BEFORE THE MUNICIPAL OFFICERS ELECTORAL BOARD
FOR THE CITY OF MARKHAM

IN THE MATTER OF THE OBJECTIONS OF:	)	
	)	
David Walker, Sr., Robert J. DePolo,	)	
Marina I. Pangopoulos,	)	
	)	
Petitioner-Objectors,	)	
	)	**CASE NO. 2020 MMOEB-01**
v.	)	
	)	
Roger A. Agpawa,	)	
	)	
Respondent-Candidate.	)	

DECISION

The duly constituted Municipal Officers Electoral Board for the City of Markham (the "Electoral Board"), consisting of Second Senior Alderman, William Barron, Substitute Chair; Senior Alderman, Rondal Jones, Member; and Public Member Thomas Jaconetty, Member; organized by law and pursuant to Circuit Court of Cook County Special Order Number 2020-53, following the issuance of a Call by Electoral Board Substitute Chair, William Barron,[1] for the purpose of hearing and passing upon of objections to the nomination papers of **Roger A. Agpawa**, a candidate for nomination to the office of Mayor of the City of Markham at the February 23, 2021 Consolidated Primary Election, having convened on December 7, 2020, December 14, 2020, and December 21, 2020 in the City Council Chambers of the City of Markham, 16313 S. Kedzie Avenue, Markham, Illinois 60428, and via remote, Zoom teleconference pursuant to the Chair's finding of in-person meeting unfeasibility due to the COVID-19 Pandemic, and having heard and determined the objections to the nomination papers in the above-titled matter, the Electoral Board finds and orders as follows:

I. PROCEDURAL HISTORY

1. The Electoral Board was legally constituted according to the law of the State of Illinois, and pursuant to Circuit Court of Cook County Special Order Number 2020-53, to hear and pass upon the objections to nomination papers filed in this matter.

[1] The original Electoral Board consisted of William Barron, Second Senior Alderman, as Substitute Electoral Board Chair (substitute for Mayor Roger Agpawa, the Respondent-Candidate in the instant case); Jennifer Coles, City Clerk; and Rondal Jones, Senior Alderman. City Clerk Coles subsequently recused herself and a Public Member was appointed pursuant to Circuit Court of Cook County Special Order 2020-53.

2. Objections to the nomination papers of the Candidate, herein, ROGER A. AGPAWA (the "Candidate"), were duly and timely filed with the City Clerk in the form of an Objectors' Petition filed on behalf of DIAVID WALKER, SR., ROBERT J. DEPOLO, and MARINA I. PANGOLOPOULOS (collectively the "Objectors").

3. A Call to the hearing on the objections was duly issued and was caused to be served on the members of the Electoral Board, the Objectors, and the Candidate by mail and/or personal service, as required by law.

4. Public hearings were held on December 7, 2020, December 14, 2020, and December 21, 2020.

5. There were present at such hearings the following persons, all attending in-person at the Markham City Council Chambers, among others:

A. The members of the Electoral Board; and the Electoral Board's its counsel, Burton S. Odelson and Ross D. Secler;

B. The Objectors by their counsel, Andrew Finko; and

C. The Candidate, by his counsel, Steven M. Laduzinsky.

6. Rules of Procedure were made available prior to their adoption by the Electoral Board; no objections to the Rules by the parties being made, the Electoral Board adopted said Rules.

7. The Electoral Board introduced and accepted the following Electoral Board Exhibits into the Record, and moved same into evidence, as follows:

Exhibit 1: Objector's Petition

Exhibit 2: Candidate's Nomination Papers

Exhibit 3: Call of the Electoral Board

Exhibit 4: The Agenda for the initial hearing

Exhibit 5: Proofs of Service, Waiver of Service, and Appearances filed by, or on behalf of, the parties

Exhibit 6: Rules of Procedure

Exhibit 7: Circuit Court of Cook County Special Order 2020-53 appointing the Electoral Board's Public Member

8. On December 7, 2020, the Electoral Board took notice of the parties' filings, set briefing schedules, continued this matter for further arguments on the Objectors' Petition, and subsequently issued a Case Management Order, dated December 8, 2020.

9. The Electoral Board takes notice of the following motions, requests, memoranda of law, filings, and responses thereto filed by the parties:

A. Candidate's Motion to Disqualify City Clerk, Jennifer Coles, from the Electoral Board and for the Electoral Board to Request the Appointment of a Public Member Pursuant to Circuit Court of Cook County General Order 21[2]

B. Objectors' "Motion to Recuse Ald. William Barron as Substitute Chair, and Odelson Sterk Law Firm"[3]

C. Candidate's "Response to Motion to Recuse Ald. William Barron as Substitute Chair and Odelson Sterk Law Firm"

D. Objectors' "Combined Reply in Support of Motion for Recusal and Response to Motion to Bar"

E. Objectors' Request for for [*sic*] Issuance of Subpoenas

F. Candidate's Response to Objectors' Request for Issuance of Subpoenas

G. Candidate's Motion to Take Judicial Notice

H. Candidate's Motion *In Limine* and to Bar Witnesses and Evidence

I. Candidate's Motion for Summary Judgment

J. Objectors' Response to Candidate's Motion for Summary Judgment

K. Objectors' Motion for Judgment on the Objection

L. Candidate's Response to Motion for Judgment on the Objection

M. Objectors' Disclosure of Documents

N. Objectors' "Supplemental Disclosure of Documents"

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[2] The Electoral Board accepted this filing for the records, but explained that prior to the initial Electoral Board hearing, the City Clerk recused herself from the proceedings as a member of the Electoral Board and the Circuit Court of Cook County issued Special Order 2020-53 appointed Public Electoral Board Member, Thomas Jaconetty. No further briefings, arguments, or determinations were required, and none were made, regarding the Candidate's Motion to Disqualify.

[3] At the initial electoral board hearing on December 7, 2020, Objectors, in response to an inquiry from Electoral Board member Jones, indicated and clarified that the motion sought disqualification of *both* Substitute Chair Barron (Second Senior Alderman) **and** Member Jones (Senior Alderman).

