

COPY
Legislative Counsel
of California

BION M. GREGORY

Jack L. Honan,
Chief Deputy
L. Ashford
J. Foster
T. Studebaker
Daniel A. Weitzman

David D. Alves
John A. Corzine
C. David Dickerson
Robert Owen Duffy
Robert D. Gronke
James A. Marsala
Robert O. Miller
Verna L. Oliver
Tracy O. Powell II
Marguerite Roth
Michael H. Upson
Christopher Zinke
Principal Deputies

State Capitol, Suite 3021
Sacramento, CA 95814-4996
(916) 445-3067
Telecopier: (916) 322-0769

David Ross Adams
Martin L. Anderson
Paul Anella
Charles C. Asbill
Joe J. Ayala
Barbara P. Beisler
Lara K. Bierman
Dede F. Boyer-Vine
Ann M. Burnstorf
Eileen J. Burton
Gwyneth L. Byrd
Barbara Cuthbertson
Ethila Cuiher
Ben E. Dale
Jeffrey A. DeLang
Clinton J. deVries
Frederic S. Dorbin
Maureen S. Dunn
Sharon R. Fisher
Clay Fuller
Patricia R. Gibbs
Debra Zidich Gibbons
Gina K. Gilbert
Ann D. Greist
Marie Hinkos Hunka
Jane T. Harrington
Baldy S. Hair
Thomas R. Heuer
Ruben L. Iniguez
Lori Ann Joseph
David B. Judson
Michael R. Kelly
Michael J. Kersten
L. Douglas Kinney
Eva B. Kronger
Aubrey Ladew
Feltie A. Lee
Victoria K. Lewis
Diana G. Lim
Jennifer Loomis
Romulo I. Lopez
Kirk S. Louis
Marlene Martin
Francisco A. Martin
Sally B. McCough
Peter Melnicko
Michael M. Manserv
John A. Moyer
Abel Munoz
Conna L. Neville
Sharon Peahy
Michael B. Seismo
Keith T. Schulz
William K. Stark
Jessica L. Steale
Ethan Swind
Mark Franklin Terry
Jeff Thom
Richard Thomson
Elizabeth M. Ward
Richard B. Weisberg
Thomas D. Whelan
Jack G. Zorman

Sacramento, California
July 12, 1993

Honorable Sal Cannella
5155 State Capitol

Liabilities of Elected Officials for Noncompliance
with Elections Code - \$23902

Dear Mr. Cannella:

You have related to us the following fact situation:

In a county where the clerk/recorder is the elections official, the board of supervisors has reduced the budget of the county Elections Department to a level insufficient to enable the county clerk/recorder to conduct the June 1994 election in full compliance with applicable state mandates. Certain expenditures essential to conducting an election in compliance with the law must be made prior to the date of the election, and the county auditor/controller will not disburse funds that are not authorized in the budget adopted by the board.

In this connection, you have asked that we discuss the means by which the county officials might be compelled to conduct the election in question, and the legal consequences for the clerk/recorder and other elected officials of the county if the election is not held in full compliance with state law, including Section 10000 of the Elections Code.

In order to compel the county to comply with the Elections Code, the appropriate action would be to seek a writ of mandamus, also called a writ of mandate (Sec. 1084, C.C.P.), to compel the performance of the act or acts required by law. Sections 1085 and 1086 of the Code of Civil Procedure set forth the basic requirements for issuance of a writ of mandate. They read as follows:

"1085. It may be issued by any court except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel

*faxed
Jill LaVine
4/27/09 om*

Honorable Sal Cannella - p. 2 - #23902

the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is lawfully precluded by such inferior tribunal, corporation, board or person."

"1086. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."

