, 'municipal affairs'." (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 398 [hereafter *Johnson*].) "The first three categories of municipal affairs are: (1) regulation, etc., of 'the city police force'; (2) 'subgovernment in all or part of a city', and (3) 'conduct of city elections.'" (*Id.*, citing Cal. Const., art. XI, § 5, subd. (b).) The fourth category that we discuss below confers "*plenary authority*" upon chartered cities with respect to the nomination and appointment of municipal officers and employees.<sup>6</sup>

<sup>5</sup> "Every person is entitled to vote at a local, special, or consolidated election who is registered in any one of the precincts which compose the local, special, or consolidated election precincts, in accordance with this code." (Elec. Code, § 10000.)

<sup>6</sup> Article XI, §5, subdivision (b) gives chartered cities "*plenary authority* ... to provide [in all city charters for] the *manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for*

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**1. California Constitution Article XI, Section 5(b) gives Chartered Cities  
“Plenary Authority over the Manner and Method of Appointing Municipal  
Officers.” (“Plenary Authority Provision”)**

Under article XI, section 5, subdivision (b) of the California Constitution, a city like San Francisco that operates under a charter adopted by the voters has “*plenary authority*” to set the qualifications of city officers. (Cal. Const., art. XI, § 5, subd. (b), italics added.) Specifically, subdivision (b) states that the City has the power to “provide [in its charter] or by amendment thereto, the manner in which, the method by which, the times at which and the terms for which the several municipal officers . . . shall be elected or appointed. . . .” (*Ibid.*) Given the plenary nature of this power, where the Charter specifies the manner and method of appointing municipal officers, the Charter governs.

In the case of the Asian Art Commissioners, who serve primarily as charitable trustees of the Asian Art Museum (S.F. Charter § 5.101), the Charter expressly exempts Asian Art Commissioners from any residency requirement and does not even require the Mayor to consider the residency of potential candidates when making Asian Art Commission appointments. (S.F. Charter, §§ 5.102, 5.104.) Nevertheless, the Charter does address the qualifications of Asian Art Commissioners. Charter section 5.104 requires the Mayor, in filling vacancies, to “solicit nominations from the Commission and . . . give due consideration to such nominees in filling such vacancies to the end that the members of the Commission shall be representative of the fields of Asian art and culture by reason of their knowledge, experience, education, training, interest or activity therein.” (S.F. Charter, § 5.104.)

**(a) Rationale and Origins of Residency Exemption.**

The Asian Art Commission’s Charter exemption from the residency requirement is intended to provide the Mayor with the largest possible pool of qualified potential Commissioners who are “representative of the fields of Asian art and culture.” (*Ibid.*) This exemption greatly broadens the pool of potential candidates with the necessary expertise and contacts to manage a world class Asian art museum. In fact, one of several conditions of Avery Brundage’s gift to the City was that the City appoint an “independent Committee of Asian Art and Culture whose primary function would be to develop a Center of Asian Art and Culture in the City and County of San Francisco. . . .” (Second Supplemental Agreement between Avery Brundage and the City and County of San Francisco, et. al., dated July 2, 1969 at Sec. A, subd. (1), pages 13-14.)

In setting down the duties of this independent committee, now known as the Asian Art Commission, Avery Brundage outlined several significant fundraising and collection development obligations, including the initiation of a campaign to raise \$1,500,000 in cash or pledges within 18 months after the execution of the agreement and another \$1,500,000 over the four-year period

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their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.” (Cal. Const., art. XI, § 5, subd. (b), italics added.)

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ending in June 1973. (*Id.* at Sec. A, subd. (2) and (3), page 14.) Despite his detailed enumeration of Commission duties, Brundage did not require the members of this body to be City residents or even residents of California. Even Avery Brundage himself was not a California resident. Instead, he resided in Chicago, Illinois. (*Id.* at page 13.)