10. On December 14, 2020, the Electoral Board accepted into the record the materials referred to in Paragraphs 1 through 12 of the Candidate's Motion to Take Judicial Notice and admitted Exhibits 1 through 6 into evidence.

11. On December 7, 2020 and December 14, 2020, arguments were made for consideration by the Electoral Board. All evidence tendered and moved into evidence, any offers of proof, and all arguments made by those appearing at public hearing on December 7, 2020 and December 14, 2020 were heard, considered, and publicly deliberated by the Electoral Board in open session.

12. A final public hearing was held on December 21, 2020 for the purposes of signing, finalizing, and serving the written Decision of the Electoral Board.

13. Having considered the Objector's Petition, any motion and/or response filed by the parties, all other evidence presented, and the parties' legal arguments, the Electoral Board hereby makes the findings contained below:

II. THE ELECTORAL BOARD MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. OBJECTORS' MOTION TO RECUSE SUBSTITUTE CHAIR, ALDERMAN WILLIAM BARRON, ELECTORAL BOARD MEMBER, ALDERMAN RONDAL JONES, AND THE ELECTORAL BOARD ATTORNEYS OF ODELSON, STERK, MURPHEY, FRAZIER, & MCGRATH, LTD.

Section 10-9 of the Illinois Election Code. 10 ILCS 5/1-1, *et seq.*, governs the composition of the municipal officers electoral board and mandates that such an electoral board be composed of:

> . . . the mayor or president of the board of trustees of the city, village or incorporated town, and the city, village or incorporated town clerk, and one member of the city council or board of trustees, that member being designated who is eligible to serve on the electoral board and has served the greatest number of years as a member of the city council or board of trustees, of whom the mayor or president of the board of trustees shall be the chair.

10 ILCS 5/10-9 (3) (also providing for the procedures for filling vacancies on the Electoral Board when designated officers are ineligible to act).

The Electoral Board herein was composed of City of Markham Alderman William Barron, as Substitute Chair, City of Markham Alderman, Rondal Jones, and Public Member, Thomas Jaconetty.

The Electoral Board finds that Objectors filed a Motion seeking recusal and/or disqualification [the "Motion to Recuse"] of Alderman William Barron as Substitute Chair and Alderman Rondal Jones as members of the Electoral Board ("the local public official members")

as well as the "Odelson Sterk law firm"[4] (and its principles and attorneys) [hereinafter "Odelson Sterk"] as counsel to the Electoral Board. The local public official members were so designated by virtue of Section 10-9 of the Illinois Election Code, 10 ILCS 5/1-1, *et seq.*, as above set forth. The initial notice of the composition of the Electoral Board was provided in the Call of the Electoral Board. Odelson Sterk was designated as counsel to the Electoral Board pursuant to Rules 4, 12, 15, and 18 of the "Rules of Procedure," adopted by the Electoral Board at its initial meeting, December 7, 2020. Upon inquiry, Objectors' counsel confirmed that there was no objection to the appointed Public Member sitting on this matter.

The Electoral Board finds that the Objectors' Motion to Recuse in reference to the local public official members alleges the following grounds:

- They are "aligned officers" with the Candidate, (Objectors' Petition, ¶27);
- The Candidate has "campaigned alongside Ald. Jones, who also donated $700.00" to him in Spring 2020, (Motion to Recuse, 6; Objectors' Combined Reply 6);
- "Ald. Barron has donated $600.00 to Agpawa over years, indicating on- going support for Agpawa (Motion to Recuse, 6; Objectors' Combined Reply, 6) and is his "walk-the-streets supporter", (Motion to Recuse, 6);
- The Aldermen have signed the Candidate's nominating Petitions, (Objectors' Combined Reply, 7); and
- "They have an interest in the outcome—seeing their colleague win and maintaining the status quo", (Objectors' Combined Reply, 7).

The Electoral Board finds the Objectors' Motion in reference to Odelson Sterk alleges the following grounds:

- They were "personal attorneys" for the challenged Candidate in his effort to obtain a Certificate of Restoration from the Governor, (Objectors' Petition, ¶¶ 22, 23, 24, 27; Motion to Recuse, 3, 4-5; Objectors' Combined Reply, 7);
- They are currently counsel for the City of Markham and have "the greatest interest in the outcome of the election", (Motion to Recuse, 5; Objectors' Combined Reply, 6);
- The firm "is strongly motivated to find a way to advise the electoral board to maintain Agwapa on the ballot" and had previously given advice to the Markham Electoral Board that was reversed in an appellate case, (Motion to Recuse, 4, 5; Objectors' Combined Reply, 7).

The Electoral Board finds that the Objectors' filing employs phrases such as "concern about", "concerns about", "could be biased" and "appears to be a conflict of interest" to describe the Objectors' underlying fears (Motion to Recuse, 3, 4, 5).

[4] Now known as "Odelson, Sterk, Murphey, Frazier, and McGrath, Ltd."

The Electoral Board finds that the requests for recusal are without merit. The concept of recusal has its roots in the Common Law. In *Dr. Bonham's Case*, 8 Co. Rep. 114, 115, 118(a), 77 Eng. Rep. 646 (C.P. 1610), the London Society of Physicians was empowered by royal and parliamentary grant to license, control, and regulate the practice of medicine and further to prosecute and punish violations, retaining half of any fines assessed. Imprisoned and fined for unlicensed practice, Lord Chief Justice Coke released Dr. Bonham from prison ruling, "*Nemo judex in causa propria sua debet esse.*"—"No one ought to be the judge in his own particular cause." James Madison reiterated in Federalist No. 10 that "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." Clinton Rossiter (ed.), *The Federalist Papers*, 79 (Mentor Books, New American Library: New York 1961). Hence, we start here: The two local public official members of this Electoral Board are not sitting in judgment of their own cause.

