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MEMORANDUM OF LAW

DATE: September 29, 2004

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Substantial Compliance with Nominating Requirements

INTRODUCTION

You have asked our advice regarding a nomination petition submitted by Patrick DeShields, a candidate for the special election to fill the unexpected vacancy in Council District 4. The petition contains 140 signatures, of which 86 have been determined by the Registrar of Voters to be valid signatures. The San Diego Municipal Code requires a candidate for City Council to submit at least 100 valid signatures. Mr. DeShields has requested that you find the signatures to be in substantial compliance with this requirement in light of the compressed time period for obtaining the signatures and other circumstances beyond his control.

QUESTION PRESENTED

Does the City Clerk have discretion under these circumstances to find substantial compliance with the requirements of the San Diego Municipal Code regarding the number of valid signatures on a candidate's nomination petition?

SHORT ANSWER

Yes, the San Diego Municipal Code provides the City Clerk with discretion to determine substantial compliance with the election provisions. While objective numerical requirements generally are not subject to discretionary determinations, the extenuating circumstances described by Mr. DeShields provide a basis for the City Clerk to exercise his independent judgment as to whether he has substantially complied with the signature requirements.

ANALYSIS

In 1987, we addressed a similar issue of whether 179 valid signatures, instead of the required 200 signatures, could be considered substantial compliance with the requirements of the San Diego Municipal Code. *See* 1987 City Att'y MOL 696. In that memorandum, we took note of an unpublished case that applied the doctrine of substantial compliance to "isolated atypical circumstances." However, the memorandum relied on published opinions to conclude that "the doctrine of substantial performance does not excuse nomination limitations that are precise, clear and uniform in their requirements" such as the minimum signature requirement for nomination petitions. Notwithstanding the conclusion reached in the 1987 MOL, it appears that a court reviewed the circumstances and concluded that the candidate's name should be placed on the ballot. We have not had an opportunity to review any pleadings or the analysis by the court, so we cannot comment on whatever rationale was used by the court in that particular case.

More recently, the court of appeal has had an opportunity to address these issues. In *D'Agostino v. Superior Court*, 33 Cal. App. 4th 107 (1995), the court held that a candidate's submission of 465 valid signatures, instead of the required 500 signatures, did not constitute substantial compliance with the signature requirement of the city charter for the City of Los Angeles. The court noted that substantial compliance has been used to validate technical deficiencies in referendum and initiative petitions, such as the use of preprinted dates, typographical errors in the text of the statutes, and the use of small type size. However, the court stated that: "The same cannot be said of the failure to provide the required number of signatures of qualified registered voters. In the instant case, the lack of 500 valid signatures is not a 'technical deficiency' but rather noncompliance with a substantive requirement for qualification for the ballot." *Id.* at 117. The court stated the issue is whether a particular provision is mandatory or directory, recognizing an earlier case in which a candidate was ineligible to hold office because he had been a registered voter for only 28 days of the 30 days required before filing nomination papers. *Id*., citing *Daniels v. Tergeson*, 211 Cal. App. 3d 1204, 1208 (1989). Further, the court stated that it did not find any authority for considering less than the required number of signatures to be "substantial compliance." *Id*. at 118. Nonetheless, the court went on to consider whether compliance should be excused because of the candidate's contention that staff at the Clerk's office had provided misinformation about the requirements for filing the petitions. The court found that the elections and campaign literature distributed by the City Clerk accurately described the requirements and procedures for submitting nominating petitions. *Id*. Accordingly, the petition was denied. *Id*. at 119.

The San Diego Municipal Code requires that nominating petitions of candidates for City Council "shall be signed by at least one hundred individuals residing in the district and who at the time of signing shall have been registered voters for a period of at least thirty calendar days in the district from which the candidate seeks nomination." SDMC § 27.0210(b). Nomination papers may be obtained 74 days prior to the special election (SDMC § 27.0204(b)) and must be filed 60 days before the election (SDMC § 27.0214(b)). The nomination papers are accepted as filed if the City Clerk determines that a candidate's nomination papers are in substantial compliance with the requirements. SDMC § 27.0216. After the petition has been accepted as filed, the City Clerk is allowed twenty business days to verify the validity or invalidity of signatures. SDMC § 27.0217.