The Asian Art Museum has become a nationally and internationally recognized cultural institution. Accordingly, it must compete with private, non-profit cultural institutions for board members and charitable donations. The Charter allows the Mayor to select the candidates best-qualified to manage and raise funds to support these international cultural treasures from the widest pool without regard to geographical limitations. As noted above, the Asian art museum's collection, which includes numerous ancient artifacts, comes primarily from outside the borders of California. (See <http://www.asianart.org/collection.htm> [describing the art collection's items].) The Charter, in short, grants authority to the Asian Art Commission and ultimately the Mayor to decide who is best qualified without regard to residency.

**(b) Manner and Method of Appointment Necessarily Includes Setting Qualifications.**

Although one could argue that the "manner" and "method" of appointing municipal officers encompasses only procedural regulations and does not extend to the scope of the qualified candidate pool, the California Supreme Court has already rejected such a narrow interpretation of article XI, section 5, subdivision (b). In *Johnson*, the court made clear that the term "manner" in subdivision (b) should not be interpreted so narrowly as "to exclude all local election regulations except those that may be labeled 'procedural.'" (*Johnson, supra*, 4 Cal.4th at 403 [upholding a city charter provision calling for partial public funding of campaigns for city elective offices despite a state law prohibiting such funding].) Indeed, the court was "reluctant to endorse" such a narrow scope of the word "manner" and noted that the court had previously found that "the constitutional provisions granting charter cities 'plenary authority' over the 'manner' of electing municipal officers has a broader scope" than purely procedural regulations. (*Ibid.*)

Moreover, although section 5, subdivision (b) does not expressly use the term "qualifications" in connection with the plenary authority over the appointment of municipal officers, the composition of the pool from which the Mayor may make appointments is inextricably intertwined with the "manner" and "method" of appointing Asian Art Commissioners. Excluding qualifications from the array of powers that the Constitution reserves to charter cities relating to the selection of city officers would substantially undermine this "plenary authority" over the "manner" and "method" of appointing city officers. Furthermore, because the Constitution expressly empowers a chartered city to set qualifications for municipal employees, it would make no sense to interpret the Constitution to preclude a charter city from setting qualifications for the municipal officers who govern the city's institutions and agencies and to whom those municipal employees report. (*Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233; *County of Orange v. Heim* (1973) 30 Cal. App.3d. 694, 713 [noting that courts should avoid constructions of laws that reach absurd results].)

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In sum, the California Constitution gives San Francisco plenary authority to determine the manner and method by which the Mayor may appoint Asian Art Commissioners under the Charter. That authority includes setting the qualifications for municipal officers. Because the Charter expressly exempts Asian Art Commissioners from any of the City's residency requirements for members of City boards and commissions, the Charter – rather than sections 1020 or 1770, subdivision (e) of the Government Code—properly dictates from which pool the Mayor may make his appointments. In order to ensure that this specialized Asian art collection is managed by those with the requisite level of expertise and interest, San Francisco voters have decided that Asian Art Commissioners should not be limited to City or even California residents.

## **2. California Constitution Article XI, Section 5, Subdivision (a) Guarantees a Chartered City's General Power Over "Municipal Affairs."**

Section 5, subdivision (b) is not the sole source of a charter city's authority to set the qualifications for its office holders. The California Constitution also empowers cities governed by charter to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters . . . City charters adopted pursuant to the Constitution . . . *with respect to municipal affairs shall supercede all laws inconsistent therewith.*" (Cal. Const., art. XI, § 5, subd. (a), italics added.)

As the California Supreme Court has noted, the power of a charter city over exclusively municipal affairs is "all embracing, restricted and limited only by the city's charter, and free from any interference by the state through the general laws." (*Simons v. Los Angeles* (1976) 63 Cal.App.3d 455, 468.) A city charter is like a state constitution on a local level and is a limitation of, not a grant of, power. (*Miller v. City of Sacramento* (1977) 66 Cal.App.3d 863, 867.) Under the home rule power, a chartered city has complete power over municipal affairs and, unless limited by the charter, may exercise all power not in conflict with the Constitution. (*Ibid.*) In other words, the adoption of a charter means that the voters of that city have assumed the full sovereign powers of the state over municipal affairs, and the City may exercise all of those powers except as limited by the Charter. Those sovereign powers necessarily include the ability to determine the terms and qualifications of those who will govern.

