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Coastal Property Rights, Land Use & Litigation

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VIA EMAIL AND U.S. MAIL

Hon. Mayor Todd Gloria and City Councilmembers
City of San Diego
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RE: ReOpen San Diego Demand for Immediate Rescission of Ordinance No. 2022-53 and 3-Stage Reopening Plan

Dear Mayor Gloria and Councilmembers:

We represent ReOpen San Diego, a registered nonprofit organization that is committed to peacefully opening, without encumbrance, every school, business, and house of worship in San Diego County. ReOpen San Diego is supported by approximately 20,000 San Diego County residents.

As part of its commitment to defending the constitutional rights of all San Diego County residents, ReOpen San Diego hereby demands that the San Diego City Council immediately set a special meeting and rescind its overly broad, illegal, and discriminatory COVID-19 vaccine mandate emergency ordinance ("Ordinance"), which was approved by the council on November 29, 2021 as Ordinance No. 2022-53, as well as the City's 3-Stage Reopening Plan ("Plan"), which was approved by the Council on October 18, 2021, and will ultimately bar members of the public who are not vaccinated for COVID-19 from access to government buildings and in-person attendance at city meetings. In particular, ReOpen San Diego vehemently objects to the Ordinance and Plan to the extent that both require all elected officials, board members, commission members, volunteers and ultimately even citizens who attend public meetings to first prove they are "fully vaccinated" for COVID-19.

The Ordinance was enacted during a special meeting, under the purported authority of Charter section 295. The Ordinance "requires all current City employees (all unclassified/unrepresented employees, classified/unrepresented employees, and employees represented by a recognized employee organization), elected officials, members of boards and commissions, and authorized volunteers to be fully vaccinated against COVID-19 and provide proof of their full vaccination by December 1, 2021, as a condition of continued employment or service with the City." The City Council received 262 written public comments and numerous speakers called in during the meeting to express their opinion – the vast majority in opposition; only 8 of the written comments expressed support. Nonetheless, 8 out of 9 Councilmembers voted to approve the ordinance. Consistent with state and national policies related to COVID-19, only Councilmember Chris Cate – the sole Republican member – voted "no."

The Council's misguided decision to enact this Ordinance and Plan, which together operate to exclude an entire category of individuals from any sort of meaningful participation in city government – whether by serving as an elected official, board member, volunteer, or even attending a city meeting – due solely to a personal medical decision (or a refusal to disclose the same), is nothing short of appalling. It is also blatantly illegal, as it violates the U.S. Constitution and state and local law. Indeed, the Ordinance and Plan are so offensive to the foundational principles of democracy that we question whether either were reviewed by the City Attorney before presentation to the Council, and whether the City Attorney recommended Council's approval.

The Ordinance Violates the City Charter Regulations Governing Emergency Measures

Charter section 295(e), upon which the Council relied as its sole authority to enact the Ordinance, provides, in relevant portion, as follows: "An emergency measure is an ordinance to provide for the immediate preservation of the public peace, property, health, or safety, in which the emergency claimed is set forth and defined in the preamble thereto."

Staff's presentation of the Ordinance attempted to justify its enactment as an "Emergency Ordinance" as "[r]equired for the immediate preservation of the public safety, health and welfare due to the coronavirus disease (COVID-19)." (Staff PPT Presentation.) We are perplexed how the Council could realistically justify an emergency finding when COVID-19 was initially discovered in San Diego in early 2020 – nearly two years ago – and the clear majority of San Diegans have since returned to school, work, and life. The Ordinance is allegedly intended to "protect the City's workforce and the public it serves." (Resolution.) However, there are far less intrusive and less discriminatory means to protect City employees and the public from COVID-19. Notably, for months, the County of San Diego and the majority of other cities and other government entities, including state and federal courts, throughout San Diego County, the State of California, and the nation, have been open to the public – and have been holding public meetings and hearings – without requiring the public to provide proof of COVID-19 vaccination before they are allowed access. The Council cannot rely solely upon the continued existence of COVID-19 cases in the community as justification to enact such a broad sweeping and

discriminatory law that excludes a significant portion of San Diego residents from participation in government – and on an emergency basis, nonetheless.

Moreover, COVID-19 vaccines have not been proven to be effective at preventing community transmission. While they may lessen the severity of infection for an individual, other measures far less intrusive than a sweeping vaccination mandate can and do provide protection and treatment for COVID-19. As city staff noted: "According to the California Department of Public Health, authorized vaccines in the United States are highly effective at protecting against symptomatic and severe COVID-19. However, how long vaccine protection lasts and how much vaccines protect against emerging variants are still under investigation." (City of San Diego Staff Report re: Declaring a Continued State of Local Emergency Regarding COVID-19 Virus, November 23, 2021.)

The Ordinance and Plan Violate the City Charter by Adding Qualifications for Candidates for Elected Office and Public Participation

The Ordinance and the Plan also violate the City's Charter by adding requirements for individuals who choose to run for elective office, choose to serve the city on a board or commission, and/or choose to petition the city government for redress of grievances.

