

**COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

CITIZENS OVERSIGHT, INC., a Delaware non-profit corporation; RAYMOND LUTZ, an individual,

Plaintiffs and Cross-Appellants,

v.

MICHAEL VU, San Diego Registrar of Voters, HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer, SAN DIEGO COUNTY, a public entity; DOES 1-10,

Defendants and Appellants.

4th Civil No. **D071907**

(San Diego Superior Court
Case No. 37-2016-00020273-CL-MC-CTL)

Appeal from a Judgment of the Superior Court,
State of California, County of San Diego
Honorable, Joel R. Wohlfeil, Judge Presiding

APPELLANTS' COMBINED REPLY BRIEF AND CROSS-RESPONDENTS' BRIEF

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INTRODUCTION

Citizens Oversight, Inc. and its principal, Raymond Lutz, (collectively “Lutz”) concede that this appeal and Lutz’s cross-appeal depend on the proper statutory interpretation of Elections Code¹ section 15360. Specifically, when the Registrar conducts the 1 percent manual tally (manual tally) required by section 15360, subdivision (a), to what extent must Vote-by-Mail (VBM) ballots be included in the manual tally? On Lutz’s cross-appeal, the court must decide whether provisional ballots are excluded or included in the manual tally. (RB/XAOB at 7, 35, 52.)

The trial court reached a split decision. (2 CT at 557.) As to VBM ballots, the trial court concluded the “more reasonable” interpretation was that proffered by Lutz that *all* VBM ballots must be included in the manual tally, regardless of the method used and regardless of when the Registrar conducts the manual tally. (*Id.*, at 555.) With respect to provisional ballots, the trial court concluded that such ballots are not required to be included in the manual tally. (*Id.*, at 550-551, 553-555.)

Recent legislation has clarified that the Registrar’s interpretation of section 15360 is correct. Specifically, subsequent to the filing of the Registrar’s Opening Brief, the Legislature amended section 15360 expressly clarifying that the manual tally is properly limited to VBM ballots already processed and tabulated as of the semifinal official canvass. (Stats. 2017, ch. 820, § 2; Elec. Code, § 15360, subs. (a)(1) and (a)(2)(A) and (B)(i) as amended.) This recent legislation along with the legislative history behind the manual tally and proper application of statutory construction demonstrates that the trial court erred in finding that section

¹ Unless otherwise noted, all references are to the Elections Code.

15360 requires *all* VBM ballots “cast” in the election to be included in the random selection process for the manual tally.

Lutz ignores the Legislature’s recent clarification that the manual tally is a tally of the “ballots canvassed in the semifinal official canvass.” (Stats. 2017, ch. 820, § 2 (Assem. Bill No. 840); Elec. Code, § 15360, subds. (a)(1) and (a)(2)(A) and (B)(i).) Instead, Lutz claims the plain language and legislative history actually supports his interpretation that all VBM ballots “cast” in the election must be included in the manual tally, regardless of the method selected. (RB/XAOB at 39-40.) The problem – to do so, requires the court to ignore the qualifying language “of the ballots tabulated by those devices” in subdivision (a) which necessarily modifies and limits the ballots to be included in the manual tally to those already tabulated. Lutz’s argument requires the court to rewrite the statute by nullifying the qualifying language – a task the court cannot do. (Code Civ. Proc., § 1858.)

Lutz also ignores the impact of implicit statutory discretion given to election officials as to when, within the official canvass, the manual tally is to be conducted. His construction would require election officials to wait until the very end of the official canvass, after all ballots are counted, before initiating the manual tally, rather than near the beginning when any problems with the tabulating machines can be corrected without jeopardizing election officials’ ability to timely certify an election.

On Lutz’s cross-appeal he contends the trial court erred in excluding provisional ballots from the manual tally. (RB/XAOB at 51-54.) Lutz argues that provisional ballots are a “ballot” under section 301 that are cast by voters, and are processed through the voting system once verified. (*Id.*, at 52-53.) On that basis, he reasons they must be included in the manual tally. Not so.