Just as courts have held that a chartered city's term limits for council members address solely local concerns and are thus "municipal affairs," (*Cawdrey v. Redondo Beach* (1993) 15 Cal.App.4th 1212, 1228), the residency of members of the governing board of a chartered city's museum is also a matter of local concern. While "'in many fields of legislation local home rule has given way to the desirability of uniform state laws because of ever-increasing population and urbanization and the need for statewide uniformity in such areas as control of traffic, education, public health and public offenses'" (*Mackey v. Thiel* (1968) 262 Cal.App.2d 362, 366), residency requirements like term limits for City officials "have to do solely with local concerns, and the electors of the City who are familiar with local conditions are best able to determine the desirability of such a charter provision." (*Cawdrey v. Redondo Beach, supra*, 15 Cal.App.4th at 1228.) In short, there is no demonstrated need for a uniform state residency requirement for members of the governing body of a chartered city's local museum.

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Like a residency requirement, the term limit upheld in *Cawdrey* is essentially a qualification for office because once the officer exceeds the maximum number of terms, he or she is no longer qualified to serve. Therefore *Cawdrey v. Redondo Beach* supports the proposition that the qualifications of city council members, specifically term limits, are a municipal affair. Similarly, where a charter city commissioner may live while holding office is a matter of purely local concern. The management of a chartered city's museum is unrelated to any statewide traffic, education, health, crime or financial issues. Instead, that management is a purely municipal affair. As a result, the Constitution entrusts to voters of San Francisco the authority to determine the qualifications of their museum's governing board.

**(a) "Actual conflict" between State and Charter City Law**

As a threshold matter, if it can do so, a court should avoid making unnecessary choices concerning competing claims of municipal and state government. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17 [hereafter *CalFed*].) A court reviewing "a putative conflict between a state statute and a charter city measure initially must satisfy itself that the case presents an *actual conflict* between the two." (*Id.* at 16, italics added.) The court additionally noted that, "[t]o the extent the difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, *they ought to be....*" (*Id.* at 16-17, italics added.) For two reasons the conflict between the San Francisco Charter and Government sections 1020 and 1770(e) can be avoided.

**(i) The term "civil office" under sections 1020 and 1770(e) can be read to not include municipal officers who are acting primarily in a fiduciary capacity as charitable trustees and thereby avoid any conflict with the Charter.**

As a threshold matter, the term "civil office" under sections 1020 and 1770, subdivision (e) can be read to exclude municipal officers who are acting primarily in a fiduciary capacity as charitable trustees. This interpretation is supported by caselaw and would enable a court to avoid any conflict with the Charter. As the California Attorney General has noted, "[t]here is a surprising lack of authority as to the definition of the term 'civil office.' It may be that the term is used to distinguish a 'civil office' from a military office and that, in general, the term is used as synonymous with the term public office. The term 'public officer' has been used in so many senses that it is almost impossible to undertake a precise definition . . . In essence, a public or civil office may be said to be one which, for a given period, an individual is vested with power to perform a public function for the public benefit." (57 Ops.Cal.Atty.Gen. 498, 501 (1974).)

The California Attorney General has already acknowledged some limitations to the application of section 1020. Specifically, the California Attorney General opined that the residency requirement of section 1020 "is unconstitutional [to the extent that it excluded legal resident aliens from service] in that it is not narrowly and precisely drawn so as to apply only to offices whose incumbents participate directly in the formulation, execution or review of broad public policies having a substantial impact upon the public." (61 Ops.Cal.Atty.Gen 528, 535 (1978) (hereafter "State Dental Examiners opinion".)) As a result, the Attorney General found

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that a permanent resident alien could lawfully serve on the Board of State Dental Examiners despite the provisions of section 1020. Accordingly, the law is clear that some governmental officers - even of state policy bodies - may not be subject to section 1020.

