MEMORANDUM OF POINTS AND AUTHORITIES

I WRIT RELIEF IS ESSENTIAL TO RESOLVE AN ISSUE OF URGENT IMPORTANCE TO PREVENT AN UNFAIR ELECTION AND THE ADULTERATION OF THE ELECTORAL PROCESS.

A. Standard of Review.

Constitutional issues are reviewed de novo. *Ohio v. Barron*, 52 Cal. App. 4th 62, 67 (1997). Issues of law are reviewed de novo. *Fuller v. Tucker*, 84 Cal. App. 4th 1163 (2000). Independent (de novo) review in this proceeding is especially appropriate because there is no dispute as to the facts. The questions to be decided are purely legal, that is the construction of the mayoral election and term limits provisions of the Long Beach City Charter, sections 202(b) and 214(a).

A. Because Norm Ryan Was the Candidate on the Primary Nominating Ballot Who Received the Second Highest Number of Votes Among the Candidates Eligible to Be Nominated in the Primary Nominating Election, Mr. Ryan's Name Should Be Placed on the Ballot for the General Mayoral Election.

This case presents an issue of immediate urgency involving the threatened deprivation of constitutional and statutory rights arising out of Respondent Superior Court of Los Angeles County's Order of April 25, 2002, denying the application of Petitioner Norm Ryan, a candidate for nomination for the office of mayor of the City of Long Beach, to enjoin the City of Long Beach and its City Clerk printing any ballots that do not contain the names of Norm Ryan and Dan Baker as the only two candidates on the ballot for the City of Long Beach's June 4, 2002 general mayoral election.[3]

The Superior Court's Order which allows the City to place Dan Baker as the *sole* name

---

[3]See April 25, 2002 Order denying preliminary injunction ("Order") attached hereto as Exhibit A.

on the general election ballot threatens to significantly impair the constitutional rights of voters. "The right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 553, 555 (1964). In particular, the Order contravenes the fundamental rights of Norm Ryan as a voter, and as a candidate, under the City Charter and California election law.

Petitioner Norm Ryan was a candidate for nomination for mayor of Long Beach on the April 9, 2002 primary nominating election ballot ("Nominating Election Ballot"). Mr. Ryan sought, unsuccessfully, to enjoin the City from printing any ballots not containing the names of Norm Ryan and Dan Baker as the only two candidates on the June 4, 2002 municipal general election ballot ("General Election Ballot").

Ryan and Baker are the two candidates for *nomination* on the April Ballot who got the most votes after Mayor Beverly O'Neill — who is a "termed-out incumbent" and therefore ineligible to have her nomination paper accepted by the City Clerk or name appear on "any ballot" under section 214(a) of the Long Beach City Charter.[4]

The official results of the April 9 Nominating Election for Mayor are as follows: Long Beach Mayor Beverly O'Neill - 11,032 (write-in) votes (28.3%); City Councilmember Dan Baker - 9,628 votes (24.7%); Norm Ryan - 8,909 votes (22.8%); Ray Grabinski - 7,490 votes (19.2%); John Stolpe - 751 votes (1.9%); David Wong - 625 votes (1.6%); and Bob Livingstone - 539 votes (1.3%). The City Attorney's office has informed counsel for Petitioner that the City's "drop dead" date for transmitting ballots to the printer is Monday, April 29 at 5:00 p.m.

Because the City's failure to place Norm Ryan's name on the ballot not only contravenes

---

[4]The relevant provisions of the Long Beach City Charter referred to in this memorandum (§§ 202, 214, 1905, 1907 and 1910 are attached hereto as Exhibit B.

the provisions of the Long Beach City Charter, but it also affects the fundamental right to vote (see *Rittenband v. Cory*, 159 Cal. App. 3d 410, 421 (1984) (right to seek and hold elective office has "a real and appreciable impact on other fundamental rights, such as the right to vote."), the City should not be permitted to print any ballots without the names of both Norm Ryan and Dan Baker as the two mayoral candidates.

Should a peremptory writ in the first instance not issue, the City would print the voter pamphlets and the ballots with only one name on the ballot for Mayor. The resulting effect would be a devastating infringement on the state and federal constitutional rights of free speech, free and fair elections and the right to vote of thousands of voters in Long Beach, and the adulteration of the electoral process.

1. Allowing Only One Candidate on the Ballot Is Based on the City Attorney's Erroneous Construction of Long Beach's Term Limits Law Which Leads to Mischievious and Absurd Results.