Lutz’s simplistic analysis flies in the face of express legislative action excluding “provisional ballots” from section 15360’s manual tally provisions. This court cannot insert into the statute that which the Legislature expressly omitted. (Code Civ. Proc. § 1858.) The trial court’s judgment finding provisional ballots are not required to be included in the manual tally is supported by the statutory language and the legislative history.

The judgment should be reversed as to the finding section 15360 requires all VBM ballots be included in the manual tally and affirmed on the exclusion of provisional ballots from that tally.

LEGAL DISCUSSION

APPELLANTS’ REPLY

I.

A LATENT AMBIGUITY EXISTS IN SECTION 15360 BECAUSE IT DOES NOT REQUIRE A TRUE 1 PERCENT MANUAL TALLY OF ALL BALLOTS CAST IN AN ELECTION BUT RATHER A MANUAL TALLY OF BALLOTS CAST IN 1 PERCENT OF THE PRECINCTS WITH DIFFERENT METHODS ALLOWED IN RELATION TO VOTE BY MAIL BALLOTS

It is undisputed that the “[o]ne percent manual tally” is the public process of manually tallying votes in 1 percent *of the precincts*, selected at random by the elections official, and in one precinct for each race not included in the randomly selected precincts.” (§ 336.5 [emphasis added]; 2 CT 553.) It is also undisputed that the limited purpose of the manual tally is to “verify the accuracy of the automated count” and that it must be conducted “during the official canvass.” (*Ibid.*) To that end, section 15360 provides, in part, “[d] uring the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a

public manual tally *of the ballots tabulated by those devices*, including vote by mail ballots” (§ 15360, subd. (a) [emphasis added].)

Because the Legislature elected to use a precinct based approach to verify the accuracy of the devices conducting the automated count, the manual tally does not result in a true counting of one percent of *all* ballots cast in an election. Rather, the audit conducted through the manual tally may count less than or more than one percent of all ballots cast in an election because the number of ballots manually tallied is dependent on the number of ballots cast in the randomly selected precincts.

This statutory structure means the Legislature did not envision a true one percent manual tally of all ballots cast in an election. Nor did it establish a process to manually verify the accuracy of all machines used in a given county’s voting system, e.g. one percent of votes tabulated by each machine. Instead, it selected a precinct based audit system as the means of conducting a random check on the accuracy of the voting system with that check to be conducted *concurrently* with the process of finalizing and counting all ballots cast in an election. The choice of a precinct based random check makes sense because the state allows counties to choose from a variety of state approved voting systems (See § 19200 et seq.), and there may be more than one type of voting system used within a county as contemplated by 15360, subdivision (b).

The temporal requirement that the manual tally be conducted *concurrently* with the official canvass, before all votes cast in an election have been processed and tabulated, necessarily means that the Legislature knew that not all votes cast in an election, or in a randomly selected precinct, would in fact be included in the manual tally if they had not already been processed and counted by the voting system. This conclusion is evidenced by the express qualifying language used by the Legislature in section 15360, subdivision (a), “of the ballots tabulated by those devices.”

That language necessarily contemplates that the manual tally is a tally of ballots already tabulated by the voting system. Had the Legislature intended election officials to wait until after all votes cast in an election were processed and counted by the automated voting system before conducting the manual tally, it could have easily specified that the manual tally be conducted after the official canvass. This it did not do.

The Legislature's selection of a random precinct based audit check on voting systems presents challenges to Registrars in relation to the increasing use of VBM ballots. Under the original "precinct" method existing in section 15360 after 2006 but before 2012, Registrars were required to identify and locate VBM ballots (then referred to as absentee ballots) submitted by voters registered in the randomly selected precincts for inclusion in the manual tally. This process was very labor intensive. (See Sen. Com. On Elections, Reapportionment and Const. Amends., analysis of Assem. Bill No. 46 (2009-2010 Reg. Sess.), Jun. 17, 2010, p. 2 ["Counties currently have to manually tally a portion of these ballots but must first sort them by precinct. By allowing the counties to conduct separate manual tallies for polling place and VBM ballots, elections officials will not have to conduct the labor intensive and lengthy sorting process."].) That challenge is amplified in short duration special elections as recognized by the Legislature's 2010 temporary enactment of Elections Code section 15360.5, which was the precursor to the current alternative "two-part" manual tally.