The purpose of a writ of mandate is to enforce a clear legal right of a petitioner against one who has a legal duty to perform an act necessary to the enjoyment of that right (Sec. 1085, C.C.P.; Farrington v. Fairfield, 194 Cal. App. 2d 237, 239). It may only be used to compel the performance of a ministerial act, to compel the exercise of discretion where there is a discretionary duty involved, or to control an abuse of discretion (Sec. 1085, C.C.P.; Thurmond v. Superior Court, 66 Cal. 2d 836, 840-841; Metropolitan Water Dist. v. Marquardt, 59 Cal. 2d 159, 170; Broyles v. Carter, 142 Cal. App. 2d 647, 650). If the act is not ministerial, but discretionary, a writ will not be issued to compel the performance of the act in a particular manner (Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 315). An act is considered to be ministerial if it does not involve the exercise of judgment or discretion (Jenkins v. Knight, 46 Cal. 2d 220, 223-224).

Division 8 (commencing with Section 10000) and Division 10 (commencing with Section 14000) of the Elections Code enumerate the general duties of the county clerk in the conduct of elections. For example, each county clerk is required to prepare, print and mail sample ballots to every registered voter (Sec. 10010); for each election, the elections official is required to provide ballots for at least 75 percent of the registered voters in each precinct (Sec. 14002); among other things, the clerk is required to furnish to each precinct officer (a) printed copies of the precinct indexes, (b) necessary printed blanks for the roster, tally sheets, lists of voters, declarations and returns, (c) envelopes in which to enclose returns, (d) not less than six nor more than 12 instruction cards to each precinct for the guidance of voters in obtaining and marking their ballots, (e) a digest of the election laws, and (f) an American flag of sufficient size to adequately assist the voter in identifying the polling place (Sec. 14005). Additionally, the county clerk is required to provide absentee ballots to all registered voters who request them (Sec. 1003); and, when ballots are counted in a central place, or whenever mechanical voting devices are used to mark ballots at the polling place, or in any direct primary or general election, the

Honorable Sal Cannella - p. 3 - #23902

election officer must create precincts so that no precinct contains more than 1,000 voters (Secs. 1508 and 1510). In our view, the duties of a county clerk/recorder mandated by the Election Code are generally ministerial, rather than discretionary (see, in this regard, Spreckels v. Graham, 194 Cal. 515, 519; see also Felton v. Groveland Community Services District, 135 Cal. App. 3d 797, 806, 807). Regardless, as noted above, where a discretionary duty is established by law, the writ of mandate may be used to compel the exercise of discretion.

The only basis in law that would excuse performance of these duties would be that of impossibility (see People v. Smith, 123 Cal. 70). Hence, if performance of the duties is rendered impossible for any reason, mandamus will not lie (Stracke v. Farquar, 20 Cal. 2d 82); (Raines v. Zemansky, 176 Cal. 369). We cannot say whether a court would find the refusal of the board of supervisors to fund an election would render it legally impossible for a county clerk/recorder to perform his or her mandated election duties. This would be a question of fact for the court, and in our view would depend upon the actual ability of the clerk/recorder to carry out his or her duties despite the inaction of the board of supervisors.

With respect to the duties of the board of supervisors in conducting a local election, Section 10000 of the Elections Code requires the county to pay the costs of conducting an election. In our opinion, even though the section makes this requirement of the county generally, without reference to any particular office or agency of the county, since the spending authority of the county is vested in the board of supervisors, funding the costs of legally required elections is a legal duty of the board of supervisors. Thus, the board could be compelled by writ of mandate to fund the costs of an election. In this regard, the courts have held that any county argument regarding financial costs incident to the granting of judicial relief where relief is compelled by law is required to be addressed to the Legislature and not to the courts (Rogers v. Detrich, 58 Cal. App. 3d 90, 103).

As discussed above, impossibility is a legal defense against an action of mandamus. Thus, a county may request a court to excuse its performance of a state mandate where circumstances make the performance impossible. However, for instance, when Butte County claimed that its financial condition left it unable to comply with a state mandate, the court refused to accept the county's claim and said that the county could use existing county funds for state-mandated programs and could try to increase its locally generated revenues by asking voters to approve special taxes to provide funding for the sheriff, the libraries, the roads, or other local programs (Board of Supervisors v. McMahon,

Honorable Sal Cannella - p. 4 - #23902

219 Cal. App. 3d 286, 301-303). As each case will be decided on its particular merits, we cannot predict the outcome of any litigation arising from the facts presented here.

