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COUNTY COUNSEL

June 18, 2024

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SUBJECT: Receive and File Report on the Authority of the Board of Supervisors in the Administration of Elections

RECOMMENDED ACTION:

Receive and File Report on the Authority of the Board of Supervisors in the Administration of Elections

DISCUSSION:

For the last several months your Board has received public comments at your meetings voicing concerns about local elections, as well as emails requesting your Board take actions to enact various types of election reform. On May 14, 2024, Chair Kelly Long asked the County Executive Officer to invite the County Clerk-Recorder & Registrar of Voters Michelle Ascencion to come to a future Board meeting with a receive and file item to discuss some of the public e-mails that the Board has received and to talk about the outcome of the last election. Supervisor Jeff Gorell also asked County Counsel to address the legal authorities that are vested with the Board of Supervisors for the administration of elections, as opposed to those authorities vested with the County Clerk-Recorder & Registrar of Voters and State Legislature.

County Clerk-Recorder & Registrar of Voters ("Clerk-Recorder") Michelle Ascencion provided an extensive four-part election education series at your Board addressing many areas of the election process. The series was as follows:

- October 17, 2023: Part One – Candidates and Campaigns
- November 7, 2023: Part Two – Voter Registration and Primary Election Voting/No Party Preference Voting
- January 23, 2024: Part Three – Vote Centers and Vote By Mail

- February 6, 2024: Part Four – Election Technology, Security, Fraud Prevention and Canvass/Certification

Recordings of Clerk-Recorder Ascencion's education series can be accessed at <https://recorder.countyofventura.org/elections/election-education-series/>. Additional resources related to the education series topics are also linked there. Also attached to this Board letter is a FAQ handout prepared by the Registrar of Voters.

The County is committed to upholding election laws and regulations to ensure the integrity, transparency, and accuracy of the electoral process. This Board letter is intended to supplement Clerk-Recorder Ascencion's education series. Since the public comments and e-mails largely ask your Board to take action, including adoption of an ordinance, it was determined that County Counsel would bring forward the agenda item given the legal questions involved. Clerk-Recorder Ascencion will also be at the Board meeting to address technical questions from your Board, if necessary.

Many public speakers frequently cite Government Code section 25201 as support for your Board's authority to act on the handling of elections. Respectfully, the public speakers neglect to state your Board's authority under Government Code section 25201 is expressly limited by the Elections Code. Government Code section 25201 states in its entirety:

"Subject to the provisions of the Elections Code, the board may establish, abolish, and change election precincts, appoint inspectors, clerks, and judges of election, canvass all election returns, declare the result, and order the county elections official to issue certificates of election."

Yes, your Board has authority under Government Code section 25201 to take the actions expressly identified in that code section so long as such actions comply with the Elections Code. California Constitution Article XI, Section 7 provides that your Board may adopt ordinances and regulations that are not in conflict with general laws. As such, as a general law county and not a charter county, your Board should not adopt ordinances that conflict with the Elections Code.

The County Clerk-Recorder & Registrar of Voters is a separately elected official under Government Code section 24009. Government Code section 26802 addresses the authority of the elected County Clerk-Recorder & Registrar of Voters. It states, "Except as provided by law, the county clerk shall register as voters any electors who apply for registration and shall perform any other duties required of him or her by the Elections Code. In those counties in which a registrar of voters office has been established, the registrar of voters shall discharge all duties vested by law in the county clerk that relate to and are a part of election procedure."

Government Code section 25303 sets forth your Board's authority to supervise the conduct of all county officers, including the County Clerk-Recorder & Registrar of Voters. Section 25303 states in relevant part:

"The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of such county officers and officers of all districts and subdivisions of the county relate to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection."

Although your Board has authority to supervise all county officers to make certain that the county officers faithfully perform their duties, your Board does not have the power to perform county officers' statutory duties for them or direct the way those duties are performed. (*People v. Langdon* (1976) 54 Cal.App.3d 384, 390.)

Given the above, your Board has limited direct authority over the administration of elections. With few exceptions, the Elections Code delegates authority over elections to the "elections official," which is the elected County Clerk-Recorder & Registrar of Voters. (Elec. Code, § 320.)

The remainder of this Board letter will address some of the more frequent topics and requests from the public concerning the handling of elections.

1. *Request that your Board adopt an ordinance to stop the universal vote by mail ballots.*

Elections Code sections 3000.5 and 3010 require the County Clerk-Recorder & Registrar of Voters to mail ballots to every active registered voter for every election. This requirement is present regardless of whether the County is proceeding with the election under the Voter's Choice Act or as a one day, precinct polling place election. Adoption of an ordinance, as requested, would impermissibly conflict with state law.

