



Memorandum

TO: MAYOR AND CITY COUNCIL **FROM: Councilmember Manh Nguyen**

**SUBJECT: CERTIFICATION OF THE
RESULTS OF THE PRIMARY
AND SPECIAL MUNICIPAL
ELECTIONS HELD JUNE 7,
2016**

DATE: August 2, 2016

APPROVE

08/02/16

RECOMMENDATION:

Accept Staff Recommendation, but defer the certification and/or confirmation of the results in the District 4 contest until such time that the recount and election contest process in the courts under the California Elections Code has concluded.

BACKGROUND:

We should recognize that in extremely close races, what we have is a *de facto* tie, and that unless we have a true mathematical tie, the contest process laid out in the California Elections Code effectively functions as our tiebreaking mechanism. Recounts and consideration by the courts are a part of this process. The recount is coming to a close, and the matter is now for the courts to consider (please see the attached report). Accordingly, we should allow the process to fully run its course before certifying and/or confirming the results for the District 4 council race.

THE SUTTON LAW FIRM

Report of Errors and Omissions in Connection with June 7, 2016 Fourth District San Jose City Council Election and Recounts

Prepared by Bradley W. Hertz, Esq.

Partner, The Sutton Law Firm

July 29, 2016

Over the course of the past several weeks -- during the post-election canvass, the automatic recount required by the Board of Supervisors, and San Jose City Councilman Manh Nguyen's voter-requested recount -- and based on detailed personal observation, extensive document review, and personal interviews, it has become clear that numerous critical legal procedures and safeguards designed to ensure the integrity of the June 7, 2016 Fourth District City Council election have not been followed.

Accordingly, we recommend that the Santa Clara County Registrar of Voters declare the election results for the June 7, 2016 San Jose City Council Fourth District City Council election to be uncertain and inconclusive, and that the results not be certified. We further recommend that a new election be conducted between candidates Manh Nguyen and Lan Diep on November 8, 2016.

Among the concerns we have with regard to the integrity of the election are the following:

1. At least five instances of double voting by individuals in the Fourth District, where such double votes were counted, with no way of knowing for which candidate such votes were recorded.
2. The apparent loss of 257 ballots between the certification of the election on July 7, 2016 (in which 2,984 alleged undervotes and overvotes were tallied) and the certification of the automatic recount July 14, 2016 (in which 2,727 alleged undervotes and overvotes were tallied). While many of these lost ballots may be "undervotes" or "overvotes" and thus not have an impact on the number of ballots cast for the two candidates, it is impossible to determine for whom, if anyone, these ballots were cast, nor has the Registrar's office provided an explanation for this extremely large number of missing ballots.

3. The fact that the July 7, 2016 and July 14, 2016 vote tallies were different in all 41 non-all-mailed-ballot precincts. The differences were in the double digits in the following precincts (1403, 1416, 1417, 1419, 1439, 1459, 1467, and 1497), and over five in the following precincts (1401, 1405, 1409, 1411, 1413, 1420, 1428, 1429, 1444, 1446, 1448, 1455). The Registrar's office has not provided an explanation for these dramatic differences.

4. The fact that the July 7, 2016 and July 14, 2016 vote tallies for Councilman Nguyen were different in the following 21 of the 41 non-all-mailed-ballot precincts (1403, 1408, 1414, 1416, 1417, 1419, 1422, 1431, 1432, 1433, 1434, 1435, 1446, 1447, 1448, 1450, 1451, 1459, 1465, 1497, and 1515). The Registrar's office has not provided an explanation for these dramatic differences. Although there was a net gain to Councilman Nguyen's tally of 8 votes, the fact that he gained 28 votes and lost 20 votes should be of grave concern to the Registrar's office. One must ask why the Nguyen recount tallies were so different from the original tallies of only one week prior.

