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MEMORANDUM OF LAW

DATE: March 18, 2016

TO: Andrea Tevlin, Independent Budget Analyst

FROM: City Attorney

SUBJECT: Drafting of Ballot Measure and Fiscal Impact Analysis

INTRODUCTION

Recently you assisted in drafting several municipal ballot measures. The San Diego Municipal Code (Municipal Code) requires the Independent Budget Analyst (IBA) to participate in the drafting of a fiscal impact analysis of all municipal ballot measure to be included in the ballot pamphlet provided to voters. SDMC § 27.0506. You asked whether there is an unlawful conflict of interest if you draft or assist in drafting a measure and, as required by the Municipal Code, prepare the fiscal impact analysis.

QUESTION PRESENTED

Can the IBA prepare a fiscal impact analysis for a ballot measure to be included in the ballot materials provided to voters after participating in the drafting of that ballot measure?

SHORT ANSWER

Yes. The IBA's drafting of ballot measures is not advocacy that would affect the duty to prepare an impartial fiscal impact analysis. Both drafting and analysis are legislative functions, not campaigning that could affect the integrity of the ballot materials.

ANALYSIS

I. THE IBA IS REQUIRED TO PROVIDE A FAIR FISCAL IMPACT ANALYSIS.

The Municipal Code requires the preparation of a fiscal impact analysis of all municipal ballot measures. SDMC § 27.0506. The fiscal impact analysis is a required part of the "ballot materials" provided to voters and can be challenged if false or misleading. SDMC §§ 27.0103, .0404. The Municipal Code provides, in relevant part:

“Ballot Materials” means those items printed on the ballot or in the voter pamphlet relating to *measures* or *candidates*.

(a) For ballot *measures*, *ballot materials* include the ordinance placing the *measure* on the ballot, which contains the *ballot question*. They also include the impartial analysis, if any; the fiscal impact analysis, if any; and arguments for and against the *measure*, if any.

SDMC §27.0103.

The Municipal Code requires the IBA to prepare a draft fiscal impact analysis, which is then reviewed by the Mayor or his designee and the City Auditor. “The fiscal impact analysis must reasonably inform the voters of the proposed measure’s fiscal impact, if any, and be true, impartial and not argumentative.” SDMC § 27.0506(d). This standard requires a neutral analysis to provide accurate fiscal information to voters.

Voters have a right to accurate, unbiased information in ballot materials. *Hull v. Rossi*, 13 Cal. App. 4th 1763, 1768 (1993). In *Lungren v. Superior Court*, 48 Cal. App. 4th 435, 439-40 (1996), the court said it is the official duty of the drafter of ballot materials to prepare a neutral abbreviation of the measure, and it should be presumed that this duty has been regularly performed. The main purpose of these requirements is to avoid misleading the public with inaccurate information. *Lungren*, 48 Cal. App. 4th at 440, citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization*, 22 Cal. 3d 208, 243 (1978). Ballot materials “must reasonably inform the voter of the character and real purpose of the proposed measure.” *Tinsley v. Superior Court*, 150 Cal. App. 3d 90, 108 (1983), citing *Boyd v. Jordan*, 1 Cal. 2d 468, 472 (1934).

Voters may seek a writ of mandate to amend or delete ballot materials on grounds that “the material in question is false, misleading, or inconsistent with the requirements of this article.” SDMC § 27.0404. This Office has previously analyzed the basis for ballot material challenges, explaining that a court shall issue a writ of mandate or injunction upon “clear and convincing proof” that the material is flawed or partial. *See* 2008 City Att’y Report 267 (2008-7; Feb. 22, 2008). Thus, evidence demonstrating a biased fiscal impact analysis overcomes the presumption that the drafter has complied with the duty to prepare neutral materials and is grounds for a successful challenge.

II. DRAFTING BALLOT MEASURES IS NOT CONSIDERED ADVOCACY.

The use of public resources for campaign purposes, including campaigns for ballot measures, is prohibited by both the Municipal Code and state law. San Diego Charter §§ 31, 135; SDMC § 27.3564; *Stanson v. Mott*, 17 Cal. 3d 206 (1976); *Vargas v. City of Salinas*, 46 Cal. 4th 1 (2009); Cal. Gov’t Code § 54964. This Office has issued memoranda outlining prohibitions on the use of City resources for ballot measure campaigns. *See* 2004 City Att’y MOL 195 (2004-16; Oct. 14, 2004).

While the use of public resources for campaign purposes is prohibited, courts have ruled that several activities related to ballot measures are *not* considered advocacy or campaigning when completed prior to a measure being put on the ballot, including staff drafting of a measure. *League of Women Voters v. Countywide Crim. Justice Coordination Com.*, 203 Cal. App. 3d 529, 550 (1988). In *League of Women Voters*, the court determined that drafting and development activities prior to a measure being put on the ballot were not “partisan campaign activity” but a “proper exercise of legislative authority.” *Id.* This Office has relied on *League of Women Voters* in the past to permit City employees to “explore, prepare and finalize ballot language.” 1990 City Att’y MOL 510 (90-50; Apr. 13, 1990), attached. Activities authorized by “clear and unmistakable [statutory] language,” such as the preparation of ballot materials are not campaign activities. *League of Women Voters*, 203 Cal. App. 3d at 544.