Guidance may be also found in Illinois Supreme Court Rule 63 (C). Those portions relating to one's impartiality applicable to the non-attorney local public official members are embodied in the principles in three subsections concerning:

(a) personal bias or prejudice concerning a party or a party's lawyer;

(d) one's spouse, parent or child wherever residing, or any other member of the one's family residing in one's household, having an economic interest in the subject matter in controversy or in a party to the proceeding, or having any other more than *de minimis* interest that could be substantially affected by the proceeding;

(e) there is a relationship within the third degree between one or one's spouse with a party or any attorney in the proceeding.

Both Electoral Board members have no (and publicly disclaimed any) economic, pecuniary, familial or personal relationship to, or bias towards, either the Objectors or their attorney. There is no legal basis for their recusal or removal from the Board.

There are generally only three (3) recognized reasons for disqualifying and replacing a statutory member of an electoral board, to wit: (i) When an electoral board member is running for the same office as the candidate(s) whose nomination petitions are subject to an objection, 10 ILCS 5/10-9; (ii) When an electoral board member holds a pecuniary interest in the outcome, *Anderson v. McHenry Twp.*, 289 Ill. App. 3d 830, 832 (2d Dist. 1997); and (iii) When a member of the electoral board will be required to serve as a necessary witness, and would ultimately need to judge the credibility of his or her own testimony, during the course of the objection hearings, *Girot v. Keith*, 212 Ill.2d 372, 378-79 (2004). Not all allegations of bias rise to the level of a due process violation. *Ryan v. Landek*, 159 Ill. App. 3d 10, 12 (1st Dist. 1987). It has been widely held that the Illinois Election Code "does not provide for substitution when a [party] alleges political bias." *Id.* at 13. Simply alleging "political bias," political party membership, or past party association is insufficient to warrant electoral board member disqualification. *See id.*; *In re Objection of Cook to Referendum Petition of Pierce*, 122 Ill. App. 3d 1068, 1072 (5th Dist. 1984); *Ayers v. Martin*, 223 Ill. App. 3d 397, 399 (4th Dist. 1991).

None of the typical elements justifying disqualification of either judge or, specifically, electoral board members have been raised and proven against them. *See Tumey v. Ohio*, 273 U.S. 510, 523, 532 (1927) ("a direct, personal substantial pecuniary interest"); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (adjudicator had a personal substantial pecuniary interest in the proceedings); *Girot v. Keith*, 212 Ill.2d at 376, 379-381 (Electoral Board member called as a witness, passed judgment on her own personal credibility, and cast the deciding vote); *Zurek v. Franklin Park Officers Electoral Board*, 2014 IL App (1st) 142618 and *Anderson*, 289 Ill. App. 3d at 833-34 (all board members had a direct personal pecuniary interest in the fate of a referendum petition; in *Zurek*, term limits; in *Anderson* dissolving township government); *Mank v. Board of Fire and Police Commissioners*, 7 Ill. App. 3d 478, 484 (1972) (blood relationship between hearing officer and a party).

In the instant case, the two public official Electoral Board have no personal financial stake in the outcome, are not passing upon their own credibility, and are not deciding issues impacting their own legal rights, terms of office or compensation. There is no cognizable conflict of interest.

Nor are these local public official members "candidates for the office with relation to which the objector's petition is filed". 10 ILCS 5/10-9. Recusal requires the decision-maker to make a clear and faithful examination of conscience. Recusal should be made in light of the facts as they exist, not upon what may be unreasonably surmised, imagined or hypothesized. Here, it should also consider the public policy reflected in the legislative composition of local electoral boards, which start from a premise that they should be as close as possible to their electorate. Objectors have not shown any viable basis upon which the Electoral Board members should recuse themselves and, furthermore, this Electoral Board cannot evade its statutorily mandated service based purely on accusations and insinuations alone. *See* Circ. Ct. Cook Cnty., Gen. Order 21, 5B: ("However electoral board members do not have a disqualifying interest because they may be political allies or opponents of a party in a case or merely because they are familiar with the facts of the case. Neither may a statutory member cause a vacancy to be filled by this General Order by a personal preference or convenience of that statutory member not to sit or merely because a party has requested such disqualification").

The Electoral Board further finds that the Objectors failed to timely raise their claims of alleged bias before the Circuit Court of Cook County. Circuit Court of Cook County, General Order 21 provides that "a **party** to a case before the board shall notify the Chief Judge of the need to appoint a public member. . . The notification may be signed by an attorney representing the electoral board, **the party**, or the officer with the petitions are filed." *See* Circ. Ct. Cook Cnty., Gen. Order 21(A). Hence, Objectors' claims could have been heard and adjudicated before the Electoral Board even convened or even after the initial hearing.

The Electoral Board finds that the law does not permit a claim of substitution of members "whenever objector feels a conflict is present." *In re Cook*, 122 Ill. App. 3d at 1072. There is "no authority which requires an electoral board member to be disqualified from hearing a dispute because of past legal or political activity or conflicts." *Id.* In addition, the Illinois Appellate Court, in *Ryan* (where two members of the Electoral Board were party members who had also circulated petitions), held:

> [T]he Election Code does not provide for substitution when an objector alleges political bias. The legislature has set up a stable mechanism for addressing pre-election grievances. The statutory provisions allowing substitution under particular circumstances and judicial review [10 ILCS 5/10-10.1] adequately insure an objector a fair hearing. It is not the province of courts to inject provisions not found in a statute (*Droste v. Kerner* (1966), 34 Ill. 2d 459, 504, 217 N.E.2d 73, 79) and upset the pre-election process.

159 Ill. App. 3d. at 13.

The Illinois Appellate Court in *Ayers*, 233 Ill. App. 3d at 399-400, similarly rejected claims of "bias." The Court reasoned:

> In the instant case, plaintiff notes that two of the electoral board members had voted as members of the School Board to authorize the preparation of the objections to his petitions that they, as members of the electoral board, would review. He also claims the School Board has a pecuniary interest in the outcome, which was not present in *Cook* and *Ryan.* However, this argument is without merit. As defendants point out, none of the electoral board members have any personal financial interest in this matter. In effect, plaintiff asks us to rewrite the statute and allow for recusal of electoral board members in this case. We decline this invitation, as did the courts in *Cook* and *Ryan.*

Id.