2. *Request that your Board adopt an ordinance directing that elections shall be one day, precinct elections.*

Essentially this is a request to move away from the Voter's Choice Act (VCA). The VCA was passed in 2016 (Senate Bill No. 450) to allow counties to choose to conduct elections under a new model by mailing every voter a ballot, expanding in-person early voting, allowing voters to cast a ballot at any vote center within the County, and providing secure ballot drop off locations

throughout the County. (Elec. Code, § 4005.) Under state law, counties may opt into the VCA. However, in doing so, the law references the “elections official” as the party that takes the actions to opt in to implement the VCA. As stated above, under Elections Code section 320, the “elections official” is the separately elected County Clerk-Recorder & Registrar of Voters. The elected County Clerk-Recorder & Registrar of Voters is vested with the power and authority to determine whether the County will conduct an election as an all-mail ballot election under the provisions of Elections Code section 4005, including the responsibility for conducting the election and preparing the plan for the administration of the election. The VCA requires each participating county to create an Election Administration Plan (EAP) through the process of public input and public hearings. The EAP must then be approved by the Secretary of State. Your Board does not approve the EAP. Former Clerk-Recorder Mark Lunn prepared the first EAP in 2022 and Clerk-Recorder Ascencion prepared an amended EAP, in accordance with her authority and the requirements of Elections Code section 4005, in 2023. The County’s Amended EAP was approved by the Secretary of State on September 29, 2023.

Respectfully, your Board lacks authority under state law to direct the Clerk-Recorder & Registrar of Voters to conduct elections as one day precinct elections versus as conducted under the Voters Choice Act. That decision is statutorily the Clerk-Recorder’s under state law as the elections official. Adoption of an ordinance, as requested, would impermissibly conflict with state law.

3. *Request that your Board adopt an ordinance directing that any use of electronic tabulation machines shall be accompanied by a full 100% citizens assisted hand count audit.*

Elections Code section 15270.1 prohibits an elections official from conducting a manual vote count in any election held on an established election date and there are more than 1,000 registered voters eligible to participate or the election is held on a date other than an established election date and there are more than 5,000 registered voters eligible to participate. Granted, this request from the public is not a request for a manual vote count on its own but instead a request for a manual 100% hand count audit in conjunction with the electronic tabulation. This request from the public is essentially seeking a recount for every race on the ballot for a given election.

Elections Code section 15360 requires a 1% manual tally process to be undertaken as part of the post-election auditing process to ensure the accuracy and integrity of the results. This 1% manual tally involves the hand count inspection and counting of official ballots from randomly selected tabulated batches of ballots across the County as required by law. The 1% manual tally

process is open to the public to view at any time during the process. Additionally, Elections Code section 15000 requires the elections official to conduct a series of tests to ensure that every device used to tabulate ballots accurately records each vote. The test conforms to the voting procedures for specific voting systems, as adopted by the Secretary of State. Test ballots are processed, and the results are tallied to verify voter's intent and selection. These tests are designed to evaluate the performance of the voting system assuring voters that their choices will be accurately recorded. This process is open to the public to view at any time during the process.

The public commenters are requesting that your Board adopt an ordinance directing the elected Clerk-Recorder & Registrar of Voters to perform a manual audit of every election which may run afoul of Elections Code section 15270.1. As stated above, your Board should not adopt ordinances that conflict with state law. Further, your Board cannot direct how or when Clerk-Recorder Ascencion performs her statutory duty. (*People v. Langdon, supra*, 54 Cal.App.3d at p. 390.)

4. *Request that your Board adopt an ordinance directing that no scanning, counting or preprocessing of ballots in any form shall take place before Election Day.*

Elections Code section 15101 expressly allows all jurisdictions, regardless of whether they are conducting the election under the VCA, to begin processing vote by mail ballot return envelopes and ballots 29 days before the election but requires that all jurisdictions begin processing vote by mail ballots no later than 5:00 p.m. on the day before the election. Specifically, section 15101 permits all jurisdictions to begin processing vote by mail ballot return envelopes 29 days before the election and permits any jurisdiction having the necessary computer equipment to begin processing vote by mail ballots 29 days before the election. (Elec. Code, §§ 15100 and 15101.) Under section 15101, "processing vote by mail ballots includes opening vote by mail ballot return envelopes, removing ballots, duplicating any damaged ballots, and preparing the ballots to be machine read, or machine reading them, including processing write-in votes so that they can be tallied by the machine, but under no circumstances may a vote count be accessed or released until 8 p.m. on the day of the election."