Because Mayor O'Neill has already been elected to two full terms as the Mayor of the City of Long Beach, she is expressly prohibited from having the City Clerk accept her nominating papers or having her name appear on "any ballot." City Charter § 214(a)(3). The Charter does, however, permit Mayor O'Neill to run as a write-in candidate, which she has done. City Charter § 214(b).

The two candidates on the primary nominating election ballot who received the most votes, after Mayor O'Neill's votes as a "termed-out incumbent" write-in candidate, were Dan Baker and Norm Ryan. On April 16, City Attorney Robert Shannon wrote a memorandum to the Mayor and City Council stating that the names of Mayor O'Neill and Norm Ryan "cannot be placed on the ballot." Exhibit C. On April 25, the Superior Court denied Norm Ryan's request for a preliminary injunction enjoining the City from printing any ballots without his name on the

ballot. *This would leave Dan Baker as the sole candidate on the ballot — a patently absurd result.*

The City Attorney's advice not to place Norm Ryan's name on the ballot, and the Court's Order affirming this decision would contravene the fundamental rights of voters under Article I, section 3 of the California Constitution and violates the rights of voters and candidates under the City Charter and California election law.

Section 202(b) of the Long Beach City Charter ("City Charter") provides:

> Candidates for the office of Mayor shall be nominated by the City at large at the *primary nominating election.* In the event that no candidate for nomination to the office of Mayor receives a majority of the votes cast for all candidates for the office of Mayor at the primary nominating election, the *two candidates receiving the highest number of votes for the office of Mayor at the primary nominating election shall be the candidates and the only candidates for such office whose name shall be printed upon the ballots* to be used at the general municipal election.

City Charter § 202(b) (emphasis added).

The term limits provision of the City Charter was adopted in 1992. It provides in relevant part:

> (a) Notwithstanding any other previously enacted provision of law or of this Charter, *the City Clerk,* or other election official authorized by law, *shall not accept or verify the signatures on any nomination paper for any person, nor shall he or she certify or place on the list of certified candidates, nor print or cause to be printed on any ballot,* ballot pamphlet, sample ballot, or ballot label, the name of *any person* who either:
>
> . . .
>
> (3) Is elected to two full terms as Mayor after November 3, 1992 and thereafter seeks to become a candidate for Mayor.
>
> . . .
>
> (c) Construction. *Nothing in this article shall be construed as preventing or prohibiting the name of any person from appearing on the ballot at any direct primary or general election unless that person is specifically prohibited from doing so by the provisions of Section 214(a) of this Article, and to that end*

Section 214(a) shall be strictly construed. This act shall be *liberally* construed to accomplish its purposes.

City Charter § 214(a) & (c) (emphasis added).

The two eligible candidates on the primary nominating election ballot for Mayor who received the most votes, after Mayor O'Neill's write-in votes as a "termed-out incumbent," are Dan Baker and Norm Ryan.

The City Attorney advised the City that Norm Ryan's name could not be placed on the June Ballot because the "Charter provides that the two candidates receiving the highest number of votes in the primary, and only those candidates, shall be entitled to have their names printed on the general municipal election ballot." Exhibit C.

The City Attorney's memorandum did not take into account salient provisions of the City Charter and the Elections Code. Moreover its analysis is at odds with section 214(c) which specifies the manner in which section 214 is construed. Section 214(c) specifically states: "*Nothing in this article shall be construed as preventing or prohibiting the name of any person from appearing on the ballot at any direct primary or general election unless that person is specifically prohibited from doing so by the provisions of section 214(a) of this Article.*" Section 214(c) also states that "*This act shall be liberally construed to accomplish its purposes.*"

Because Norm Ryan was the eligible candidate on the ballot who got the next highest number of votes, *nothing* in section 214 can be construed as preventing Mr. Ryan from being on the ballot. A *common sense and a liberal construction* of the act requires this result.

The City Attorney incorrectly interpreted section 214 as if it were in conflict with section 202. Section 202 states that the "*two candidates receiving the highest number of votes for the office of Mayor at the primary nominating election shall be the candidates and the only*

candidates for such office whose name shall be printed upon the ballots." The City Attorney asserts that since Mayor O'Neill is one of the candidates receiving the highest number of votes (under section 202), and since she is prohibited from appearing on the ballot (by section 214(a)(3)), then Dan Baker is the only person who can be on the ballot. Surely the voters of Long Beach did not intend this absurd result when they enacted the term limits measure in 1992. The City Attorney cannot ignore section 214(c) in his construction of section 202.