In the instant case, Objectors have made allegations of, as discussed herein, a purely legal nature that does not require the Electoral Board Members to testify or otherwise sit as judge over their own case or one where they have a proven, actual pecuniary or other disqualifying interest. As such, because the Objectors' have failed to establish any viable, legal, or actual reason for the public officer Electoral Board Members' recusal and/or disqualification from serving on the Electoral Board, the Electoral Board voted three (3) to zero (0) to **DENY** the Objectors' motion to recuse, disqualify, and/or exclude Alderman William Barron, as Substitute Chair, and Alderman Rondal Jones as Member of the instant Electoral Board.

As to the objections made against the Electoral Board's Attorney, the Electoral Board finds that there is no legal basis to require it to discharge Odelson Sterk as counsel. There are several reasons, to wit:

(a) A party is constitutionally entitled to representation by counsel of its choice.

(b) No attorney of Odelson Sterk sits as a member of this Electoral Board, no attorney of Odelson Sterk has a vote to decide this matter.

(c) Neither the Election Code nor Circuit Court General Order 21 provide a mechanism for the removal of an attorney from advising an Electoral Board.

(d) Under the adopted "Rules of Procedure" counsel may only make "recommendations", "evidentiary rulings, subject to appeal to entire Board" (which "may overrule" them), offer "suggested rulings, and make "recommendation findings". None of these are binding upon the Electoral Board.

(e) Odelson Sterk's representation of the Candidate as his private attorney concluded when the Circuit Court of Cook County entered its order concerning the impact of the Certificate of Restoration and has no bearing on the instant matter where the Electoral Board must determine whether the Candidate's Nomination Papers were filed in the manner required by law.

Objectors' allegations are made without actual, relevant statutory support. The Objectors rely on no relevant case law to support their contentions and, instead cite *Muldrow v. Mun. Officer Electoral Board*, 2019 IL App (1st) 190345 as an attempt to make irrelevant insinuations against Odelson Sterk, but said case has nothing to do with disqualification of the Electoral Board's selected and appointed Attorney. Similar to allegations of "political bias" of electoral board members, there is also no "common law" that prevents a law firm from advising one or more members of a municipal electoral board in a political campaign setting. Furthermore, there is no support in any law that a municipal lawyer cannot represent an electoral board when it considers substantive matters, whether it be a referendum, or a candidate's nomination papers.

Both federal and state courts have viewed with disapproval a litigant's attempt to disqualify opposing counsel as a tactical weapon in litigation for fear that such action can be misused for purposes of harassment. A disqualification is regarded as a drastic measure which courts should approach with caution and grant only as a last resort. *Freeman v. Chicago Musical Instrument Co.* 689 F.2d 715 (7th Cir. 1982). It is also looked upon as a vehicle that serves to destroy the attorney-client relationship by effectively preventing a party from freely retaining his counsel of choice. *See In re Marriage of Thornton* 138 Ill. App. 3d 906 (1st Dist. 1985). This is especially apropos where, as here, the Motion requested calling two Odelson Sterk attorneys as witnesses, thereby attempting to manufacture an artificial conflict of interest. *See Utilimaster Corp. v. Indiana Department of State Revenue*, 967 N.E.2d 92, 98 (Ind. Tax Court 2012) (rejecting such "abuse as a procedural weapon"); *Beller v. Crow*, 227 Neb. 603, 742 N.W.2d 230, 234 (2007) (inappropriate attempt to gain tactical advantage in litigation); *Harter v. University of Indianapolis*, 5 F. Supp.2d 657, 668 (S.D. Ind. 1998 ("abusive tactic to hurt the opponent's ability to pursue his case"); *Lease America Corp. v. Stewart*, 19 Kan. App. 2d 740, 876 P. 2d 184, 191 (1994) ("foist upon that lawyer the role of advocate-witness and thereby drive the lawyer from the case"). It is clear that the purpose of the Motion and, in particular, the request to disqualify the law firm, is frivolous and is purely for the purposes of harassment and potentially engineering a tactical advantage.

The Electoral Board finds that the Illinois Rules of Professional Conduct are clear on their face that Odelson Sterk and its members may serve as counsel to the Electoral Board as the law firm was duly appointed, and that it will be able to provide (and has provided) competent and diligent representation to the Electoral Board. The contentions made by the Objectors do not carry the weight of established law. Therefore, the Electoral Board voted three (3) to zero (0) to **DENY** the Motion to Recuse and disqualify Odelson Sterk and its attorneys from serving as the Electoral Board's Attorney herein. The Electoral Board then proceeded to hear arguments on the Motion to Take Judicial Notice and the other, proposed facts and documents requested to be admitted into the record.

B. MOTION TO TAKE JUDICIAL NOTICE & OTHER, PROPOSED EXHIBITS AND EVIDENCE

The Electoral Board next proceeded to determine what, if any, questions of fact existed or were otherwise proper for argument and consideration by the Electoral Board in the instant matter.

The Electoral Board finds that the Candidate properly requested that the Board take "judicial notice" of various facts and documents. They are particularly described in paragraphs 1 through 12 in his "Motion to Take Judicial Notice," and were specifically included in Exhibits 1 through 6 of said Motion.