5. The fact that the July 7, 2016 and July 14, 2016 vote tallies for Mr. Diep were different in an even more alarming 23 of the 41 non-all-mailed-ballot precincts (1403, 1408, 1409, 1410, 1415, 1416, 1417, 1422, 1428, 1431, 1432, 1436, 1444, 1446, 1447, 1448, 1449, 1453, 1465, 1467, 1469, 1472, and 1515). The Registrar's office has not provided an explanation for these dramatic differences. Although there was a net loss to Mr. Diep of 6 votes, the fact that he gained 21 votes and lost 27 votes should be of grave concern to the Registrar's office. One must ask why the Diep recount tallies were so different from the original tallies of only one week prior.

6. The admission by the Registrar's office staff that nearly 40 ballots from precinct 1416 were "overlooked" during the first recount, as a result of "human error."

7. A large number of ballots potentially requiring duplication not being marked with a "D" as required by the Official Canvass Manual (the "Manual" at page 8).

8. The required Duplication Log being in disarray in violation of the Manual (at page 9), and thus being of no assistance in verifying the accuracy of the duplication process and the number of duplicated ballots.

9. Numerous problems regarding the placement of the duplicating team's initials on the voided and duplicated ballots, in violation of the Manual (at page 9). Duplication teams often appear not to have cross checked each other's work, and in a large number of instances appear to have initialed documents for one another. A number of "duplicate" and "void" ballots contained no initials of duplication team members, in further violation of the Manual. That the duplication process was not followed with a large number of ballots undermines the integrity of the ballot duplication process and fails to provide a

comfort level that ballots were duplicated properly and that there was no fraud or other wrongdoing.

10. Numerous problems regarding the accuracy of the serial numbers placed on the voided and duplicated ballots, in violation of the Manual (at page 9). In this regard, some serial numbers were not in sequential order (as required), were not present on the void or duplicated ballots at all, or repeated themselves, seriously undermining the ballot duplication process and casting doubt on the accuracy of the duplications.

11. Situations in which duplicate ballots or voided/original ballots were located but could not be determined to correspond with one another.

12. Admissions by the Registrar's office staff on Monday, July 11, 2016 that there was "lots of human error" in connection with the ballot duplication process.

13. Numerous problems with the tallying of the "partial ballots" and the placement or non-placement of an "X" in the field pertaining to the Fourth District City Council race. The recordkeeping with regard to the partial ballots was so lacking that it is unclear how many voters were either disenfranchised (because they were Fourth District voters but were not allowed to vote for Nguyen or Diep) or how many illegal votes were tallied (because they were not Fourth District voters but were allowed to vote for Nguyen or Diep). After certain provisional voters were identified as not being eligible to vote in the Fourth District, the Registrar's staff would open the ballot envelope to remove the ballot, but then fail to mark an X on the Fourth District area of the ballot. Because the envelope was then separated from the ballot, such that the ballot could not be traced back to the envelope, and because the Registrar's staff in many instances failed to mark an X in the Fourth District area of the voided/original provisional ballot, a number of illegal ballots were counted (but it is unknown if they were tallied for Nguyen or Diep).

14. The failure of the Registrar's office to use the best evidence of the voters' intent by looking to the original ballots, rather than the duplicate ballots, during the recount process.

15. The opening of at least one provisional ballot envelope in such a way as to identify a particular voter's vote, in violation of that voter's constitutional right to the privacy of his or her vote.

16. The processing of what was said to be nearly 1,900 provisional precinct ballots from the Fourth Council District on or about June 14, 2016, and the fact that this number is inconsistent with (and 700 ballots greater than) the total number of provisional ballots from the Fourth District (1,200).

17. At least one vote-by-mail envelope that contained a completely different name and signature from that of the voter to whom the ballot was sent, indicating possible fraud or an error in the Registrar's office computer system.

18. The Registrar's refusal to allow those who were officially observing and participating in the recount to photograph ballots, until it was pointed out to the Registrar's office that such refusal was improper under the election laws.

Although our investigation is ongoing and we intend to further examine the Registrar's election processes and procedures in the context of an election contest to be filed in Santa Clara Superior Court next week, we wanted to point these observations out to you at this juncture.

If we may provide additional information, please contact us.