July 18, 2022

VIA EMAIL (;   **)**

Marie Weber
City Clerk
City of Livermore
1052 S. Livermore Ave.
Livermore, CA 94550

Jason Alcala
City Attorney
City of Livermore
1052 S. Livermore Ave.
Livermore, CA 94550

RE: Referendum Petition Against Livermore City Council Resolution No. 2022-085

Dear Ms. Weber and Mr. Alcala,

On behalf of Richard Ryon and other Livermore voters, this responds to the City Clerk's July 13, 2022 letter regarding the referendum petition against City Council Resolution No. 2022-085 (the "July 13 Letter").

The July 13 letter states that when the referendum petition was presented for filing on July 8, 2022, the City Clerk "took in the petition sections for the purpose of making the *prima facie* count of signatures to determine whether the total number of signatures equals or is in excess of the minimum number of signatures required, which is 5,702," as required by Elections Code Section 9210. To that end, the July 13 Letter attached a *prima facie* signature count that counted 9,737 total signatures and noted that it was a "signature count, not a determination that signatures are valid." This is, of course, over 4,000 more signatures than required.

However, rather than proceed to the next step in the mandatory process the City Clerk must undertake to determine whether the procedural requirements for submitting the referendum petition have been satisfied—i.e., to validate the signatures—the July 13 Letter takes the position that the referendum petition does not challenge legislative action, and "has no legal effect and is therefore not eligible for filing or processing as a referendum."

In making the substantive and discretionary determination that the referendum petition is "not eligible for filing or processing" and refusing to take further action on the petition, the City Clerk is in violation of her purely <u>ministerial</u> duties under the Elections Code. **Accordingly, as explained in further detail below, we demand that the City Clerk rescind the July 13**

Letter, accept the referendum petition for filing, and proceed with examining the petition for the validity of signatures in compliance with the Elections Code.

The City Clerk's Duties Upon Submittal of Referendum Petition Signatures

Elections Code Sections 9239 and 9240 set forth the City Clerk's duties upon the proponents' submittal of a referendum petition pursuant to Elections Code 9210.

First, Section 9239 states that a petition "*shall* be accepted for filing and the number of signatures thereon *shall* be made by the elections official in accordance with Section 9210." (Emphasis added.) Under Section 9210, the elections official (i.e., city clerk) must take two actions: (a) ascertain the number of registered voters in the city; and (b) determine the total number of signatures affixed to the petition. If, from examining the petition, "the elections official determines that the number of signatures, prima facie, equals or is in excess of the minimum number of signatures required, he or she *shall accept the petition for filing*." (Elec. Code, § 9210(b) [emphasis added].)

Here, the July 13 Letter stated that 5,702 signatures were required, and the *prima facie* signature count sheet, which the City Clerk signed, indicated that the referendum petition contained 9,737 total signatures. As such, under Section 9210(b), the City Clerk was obligated to "accept the petition for filing."

Second, Section 9240 states that after the petition "has been filed as herein provided, the elections official *shall* examine the petition and certify the results in the same manner as are county petitions in Sections 9114 and 9115." (Emphasis added.) Sections 9114 and 9115 provide the City Clerk with two different ways to examine the petition and ascertain whether it contains the requisite number of valid signatures. Typically, city clerks will contract with their county registrar to have the county verify the signatures and charge the city for the costs of doing so. In any event, if based on the signature examination, "the petition is found to be sufficient, the elections official *shall* certify the results of the examination to the [city council] at the next regular meeting of the [council]." (Elec. Code, §§ 9114, 9115(f) [emphasis added].)

Here, rather than accept the referendum petition for filing and examine the petition to determine the number of valid signatures, as was required under the Elections Code, the City Clerk has refused to take any further action on the petition. This refusal, in clear violation of the Elections Code, subjects the City to liability under the Elections Code.

The City Clerk's Duties Are Ministerial; No Discretion Is Involved

The July 13 Letter refused to accept the referendum petition for filing because, according to the City, "Resolution No. 2022-085 was an administrative act, not a legislative act, and not subject to referendum." But the City Clerk had no authority to make such a substantive and discretionary determination and terminate her mandatory obligations under Elections Code Sections 9239 and 9240.

Case law is clear that in reviewing a referendum petition, "a clerk's duty *is limited to the ministerial function of determining whether the procedural requirements have been met.*" (*Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, 420 [emphasis added]; *Billig v. Voges* (1990) 223 Cal.App.3d 962, 969-970 [same].) In that vein, "[t]he role of the election official is meant to be as impersonal as possible. There is to be no concern with whether a referendum 'will be valid if enacted.'" (*Friends of Bay Meadows v. City of San Mateo* (2007) 157 Cal.App.4th 1175, 1187 [quoting *Farley v. Healey* (1967) 67 Cal.2d 325, 327].)

This case law is consistent with the plain language in Elections Code Sections 9239, 9240, 9210, 9114, and 9115, which state that the City Clerk **shall** take various actions to determine whether the referendum petition contains the requisite number of signatures in order to be certified at the next regular City Council meeting. The City Clerk had no authority under the Elections Code to refuse to accept the petition for filing and proceed to validate the signatures, and certainly had no legal right to make the discretionary determination that the referendum petition does not challenge a legislative act.

The City Clerk does not have the power, even on advice of counsel, to not perform the clearly stated legal responsibilities set forth in the Elections Code. Even under these circumstances where the City Clerk is apparently deferring to the City Attorney to tell her what her duties are under the Elections Code, the Livermore City Attorney himself stated the following equivocal statement: "Unfortunately, there is no specific section of the Elections Code or regulation that instructs city clerks what they should do with a petition that is an improper use of the referendum power or is not eligible for referendum."

Absent any such legal guidance or authority, the City Clerk has no discretion or right to ignore the existing clearly stated statutory duties that apply to the Clerk, or to read into the Elections Code the ability to reject a referendum petition as challenging administrative action rather than legislative action. (See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 [courts may not broaden a statute by "reading language into it that does not appear in it"]; Code Civ. Proc., § 1858 [in interpreting statutes, courts are "to ascertain and declare what is in terms or in substance therein, not to insert what has been omitted, or to omit what has been inserted"].) City clerks should not, as a matter of public policy, have the latitude to decide for themselves which petitions are valid and which are not. That is a decision for another day and another decision-maker.

Here, however, the City Clerk's "decision involves the sort of discretionary, adjudicatory decisionmaking reserved for judges and juries." (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 134.)[1] While we disagree with the City that Resolution No. 2022-085 is administrative action, as noted above that is a dispute to be resolved at another time,

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[1] To the extent you argue that *San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524 allows the City Clerk to refuse to take further action, the case does not stand for this proposition. Although the clerk there took a similar action as the City Clerk did here, the issue of whether the clerk could to refuse to accept the referendum petition for filing *was not litigated in the case*. Thus, *San Bruno* cannot be read as broadly as the City asserts.

after the Clerk complies with her ministerial duties to accept the referendum petition for filing and examine the signatures on the petition.

On behalf of my clients and the nearly 10,000 voters who signed the referendum petition, we demand that the City Clerk treat the referendum petition as filed and proceed to verify the validity of signatures, as the Elections Code demands.

Please confirm receipt of this letter as soon as possible.

Sincerely,

Barry Fadem