The Electoral Board finds that a Court may take "judicial notice" of facts which are "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned", ILL. R. EVID., Rule 201 (b); *Cook County Bd. of Review v. Property Tax Appeal Bd.*, 339 Ill. App. 3d 529, 541 (1st Dist. 2003) (sources "so capable of verification as to be beyond reasonable controversy"). Administrative agencies, bodies, tribunals, and quasi-judicial and adjudicative bodies may take judicial notice of the same matters of which Illinois Courts may. *See Albazzaz v. Illinois Dep't. of Professional Regulation*, 314 Ill. App. 3d 97, 101 (1st Dist. 2000); *All Purpose Nursing Service v. Human Rights Commission*, 205 Ill. App. 3d 816, 823 (1st Dist. 1990); *Ekco Glaco Corporation v. Environmental Protect Agency*, 186 Ill. App. 3d 141, 149 (1st Dist. 1989). This Electoral Board is a quasi-judicial and administrative body with adjudicative powers. *See Tobin for Governor v. Illinois State Board of Elections*, 268 F.3d 517 (7th Cir. 2001); *Kimball v. Ryan*, 288 Ill. App. 456, 462-465 (1st Dist. 1936); 10 ILCS 5/10-8, 10-9, 10-10. 10.10.1.

Public documents and records that are "readily verifiable" are "capable of instant and unquestionable demonstration of which a court may take judicial notice." *In re Linda B*, 2017 IL 119392, at 31, n. 7, citing *Cordrey v. Prisoner Review Bd.*, 2014 IL 117155, ¶12 and *May Department Stores, Co. v. Teamsters Union Local No 743*, 64, Ill. 2d 153 (1976). In *Cordrey*, the Court accessed the Department of Corrections public website, noting that such records were "public" and "matters that are readily verifiable from sources of indisputable accuracy". *Id.*, ¶15 and note 3. In *May*, citing 9 Wigmore, Evidence, § 2571, at 548 (3d ed. 1940), the Court found that judicial notice is appropriate for such records which are capable of "instant and unquestionable demonstration". 64 Ill.2d at 159.

Judicial notice may be taken of State constitutional provisions and statutes *American Federation of State, County, and Municipal Employees, Council 31 v. County of Cook*, 145 Ill. 2d 475, 480 (1991). Similarly, such notice extends to public officials and officers as well as to

elections and election results. *Johnson v. Ames*, 2016 IL 121563, ¶ 7; *Jackson v. Board of Election Commissioners*, 111928, ¶22; *People v. Austin*, 116 Ill. App. 3d 95, 98 (2d Dist. 1983). So too, judicial notice encompasses published decisions and records of proceedings in other courts (*Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶37), published case law (*People v. Allen*, 222 Ill. 2d 340, 356 (2006); *Bank of America, NA v. Kulesza*, 20154 IL App (1st) 132075, ¶21), and other court proceedings involving the same parties (*People v. Davis*, 65 Ill 2d 157, 165 (1976); *People v. Yelliott* (*In re J.R.Y.*), 157 Ill. App. 3d. 396, 399 (4th Dist. 1987)).

The Electoral Board finds that all of the requested facts and documents are of a type and character which are "not subject to reasonable dispute". Further, they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned". Being "readily verifiable" and "capable of instant and unquestionable demonstration", these materials are "from sources of indisputable accuracy" that are "subject of instant and unquestionable demonstration". As such, it was clearly within the power of the Electoral Board to take "judicial notice" of them, upon request or upon its own motion. ILL. R. EVID., Rule 201 (c) and (d).

The Electoral Board finds that counsel for the Objectors did not file a written response or objection to this motion. At hearing, he would not formally "stipulate" to their admission into the record. Nor would he agree that the Electoral Board take judicial notice of them. Also, Counsel for Objectors did not accept the legal argument advanced by the Candidate in support of the Motion. However, counsel for the Objectors several times reaffirmed that he did not object to their admission and inclusion into the record.

The Electoral Board finds that these facts and exhibits were properly admitted into the record. Whether their admission was by agreement of the parties—which it appears to be—or by the taking of "judicial notice" of them—which was in the province of the Board to do—they are properly part of the record. The Electoral Board is, therefore, entitled to rely upon their authenticity and verifiability.

As to Objectors' proffered exhibits and requests for the issuance of subpoenas, the Electoral Board finds that it has no authority to consider collateral attacks on the *bona fides* of the actions of the Governor of the State of Illinois and the orders and judgement of the Circuit Court of Cook County, discussed herein, which are at issue in this case. The Objectors proffered documents and exhibits are not relevant to the Electoral Board's determining whether the Nomination Papers at issues here are valid.

Pursuant to the Illinois Rules of Evidence, irrelevant evidence is generally inadmissible. IL. R. EV., Rule 402. Further, similar to the law surrounding the issuance of subpoenas pursuant to Section 10-10 of the Illinois Election Code, a court's power (and thereby an electoral board's power) to order a party to appear should only be exercised for good cause and in such a manner that a party may not be subjected to harassment, oppression, or hardship. *Pickering v. Owens-Corning Fiberglas Corp.*, 265 Ill. App. 3d 806, 816 (5th Dist. 1994) (emphasis added). Good cause is shown where: (i) the information expected to be elicited from the subpoenaed individual is relevant to the issues raised, (ii) the subpoenaed individual has personal knowledge of the relevant facts, (iii) the information expected to be elicited is not cumulative. *See Id.* at 816- 18; *see also* 735 ILCS 5/2-1101. The use of subpoenas is a judicial process, and courts have broad and flexible powers to prevent abuses of their process. *Parkway Bank & Tr. Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 62, as supplemented (Dec. 16, 2013). A subpoena should be quashed where there is a

broad demand that is of questionable relevance to the issues raised and that is intended as a catch-all request. *People v. West*, 102 Ill. App. 3d 50, 52 (2d Dist. 1981). The Electoral Board finds that the Objectors' proffered exhibits and requested subpoenas have no relevant or necessary basis that could provide any support or justification for the Electoral Board to admit or grant same. *See generally Nader v. Illinois State Bd. of Elections*, 354 Ill. App. 3d 335 (1st Dist. 2004) (inquiry into state payroll records to determine whether state employees improperly worked on objection found irrelevant; Board is "limited to consideration of objections to a candidate's nomination papers").

As further discussed herein, this being a matter presenting a legal question, the Electoral Board heard and deliberated on the parties' motions for judgment in open public session.

