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MEMORANDUM OF LAW

DATE: November 13, 2017
TO: City Council
FROM: City Attorney
SUBJECT: Councilmember Absences

INTRODUCTION

The City Attorney's Office recently was asked about the laws requiring Councilmembers to attend meetings and the protocols for Councilmember absences. This memorandum addresses the issue.

Councilmembers have a Charter-imposed duty "to attend all Council meetings." San Diego Charter § 12(e). The San Diego City Council (Council) "shall" vacate a Councilmember's seat if absences exceed eight consecutive meetings or 50 percent of any scheduled meetings in a month, unless the Council excuses the absences by resolution. *Id.* A related section of the San Diego Municipal Code (Municipal Code and SDMC) similarly requires Councilmembers to attend standing committee meetings or to seek excused absences. SDMC § 22.0101, Rules 6.4.5 and 6.8.1.

The San Diego Charter (Charter) also provides a rarely used power to underscore the importance of attendance: Councilmembers "shall have power to compel the attendance of absent members, and may punish its members for disorderly behavior after notification of the charge and opportunity to be heard in defense." San Diego Charter §14.

A few Council offices diligently submit agenda items seeking Council approval of excuses for their absences. Other Councilmembers do not submit such agenda items, perhaps in the belief they will not exceed the limit, while newer members may be unaware of the Charter mandate.

This memorandum considers what qualifies as a meeting "absence" that may require an excuse under the Charter and the Rules of the Council (Rules of Council) in the Municipal Code. It examines governing law and voter intent and reminds Councilmembers of protocols related to absences from meetings they have a Charter-imposed duty to attend. This memorandum also

considers how and whether a Councilmember may participate in a meeting if not physically present.

QUESTIONS PRESENTED

1. What qualifies as a Councilmember's "absence" from a meeting under the Charter and Rules of Council, potentially requiring Council approval of an excuse?
2. What are the protocols for seeking an excused absence?
3. How and when may a Councilmember participate in a meeting at which he or she is not physically present?

SHORT ANSWERS

1. Charter section 12(e), and the related Rules of Council in the Municipal Code, limit the number of unexcused absences from meetings that a Councilmember may incur without forfeiting a seat on the Council or a Council committee. Voter intent and statutory interpretation confirm that the absences the Charter contemplates are those from regularly scheduled meetings. As discussed in this memorandum, even partial absences from regularly scheduled Council meetings are absences within the meaning of the Charter. The Rules of Council include similar language governing Committee absences. Thus, Councilmembers should track absences and seek Council resolutions excusing absences.

2. Councilmembers who miss a meeting have the responsibility to submit Council agenda items if they wish to seek a Council-approved excuse. It is legally advisable for Councilmembers to provide a reason for their absence, to be included in the resolution. This has been the routine practice of Councilmembers for many years. This provides a record and a basis for the Council's exercise of discretion to grant an excuse, sheds light on a Councilmember's attendance practices, and gives transparency to the public.

3. Councilmembers are encouraged to work with this Office if they seek to participate at Council or Committee meetings during discussion of an item when they are not going to be physically present to hear it.¹ In certain instances, it is not legally appropriate for a Councilmember to participate by submitting a statement, such as when an item is quasi-judicial, requiring Councilmembers to hear facts and evidence and make findings. Councilmembers should contact this Office before submitting proposed statements.

¹ This memorandum does not address teleconferencing, which may be available to a traveling Councilmember, for example, if all conditions specified by the Ralph M. Brown Act are met (including specific noticing and opening the remote location to members of the public who may wish to attend). Cal. Gov't Code § 54953(b). Our Office can provide a memorandum regarding teleconferencing procedures upon request.

DISCUSSION

I. COUNCILMEMBERS HAVE A CHARTER-IMPOSED DUTY TO ATTEND ALL MEETINGS; THE COUNCIL “SHALL VACATE THE SEAT” OF ANY COUNCILMEMBER WHO EXCEEDS THE LIMIT FOR UNEXCUSED ABSENCES.

