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February 22, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

IMPARTIAL ANALYSES OF BALLOT MEASURES

**INTRODUCTION**

On February 4, 2008, in compliance with the San Diego Municipal Code and state elections law, the City Council considered whether to request that the City Attorney prepare impartial analyses of ballot measures to be submitted to voters in the June 2008 sample ballot. In a change of procedure, however, the Council deferred a decision on whether to publish the analyses until *after* the City Attorney prepares the analyses and submits them to the Council for pre-publication review. Several Council members expressed concern the analyses would not be “impartial.”

The Council voted to direct the City Attorney to prepare the analyses for Council review *before* it decides whether to direct that they be published in the sample ballot mailed to all registered voters.

This office expressed concerns at the February 4, 2008 Council meeting that the pre-publication review is contrary to the San Diego Municipal Code and state elections law. Rather, attorneys from this office explained that the proper procedure to contest impartial analyses submitted to the City Clerk for publication in the sample ballot is to bring an action in state court. The elections calendar provides adequate time for legal challenge before such materials would be published.

We further explained that the legal procedure does not call for a legislative body to first review an impartial analysis before it is submitted for publication. Permitting Council review or approval before publication could even prompt a concern about the impartiality of the process and trigger a challenge.

This report provides the legal basis for our concerns and raises a concern the Council is acting outside of legal authority.

## DISCUSSION

### I. **Local and State Law Do Not Provide for Pre-Publication Review of a City Attorney's Impartial Analysis of a Ballot Measure.**

San Diego Municipal Code section §27.0505 (Preparation of Impartial Analysis) governs the drafting of impartial analyses for local ballot measures in City elections. It states in relevant part:

(a) **The City Council may direct the City Attorney to prepare an impartial analysis of any proposed *measure*. If so directed, the City Attorney shall place the impartial analysis on file in the Office of the City Clerk no later than 5:00 p.m. on the date established in accordance with the City Clerk's administrative calendar for the *election* on the proposed *measure*.**

(b) The analysis shall not exceed 500 words in length.

(c) The City Attorney shall prepare the analysis to show the effect of the *measure* on existing law and what the *measure* would do.

(d) If the *measure* affects the organization or salaries of the Office of the City Attorney, the City Council may direct an appropriate official to prepare the analysis.<sup>1</sup>

(e) The analysis shall be printed in the *voter pamphlet* preceding any arguments for and against the proposed *measure*. . .

S.D. Muni. Code §27.0505 [Emphasis added.]

The Municipal Code makes clear that once the Council directs the City Attorney to prepare the analysis, the City Attorney *shall* file it with the clerk. There is no intervening review.

The Municipal Code closely follows the California Elections Code. Section 9280 of the state code states in relevant part:

Whenever any city measure qualifies for a place on the ballot, the governing body may direct the city elections official to transmit a copy of the measure to the city attorney, unless the organization or salaries of the office of the city attorney are affected. **The city attorney shall prepare an impartial analysis** of the measure showing the effect of the measure on the existing law and the operation of the measure. If the measure affects the organization or salaries of the office of the city attorney, the governing board may

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<sup>1</sup> None of the impartial analyses discussed at the February 4, 2008 Council meeting involve "the organization or salaries of the Office of the City Attorney." Thus, it is appropriate for the analyses to be prepared by the City Attorney.

direct the city elections official to prepare the impartial analysis.  
**The analysis shall be printed preceding the arguments for and against the measure.** The analysis shall not exceed 500 words in length. . .

Cal. Elec. Code §9280 [emphasis added].

Both the Municipal Code and state elections law contemplate a process in which a legislative body directs the City Attorney to prepare an impartial analysis of a ballot measure and then to submit it – *without intervening review* – to the appropriate elections official for automatic placement in the ballot pamphlet. Neither law permits a legislative body to direct preparation of an analysis, review the analysis, and only after review, direct its publication.

## **II. Local and State Law Require An Impartial Analysis Not to Be False or Misleading and Provide a Process to Challenge Language that Does Not Comply.**

Elections Code section 9280, on which our local Code is based, plainly places the “duty” to properly prepare an impartial analysis “showing the effect of the measure on the existing law and the operation of the measure” squarely on the City Attorney. *Horwath v. City of East Palo Alto*, 212 Cal. App. 3d 766, 775 (1989) (defect in impartial analysis misled voters about nature of rent rollback legislation).

If a voter believes an impartial analysis submitted to the clerk is flawed or “partial,” the appropriate action is to seek a writ of mandate or injunction to compel the amendment or deletion of the wording on the ground that it is false or misleading. This action is taken during the 10-day examination period after the analysis is submitted to the City Clerk, but before its publication by the County Registrar of Voters.<sup>2</sup> S.D. Muni. Code §§ 27.0404, 27.0515.

A writ of mandate or injunction shall be issued “only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements” for ballot materials. *See, Mandicino v. Maggard*, 210 Cal. App. 3d 1413, 1415 (1989) (ballot argument, not impartial analysis, flawed and modified by court); *King v. Lewis*, 219 Cal. App. 3d 552, 555 (1990) (sought amendment or deletion of impartial analysis on ground it was “misleading in its entirety,” “false in several sections,” biased and otherwise not in compliance with state election law; court ordered two word changes and one deletion, but held changes did not significantly alter meaning of impartial analysis, thus denying attorneys’ fees to prevailing party).

The state has a strong interest in providing the electorate with accurate information in voter pamphlets. Since the pamphlet accompanies the ballot, it appears to give an imprimatur of official approval to its contents and is likely to carry greater weight in the minds of the voters than normal campaign literature. *Hull v. Rossi*, 13 Cal. App. 4th 1763, 1768 (1993), citing

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<sup>2</sup> There is also the potential for post-election review. *Horwath v. City of East Palo Alto*, 212 Cal. App. 3d at 775-780.

*Washburn v. City of Berkeley*, 195 Cal. App. 3d 578, 585 (1987) (deleting from a ballot argument blatantly false statements that opponents of the measure had acted illegally); *see also*, *Patterson v. Board of Supervisors*, 202 Cal. App. 3d 22, 30 (1988) (“... the voter's pamphlet can have a substantial impact on the equality and fairness of the electoral process.”).

The “courts recognize the importance of an impartial ballot summary to the election process and to interpretation of legislative intent thereafter.” *Washburn*, 195 Cal. App. 3d at 585. The purpose of statutes like the one governing preparation of impartial analyses is to “foster a more informed electorate by supplying correct information about the measures appearing on any given ballot.” *Horwath*, 212 Cal. App. 3d 766, 777 (1989). Laws “designed to protect the elector from confusing or misleading information should be enforced so as to guarantee the integrity of the process.” *Chase v. Brooks*, 187 Cal. App. 3d 657, 663 (1986). Courts have also held the “public’s right to an accurate impartial analysis” is an “important right” within the meaning of a statute providing for private attorney general fees. *Hull*, 13 Cal. App. 4th at 1768.

### CONCLUSION

The Council’s request for pre-publication review of the City Attorney’s impartial analyses of ballot measures is a procedure not contemplated by local or state law. The Council has no jurisdiction to revise wording once the materials have been prepared. Permitting Council review or approval before publication could prompt concern about the impartiality of the process and lead to a legal challenge. To the extent a voter or City official contends the analyses are flawed, he or she may challenge the wording in court, in the manner set forth by law.

Respectfully submitted,

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