C. THE OBJECTION AGAINST CANDIDATE'S QUALIFICATION TO SEEK THE OFFICE OF MAYOR OF THE CITY OF MARKHAM

The Electoral then must proceed to determine the ultimate question: Whether the Candidate's Nomination Papers are in proper form, and whether or not they were filed within the time and under the conditions required by law, whether or not the certificate of nomination or nominating papers or petitions on file are valid or whether the objections thereto should be sustained. 10 ILCS 5/10-10. At issue in this case is whether the Candidate is qualified to seek and hold the office of Mayor of the City of Markham due to a prior felony conviction where the Governor of the State of Illinois issued a Certificate of Restoration of Rights of Citizenship to the Candidate and the Circuit Court of Cook County issued an order vacating a prior order finding candidate ineligible.

The Electoral Board finds that it may only exercise those powers conferred under its statute (10 ILCS 5/10-8, 10-9, and 10-10 of the Election Code). *Nader v. Illinois State Bd. of Elections*, 354 Ill. App. 3d 335, 340 (1st Dist. 2004); *Geer v. Kadera*, 173, Ill. 2d 398, 407 (1996); *Kozel v. Illinois State Bd. of Elections*, 126 Ill.2d 58, 68 (1988); *Coalition for Political Honesty v. Illinois State Bd. of Elections*, 65 Ill.2d 453, 463 (1976).

The Objectors allege that the "[f]ormer Governor Rauner's action to allegedly restore rights to Agpawa was not authorized by Illinois law and exceeded the authority vested in a governor to directly contradict the Legislature intent". (Objectors' Petition, ¶26; Objectors' Response to Candidate's Motion for Summary Judgement, 9-10). Claiming an action is beyond the scope of the constitutional powers of the Governor challenges his authority under Article V, Section 8 (ILL. CONST. (1970), Art. V, §8) and Article V, Section 12 (ILL. CONST. (1970), Art. V, §12), and suggesting a clash between his prerogatives and the power of the General Assembly, raises separation of powers issues under Article II, Section 1 of the Illinois Constitution, (ILL. CONST. (1970), Art. II, §1).

The Electoral Board finds that it does **not** have the legal authority to pass on any such constitutional questions. *Goodman v. Ward*, 241 Ill. 2d 398 (2011); *Nader*, supra; *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d. 262, 278 (1998); Coalition for Political Honesty, supra; *Wiseman v. Elward*, 5 Ill. App. 3d 249, 257 (1st Dist. 1972).

The Electoral Board finds that Article V, Section 12 of the Illinois Constitution (1970 provides:

> The Governor may grant reprieves, commutations, and pardons, after conviction, **for all offenses and on such terms as he thinks proper**. The manner of applying therefore may be regulated by law.

ILL. CONST. (1970), Art. V, §12 (emphasis added).

The predecessor Constitution for the State of Illinois (1870) contained a less expansive delegation of power. It provided:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor.

ILL. CONST. (1870), Art. V, §13.

After the word "offenses", it did not contain the current phrase "on such terms as he thinks proper". This change was purposeful. As explained during the 6th Illinois Constitutional Convention:

> MR. J. PARKER: This is the section we presently have in section 13 of the executive article. It is identical except for one major substantive change, and that is that in reading this language you have to – let me read it so it will be better to point out:
>
> > "The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses and on such terms as he thinks proper. The manner of applying therefore may be regulated by law."
>
> Now, the point here is that the important change is "upon terms that he things proper." This means that this is giving the governor, for the first time, what is better called a conditional pardon.

6th Ill. Const. Convention, Dec. 8, 1969 – Sept. 3, 1970, Vol. III, p. 1331 (Mr. James S. Parker, 51st Senatorial District).

Thus, in adopting the Constitution of 1970, the State of Illinois *expanded* the discretion and authority of the Governor's powers to grant pardons, reprieves, commutations, and any combination or on any terms "he thinks proper."

The Governor's power of clemency is essentially unreviewable. *See People ex rel. Madigan v. Synder*, 208 Ill. 2d 457, 467, 479-481 (2004) ("The Governor's constitutional clemency powers allow him to completely or partially absolve a defendant of the consequences of his crime, and to suspend or commute any sentence imposed by the judiciary" (emphasis added)). In *People ex rel. Smith v. Jenkins*, 325 Ill. 372, 373-374 (1927), the Court held: "Having this power by the constitution his use of it cannot be controlled by either the courts or the legislature. His acts in the exercise of the power can be controlled on by his conscience and his sense of public duty." Regulation pertaining the manner of applying for relief "does not restrict the Governor's authority". *See People v. Hofer*, 363 Ill. App. 3d 719 (2006) (upholding "the provision requiring a convicted felon who wants to run for a statutorily created office to establish to the Governor's satisfaction that he has rehabilitated himself and is worthy of the public trust" (emphasis added)).

There is no dispute that *People ex rel. Symonds v. Gualano*, 97 Ill. App. 2d 248, 254-255 (1st Dist. 1968) ("*Gualano* I") recognized that a previous mail fraud conviction of a village president disqualified him from holding office. That the municipal officer in *Gualano* I demonstrated rehabilitation and the significant passage of time since the conviction did not *ipso facto* remove the disability only "the restoration of the rights of citizenship if there is an appropriate pardon" from the Governor could.