The Charter requires Councilmembers to attend all meetings and expresses a severe ramification if a Councilmember has excessive unexcused absences. Charter section 12(e) states:

It is the duty of the Council-members to attend all Council meetings. The Council shall vacate the seat of any Councilmember who is absent from eight (8) consecutive meetings or fifty percent (50%) of any scheduled meetings within a month unless the absence thereof is excused by resolution of the Council.

The Charter section does three things:

- (1) it places a duty on Councilmembers to attend all Council meetings;
- (2) it describes when the Council is required to declare a vacancy in office for a Councilmember’s unexcused absences; and
- (3) it provides a method for the Council to excuse meeting absences.

See 1993 City Att’y MOL 187, 192 93-26 (Mar. 3, 1993).

This Office has issued several memoranda addressing Councilmember absences. We discuss, and distinguish as may be warranted, certain earlier advice here:

- In 1974, the Council treated any “presence, however short in duration, [as] qualifying a councilman not to be considered . . . absent from a meeting.” 1974 City Att’y MOL 267-68 (Aug. 20, 1974). This Office later suggested this practice did not conform to the Charter’s intent because it nullifies the Council’s power under Charter section 14 to compel a member’s attendance. 1978 City Att’y MOL 272 (Aug. 11, 1978).
- In 1993, this Office construed “meeting” to determine which unexcused absences might subject a Councilmember to losing his or her seat. 1993 City Att’y MOL 187.² When voters amended Charter section 12 in 1963, voters were provided with a supporting ballot argument expressing the intent that a Councilmember forfeit his or her seat only for unexcused absences from

² The paragraph of Charter section 12 construed in 1993 became Charter section 12(i) after the June 7, 1994 election; it became section 12(f) after the June 2014 election; and became section 12(e) after the November 2016 election.

“regular” Council meetings.³ Applying principles of statutory construction and reviewing legislative history, this Office concluded a Councilmember could forfeit elected office only for unexcused absences from *regularly scheduled* City Council meetings, even though section 12 places a duty on Councilmembers to attend *all* Council meetings.⁴ 1993 City Att’y MOL at 188-90, 196, 197, 199. The Charter section thus does not apply to “special” meetings. These principles of statutory construction and legislative history are unchanged; the analysis remains legally sound.

Significantly, the Council is required to approve a legislative calendar for an entire calendar year each December, which is referenced in the Municipal Code and lists the date and time of every Council and standing committee meeting set for the year ahead. SDMC § 22.0101, Rules 1.1, 1.3, 1.4 and 2.1. The legislative calendar is posted on the City’s website, providing the public with advance notice of all meetings. The calendar is set well in advance to allow Councilmembers sufficient notice to minimize absences, to the extent possible. Given the legal duties to attend Council and committee meetings, the legislative calendar is designed to assist advance planning and reduce absences.⁵

A. Voter Intent Supports the Interpretation that the Charter Language Applies to Attendance at All of Each Regularly Scheduled Meeting.

When construing the meaning of a voter-approved amendment to a city charter, courts use the same process as they would to construe a voter-approved amendment to the state Constitution. *Woo v. Superior Court*, 83 Cal. App. 4th 967, 975 (2000). The voter’s intent in approving the measure is the “paramount concern.” *Id.* Courts first look to the actual words of the provision adopted. If the language is clear and unambiguous, there ordinarily is no need for construction, and a court’s inquiry will end. *Id.*

Common sense and the Council’s long-existing practices confirm that missing an entire regularly scheduled Council meeting is an absence that might result in loss of a Council seat if too frequent and unexcused. The plain meaning of being “absent” means being “not present.” *Webster’s New Universal Unabridged Dictionary* 6 (2d ed. 1983). This language is clear. The

³ This 1993 memorandum impliedly superseded one from 1978 to the extent it assumed, without analysis, that unexcused absences from *special* Council meetings would also count toward unexcused absences that might lead to loss of a Council seat. 1978 City Att’y MOL 272.

