

**SEP 7 2018**

DAVID H. YAMASAKI, Clerk of the Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ORANGE NORTH JUSTICE CENTER

DIANA C. FASCENELLI,  
Petitioner,  
vs.  
STEVE FRANKS, City Clerk for City of  
Villa park, California,  
and  
NEAL KELLY, Orange County Registrar of  
Voters,  
Respondents

Case No. 2018-01013530  
  
RULING ON PETITION FOR WRIT OF  
MANDATE  
  
Assigned for all purposes to the Honorable  
Craig L. Griffin  
Department N17

DONALD ROBERT COLLACOTT aka  
ROBERT COLLACOTT,  
Real Party in Interest

The petition for writ of mandate in the above-captioned matter came on for hearing on September 4, 2018, before the Honorable Craig L. Griffin, Department N17 of the Orange County Superior Court, North Justice Center. Appearances were made by Frederick W. Facenelli of Fascenelli & Associates, appearing for Petitioner Diana C. Fascenelli; Todd O. Litfin of Rutan & Tucker, LLP, City Attorney for City of Villa Park, California, for Respondent Steve Franks; Rebecca

1 S. Leeds, Senior Deputy County Counsel, for Respondent Neal Kelly; and Edward R. Danoff, Jr.  
2 specially appearing for Real Party in Interest Donald Robert Collacott. The Court, having taken  
3 evidence, both oral and written, and considered the arguments of the parties, both oral and written,  
4 and taking the matter under submission, now rules as follows:

5 **I. Factual Background**

6 The City of Villa Park is a general law city that consolidates its elections for city council with  
7 the elections held by the County of Orange. Accordingly, Respondent Neal Kelly, as Orange County  
8 Registrar of Voters conducts the election, and Respondent Steve Franks, as City Clerk, is the  
9 elections official for the City of Villa Park. Under the arrangement between the County and the City,  
10 the County performs the ministerial role of accepting elections paperwork from the City and  
11 reviewing it to ensure it is in the proper form and complete. If the candidate filing deadline has not  
12 passed, the County's practice is to reject any incomplete or improper papers and notify the City Clerk  
13 not that the City may cure the issues. Once the deadline has passed, the County accepts the  
14 paperwork from the City and uses it to create the ballot materials. As the election official, the City  
15 Clerk has the authority to directly reject any deficient documents submitted by the candidates.

16  
17 Real Party is an incumbent member of the Villa Park City Council, elected in November of  
18 2014. Real Party pulled nomination papers to seek reelection in the upcoming election on November  
19 6, 2018. Although the last day for an incumbent to file nomination papers was August 10, 2018, Real  
20 Party mistakenly believed that because the filing deadline for nomination papers of non-incumbents  
21 had been extended to August 15, he could wait until then to file his papers. On August 10, the City  
22 notified Real Party that he had until 5:00 p.m. that day to file his papers. Recognizing his mistake,  
23 Real Party, who was San Diego that afternoon, contacted Mary Beth Felcyn to file nomination papers  
24 on his behalf. Accordingly, Ms. Felcyn faxed the fourth page of Real Party's nomination papers,  
25 along with a letter authorizing her to file papers on his behalf, to a FedEx location in San Diego.  
26 Real Party signed the documents, and faxed them back to Ms. Felcyn, who then timely filed with the  
27 City (1) the unsigned original nomination papers; (2) a facsimile of the last page of the nomination  
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1 papers complete with all required signatures of Real Party; and (3) a facsimile copy of the fully  
2 executed letter authorizing Felcyn to file Real Party's candidate statement.

3 The next business day, on August 13, Real Party came into the City Clerk's office and  
4 executed the original nomination papers. At the direction of an election consultant working the City,  
5 Real Party backdated the papers to August 10. The original "wet ink" nomination papers were  
6 forwarded to the County on August 13, 2018. Noting the space for the circulation dates on the  
7 Declaration of Circulator had been left blank, the County contacted the City Clerk, who directed the  
8 County to fill in the missing information. That same day, the County verified the voters whose  
9 signatures were contained on the nomination papers, and determined the signatures were sufficient.  
10 On August 17, 2018, the City Clerk's office sent an email to the County requesting that the fax  
11 version of the nomination papers be substituted for the original, as the fax was the one received on  
12 August 10. The County attached the fax version to the original, but did not take any steps to supplant  
13 the original with it.