The duty to process ballots, including vote by mail ballots is delegated exclusively to the elections official. As the elections official, Clerk-Recorder Ascencion is expressly allowed under state law to process ballots prior to election day. That decision is statutorily the Clerk-Recorder's under state law. Respectfully, your Board cannot direct how or when Clerk-Recorder Ascencion performs her statutory duty. (*People v. Langdon, supra*, 54 Cal.App.3d at p. 390.) Adoption of an ordinance, as requested, would impermissibly conflict with state law.

5. Request that your Board adopt an ordinance requiring voter identification.

Under state law, identifying information, as well as other specified information, is required when registering to vote and must be validated by elections officials. (Elec. Code, §§ 2188, subd. (b), 2196, subd. (a)(7); Cal. Code Regs. tit. 2, §§ 19073, 20107.) An applicant registering to vote must certify to the truth and correctness of the content of the application, under penalty of perjury. (Elec. Code, § 2188, subd. (e).) An individual who registers to vote knowing that they are ineligible to do so is subject to criminal penalties. (Elec. Code, § 18100.) Elections Code section 14216 further provides that, at the time of voting, a registered voter wishing to vote in person needs only provide their name and address; no further identification is required.

The City of Huntington Beach is currently being sued by the California Attorney General over the City's voter identification law, Measure A, which amended the City's Charter to allow the City to impose voter identification requirements at the polls for municipal elections in 2026. The Attorney General and Secretary of State allege that the City's Measure A is preempted and unlawfully conflicts with state law. If your Board were to adopt an ordinance requiring voter identification, it is foreseeable that the County would face a similar lawsuit.

Additionally, Senate Bill No. 1174 (Min, coauthor Newman) is currently pending before the State Legislature. If enacted, this bill would prohibit a local government from enacting or enforcing any charter provision, ordinance, or regulation requiring a person to present identification for the purpose of voting or submitting a ballot at any polling place, vote center, or other location where ballots are cast or submitted. Should your Board wish to do so, your Board could take a formal position on the Senate Bill.

6. Request that your Board appoint a Citizen's Election Oversight Commission.

Government Code section 31000.1 states that your Board "may appoint commissions or committees of citizens to study problems of general or special interest to the board and to make reports and recommendations to the board." Should your Board wish to do so, your Board could appoint a commission. However, such a commission could only be advisory to your Board and could only make recommendations to your Board. Similar to the limitations on your Board above, such a commission could not direct how or when Clerk-Recorder Ascencion performs her statutory duties under state law. Nor could a commission impede the performance of those statutory duties. If the formation of a commission is desired by your Board to serve as advisory to your Board, this would need to be explored further to determine the proper role for such a commission.

7. Request that your Board establish an independent election fraud hotline and election inspector's office.

During the election education series, Clerk-Recorder Ascencion advised that the Elections Division activates a call center that fields voter inquiries and issues of all kinds throughout the election. Additionally, the Clerk-Recorder & Registrar of Voters has a full-time Legal Compliance Officer (LCO) who handles all the cases that need to be addressed. The LCO sends these cases to both the Secretary of State and/or the Ventura County District Attorney.

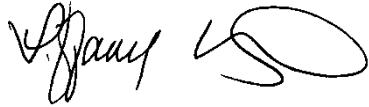
Should your Board wish to do so, your Board could establish an additional hotline/office and staffing for same. However, similar to the limitations on your Board above, such additional staffing could not direct how or when Clerk-Recorder Ascencion performs her statutory duties under state law. Nor could the additional staffing impede the performance of those statutory duties.

Finally, one of the few exceptions to the authority of the elections official pertains to the adoption of a voting system. Elections Code section 19207 provides that your Board may adopt for use at elections any kind of voting system, any combination of voting systems, or any combination of a voting system and paper ballots, provided that the voting systems involved have been certified or conditionally approved by the Secretary of State. As an aside, Elections Code section 19205 prohibits a voting system from being connected to the internet at any time or for a voting system to electronically receive or transmit data through an exterior communication network or to receive or transmit wireless communications or wireless data transfers. Related to the authority to adopt the voting system, your Board is the entity responsible for approval of the budget for the Clerk-Recorder & Registrar of Voters and for approval of any contract with vendors/contractors if the dollar amount is over the Purchasing Agent's authority of \$200,000 per year. Your Board is also tasked with declaring the results of each election under Elections Code section 15400 after your Board receives the certified statement of results from the elections official per Elections Code section 15372, typically accomplished by a routine receive and file consent item.

Board of Supervisors
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This item has been reviewed by the County Executive Office and the Clerk-Recorder & Registrar of Voters.

Very truly yours,

A handwritten signature in black ink, appearing to read "Tiffany N. North", followed by a large, stylized circular flourish.

TIFFANY N. NORTH
County Counsel

TNN:tdb

Attachment: FAQ Prepared by County Clerk-Recorder & Registrar of Voters