⁴ The following Rule of Council in the Municipal Code has been cited to define what the City considers to be a “regular” weekly meeting of the City Council: Former Rule 1(a) has been renumbered as Rule 1.1. It provides: “1.1. Time. The regular weekly meetings of the City Council shall be scheduled as follows: Monday 2:00 p.m. — 5:30 p.m. Tuesday 10:00 a.m. — 6:00 p.m.” SDMC § 22.0101, Rule 1.1. Rule 2.2 provides that Closed Session is held Tuesdays at 11 a.m., falling within the time of the regular meeting and thus included in the definition. *Id.*, Rule 2.2. Given the Charter’s direction that Councilmembers are required to attend “all Council meetings,” with no exception made in the Charter for attendance at Closed Session, Councilmembers are now advised to seek excused absences from Closed Session as well. *See* RC 90-53, Closed Session “Leaks” (Oct. 16, 1990). We note that, historically, Councilmembers did not seek excused absences from Closed Session meetings.

⁵ Although the legislative calendar is not intended to be amended after it is approved annually (generally in December), the Council has recently amended the calendar with frequency. This affects the amount of notice the public has about when to expect Council and committee meetings to be held.

analysis at issue is whether a failure to be present *at any part of a meeting* would qualify as an absence from that meeting and is addressed below.

Voter intent regarding the language in Charter section 12(e) is critical in determining which specific “absences” require excuses. Printed ballot arguments are persuasive. 1993 City Att’y MOL at 196. When voters amended Charter section 12 in 1963, voters were provided with a supporting argument expressing the intent that a Councilmember forfeit his or her seat only for unexcused absences from “regular” Council meetings. Prop. B, Special Municipal Elec. (Sept. 17, 1963). The ballot argument said in part: “The Charter Review Committee also felt that Charter provisions were necessary to require a good attendance record at Council meetings on the part of all members, and is proposing that limits be set as to the number of unexcused absences at *regular meetings*.” *Id.* (emphasis added here, but not in the ballot materials).

The ballot argument also supports an interpretation that voters expected Councilmembers to be present and to participate at *all of each* regular City Council meeting, thus ensuring a “good attendance record.” *Id.* This interpretation avoids the potential absurdity of permitting any Councilmember who attends roll call, yet misses the substantive part of the meeting, to be counted as present.⁶

This interpretation harmonizes with related Charter sections, so all are equally effective. For example, Charter section 12(f) requires Councilmembers to “devote full time to the duties of their office and not engage in any outside employment, trade, business or profession which interferes or conflicts with those duties.” The supporting argument for this 1974 amendment emphasized the need for Councilmembers to “devote the majority of their working time to their City responsibilities.” Prop. L, Special Municipal Elec. (Nov. 5, 1974). It continued: “These duties require the full-time use of the energy, talent and resources of these elected representatives. Their decisions are far-reaching and must be based upon deliberate and full consideration of the data available to them.” *Id.* Interpreting Charter section 12(e) to require the City’s full-time Councilmembers to attend all of each regularly scheduled City Council meetings is consistent with and furthers the purposes of section 12(f).

This interpretation is also consistent with Charter section 14, providing the Council “the power to compel the attendance of absent members.” A failure to treat partial absences from regular City Council meetings as an absence under Charter section 12(e) could nullify the Charter section 14 power, as this Office explained in 1974: “Those who do not want their attendance compelled would show up for roll call, and then disappear We believe that the better procedure would be for the Council to require its members to be present during the entire course of a meeting in order for an absence not to be recorded.” 1974 City Att’y MOL at 268. In addition, this interpretation encourages Councilmembers to exercise and fulfill their right and responsibility to vote on all matters before the Council, except matters involving consideration of their own official conduct or in their personal interests. San Diego Charter §§ 15, 270(d).

⁶ The City Clerk’s legislative recorders document Councilmember absences from each Council vote, which appear in the minutes recorded for each Council meeting. Councilmembers are responsible for deciding whether to seek an excused absence by resolution, and for independently calculating whether their unexcused absences may be nearing the limits set by the Charter and Municipal Code.