## 14 **II. Legal Analysis**

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16 Petitioner, an incumbent on the City Council of Villa Park who is also running for reelection  
17 this November, filed a writ petition seeking to remove Real Party from the ballot. The writ petition  
18 seeks this relief on three theories:

- 19 • The nomination papers filed on August 10 were not notarized, as required under  
20 California Elections Code § 8040, subdiv. (2);
- 21 • The nomination papers containing Real Party's original signature was not filed until  
22 August 13, after the deadline; and
- 23 • At the time of filing, the signature collection declaration did not contain the dates on  
24 which the names and signatures were collected, in violation of California Elections  
25 Code § 8065.

26 Because the parties do not dispute that the filing deadline for Real Party as an incumbent was  
27 August 10, 2018, the Court will address only those documents filed as of that date.  
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1       A. Elections Law

2       Except where the Elections Code statutes are on point, courts look to the statutes on traditional  
3 writs of mandate for practice and procedure in handling petitions for writ of mandate under the  
4 Elections Code. (See Code of Civil Procedure § 1109; *Knoll v. Davidson* (1974) 12 Cal.3d 335, 338.).

5       In considering whether to grant a petition for writ of mandate, courts may receive evidence by  
6 declarations, documentary evidence, or testimony by live witnesses. (*American Federation of State,*  
7 *County and Municipal Employees v. Metropolitan Water Dist. of Southern California* (2005) 126  
8 Cal.App.4th 247, 263; *Appelgate v. Dumke* (1972) 25 Cal.App.3d 304, 315; *California School*  
9 *Employees Assn. v. Del Norte County Unified Sch. Dist.* (1992) 2 Cal.App.4th 1396, 1405; *see also*  
10 CCP §1094; CRC 3.1306.) Generally, the petitioner bears the burden of pleading and proving the  
11 facts on which the claim for relief is based. (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th  
12 1264, 1274.)

13       The right to be considered for and to hold public office whether by election or appointment is a  
14 fundamental constitutional right. (*Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 720.) “The exercise of  
15 this right should not be declared prohibited or curtailed except by plain provisions of law.  
16 Ambiguities are to be resolved in favor of eligibility to office.” (*Carter v. Commission on*  
17 *Qualifications of Judicial Appointments* (1939) 14 Cal.2d 179, 182; *See also Woo v. Superior Court*  
18 (2000) 83 Cal.App.4th 967, 977.)

19       B. Petitioner has Failed to Show Notarization of Nomination Papers was Required

20       Petitioner contends that the nomination papers filed on August 10 were required to be notarized  
21 because Real Party did not execute them in the presence of the City Clerk or nominee.

22       In support of her contention that Real Party’s nomination papers filed on August 10 were required  
23 to be notarized, Petitioner cites Elections Code § 8028 and § 8040, subdiv. (2). Specifically, section  
24 8020, subdiv. (a) provides that “the elections official shall require all candidates filing a declaration  
25 of candidacy to execute the declaration in the office of the elections official,” unless the candidate  
26 designates a person in writing to do so under subdivision (b) of that section. Section 8040,  
27 subdivision (2), provides that a declaration of candidacy form shall be substantially in the form  
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1 included in that section, which includes spaces for the elections official and/or a notary public to  
2 verify the candidate's signature on the nomination form. Implicit is the notion that the candidate  
3 must either sign in the presence of the elections official if filing personally, or sign in the presence of  
4 a notary public if filed by a candidate's designee.

5 The principal problem with Petitioner's argument is that she has not demonstrated that Elections  
6 Code sections 8028 and 8040 apply in the present situation. Sections 8028 and 8040 fall within  
7 Chapter 1, of Part 1, of Division 8 of the Elections Code. Elections Code section 8000 provides that  
8 Chapter 1 "does not apply to: [¶]. . . [¶] (e) Nomination of officers for general law cities."

9 Accordingly, sections 8020 and 8040 are by express statute inapplicable to the present situation.

10 Petitioner seeks to avoid this limitation by citing section 5, which provides: "Division, part,  
11 chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of this  
12 code." But the Court is not relying on the *headings* of the divisions, parts, chapters, articles and  
13 sections of the code to determine the scope of the various Elections Code provisions, but the *express*  
14 *pronouncements* of the code regarding the scope of those divisions, parts, etc. The Court is not free  
15 to apply a statute that is expressly inapplicable.  
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17 Petitioner also relies on section 10512 as requiring notarization of election papers, which  
18 provides:

19 "Each candidate shall set forth in full the oath or affirmation set forth in Section 3 of Article  
20 XX of the California Constitution, which shall be filed with the declaration of candidacy.