The California courts have expressly recognized that the trustees and commissioners of San Francisco's chartered-city museums are serving primarily as charitable trustees rather than as governmental officers.<sup>7</sup> The court in *Hardman v. Feinstein*, which involved a taxpayer's lawsuit challenging the actions of the trustees of San Francisco's Fine Arts Museums (also a "charitable trust" department under Section 5.101 of the Charter), held that in administering the trust, the trustees were merely fulfilling their fiduciary duties as trustees and not engaging in governmental action, notwithstanding that they were city officials and that they administered the trust pursuant to the city charter. (*Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 163.) In finding that a taxpayer did not have standing to sue the trustees of San Francisco's Fine Arts Museums (the sister department to the Asian Art Museum), under Code of Civil Procedure section 526a, the court held that "although the Fine Arts Museums allegedly is administered by City officials, the trust assets do not constitute public assets but rather the res of a charitable trust. Respondents, in operating the museums, are fulfilling their fiduciary obligations as trustees of the trust. Accordingly, the [alleged action of the trustees] is not illegal governmental activity or the misappropriation of public property, but [instead concerns] the mismanagement of a charitable trust." (*Id.* at 163.) The court then confirmed that appellants had no standing to bring an action against the trustees of the Fine Arts Museums, a charitable trust, to enjoin the alleged breaches and mismanagement of the trust. (*Id.* at 163-164.)

Like the Fine Arts Museums Board of Trustees, the Asian Art Commissioners are also acting primarily as trustees of the charitable trust established by Avery Brundage and of the subsequent gifts donated to the Museum for the benefit of the public. But for the gift of Avery Brundage, the City likely would not have any separate Asian Art Commission or Asian Art Museum. The Asian Art Commissioners are, like the Fine Arts Museums trustees, acting primarily as fiduciaries rather than as governmental officers.

We are unaware of any state law requiring trustees of a charitable trust whose property is in California to live in California. Interestingly, although museums are often established as private tax-exempt, nonprofit corporations, even California's Nonprofit Corporation Law does not impose any residency requirement on its officers. (See Cal. Corp. Code § 5000 et seq.) Indeed, according to conversations with museum administrators and attorneys of comparable cultural institutions, we have learned that many major museums, including the Metropolitan Museum, the Getty, the

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<sup>7</sup> Cities, towns, and other municipalities are often the designated trustees of charitable trusts. See IVA A. Scott, *The Law of Trusts*, §378 (4<sup>th</sup> ed. 1989). A chartered city's ability to elect whether or not to accept the responsibility for administering charitable gifts and bequests is another important facet of its authority over municipal affairs. Accordingly, a city officer's fiduciary functions complement rather than conflict with any general municipal governmental responsibilities.

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Guggenheim and the Museum of Modern Art in New York are managed by trustees some of whom live out of the state in which the museum is located.<sup>8</sup>

- (ii) **Sections 1020 and 1770(e) can also be read to apply only to general law cities and thereby avoid any conflict with the Charter.**

Even if a court were to find that Asian Art Commissioners are civil officers within the meaning of sections 1020 and 1770, subdivision (e), a court could still find that there is no actual conflict between the Charter and state law because those state law sections were intended to apply only to general law cities.

It has been suggested that sections 1020 and 1770 do not conflict with the Charter because the Charter would allow for Commissioners to reside outside of San Francisco but elsewhere in California. This assertion overlooks the fact that the San Francisco Charter imposes no residency requirement on its Asian Art Commissioners and thus allows them to reside outside of California. Nevertheless sections 1020 and 1770, subdivision (e) can be read to apply only to general law cities and thereby avoid any conflict with the Charter. Such an interpretation would be consistent with settled precedent. Neither section 1020 nor section 1770, subdivision (e) purports to apply to charter cities. Nor does either section find an overriding matter of statewide concern that the Legislature concludes warrants preempting conflicting local regulations.

When it intends to apply legislation to chartered cities, the Legislature knows how to do so. It expressly enumerates charter cities among the regulated entities. (See Gov. Code § 4529.20 [provisions "intended to apply to charter cities as well as all other governmental entities."]; Gov. Code § 14999.34 [mandating application "to any city, including any charter city"]; Gov. Code § 16281 [evincing legislative intent to "apply to charter counties and charter cities"]; Gov. Code § 37361 [applying subdivisions explicitly to charter cities].)