Article II, Section 7 of the Charter provides: "An elective officer of the City shall be a resident and elector of the city. In addition, every Council-member shall be an actual resident and elector of the district from which the Council-member is nominated. […] The Council shall establish by ordinance minimum length of residency requirements for candidacy to elective office, whether by appointment or election." While we recognize that not all candidates will ultimately be elected to office, because the Charter does not authorize the Council to establish any additional requirements for candidates who run for elective office – such as a requirement that any elected official be fully vaccinated for COVID-19 – the Ordinance violates the Charter through the addition of a requirement that must be satisfied by those candidates who ultimately win an election.

Article XIV, Section 211 of the Charter establishes minimum requirements for every officer or member of a Committee, Board or Commission to take and subscribe to an oath or affirmation as provided by the Constitution or General Law of the State. Notably, however, this section does not require every officer or member to proof of vaccination for COVID-19. Since the Ordinance adds an additional requirement for members of committees, boards and commissions (i.e., vaccination for COVID-19), it violates the Charter.

Additionally, the Ordinance and the Plan violate Article XIV, Section 216.1, of the Charter, which provides for broad and open access to the government, giving the people the right to instruct their representatives, to petition the government for redress of grievances, and to assemble freely to consult for the common good, as well as the right of open access to meetings of public bodies. By imposing a requirement that all individuals share their private medical information as a condition that must be satisfied to gain access to city offices and meetings, the

Ordinance and the Council's Plan further violates Section 216.1, which also guarantees the right of privacy provided by Section 1 of the California Constitution. Finally, the Ordinance and the Plan violate the provision that "guarantees that a person may not be deprived of life, liberty or property without due process of law, or denied equal protection of the laws." (City of San Diego Charter, Art. XIV, Sec. 216.1(a) and (b), subs. (1)-(4).) Because the Ordinance and Plan restrict broad and open access and rights of the people to petition the government and assemble freely to only those who provide proof of vaccination for COVID-19, it necessarily violates both the letter and intent of the Charter.

The Ordinance and Plan Violate the Brown Act

Even if the Council could justify the temporary cessation of in-person meetings for the City to prevent the spread of COVID-19, the Ordinance and Plan will be implemented for an indefinite duration, has no "sunset" provision and therefore unquestionably violates the Brown Act, which provides: "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency in person, except as otherwise provided in this chapter. Local agencies shall conduct meetings subject to this chapter consistent with applicable state and federal civil rights laws, including, but not limited to, any applicable language access and other nondiscrimination obligations." (Gov. Code Section 54953(a).) The language and Legislative intent of the Brown Act is clear: government meetings must be open to all persons, not just certain persons (here, persons who are vaccinated for COVID-19). There is no possible argument that an ordinance indefinitely prohibiting a certain class of individuals (i.e., those who are not vaccinated for COVID-19) from attending meetings in person does not violate both the letter and the spirit of the Brown Act.

The Ordinance and Plan Are Unconstitutional

While the majority of the Council apparently believes otherwise, elections do not belong to elected officials, one party, or one category of people. As Abraham Lincoln famously said, "[e]lections belong to the people." This means all people, including those who are not vaccinated for COVID-19.

The Ordinance's requirement that all elected officials must be vaccinated for COVID-19 effectively prohibits individuals who have chosen not to be vaccinated for COVID-19 from running for elected office. This, in turn, prevents individuals from voting for an individual who is not vaccinated for COVID-19 (and may have different philosophical views as compared to current elected officials) as their representative.

As evidenced by the Council's obviously partisan vote on the Ordinance, individual decisions whether to get vaccinated for COVID-19 and philosophical beliefs whether one's COVID-19 vaccination status should be shared with others or whether individuals should be judged based upon that status, are particularly (albeit sadly) partisan. Indeed, partisanship is the strongest predictor of vaccination status. (https://www.kff.org/coronavirus-covid-19/poll-finding/importance-of-partisanship-predicting-vaccination-status/._) As of September, 72% of

adults 18 and older had been vaccinated. Of those, 90% were Democrats; 68% Independents; and 58% Republicans. According to a Gallup survey, 40% of Republicans do not plan to get vaccinated, versus 26% of Independents and 3% of Democrats. (https://www.brookings.edu/blog/fixgov/2021/10/01/for-covid-19-vaccinations-party-affiliation-matters-more-than-race-and-ethnicity/.) Nearly 7 in 10 unvaccinated Republicans describe themselves as conservative. (https://www.cnn.com/2021/11/16/politics/covid-19-vaccine-partisanship/index.html.) Thus, the Ordinance insidiously discriminates against political candidates who are registered as Republicans – and even more so against conservative Republicans, who are far less likely to be vaccinated for COVID-19 than any Democrat – by restricting access to elected office and narrowing the pool of candidates for voters.