2. Contrary to the Arguments Posed by Baker and the City in the Trial Court, the Court Must Resolve any Tension Between Section 202(b) and Section 214(a) by Giving Effect to the Later-Enacted Provision.

The arguments posited by the City as to why Ryan cannot be placed on the ballot boil down to looking at the language of sections 202(b), and the near identical language of section 1905 of the City Charter, that "the two candidates receiving the highest number of votes for the office of Mayor at the primary nominating election shall be the candidates and the only candidates for such office whose name shall be printed upon the ballots." The City Attorney however, read these sections as if they were not impacted by the later-enacted term-limit amendment.

It is a cardinal rule of statutory construction that "when a later statute supersedes or substantially modifies an earlier law but *without expressly referring to it,* the earlier law is repealed or partially repealed by implication." *People v. Bustamante*, 57 Cal. App. 4th 693, 699 (1997) (emphasis in original); see also Govt. Code § 9605 ("it shall be conclusively presumed that the statute which is enacted last is intended to prevail over statutes which are enacted earlier at the same session."). The "rules of statutory construction are the same whether applied" to initiative measures as to statutes. *Bustamante*, 57 Cal. App. 4th at 699 n.5 (citing *Winchester v. Mabury*, 122 Cal. 522, 527 (1898)).

Moreover, where two laws on the same subject, passed at different times, are inconsistent with each other, the later act prevails. *Bustamante*, 57 Cal. App. 4th at 701 (citing *County of Ventura v. Barry*, 202 Cal. 550, 556 (1887)). To the extent that the City Attorney reads any conflict between sections 202(b) and 1905 of the City Charter, the Court must give effect to section 214 which states *"the City Clerk . . . shall not accept or verify the signatures on any nomination paper for any person, nor shall he or she certify or place on the list of certified candidates, nor print or cause to be printed on any ballot . . . the name of any person* who [is a termed-out incumbent]." City Charter § 214(a) (emphasis added).

Section 202(b) explicitly requires the names of *two candidates* to be listed on the general election ballot — and one of those names cannot be a termed-out incumbent under section 214. In short, the only way to harmonize section 202 and 214 is to have the names of Dan Baker and Norm Ryan appear on the June run-off election ballot.

3. The Trial Court's Interpretation Violates the Rule Requiring Courts to Give Effect to "Every Word and Phrase" of a Statute.

The City Attorney and the trial court's interpretation of section 202(b) "violates the rule of statutory interpretation that requires [courts] if possible, to give effect and significance to *every word and phrase of a statute*." *Garcia v. McCutchen*, 16 Cal. 4th 469, 476 (1997) (citing *Steinberg v. Amplica, Inc.* 42 Cal. 3d 1198, 1205 (1986) (emphasis added)).

Courts are obligated to give a statute *"a reasonable and commonsense interpretation consistent with its apparent purpose, practical rather than technical in nature, which upon application will result in wise policy rather than malice or absurdity."* *Volkswagen of America, Inc. v. Superior Court*, 94 Cal. App. 4th 695, 706 (2001) (emphasis added).

A common sense and practical construction of Article 2 of the City Charter is to

recognize that Mayor O'Neill, as a termed-out incumbent, was ineligible to be nominated or to have her name as a candidate on the primary ballot. Mayor O'Neill could have won a write in campaign if she had received more than fifty percent of the vote in the primary nominating election. But her vote count in the primary election otherwise has no effect on reducing the required two names which *must* appear on the general election ballot.[5]

As an example, consider a situation where Mickey Mouse received the highest number of votes for mayor of Long Beach in the primary nominating election, followed by Dan Baker and Norm Ryan. It would hardly be proper to hold that, because Mickey Mouse and Dan Baker were the two candidates receiving the highest number of votes, these two candidates would be the nominees in the primary nominating election — since Mickey Mouse is obviously not eligible to be nominated for Mayor. But would it be proper to then allow only Dan Baker's name on the ballot, simply because Norm Ryan was not one of the candidates who finished in the top two vote getters, while an ineligible Mickey Mouse finished first? This would clearly be an absurd result. Cf. *Pierce v. Harrold*, 138 Cal. App. 3d 415 (1982) (successful candidate declared ineligible after election and judge ordered new election, to be held as to the two unsuccessful candidates who received the next highest number of votes at the primary pursuant to Cal. Elect. Code section 6611 (now Elections Code section 8140)).