Since the drafting and development of a ballot measure does not constitute advocacy that would implicate prohibitions on the use of public resources, it is unlikely that a court would consider those activities evidence of bias invalidating an otherwise impartial fiscal impact analysis.¹ The Municipal Code provides an additional safeguard to ensure impartiality as the fiscal impact analysis requires three individuals (IBA, Mayor, City Auditor) to coordinate final language. SDMC § 27.0506(a). Two of the three reviewers can agree to language without the consent of the third party. *Id.*

CONCLUSION

The IBA’s participation in drafting a ballot measure is not considered advocacy and should not present any challenge to the preparation of impartial ballot materials. Drafting and analysis are legislative functions, not campaigning for a measure. Since drafting a measure is not considered advocacy, that activity alone would not provide evidence of bias that would invalidate a fiscal impact analysis as false and misleading.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Jennifer L. Berry

Jennifer L. Berry
Deputy City Attorney

JLB:sc

ML-2016-6

Doc. No. 1239789_1

Attachment: 1990 City Att’y MOL 510 (90-50; Apr. 13, 1990)

cc: Eduardo Luna, City Auditor
Elizabeth Maland, City Clerk

¹ We are unaware of any other IBA activities that would provide evidence of impartiality.

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 (SPECIAL PROJECTS)

MEMORANDUM OF LAW

DATE: April 13, 1990
TO: Ann Van Leer, Council Representative
FROM: City Attorney
SUBJECT: Political Activity of City Staff on Open Space and
 Park Bond Committee

Arising from the involvement of city staff on the Open Space and Park Bond Committee, you have recently inquired as to the limitations placed on public employees in support of ballot activities. We have repeatedly stressed that public employee activity on pending or potential ballot issues presents a delicate constitutional balance that is essentially struck by permitting an informational role but denying a promotional role. Stanson v. Mott, 17 Cal. 3d 206 (1976), and City Attorney Memoranda of Law of December 19, 1988; October 26, 1988; September 29, 1986; February 20, 1985; and Memoranda of August 20, 1985; August 7, 1981; June 20, 1975 and August 1, 1967.

It is only recently that the courts have confronted to what extent public employees may participate in creating ballot measures. In 1988, the League of Women Voters challenged the preparation of an initiative measure aimed at criminal justice reforms and using the staff time and administrative resources of a county district attorney's office in formulating, drafting and typing memoranda on various forms of the initiative. The League challenged the use of public time and resources as an improper expenditure of public funds in placing public resources in support of a ballot issue since it is fundamentally improper for government to bestow an advantage on one side of competing interests.

The court in League of Women Voters v. Countywide Crim. Justice Coordination Com., 203 Cal. App. 3d 529 (1988), recognized it faced an issue of first impression. While clearly one purpose of government was to formulate legislation, what limits existed in the initiative process to ensure that government did not become the principal promotor of an issue such that an unfair advantage existed?

Ms. Van Leer

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April 13, 1990

Recognizing the dual activities of preparation and promotion the court found:

Clearly, prior to and through the drafting stage of a proposed initiative, the action is not taken to attempt to influence voters either to qualify or to pass an initiative measure; there is as yet nothing to proceed to either of those stages. The audience at which these activities are directed is not the electorate per se, but only potentially interested private citizens; there is no attempt to persuade or influence any vote [citation]. It follows those activities cannot reasonably be construed as partisan campaigning. Accordingly, we hold the development and drafting of a proposed initiative was not akin to partisan campaign activity, but was more closely akin to the proper exercise of legislative authority.

League, 203 Cal. App. 3d at 550.

Once formulated, however, the promotion of a ballot measure presents the spectre of governmental advocacy. Stanson and its progeny clearly permit government information but distinguish between public education and public advocacy.

Whether CCJCC legitimately could direct the task force to identify and secure a willing sponsor is somewhat more problematical. The power to direct the preparation of a draft proposed initiative does not necessarily imply the power to identify and secure a willing proponent to sponsor it thenceforward. On the one hand, it can be argued the power to draft the proposed initiative is essentially useless without the power to seek out a willing proponent and the latter power thus must be implied. On the other hand, it can be argued this brings CCJCC, as an arm of the board of supervisors, too close to impermissible publicly funded political activity, in that it necessarily involves some degree of advocacy or promotion. The logical force of the latter view depends largely on the approach the task force employed in identifying a willing proponent.

. . . .

Ms. Van Leer

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To the extent CCJCC had authority to direct the performance of the above acts, it is clear the county's elected officers had authority to participate in CCJCC and its subcommittees and to perform a broad spectrum of tasks at public expense. It is only at the point the activities of CCJCC and its subcommittees cross the line of improper advocacy or promotion of a single view in an effort to influence the electorate that the actions of elected officers or their deputies, undertaken at public expense, likewise would become improper.

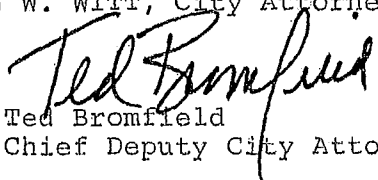
League, 203 Cal. App. 3d at 553-554.

Stressing the distinction between preparation and promotion, you are advised that city employees may properly utilize time and necessary support to explore, prepare and finalize ballot language. However, there should be no public employee time or resources devoted to fundraising or public relations since this is more concerned with improper advocacy than with permissible information. Of course, this restriction does not apply to citizen volunteers or employees whose efforts are clearly outside their public employment.

As you can see, government need not stand silent in the face of pressing issues. Its voice, however, must have the measured tone of information and not advocacy.

JOHN W. WITT, City Attorney

By


Ted Bromfield
Chief Deputy City Attorney

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