The challenge also exists in large counties and counties which rely heavily on VBM ballots in place of physical polling locations. It was this challenge that led to the 2011 amendments to section 15360 setting forth the two authorized methods of conducting the manual tally – the original "precinct method" and the newer "two-part" method. (See Stats. 2011 ch. 52, § 1 (Assem. Bill No. 985) (2011-2012 Reg. Sess.)) Both methods

include VBM ballots, but the two methods treat VBM ballots differently in relation to how the manual tally is conducted. It is that differing treatment, along with internally different language used in section 15360 – “ballots tabulated by those devices” in subdivision (a) as compared to “ballots cast” used in subdivision (a)(1) and (a)(2) – that gave rise to the present dispute over the extent to which VBM ballots must be included in the manual tally.

II.

THE LANGUAGE “BALLOTS TABULATED BY THOSE DEVICES” QUALIFIES AND LIMITS THE SUBSEQUENT USE OF THE TERM “CAST” IN SECTION 15360, SUCH THAT THE MANUAL TALLY IS OF BALLOTS ALREADY TABULATED BY THE VOTING SYSTEM WHEN THE MANUAL TALLY IS CONDUCTED

The Legislature’s use of the words “ballots tabulated by those devices” in subdivision (a) of section 15360 necessarily limits the subsequent general term “ballots cast” used in subdivision (a)(1) and (a)(2), to those ballots cast that have been tabulated by the automated voting system when the manual tally is conducted. This conclusion is supported by the recent legislative clarification made to section 15360 that the manual tally is of ballots and VBM ballots already tabulated as of the semifinal official canvass. (Stats. 2017, ch. 820, § 2 (Assem. Bill No. 840); Elec. Code, § 15360, subd. (a)(1), (a)(2)(A) and (B)(i).)

Under the principle of *ejusdem generis*, when ““specific words follow general words in a statute or vice versa,’ the general words ordinarily are best construed in a manner that underscores their similarity to the specific words.” (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 939, quoting from *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 342.) Under the similar maxim of jurisprudence,

“[p]articuliar expressions qualify those which are general.” (Civ. Code, § 3534.) “The canon presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage.” (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court, supra*, 42 Cal.4th at 342.)

The use of the more general term ballots “cast” in subdivisions (a)(1) and (a)(2), is controlled and limited by the more specific language “ballots tabulated by those devices,” in subdivision (a) of section 15360. If the Legislature truly intended to have the manual tally consider all ballots cast in an election, it would have used the broader “cast” language throughout the statute. Instead, consistent with the stated purpose of the manual tally as a check on the accuracy of the voting system, the Legislature expressly qualified the ballots included in the manual tally as those already tabulated by those devices. Accordingly, Lutz’s attempt to use the broader “cast” language to claim the tabulation must include all VBM ballots, regardless of whether they have been processed is unavailing and must be rejected.

The use of the past-tense language “tabulated by those devices” also indicates a Legislative intent that the manual tally is of ballots already tabulated when the manual tally is conducted, not ballots cast that are in the process of tabulation. This is consistent with the statutory timing of the manual tally as occurring concurrent with the official canvass process of counting all votes properly cast in the election. If the Legislature intended a broader meaning to include all ballots cast in an election regardless of where they are in the process of being tabulated, as argued by Lutz, it had options available to accomplish that result by specifying the manual tally was to occur after all ballots were tabulated or by using the broader language “cast” throughout the entirety of section 15360.