Then, in *People ex rel. Symonds v. Gualano*, 124 Ill. App. 2d 208, 220, 223 (1st Dist. 1970) (*Gualano* II), the Governor of the State of Illinois intervened. The Governor issued (as here) a certificate of restoration of civil rights. The Court's comprehensive and definitive ruling is clearly dispositive here:

> In regard to the provision which became section 13 of Article V [of the 1870 Illinois Constitution] we conclude that **it was the intention of the drafters of the provision to give the governor unlimited power to grant reprieves, commutations and pardons**. They defeated the proposal of the Committee on the Executive Department that this power be subject to legislative supervision. They recognized that imperfections can exist in the judicial machinery and occasions might arise when an innocent person would be convicted of a crime; they also foresaw that the pardoning power would be a means of **encouraging guilty persons to become upstanding citizens of the community and to prove by exemplary conduct that they were worthy of public confidence**. It was the manifest purpose of those who designed our constitutional framework to give the governor **full and untrammeled discretion in remedying injustices**, in lowering sentences and in restoring the rights of citizenship.
>
> . . . .
>
> Section 13 in **no** way limits or modifies the **full force and effect of the governor's power and discretion**. Section 13 vests in the governor the **exclusive power** to grant, after conviction, reprieves, commutations and pardons. *People ex rel. Brundage v. LaBuy*, 285 Ill. 141, 120 N.E. 537 (1918). Such power is subject only to the

> limitation that the legislature may establish the manner of applying therefor. *People ex rel. Smith v. Jenkins*, 325 Ill. 372 , 156 N.E. 290 (1927). **The granting of a restoration of rights falls within the ambit of the governor's employment of the pardoning power. When the framers of the Illinois Constitution incorporated that power, they meant it to be used effectively**.
>
> . . . .
>
> The Illinois Constitution provides that an individual convicted of an infamous crime is ineligible to hold an office of profit and trust. **The constitution also provides for the removal of such ineligibility by the governor. The governor's certificate of restoration of the rights of citizenship removed the defendant's ineligibility to hold public office.**

Id. (emphasis added).

While *Gualano* II was decided by examining the Illinois Constitution of 1870, as discussed above, the Illinois Constitution of 1970 only *expanded* the discretion and authority of the Governor in regards to matters of clemency. Again, this Electoral Board takes notice that it is bound by Illinois case law, which supports the Governor's unlimited power to restore a citizen's civil rights when those rights are lost as a collateral consequence of Illinois law (in addition to other powers concerning the punishment or sentence for the crime itself). *See Gualano II*, 124 Ill. App. 2d at 221 (1st Dist. 1970); *see also People ex rel. Taborski v. Illinois Appellate Court*, First Dist., 50 Ill.2d 336, 341 (1972) citing *People ex rel. Rice v. Appellate Court, Fifth Dist.*, 48 Ill.2d 195, 199 ("the removal from public office of an official convicted of an infamous crime is not a punishment but simply a consequence of a condition imposed upon public officials . . ."); *People ex rel. City of Kankakee v. Morris*, 126 Ill. App. 3d 722, 726 (3d Dist. 1984).

Gualano II has also been cited as persuasive authority by other courts. See *Mack v. State*, 37 Ill. Ct. Cl. 1, 26 (1984); *Lopez v. Kase*, 126 N.M 733, 736 (1999) ("voiding the Governor's certificate would be an unwarranted intrusion on the Governor's constitutional prerogative to restore [one's] civil rights."); *see also Payne v. Fawkes*, 2014 U.S. Dist. LEXIS 134451 at 15, n. 7 (U.S. D.C. V.I, 2014); *see generally, People v. Agpawa*, 2018 IL App (1st) 171976, ¶ 19, n. 1 (citing *Gualano* I for definition of infamous crime).

Objectors stress that this case must be determined by the holdings of *People v. Agpawa* and *Alvarez v. Williams*, 2014 IL App (1st) 133443, which find that felonies and "infamous crimes" are bars to statutorily created offices (like Mayor or School Board Member). This Board does not disagree with Objectors assertion of the existence of such a prohibition, but Objectors do not provide the entire law, nor do they recognize the facts of the instant case. As the Illinois Appellate Court discussed in *Alvarez*, "When read in their entirety, the provisions of the Election Code and School Code at issue establish an intent by the legislature to prevent individuals convicted of infamous crimes from holding offices of honor, trust and profit without an official pardon **or restoration of rights**. 2014 IL App (1st) 133443, ¶ 10 (emphasis added). In the instant case, the Candidate received such a "restoration of rights" and, after the disposition of his case in the Appellate Court, and then following the Governor's actions, the Circuit Court of Cook County

(with the mandate returned to enforce or otherwise address its original order and judgment), vacated its original order. In doing so, the Circuit Court found that "by virtue of a Restoration of Rights issued by the Governor of the State of Illinois, Defendant Roger Agpawa's 1999 federal conviction for mail fraud no longer renders him ineligible to hold municipal office in Illinois." Order, *People v. Agapwa*, Circ. Ct. Cook Cnty., Case No. 2017 CH 05276 (Sept. 28, 2018; J. David B. Atkins), ¶ 4 [Objector's Exhibit 6]. That Order removed the previous disqualification, permitting him to take his oath of office, assume his duties, and continue to serve to this date. That judicial determination—affecting this person's ability to seek and hold this office—is binding upon the Electoral Board. Since the 2018 Circuit Court order, neither the State's Attorney, the Attorney General, nor any private voter or taxpayer has attempted to or otherwise sought to challenge the Candidate's eligibility to hold office through a renewed *Quo Warranto* action or otherwise. *See generally* 735 ILCS 5/18-101 — 108 (Article VIII of the Illinois Code of Civil Procedure governing *Quo Warranto*). Furthermore, it would be a legal absurdity if an officeholder and candidate were forced to re-litigate this same issue every election cycle.

The action of the Governor of the State of Illinois, and the order of the Circuit Court of Cook County, end this Electoral Board's inquiry.

The Electoral Board finds it has no legal authority, directly or indirectly, collaterally or otherwise, to question, review, or challenge the constitutionality of the action of the Governor. Further, it finds that analogously the Chicago Electoral Board when then enforcing the municipal indebtedness bar to ballot access refused to permit collateral attacks on underlying indebtedness determinations. *Lockette v. Thomas*, No. 11-EB-ALD-023 (Chicago Electoral Board), *judicial review voluntarily dismissed*, No. 11 COEL 020 (Circ. Ct. Cook Ctny. 2011); *Olsen v. Myers*, No. 11-EB-ALD-070 (Chicago Electoral Board), *judicial review dismissed*, No. 2011 COEL 028 (Circ. Ct. Cook Ctny.), *aff'd*, Ill. App. Docket No. 1-11-0359 (2011); *Allison v. Johnson*, No. 11-EB-ALD-121 (Chicago Electoral Board), *aff'd.*, (Cook County Circuit Court), *appeal dismissed*, No. 1-11-0323 (1st Dist. 2011).