To determine the sufficiency or insufficiency of a nominating petition, the City Clerk shall only count valid signatures. SDMC § 27.0217(b). If the City Clerk finds the nominating petition to be sufficient and in proper form, he or she shall so certify and send a notice of sufficiency to the candidate. SDMC § 27.0218. If the nominating petition is insufficient, the City Clerk shall send a notice of insufficiency to the candidate. SDMC § 27.0219.

In this special election to fill the vacancy in Council District 4, the time period to obtain signatures for the nomination petitions were compressed from the usual procedures. The City Council declared the vacancy and called the special election on Tuesday, September 7, 2004, which was 70 days before the November 16, 2004 election. At that point, the usual time to obtain the nomination papers (74 day period prior to an election) had already passed. The City Council ordered that the nomination period would begin on Friday, September 10, 2004, and end on Friday, September 17, 2004, leaving only 7 days to obtain nomination petition signatures.

On Friday, September 17, 2004, Mr. DeShields submitted to the Office of the City Clerk, 140 signatures, of which 86 have been determined to be valid.[1] Mr. DeShields contends that he has substantially complied with the requirements in light of the short time frame for this special election and difficulties at the Clerk's Office and the Registrar of Voters. In particular, he contends that he was "prohibited from picking up" the election packet on Friday, September 10, 2004, because of the number of other candidates receiving assistance on that day, and that he was given an appointment the following Monday, September 13, 2004. This obviously deprived him of the weekend opportunity for gathering signatures. He also contends that the Registrar of Voters did not timely provide the voters registration list and precinct map because of their heavy workload. Taking these factors into consideration, he requests that the City Clerk find his nominating petition substantially complies with the City's requirements and that his name be placed on the ballot.

In reviewing the San Diego Municipal Code requirements and the case law on the subject, we believe you would be within your rights to determine that Mr. DeShields has not complied with the letter of the San Diego Municipal Code. The San Diego Municipal Code clearly prescribes 100 signatures, and that only valid signatures may be counted. By any count, 86 or 96, Mr. DeShields has failed to reach this numerical requirement.

On the other hand, the San Diego Municipal Code provides that substantial compliance with the election provisions shall be deemed sufficient to hold a valid election. SDMC § 27.0102. Mr. DeShields contends that, despite delays caused by the City Clerk's Office and the Registrar of Voters, he collected signatures in good faith and returned the petition to the City Clerk's Office by the September 17, 2004, deadline. Clearly, obtaining the forms on Monday placed him at a disadvantage to candidates who were able to pick up their forms the previous Friday. Those candidates were afforded at least two additional days to gather signatures. Further, we are advised

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[1] In addition to the 140 signatures, Mr. DeShields had collected another 25 signatures by the filing deadline, but did not present these signatures at the Office of the City Clerk before the 5:00 p.m. deadline. Since that time, the City Clerk preliminarily accepted those signatures and the Registrar of Voters determined that 10 are valid, for a total of 96 valid signatures.

that some of the names were stricken as invalid due to residency outside the District or a failure to be a registered voter. Arguably, the Registrar of Voters' alleged inability to timely provide a voters registration list and precinct map might have affected the candidate's ability to obtain the required number of valid signatures. Assuming these facts are true, combined with the compressed time period for gathering signatures, you may exercise your independent judgment to reach a conclusion that the number of signatures substantially complies with the City's requirements.

CONCLUSION

In summary, the San Diego Municipal Code provides that substantial compliance with the election provisions shall be deemed sufficient to hold a valid election. SDMC § 27.0102. This authority gives you discretion to determine whether the nomination requirements have been substantially complied with. Given the compressed time period associated with this special election we suggest you take into consideration the extenuating circumstances presented by Mr. DeShields and exercise your independent judgment to whether strict compliance with the 100 signature requirement can be excused. This Office will be ready to defend whichever decision you chose under these circumstances.

CASEY GWINN, City Attorney

By

Catherine M. Bradley
Deputy City Attorney

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