21 The county elections official or district secretary, or a person designated by the county  
22 elections official or district secretary, shall administer the oath."

23 Like the other sections upon which Petitioner relies, section 10512 is inapplicable to municipal  
24 elections. Section 10512 is contained in Part 4, of Division 10 of the Elections Code. The scope of  
25 Part 4 is set out in section 10501, which states:

26 "It is the purpose of this part to provide *a procedure for the election of elective officers of*  
27 *districts*. These elections shall be called and conducted and the results canvassed, returned, and  
28 declared pursuant to this part." (Emphasis added.)

1 This case concerns a municipal, not a district election.

2 The municipal election at issue is expressly governed instead by Elections Code sections 10200 et  
3 seq., found in Division 10, Part 2. Part 2 commences with section 10101, which specifies the part's  
4 scope:

5 "This part shall apply to all municipal elections, except where otherwise provided for in the  
6 Constitution of the state, or in a charter duly adopted or amended pursuant to the Constitution of  
7 this state."

8 The form of nomination paper and affidavit in municipal elections is set forth in section 10226, which  
9 is similar in some respects to the form in section 8040 but, significantly, omits spaces for the  
10 elections official and/or a notary public to verify the candidate's signature on the nomination form.  
11 True, the form includes the phrase, "duly sworn" preceding the candidates signature; but nothing  
12 requires a candidate to be sworn in by either an election official or a notary. Petitioner provided no  
13 evidence that candidates are sworn in by Villa Park City Clerk staff; only that the typical procedure is  
14 for the candidates to sign in staff's presence.

15  
16 The requirements for the statement of acceptance in municipal elections are set out in Elections  
17 Code section 10223:

18 "Each nomination paper shall be accompanied by a verified statement of the candidate that he or  
19 she will accept the nomination, and will also accept the office in the event of his election. The  
20 statement shall contain a blank space wherein the candidate shall be required to fill in his or her  
21 name in the manner in which he or she wishes the same to appear on the ballot and also the  
22 designation which he or she wishes to have under his or her name on the ballot, which  
23 designation shall conform to one of the designations permitted under this code relating to the  
24 forms of ballots generally."

25 Nothing in the foregoing suggests papers submitted must be notarized. If the Legislature wanted  
26 nomination papers in municipal election to be notarized, they could have expressly so provided in in  
27 sections 10223 or 10226. Indeed, a previous version of section 10226 expressly required  
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1 notarization; but this requirement was eliminated from the statute in 2004. The Court refuses to read  
2 back into a statute a provision that the Legislature removed.

3 Finally, Petitioner cites the Orange County Candidate's Handbook, which states that notarization  
4 is necessary when papers are returned by a third party. But the Handbook covers various types of  
5 elections, not specifically municipal elections, and cites as authority for the notarization requirement  
6 section 8028, which as noted above, does not apply in municipal elections.

7 C. Petitioner has Failed to Show that a "Wet Ink" Signature is Required on Nomination Papers

8 Petitioner contends that nomination papers must be filed with an original "wet ink" signature, and  
9 that a facsimile signature is inadequate. Because Real Party did not provide a wet ink signature until  
10 after the August 13 deadline, Petitioner contends the papers should have been rejected.

11 Petitioner cites no authority for this proposition, and the Court aware of none prohibiting the  
12 filing of nomination papers bearing a facsimile signature.

13 D. Petitioner Has Failed to Show that the Failure to Include Dates of Circulation Invalidates the  
14 Nomination Papers

15 On the papers filed on behalf of Real Party, the space on the nomination form for the dates the  
16 nomination papers were circulated for signatures was left blank. Petitioner contends this omission  
17 invalidates the filing. Not so.