The Legislature can also insert findings of statewide concern when it determines such findings are necessary. (See *Baggett v. Gates* (1982) 32 Cal.3d 128, 136-37 [noting that courts give deference to findings by the Legislature regarding statewide concerns].) In contrast to sections 1020 and 1770, subdivision (e), several other California state laws and legislative bills expressly identify statewide concerns. (Gov. Code, § 3301 [stating that the rights and protections provided to peace officers constitute a matter of statewide concern]; Gov. Code, § 16281 [stating that limiting the increases of wages, salaries, and cost of living compensation for local public agency officers and employees constitutes a matter of statewide concern]; Gov. Code, § 53270 [stating that the hiring of permanent career civilian federal, state, and local government firefighters by local agencies constitutes a matter of statewide concern]; Gov. Code, § 71618 [stating that the status, rights, and protections provided to court employees constitute a matter of statewide concern]; Code Civ. Proc., § 1299, added by Stats. 2000, ch. 906, § 2 [stating that strikes and work stoppages by peace officers and firefighters constitute a matter of statewide

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<sup>8</sup> Please let us know if you need information concerning how to contact any of those museums regarding their board composition.

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concern]; Assem. Bill No. 2023 (2001-2002 Reg. Sess.) as introduced Feb. 15, 2002 at Sec. 1(a) [stating that the retirement system for prosecutors, public defenders, and public defender investigators be constitutes a matter of statewide concern].)

Neither an express statement concerning application to chartered cities nor a statement articulating any statewide concern is present in either section 1020 or 1770, subdivision (e). As noted above, where possible, a court will forestall resolving competing claims of municipal and state governments. Instead, the California courts will first attempt to avoid finding a conflict between a state law and a charter provision. *CalFed*, 54 Cal.3d 1, 16. Here, given the absence of any reference to charter cities in sections 1020 and 1770 and absence of any expressly articulated statewide concern, a court could readily find that there is no genuine conflict between the Charter and these state laws because section 1020 and 1770, subdivision (e), do not apply to Charter cities. In *Ector v. City of Torrance*, the Supreme Court of California noted that "it follows that a statute purporting to prohibit charter cities from prescribing municipal employee residence requirements in their charters would contravene that explicit constitutional authorization [in Article XI, §5(b)]. We must presume that in adopting [the state law] the Legislature intended to enact a valid statute . . . and therefore meant to limit its reach to general law cities." (*Ector v. City of Torrance* (1973) 10 Cal.3d 129, 133, cert. denied (1974) 415 U.S. 935 [internal citations omitted].)<sup>9</sup>

**(b) Residency Requirements for a Chartered City's Museum Officers are a Matter of Municipal rather than Statewide Concern.**

Even if a court were to find that sections 1020 and 1770, subdivision (e) conflict with the Charter because those sections are applicable to charitable trustees of a municipal museum or because those sections are intended to apply to charter cities (neither of which is the case as discussed above), that is not the end of the inquiry. *Johnson* enunciates a two-part test that a court will apply under article XI, section 5, subdivision (a) of the California Constitution once it finds that a state statute regulates a municipal affair *and* poses a "genuine conflict" with state law. (*Johnson, supra*, 4 Cal.4th at 404.)

First, the court focuses on whether the conflicting state law addresses a matter of "statewide concern." (*Ibid.*) If the state statute does not address a matter of statewide concern, the conflicting charter city measure is a "'municipal affair' and 'beyond the reach of a state legislative enactment.'" (*Ibid.*) If the state statute addresses a statewide concern, the court next considers whether the state statute is "both (i) reasonably related to the resolution of that concern, and (ii) 'narrowly tailored' to limit incursion into legitimate municipal interests." (*Ibid.*) If the state statute meets this final test, "then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by Article XI, Section 5 [, subdivision] (a), from addressing the statewide dimension by its own tailored enactments." (*Ibid.*)

<sup>9</sup> The holding in *Ector v. City of Torrance* that charter cities may require their employees to be residents was superceded by the enactment of Article XI, section 10, subdivision (b) of the California Constitution. (*Cooperrider v. Civil Service Com.* (1979) 97 Cal.App.3d 495, 500, fn. 4.) Nevertheless the rule of construction that a court should endeavor to interpret vague statutory language to avoid constitutional infirmity was not affected by the constitutional amendment.