As an additional example, what if there were an election where two termed-out, write-in candidates for mayor finished with the two highest vote totals, and then one of the candidates

---

[5]Theoretically, Mayor O'Neill did not even need to run in the primary nominating election, and obviously did so for political considerations rather than any reason having to do with qualifying as a nominee. Mayor O'Neill needed to run in the primary for practical reasons, such as holding down her base so that the endorsements and support she needed would not be pledged to other candidates had she opted to sit out the primary nominating election.

decides for whatever reason to not certify him or herself as a write-in for the general election? Under the City and Baker's interpretation, in this scenario, *the remaining termed-out candidate gets a leg-up, or a free ride in the general election.* This result would follow because the termed-out write-in candidate would have no competition on the ballot in the general election, and — in the event a new write-in candidate emerged — the termed-out candidate would already have an established campaign organization from the write-in campaign in the primary election.

Or more strikingly, what if under the same circumstances one of the termed-out candidates is the incumbent mayor and neither of the two termed-out candidates for mayor certify to be write-in candidates in the general election? The termed-out incumbent would not even have to stand for election, yet would stay in office until a successor qualified in a special election under section 202(c) and (e) of the City Charter. *In short, the termed-out incumbent would be a hold-over for a period beyond what the voters intended when enacting term limits. Surely, the term limits provision was not intended to give a free ride to termed-out incumbents.* Either the term limits provision applies by its terms or it doesn't. *But term limits does not mean a termed-out incumbent should get a free ride, or an easier ride, which is the end result of the City Attorney's, and the trial court's construction of the law.*

The City Attorney's construction of Article 2 is rife for mischief and absurdity. Unless a peremptory writ issues, Mr. Baker will be the *only* candidate in the election. Interpreting the election laws in a tortured manner that leads to only one candidate on the general election ballot is absurd because it flies in the face of the language in section 202(b) requiring the names of "two candidates" to be printed on the general election ballot.

Under Norm Ryan's interpretation of the City Charter, two candidates would be listed on the general election ballot, including qualified candidates who did not finish first or second

solely because of the presence of unqualified candidates. This is the only construction that does *no violence* to any provision of the City Charter.

In other words, Mayor O'Neill is not a *nominee* ineligible to appear on the ballot. Rather, she is a *write-in candidate ineligible to be a nominee*, who can only win a primary nominating election by getting a majority of votes at the primary nominating election. See City Charter section 214(a) ("*the City Clerk . . . shall not accept or verify the signatures on any nomination paper for any person . . . .*").

A different result would be obtained for another candidate who is not a termed-out incumbent. Such a candidate could run a write-in campaign and qualify to be nominated for the run-off election — because the prohibition on filing nominating papers under section 214(a) would not apply.

C. Alternatively, if Mayor O'Neill were Nominated in the Primary Nominating Election, Her Ineligibility Creates a Vacancy on the Ballot Because She is Prohibited From Being On the Ballot by Section 214(a) — and that Vacancy Should Be Filled in a Manner Proscribed by the Elections Code.

To the extent that the City maintains that Mayor O'Neill was nominated for Mayor in the primary nominating election (see Exhibit D, which reflects this very position), but is still ineligible to have her name placed on the ballot because of the prohibition in section 214(a), Norm Ryan submits that this creates a vacancy on the ballot, and because the Long Beach City Charter has no provisions for dealing with ballot vacancies — and section 1910 of the City Charter expressly adopts the provisions of the Election Code where the Charter is otherwise silent — the vacancy should be filled in the manner proscribed by Elections Code sections 8807 and 8141.

It is fundamentally wrong for the City Attorney to read section 202 as being in conflict

with section 214(a). But any doubt as to the proper approach can be resolved, as the City Charter provides, "*in accordance with the Elections Code of the State of California governing municipal elections.*" City Charter § 1910. The Elections Code provides the same common sense approach Plaintiff suggests here:

> *If the vacancy occurs among candidates chosen at the direct primary to go on the ballot for the succeeding general election for a nonpartisan office, the name of that candidate receiving at the primary election the next highest number of votes shall go upon the ballot to fill the vacancy.*

Cal. Elect. Code § 8807 (emphasis added); see also *Pierce v. Harrold*, 138 Cal. App. 3d 415 (1982) (successful candidate declared ineligible after election and judge ordered new election to be held as to the two unsuccessful candidates who received the next highest number of votes at the primary pursuant to Elections Code section 6611 (now Elections Code section 8140)).

Here, the City Charter does not provide for a contrary result as to a vacancy on the ballot due to a candidate's ineligibility. Therefore, if there were any doubt as to the proper interpretation of the relevant charter provisions, the Court should apply section 8807 of the Elections Code to fill the vacancy with the name of the candidate who received the next highest number of votes, Norm Ryan.