18 In support of this argument, Petitioner cites section 8065 which provides: "The elections official  
19 shall not accept for filing any nomination paper unless all blanks in the certificate are filled." But  
20 section 8065 is, as with the other sections upon which Petitioner relies, inapplicable to municipal  
21 elections. The requirements of the declaration of the circulator applicable to municipal elections is  
22 found in Elections Code 10222:

23 "Every nomination paper shall have annexed an affidavit of the person who circulated it, to the  
24 effect that he or she saw written all the signatures appended thereto, and knows that they are the  
25 signatures of the persons whose names they purport to be."  
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27 Nowhere in the foregoing is any requirement that the dates of circulation be included in the circulator  
28 affidavit.

1 In a supplemental brief submitted after the matter was taken under submission, Petitioner for the  
2 first time cites section 104, which provides:

3 '(a) Wherever any petition or paper is submitted to the elections official, each section of the  
4 petition or paper shall have attached to it a declaration signed by the circulator of the petition or  
5 paper, setting forth, in the circulator's own hand, the following: [¶] . . . [¶] (3) The dates between  
6 which all the signatures to the petition or paper were obtained."

7 Section 104 is a general Elections Code provision applicable to all elections, and does specify that  
8 the declaration of the circulator "shall" include the dates the signatures were obtained. Thus, the  
9 question arises whether is a failure to comply with this obligation sufficient to invalidate a  
10 candidate's nomination papers. The answer is no.

11 This very issue was addressed in *Whittemore v. Seydel* (1946) 74 Cal. App. 2d 109, in which a  
12 referendum was introduced seeking to request the overturning of a city ordinance. The referendum  
13 was challenged in part because a previous Elections Code provision, section 45, purportedly required  
14 that the dates of circulation be included in the filing papers.

15 Although there was some question whether this requirement applied to the referendum, the Court  
16 of Appeal in *Whittemore* determined that even if statutorily required, the failure to include the dates  
17 of circulation did not render the referendum invalid. The Court noted that each of the signers dated  
18 the document, making it apparent the dates it was circulated. The Court rejected the challenge on this  
19 basis, observing:

20 "To construe the provision of section 45 regarding the affidavit so as to render the whole  
21 proceeding void, as respondent contends it should be construed, would be not only illiberal, but  
22 would be a case of the tail's wagging the dog. Here the petition and the affidavits furnished  
23 evidence sufficient to satisfy the city clerk of these matters, and he certified to the Council that he  
24 had determined that the requisite number of qualified electors had signed. Under such  
25 circumstances the wishes of said electors should not be defeated by omissions of the affidavits to  
26 state matters which, if stated, would obviously only serve to confirm that which was already  
27 apparent."  
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1 *Id.* at 116. So it is in the present case. The nomination papers were dated July 27, 2018 by the  
2 Deputy Clerk when they were provided to Real Party, and were returned on August 10, 2018. The  
3 inconsequential nature of the omission was addressed by Respondent Kelley in his supplemental  
4 opposition. Acknowledging that the City provided circulation dates to County Staff, who then added  
5 them to Real Party's paperwork, he noted: "Though this was a deviation from our custom and  
6 practice, it was, in my opinion, inconsequential. This is because nomination documents re only  
7 circulated when candidate filing is open, so the circulation date range is irrelevant for candidate races  
8 (in contrast to, for example, referendum petitions or initiatives)." As in *Whittemore*, invalidating  
9 Real Party's candidacy based on an inconsequential omission, would be the "tail[] wagging the dog."

10 The Court in *Whittemore* also found "strong support" for the notion that section 45 did not apply  
11 to municipal elections by reference to the location of that statute within the Elections Code. In  
12 seeking to reconcile various parts of the Elections Code, the Court cited "the rule that specific  
13 provisions relating to a particular branch of a subject must govern that branch as against general  
14 provisions in other parts of a statute . . . ." *Id.* at 120. Applying that rule here, section 10222,  
15 applicable specifically to municipal elections, should take precedence over the general provision of  
16 section 104.  
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18 Moreover, Elections Code section 10200, applicable specifically to municipal elections, provides:

19 "This chapter shall be liberally construed to promote its objects, and no error, omission or  
20 irregularity shall invalidate an election if there has been a substantial compliance with this  
21 chapter."

22 The purpose of the foregoing, providing for a liberal construction and applying the substantial  
23 compliance doctrine to municipal elections, is manifest; except for very large cities, those running for  
24 city council are typically not professional politicians, but local residents willing to be involved in the  
25 running of their communities. Given this reality, minor omissions and irregularities in complying  
26 with the complexities of the Elections Code are to be expected.  
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1       Petitioner contends that the doctrine of substantial compliance applies only to post-elections  
2 challenges; that pre-election challenges are held to a “strict compliance” standard. The Court  
3 disagrees.