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(i) **Where Charter City Commissioners live is not a matter of statewide concern.**

*Johnson* points out that the mere existence of a state law does not mean that the law addresses a matter of "statewide concern." (*Johnson, supra*, 4 Cal.4th at 405.) "[The] Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." (*Ibid.*) Nor does the mere existence of a state law mean that that law is "reasonably related" to the resolution of a statewide concern or "narrowly tailored to avoid unnecessary incursion into legitimate areas of local concern." (*Id.* at 411 [holding that a state law prohibiting the use of public funds to finance elections was not reasonably related to statewide concern of enhancing the integrity of the electoral process].) As the California Supreme Court has noted, "our inquiry regarding statewide concern focuses not on the legislative body's intent, but on the 'identification of a convincing basis for legislative action originating in extramunicipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations.'" (*Id.* at 405 [quoting *CalFed, supra*, 54 Cal.3d at 18].)

While Government Code section 1020 sets *general* rules regarding citizenship requirements for civil office, its mere existence does not mean that section 1020 or section 1770, subdivision (e) regulates a matter of statewide concern. As noted above in section 2(a)(ii), since neither section 1020 nor section 1770, subdivision (e) purports to address or even mention statewide concerns, we can only speculate as to its purpose. It could be argued that in-state residency ensures an adequate familiarity with the community to ensure that the office holder makes decisions that promote the welfare of the community. In addition, in-state residency could also ensure proximity to the meeting sites so as to facilitate and enhance attendance at governmental meetings. Or, there could even be an argument that this requirement relates to the interest of Californians in being governed by their citizen peers where such peers are directly responsible for the formulation, execution or review of broad public policy. (State Dental Examiners Opinion, *supra*, 61 Ops.Cal.Atty.Gen. at 530.)

But there does not appear to be an overriding statewide concern in local officials' knowledge of and proximity to the community they serve that would warrant state law overriding a charter city's policy here. Moreover, any statewide interest in governance by citizen peers would necessarily be limited to areas where those governing were actually responsible for broad public policies having a statewide impact. While some city functions may have a sufficiently significant extraterritorial impact to warrant state regulation, the Asian Art Commissioners are acting as charitable trustees in managing a collection of City-owned objects and the facility that houses such objects in San Francisco.

The Asian Art Commissioners' jurisdiction is limited to running a charter city's charitable trust museum department. Moreover, the citizens of San Francisco have made clear that they do not want the Asian Art Commissioner appointments to be limited by any residency requirement. Instead, the citizens of San Francisco have expressed a desire that those governing this cultural institution "be *representative of the fields of Asian art and culture by reason of their knowledge, experience, education, training, interest or activity therein,*" regardless of where they live. (S.F. Charter, § 5.104, italics added.)

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- (ii) **Even if Charter City Commissioner residency requirements were a matter of statewide concern, sections 1020 and 1770(e) are not "reasonably related to that concern" and are not "narrowly tailored" to limit incursion into legitimate municipal interests.**

Even if these concerns are matters of statewide concern, which they are not for the reasons set forth above, a court would still likely hold that section 1020 and section 1770, subdivision (e) are not "reasonably related to that concern" or "narrowly tailored" to limit incursion into legitimate municipal interests. Requiring California citizenship of chartered city officials is not reasonably related to either a general state interest in familiarity with the policy issues in a particular community or to a Commissioner's capacity to regularly attend governmental meetings.<sup>10</sup> Given modern communications, media and transportation facilities, residency in a community is not essential to either knowledge of the community's affairs or to regular attendance at meetings.