Significantly, the Elections Code also provides that there be more candidates on the general election ballot than there are open seats if there were additional candidates at the primary. Elections Code section 8141 states:

> If no candidate has been elected to a nonpartisan office pursuant to Section 8140 or if the number of candidates elected at the primary election is less than the total number to be elected to that office, then candidates for that office at the ensuing election shall be those candidates not elected at the primary who received the next highest number of votes cast for nomination to that office, equal in number to twice the number remaining to be elected to that office, or less, if the total number of candidates not elected is less.

Cal. Elect. Code § 8141. This code section gives explicit guidance to situations where there would otherwise be only one candidate on the ballot, and gives express authority for going down the ballot to the third place finisher who "received the next highest number of votes cast for nomination to that office."

Applying Elections Code sections 8807 or 8141 here does no violence to section 214(a) of the City Charter and in fact, furthers the purpose of the term limits law by ensuring that the potentially absurd results which may manifest themselves under the City Attorney's interpretation do not occur.

D. Having the Names of Both Norm Ryan and Dan Baker Appear on the General Election Run- Off Ballot Is the Only Interpretation of the Provisions of the City Charter that Is Reasonable and Does Not Produce Absurd Consequences.

"When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from the particular interpretation. In this regard, it is presumed that the Legislature intended reasonable results consistent with expressed purpose, not absurd consequences." *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1165-66 (1991).

Respondent court's interpretation yields the wholly unreasonable result that *only one name will appear on the June run-off ballot for Mayor*. In contrast, Norm Ryan's interpretation of the City Charter is reasonable and does not result in absurd consequences.

What kind of "run-off" election is held with only one candidate appearing on the ballot? By definition, the general municipal election in Long Beach and in other jurisdictions adopting the two-stage primary election process is a *run-off election* between the two qualified candidates who received the highest number of votes in the primary nominating election. Of course, where

only one candidate might choose to run for a particular office, only one candidate's name will appear on the ballot. *But this occurs not in general run-off elections*, only in primary nominating elections or in the single elections held in most municipalities.

Significantly, in order to ensure that run-off elections are conducted with the names of two candidates appearing on the ballot, the Elections Code prohibits candidates who are nominated in a primary nominating election from withdrawing, or having their names removed, form the general election ballot except under very limited circumstances (death or appointment to a higher office). Moreover in those limited situations in which the name of the candidate who was nominated at the primary election does not appear on the general election ballot, the Elections Code specifies a procedure for selecting a *replacement candidate* to appear on the ballot instead. See Cal. Elect. Code §§ 8800-8811. In short, there appears to be no circumstance under California law in which only one candidate's name is permitted to appear on the general election ballot under the primary-general election system. The court's interpretation, however, yields precisely this absurd and unprecedented consequence.

Indeed, as discussed above, it is quite possible under the court's interpretation, for there to be a run-off election in which *no candidates' names* will appear on the ballot. Because the term limits initiative was only enacted in 1992 and did not apply retroactively, this is the first year in which its provisions have "kicked in." Mayor O'Neill is the first termed-out candidate to seek reelection under that law. But in future years, there will be an increase in the number of termed-out city officials, and it is likely to expect situations in which *two or more* termed-out candidates, each having previously served two terms in office, decide to run as write-in candidates for the same city office. If those two write-in candidates finish first and second in the primary nominating election, no one's name will appear on the general election ballot according

to the City Attorney's interpretation as adopted by the trial court. It is interesting to speculate as to what the ballot would look like in such a situation. Could a more absurd result ever be imagined?

On the other hand, there is nothing absurd or unreasonable about the consequences that flow from Norm Ryan's interpretation of the Charter, to list his name and Dan Baker's on the run-off ballot. The names of "two candidates," as required by section 202(b) would thus appear in the run-off election ballot. There is no more reasonable approach that can be contemplated to reconcile the salient charter provisions.

III CONCLUSION

An expedited decision by the Court is necessary because the City Attorney's office has informed counsel for Plaintiff that the Court's decision is needed by 5:00 p.m. April 29, 2002 — which is the last day that the City states it can send the ballots to be printed in time for the election. Petitioner requests that the Court give this case precedence on its calendar for election contests as set forth in section 35 of the California Code of Civil Procedure.

For the reasons stated, Petitioner respectfully request this Court to grant a peremptory writ of mandate in the first instance as prayed and order that Respondent Superior Court's (a) vacate its Order of April 25, 2002, denying Petitioner's application for preliminary injunction and (b) enter a new and different order granting the preliminary injunction as prayed.