4       Despite any facial appeal of such a dichotomy, rejecting a candidate for office either before or  
5 after the election deprives both the candidate of the fundamental right to run for office, and the voters  
6 of their equally fundamental right of choosing their officials. The importance of voters’ choice is  
7 great here, where there are apparently four candidates vying for three seats; forcibly removing one of  
8 the candidates leaves voters with no real choice in the election.

9       Moreover, case law does not support Petitioner’s contention that elections statutes are to be  
10 applied differently based on whether the challenge is brought pre- or post-election. For example, in  
11 the case of *Daniels v. Tergeson*, 211 Cal. App. 3d 1204, upon which Petitioner relies, the Court of  
12 Appeal determined a candidate who filed candidacy papers two days late was ineligible. In doing so,  
13 the Court did not base its decision on the timing of the challenge, but whether the statute provision  
14 violated was subject to the doctrine of substantial compliance. After considering the language and  
15 purpose of the provision violated, the Court applied the following principle:

16       “Whether a provision is mandatory or directory depends on the character of the act prescribed. If it  
17 goes to the substance or necessarily affects the merits or results of an election, the provision is  
18 mandatory. Provisions relating to the time and place of holding elections, the qualifications of  
19 voters and candidates and other matters of that character are mandatory.”

20       Significantly, the Court in *Daniels* distinguished that case from the more liberal the application of  
21 the substantial compliance doctrine in referendum cases because it found “[t]here is a judicial policy  
22 to construe liberally the power of initiative and referendum.” *Id.* at 1210. As set forth above, section  
23 10200 articulates a legislative policy to apply the doctrine of substantial compliance to municipal  
24 elections.

25       Another case cited by Petitioner is *D’Agostino v. Superior Court* (1996) 33 Cal. App. 4th 107, in  
26 which the Court of Appeal upheld the city clerk’s refusal to accept nomination papers of a candidate  
27 who fell 35 signatures short of the required 500 for that office. In making this decision, the Court  
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1 again did not draw a distinction between pre- and post-election challenges, but the nature of the  
2 technical requirements violated. Specifically, the Court quoted from other election cases that set  
3 standards for when the doctrine of substantial compliance can and cannot be applied. Among those  
4 cited was the principle that “[s]ubstantial compliance ... means actual compliance in respect to the  
5 substance essential to every reasonable objective of the statute.” *Id.* at 116 (*quoting Stasher v.*  
6 *Harger-Haldeman* (1962) 58 Cal.2d 23, 29.) Also cited was the issue whether the asserted errors  
7 have “interfered with the statutory purpose behind the technical regulations.” *D’Augustino* at p. 117  
8 (*citing Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 652-653.)

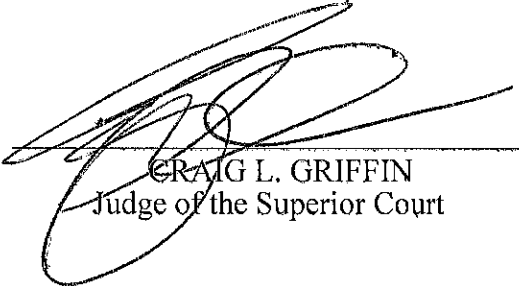
9 Accordingly, whatever purpose section 104 may have in requiring the dates of circulation, this  
10 purpose was not interfered with in the present case, where it was clear the petition was circulated  
11 between July 27 and August 10, 2018. As Respondent Kelly, in charge of County and City elections,  
12 noted, the omission of the dates of circulation was “immaterial.”

13 Petitioner raises a number of other issues in her supporting papers, such as Petitioner failing to  
14 physically attach his signed facsimile page to his original application, and allegedly using the place of  
15 execution on his papers as Villa Park and Orange County, while his actual signing was in San Diego.  
16 Because these issues were not squarely raised in her writ petition, the Court does not consider them.

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18 **III. Ruling**

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20 The Petition for Writ of Mandate is DENIED.

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23 Dated this 7<sup>th</sup> day of September, 2018

24   
25 CRAIG L. GRIFFIN  
26 Judge of the Superior Court  
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