The Legislature’s recent clarification that the manual tally is of the “ballots canvassed in the semifinal official canvass” demonstrates that the practical temporal limitation of conducting the manual tally during the official canvass was intended as a check on ballots already tabulated by the voting system, and not a manual tally reflective of all ballots cast in the election. (See Stats. 2017, ch. 820, § 2 (Assem. Bill No. 840).) The legislative history referenced in the Registrar’s Appellant’s Opening Brief further supports this conclusion. In this regard, as amended by Assembly Bill 2769, section 15360 provided, in pertinent part, that the manual tally is “a public manual tally of the ballots *tabulated by those devices* including absent voters’ ballots, cast in 1 percent of the precincts chosen at random by the elections official.” (Stats. 2006, ch. 894, § 1.) It is further bolstered by the Legislature’s consideration of and ultimate rejection of versions that would have required the inclusion of “all” VBM ballots. (See AOB at 21-22.)

The trial court erred in construing section 15360 as requiring “all” VBM ballots be included in the manual tally. The portion of the trial court’s judgment compelling inclusion of all VBM ballots in the manual tally must be reversed. That reversal necessarily requires a reversal of the attorney fee award to Lutz. (See *Carson Citizens for Reform v. Kawagoe* (2009) 178 Cal.App.4th 357, 371.)

CROSS-RESPONDENTS' BRIEF

III.

THE TRIAL COURT CORRECTLY CONCLUDED THAT PROVISIONAL BALLOTS ARE NOT REQUIRED TO BE INCLUDED IN THE MANUAL TALLY

The 2006 legislative history addressed in the Registrar's Appellant's Opening Brief at pages 20-21 also shows that the Legislature initially considered including provisional ballots in the manual tally, but ultimately excluded them from the ballots required to be included in the manual tally under section 15360. When “the Legislature chooses to omit a provision from the final version of a statute which was included in an earlier version, this is strong evidence that the act as adopted should not be construed to incorporate the original provision.” [citation].” (*UFCW & Employers Benefit Trust v. Sutter Health* (2015) 241 Cal.App.4th 909, 927, citing *People v. Delgado* (2013) 214 Cal.App.4th 914, 918.) In such cases, “courts must not interpret a statute to include terms the Legislature deleted from earlier drafts.” (*Berry v. American Exp. Publishing, Inc.* (2007) 147 Cal.App.4th 224, 231.)

To date, section 15360 has not and does not identify provisional ballots as among the ballots that must be included in the manual tally. (See, e.g. Stats. 2017, ch. 820, § 2 (Assem. Bill No. 840).) The trial court correctly concluded provisional ballots are not required to be included in the manual tally.

CONCLUSION

Section 15360 never required the inclusion of “all” VBM ballots “cast” in an election to be included in the 1 percent manual tally. The language of section 15360 qualified and limited the ballots included in the 1 percent manual tally to the precinct and VBM ballots previously tabulated by the voting system devices. The trial court erred in issuing a writ of

mandate ordering the Registrar to include all VBM ballots in conducting the manual tally in future elections and that portion of the trial court's judgment is properly reversed. The balance of the trial court's judgment finding in favor of the Registrar as to provisional ballots should be affirmed because the Legislature opted to eliminate provisional ballots from the ballots that must be included in the 1 percent manual tally.

The reversal of one portion of the judgment in favor of Lutz necessarily requires the court to reverse and vacate the order awarding Lutz attorney fees as the prevailing party.

This court should issue directions to the trial court to vacate its original judgment and enter a judgment in favor of all defendants.

DATED: February 13, 2018

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WORD COUNT CERTIFICATION
(Cal. Rules of Court, rule 8.360(b)(1))

The text of this brief consists of 2,755 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

DATED: February 13, 2018

THOMAS E. MONTGOMERY,
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DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On February 13, 2018, I served the following documents:

- 1. APPELLANTS' COMBINED REPLY BRIEF AND CROSS-RESPONDENTS' BRIEF.**

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- (BY E-mail)** I cause to be transmitted a copy of the foregoing document(s) this date via TrueFiling System, which electronically notifies all counsel as follows:

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