Further, the State Attorney General has already opined that section 1020 is *not narrowly tailored* to apply only to civil offices whose incumbents participate directly in the formulation, execution or review of broad public policies having a substantial impact on the public. (State Dental Examiners opinion, *supra*, 61 Ops.Cal.Atty.Gen. at 528.) Specifically, as discussed in detail above, the Attorney General concluded that the section is *unconstitutional* as applied to resident aliens wishing to serve on the State Board of Dental Examiners. (*Ibid.*) Though not addressed in the State Dental Examiners opinion, a reviewing court would likely find that section 1770, subdivision (e) is also not narrowly tailored because the section's language fails to limit its application to only those civil officers in charge of public policy-making likely to have a significant impact on state residents.

Accordingly, the application of sections 1020 and 1770, subdivision (e) to Asian Art Commissioners does not address a matter of statewide concern nor are those sections reasonably related to, or narrowly tailored to address such a concern.

### Conclusion

In sum, a court would likely conclude that (1) a charter city's home rule power over municipal affairs includes the authority to set qualifications for those holding city offices, including a commission directing a local art museum (2) sections 1020 and 1770, subdivision (e) were not intended to apply to municipal officers who are acting primarily in a fiduciary capacity as charitable trustees, such as the Asian Art Commissioners (3) sections 1020 and 1770, subdivision (e), were also not intended to apply to charter cities, such as San Francisco (4) even if the sections did apply to the charitable trustees of a charter city's museum department, a court

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<sup>10</sup> The California Nonprofit Corporation Law provides an example of how to narrowly tailor legislation to address attendance issues by stating that "(a) The board may declare vacant the office of a director who ... if at the time a director is elected, the bylaws provide that a director may be removed for missing a specified number of board meetings, fails to attend the specified number of meetings." Cal. Corp. §5221(a).

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would likely hold that as applied to the Asian Art Commission, the residency requirement does not address a matter of statewide concern, and (5) even if the residency requirement does address a matter of statewide concern, the requirement is not narrowly tailored to minimize intrusion into home rule power by narrowly focusing on statewide concerns and would not apply to the Asian Art Commission.

For all of the foregoing reasons, and as we have previously advised, the Asian Art Commission<sup>11</sup> in accordance with the provisions of San Francisco Charter, § 5.104, the Mayor may as a policy matter lawfully appoint qualified individuals to the Asian Art Commission without regard to their residency.

Thank you again for requesting our input on this issue of San Francisco Charter interpretation. If you have any questions or need additional materials, please feel free to contact me at (415) 554-4670.

Very truly yours,

DENNIS J. HERRERA  
City Attorney



ADINE K. VARAH  
Deputy City Attorney

cc: Buck Delventhal, Chief, Government Division – Office of the City Attorney  
Emily Sano, Director – Asian Art Museum  
Alexander D. Calhoun, Commissioner – Asian Art Commission  
Laura Hathhorn, Executive Secretary – Asian Art Commission

Rodney O. Lilyquist, Esq.  
Senior Assistant Attorney General and Chief of the Opinions Unit (San Diego)  
Department of Justice – Office of the State Attorney General  
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San Diego, CA 92101

<sup>11</sup> Memorandum dated August 16, 2004, a copy of which was provided to Mr. Rodney Lilyquist, Senior Assistant Attorney General and Chief of the Opinions Unit, on September 27, 2004 (copy attached).



DENNIS J. HERRERA  
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**MEMORANDUM  
PRIVILEGED & CONFIDENTIAL**

TO: Emily Sano, Director – Asian Art Museum  
 CC: Laura Hathhorn, Executive Secretary – Asian Art Commission  
 Alexander D. Calhoun, Commissioner – Asian Art Commission  
 FROM: Adine K. Varah, Deputy City Attorney *AKV*  
 DATE: August 16, 2004  
 RE: Asian Art Commission - Residency Requirements

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**Background and Question Presented**

In light of the upcoming Asian Art Commission officer elections in September, you have asked our office the following question:

Must Commissioners or Officers of the Asian Art Commission be residents of California?

**Short Answer**

No. Under the San Francisco Charter Commissioners and Officers of the Asian Art Commission may lawfully serve on the Commission even if they reside outside of California.