A representative government is the bedrock of our democracy. Even if the Council could satisfy its burden to show that a COVID-19 vaccination mandate is necessary to protect city staff and the public from a virus that is now endemic, our Constitution and decades of Supreme Court precedent firmly establish that the state and its municipalities cannot engage in such invidious discrimination that so blatantly restricts the pool of candidates for public office without violating both the First Amendment and the Fourteenth Amendment of the Constitution, as the Council has done here. (*Williams v. Rhodes* (1968) 393 U.S. 23, 30.)

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." (*Id.*, at p. 31.) The Council has chosen to blatantly violate that right under the guise of "protecting" employees and the public from an endemic virus. It should be ashamed.

As Chief Justice Warren wrote: "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." (*Sweezy v. New Hampshire* (1957) 354 U.S. 234, 250-25.)

Apparently, the Council is so fearful of losing its political power that it must conjure up an emergency to justify the exclusion of dissenters from the political process. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." (*Illinois State Board of Elections v. Socialist Workers Party* (1979) 440 U.S. 173, 184, internal quotes and citations omitted [Signature gathering standard that produced incongruous result

requiring new party or independent to gather substantially more signatures to gain access to the ballot than a similarly situated party or candidate for state-wide office violated Equal Protection Clause of Fourteenth Amendment.].) "[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty, and we have required that States adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved." (*Id.*, at p. 185, internal quotes and citations omitted.) The Ordinance is clearly not the least drastic means to protect staff and the public from COVID-19.

Moreover, the Ordinance and Plan infringe upon an individual's fundamental liberties, which are protected by the Fourteenth Amendment's Due Process Clause and "extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs," such as the decision whether to receive a vaccination. (*Obergefell v. Hodges* (2015) 576 U.S. 644, 645.) The right of an individual to make such choices are so fundamental that the State must accord them its respect. (*Id.*)

"When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." (*Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. 173, 184.) The Council cannot possibly justify its classification and exclusion of individuals who are not vaccinated for COVID-19 from participation in city government as necessary to serve a compelling interest, especially when there are far less intrusive means to satisfy the City's interest. "The State has the responsibility to observe the limits established by the First Amendment rights of the State's citizens, including the freedom of political association." (*Wash. State Grange v. Wash. State Republican Party* (2008) 552 U.S. 442, 451.) Indeed, the Council should respect its limits by supporting the City in implementing other, far less intrusive public health measures that would be just as, if not more, effective than this Ordinance and Plan, which severely limit access, representation, and participation in the City's government by allowing full participation only to those individuals who are vaccinated for COVID-19 (and who are more likely affiliated with the Democratic Party).

The Ordinance Creates *De Facto* Patronage Requirements for City Employees

While this firm does not represent any employees of the City of San Diego, ReOpen San Diego finds the Ordinance's COVID-19 vaccine mandate just as offensive when applied to City employees. Based on its inarguably partisan nature, the Ordinance as applied to terminate employees who choose not to comply based on philosophical objections creates a situation similar to a patronage dismissal. "Patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics, since political parties are nurtured by other methods that are less intrusive. More fundamentally, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms." (*Elrod v. Burns* (1976) 427 U.S. 347, 349 [In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party,

contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party].)

"It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs. As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant." (*Id.*, at p. 356.) "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." (*Id.*, at p. 363.) "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive." (*Ams. for Prosperity Found. v. Bonta* (2021) 141 S.Ct. 2373, 2384.)

Conclusion

On behalf of ReOpen San Diego and your constituents, we respectfully request that the Council immediately schedule an emergency meeting to rescind Ordinance No. 2022-53 and the Plan.

We conclude with a reminder that the Council just recently approved a resolution designating San Diego as a "Welcoming City." The resolution affirmed, in relevant portion: "…WHEREAS, the **City is committed to recognizing the dignity of all residents**, including the **right of all San Diegans to live in a city that does not subject them to prejudicial treatment or discrimination**; and WHEREAS, the City seeks to implement programs and policies that build a welcoming and neighborly atmosphere in our community and beyond, where all people are welcome and accepted…" (R-2022-188, bold added.) As the resolution states, "BE IT RESOLVED, by the City Council of the City of San Diego, that the City of San Diego is hereby declared a Welcoming City, and one that affirms the beauty and richness of our diversity, and one in which all are welcome, accepted, and valued." (R-2022-188.)

ReOpen San Diego expects the Council to affirm its recent commitment to recognizing the dignity of *all* residents by rescinding its unlawful and discriminatory Ordinance and Plan, thereby choosing not to subject any San Diegan to prejudicial treatment or discrimination.

If the Ordinance and Plan are not rescinded by December 31, 2021, ReOpen San Diego will file a lawsuit against the City of San Diego, Mayor Gloria, and the Council, and will ask the court to enjoin the City of San Diego from implementing this unlawful and discriminatory legislation and awarding attorney's fees and costs in its favor.

Very truly yours,

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cc: Mara W. Elliott, Esq., via email only (cityattorney@sandiego.gov)
Clients