Regardless, it is clear that if a court finds a county's claim of financial impossibility to be legally inadequate, and elected officials of the county then refuse to comply with a court order, they may be cited for contempt. For example, in Ross v. Superior Court, 19 Cal. 3d 899, 916, the court held the members of the Plumas County Board of Supervisors guilty of contempt for willfully violating a court order requiring the payment of retroactive welfare benefits. Upon being informed by the Plumas County Welfare Director that a court order mandated the payment of retroactive welfare grants, the Plumas County Board of Supervisors adopted a motion resolving "that Plumas County not comply with the court order, as this would be an unanticipated expense for which no county funds are available" (Id., at p. 903). Each member of the board of supervisors was fined \$500 for being in contempt of the court order (Id., at p. 904).

As to the question of who has standing to seek a writ of mandate, Section 1085 of the Code of Civil Procedure provides that a person or corporation may seek the writ to compel an act that the law requires. Section 1086 of the Code of Civil Procedure requires that the writ of mandate be "issued upon the verified petition of the party beneficially interested." However, if the writ is to procure the enforcement of a public duty, the petitioner need not show that he or she has any legal or special interest in the result, since it is sufficient that the petitioner is interested as a citizen in having the laws enforced and the duty in question executed (Santa Monica Mun. Employees Assn. v. City of Santa Monica, 191 Cal. App. 3d 1538, 1548).

While a private person or corporation may seek a writ of mandate, the writ may also be petitioned by public agencies and officers (see Huntington Park Redevelopment Agency v. Martin, 38 Cal. 3d 100; Bell Community Redevelopment Agency v. Woosley, 169 Cal. App. 3d 24; County of Placer v. Corin, 113 Cal. App. 3d 443). Thus, for instance, we think a county clerk/recorder could, under appropriate circumstances, seek a writ of mandate to compel a county board of supervisors or the county auditor controller to pay all costs of conducting a legal election, in order that the clerk/recorder may carry out his or her statutorily mandated duties to conduct the election.

In addition, it should be observed that Section 29102 of the Elections Code provides:

"[e]very person charged with the performance of any duty under the provision of any law of this

Honorable Sal Cannella - p. 5 - #23902

state relating to elections, who willfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment is prescribed by this code, punishable by fine not exceeding one thousand dollars (\$1000) or by imprisonment in the state prison for 16 months or two or three years, or by both."

Furthermore, Section 1222 of the Government Code provides that "Every willful omission to perform any duty enjoined by law on any public officer, or person holding any public trust or employment, where no special provision is made for punishment of such delinquency, is punishable as a misdemeanor." Section 661 of the Penal Code specifies that "In addition to the penalty affixed by express terms, to every neglect or violation of official duty on the part of public officers, state, county, city, or township, where it is not so expressly provided, they may, in the discretion of the Court, be removed from office." Sections 3060 to 3073, inclusive, of the Government Code, prescribe the procedures for initiation and prosecution of legal proceedings against officers of districts, counties, or cities, for "willful or corrupt misconduct in office." The latter procedures involve the presentation of an accusation to the grand jury and prosecution by the district attorney at a trial by jury. Sections 3060 and following of the Government Code apply only to general law counties, and not to charter counties.

In summary, we have concluded that (1) elected officials of the county may be compelled by writ of mandate to comply with the Elections Code; (2) elected officials of the county may be held in contempt of court for failure to comply with any court order such as described above; and (3) elected officials of the county charged with the performance of any duty or duties relating to elections who fail to perform those duties may be subject to criminal penalties under appropriate facts as summarized above.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By *Romulo I. Lopez*
Romulo I. Lopez
Deputy Legislative Counsel

RIL:mv