**Discussion**

Neither state nor local law requires Commissioners or Officers of the Asian Art Commission to be residents of California or of the City and County of San Francisco ("City") in particular. Under Article XI, Section 5(b) of the California Constitution a city that operates under a charter adopted by the voters, as does the City and County of San Francisco, has "plenary authority" to set the qualifications of city officers. Cal. Const. Art XI, Sec. 5(b). Specifically, Article XI, Section 5(b) states that the City has the power to "provide [in its charter] or by amendment thereto, the manner in which, the method by which, the times at which and the terms for which the several municipal officers ... shall be elected or appointed ...." *Id.*

The City Charter, in turn, establishes a general residency requirement for members of most City boards and commissions but has expressly exempted Asian Art Commissioners from that requirement. Charter Section 4.101(2) states a general rule that the composition of each appointive board, commission or advisory body of any kind established by the Charter shall "[c]onsist of electors of the City and County at all times during the term of their respective offices, **unless otherwise specifically provided in this Charter ....**" S.F. Charter Sec. 4.101(2) (Boards and Commissions – Compensation) (emphasis added). Under the Charter, an "elector," in turn, means "a person registered to vote in the City and County." S.F. Charter Article XVII (Definitions). In order to be registered to vote, one must be "a United States citizen 18 years of age and resident" of the State of California. Cal. Const. Art. 2 § 2 (Voters; qualifications). To vote in San Francisco,

**Memorandum**  
**Privileged & Confidential**

TO: Emily Sano, Asian Art Museum Director  
DATE: August 16, 2004  
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RE: Asian Art Commission - Residency Requirements

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one must also be a resident of San Francisco. *See* Cal. Elec. Code Sec. 10000.<sup>1</sup> Therefore, City Commissioners generally must be City residents. But Charter Section 5.102 makes clear that commissioners of the Asian Art Museum are “exempt from the requirement of Section 4.101(2) of this Charter....” S.F. Charter Sec. 5.102. (City Museums) (emphasis added).

In addition, the Asian Art Commission’s Bylaws, as adopted on September 27, 1999 and amended on September 15, 2003, expressly provide that “Commission members need not be residents of the City and County.” Amended and Restated Bylaws of the Asian Art Commission, Art. IV (Members), Sec. 1 (“Bylaws”). The Bylaws provide that “the officers of the Commission shall be selected by the Commission from among its members.” Bylaws, Art. V, Sec. 1. Therefore, the officers also “need not be residents of the City and County.” Moreover, the Bylaws, like the Charter, do not require the Commissioners or Officers to be residents of California. As we discuss below, while the Bylaws may not contradict the Charter, they are evidence that supports the interpretation that City or state residency is not a qualification for membership on the Asian Art Commission.

Furthermore, the Charter also does not require the Mayor to give any special consideration to the residency of potential candidates when making Asian Art Commission appointments. Instead, Charter Section 5.104 states that the Mayor, in filling vacancies, “shall solicit nominations from the Commission and shall give due consideration to such nominees in filling such vacancies to the end that the members of the Commission shall be representative of the fields of Asian art and culture by reason of their knowledge, experience, education, training, interest or activity therein.” S.F. Charter Sec. 5.104.

It is our understanding that the purpose of the Asian Art Commission’s Charter exemption from the residency requirement is to provide the Mayor with the largest possible pool of qualified potential Commissioners who are “representative of the fields of Asian art and culture.” *Id.* Given that the Asian Art Museum is a nationally and internationally recognized cultural institution and must compete with private, non-profit cultural institutions for board members, the Charter allows the Mayor to select the best candidates from the widest pool without regard to geographical limitations.

You have also asked whether the Commission may limit the qualifications of Commissioners in its Bylaws. It may not do so. The Charter sets the qualifications for the Asian Art Commission. S.F. Charter Secs. 5.102 and 5.104. A bylaw imposing a residency requirement for Asian Art Commissioners would conflict with Charter Section 5.102. Only a Charter amendment, approved by the voters, could impose California residency as a qualification for appointment to the Asian Art Commission.

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

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<sup>1</sup> Section 10000 provides that “[e]very person is entitled to vote at a local, special, or consolidated election who is registered in any one of the precincts which compose the local, special, or consolidated election precincts, in accordance with this code.” *Id.*