The Electoral Board finds that Section 29-15 of the Illinois Election Code provides that "any person convicted of an infamous crime . . . shall thereafter be prohibited from any office of honor, trust, or profit, **unless such person is again restored to such rights by the terms of a pardon for the offence or otherwise according to law.**" 10 ILCS 5/29-15 (emphasis added); *see also* 65 ILCS 5/3.1-10-5(b) (regarding the relevant, conviction prohibition within the Illinois Municipal Code). The granting of the certificate restoring the Candidate's civil rights and the removal of the disqualification from holding office was a "restoration of rights" contemplated by this statute, as confirmed by the Circuit Court of Cook County.

Therefore, the Electoral Board **GRANTS** Candidate's Motion for Summary Judgment filed and denies the Objectors' Motion for Judgment on the Objections by a vote of three (3) to zero (0). The Electoral Board orders that the objections to Candidate's qualification to seek office be **OVERRULED**. Any further pending motions or requests are found to be **MOOT** and, as such, are **DENIED** again by a vote of three (3) to zero (0)

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Objections as they relate to the nomination papers of ROGER A. AGPAWA, candidate for Mayor of the City of Markham, are **OVERRULED**, in conformity with the findings hereinbefore submitted, with the result that the nomination papers are found **VALID**, in conformity with the findings above, and the Candidate's name **SHALL** appear on the ballot for the February 23, 2021 Consolidated Primary Election.

IT IS FURTHER ORDERED that the Electoral Board's Attorney is directed to serve a copy of this Decision on the parties in an open proceeding, either in-person or by way of acknowledged electronic transmission, and to mail a copy of the Decision in the United States Mail, in a sealed envelope or package, with postage prepaid, addressed to each party affected by the Decision or to such party's attorney of record, if any, at the address on record for such person the files of the Electoral Board. This Decision may be executed in counterparts by any or all of the Members of the Electoral Board to be assembled together as a single instrument.

The oral motion to sustain the Objectors' Petition, as specified above, and find the nomination papers invalid was decided by a majority vote (3-0) of the Electoral Board on December 14, 2020. This Decision is reduced to writing and is signed during open session this **21st Day of December, 2020** by the,

MUNICIPAL OFFICERS ELECTORAL BOARD FOR THE CITY OF MARKHAM.

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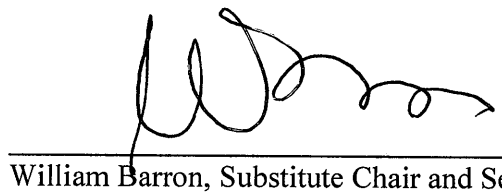
The undersigned Electoral Board Chair hereby joins, adopts, approves, the Decision, including the findings and orders of the Decision, as hereinbefore set forth as Chair of the,

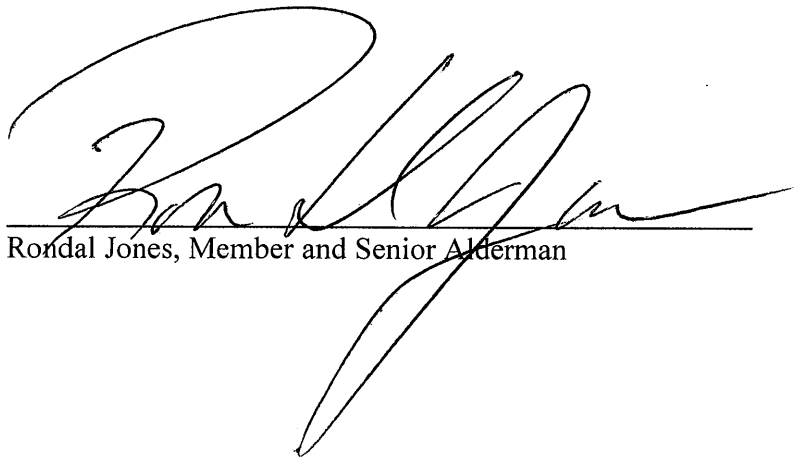
MUNICIPAL OFFICERS ELECTORAL BOARD FOR THE CITY OF MARKHAM:



William Barron, Substitute Chair and Second-Senior Alderman

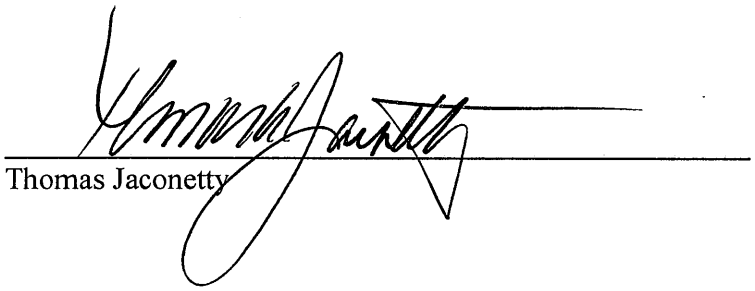
The undersigned Electoral Board Member hereby joins, adopts, approves, the Decision, including the findings and orders of the Decision, as hereinbefore set forth as Member of the,

MUNICIPAL OFFICERS ELECTORAL BOARD FOR THE CITY OF MARKHAM:



Rondal Jones, Member and Senior Alderman

The undersigned Public Electoral Board Member hereby joins, adopts, approves, the Decision, including the findings and orders of the Decision, as hereinbefore set forth as Member of the, **MUNICIPAL OFFICERS ELECTORAL BOARD FOR THE CITY OF MARKHAM:**



Thomas Jaconetty