This Office recognizes that the Council has come to treat any member's presence at a Council meeting, however short in duration, as presence for the entire meeting. The practice is inconsistent with the Charter and intent of the voters, the requirement that Councilmembers devote full time to the duties of their office, and Councilmembers' responsibilities to vote on matters that come before the Council. San Diego Charter §§ 15, 270(b). Voters intended to place a duty upon Councilmembers to "attend all Council meetings," not simply parts of all Council meetings, when enacting the Charter section. Prop. B, Special Municipal Elec. (Sept. 17, 1963). Thus, given the potential consequences of removal from office, Councilmembers may wish to seek excused absences by resolution for any partial absence from a Council meeting.⁷ As has long been the practice, Councilmembers may group multiple absences into a single resolution.

B. Councilmembers Have Similar Duties to Attend All Regularly Scheduled Council Committee Meetings.

The Rules of Council in the Municipal Code include similar law removing Councilmembers from a standing committee seat for unexcused committee meeting absences. See 1993 City Att'y MOL at 190 n.2, 198 and n.13. The 1993 memorandum did not address what types of unexcused absences from these meetings might qualify to vacate a committee seat. The Municipal Code language, modeled after Charter section 12(e), follows:

The Council shall vacate the committee seat of any appointed committee member who is absent from four consecutive scheduled committee meetings of that committee unless the absence thereof is excused by resolution of the Council.

SDMC § 22.0101, Rule 6.4.5. Additionally,

It shall be the duty of each Councilmember to attend every meeting of every committee of which he or she is a member, and he or she is charged with fulfilling the responsibilities of such committees.

Id., Rule 6.8.1.

The Rules of Council that require Councilmembers to attend Committee meetings, and permit absences to be excused, thus is similar to Charter section 12(e). *Id.* Rules 6.4.5 and 6.8.1. We note, however, that the Municipal Code confirms that the ramification for failing to attend Committee meetings is losing a spot on the Committee, not forfeiting a Council office.

⁷ The Council voted to remove a member on "absences" grounds in the 1970s. Although distinguishable from routine absence cases, the historical note confirms there is precedent for such removal from office. Councilmember Jess Haro had been appointed to fill the vacancy in the seat previously held by Jim Bates. Councilmember Haro was under federal investigation for customs violations. He was later charged with a misdemeanor and faced jail time. At the time this was discovered, the Council considered the number of meetings Councilmember Haro would miss if sentenced to at least 30 days in jail. Although the Council had discretion to excuse his absences, the Council chose to vacate his Council seat based on the Charter's absences provision and invoked that clause to remove him from office.

II. COUNCILMEMBERS SHOULD PROVIDE A REASON FOR ANY ABSENCE THEY SEEK TO HAVE EXCUSED, BUT DO NOT RELINQUISH LEGAL RIGHTS TO PRIVACY.

In placing the duty on Councilmembers to attend all regularly scheduled meetings, the Charter and Municipal Code also provide the Council with authority to adopt a resolution excusing absences. The decision whether to grant such an excuse is addressed to the Council's sound discretion. *See* 1973 City Att'y MOL 194 (May 21, 1973). Generally speaking, courts will not interfere with discretionary public agency decisions unless there is a claim the agency abused its discretion. *See* 2A McQuillin Mun. Corp. § 10:40 (3d ed. 2017). When courts do become involved, their focus is whether the decision made was arbitrary or capricious or a reasonable exercise of the discretionary power. *See Bright Development v. City of Tracy*, 20 Cal. App. 4th 783, 795 (1993).

Neither the Charter nor the Rules of Council expressly require Councilmembers to provide reasons for meeting absences when they request a Council-approved excuse. Both the Charter and the Municipal Code do, however, require the Council to act by resolution when granting an excuse. A resolution is evidence of a Council's decision. Including a reason for the decision within a resolution provides the Council with a basis for exercising its discretion—in this situation, whether to grant or deny the excuse. The reason can be used as evidence in any court review of whether the Council is properly exercising its discretion. It also assures the public that absent Councilmembers are justifiably excused from performing their duty to attend regularly scheduled Council or Committee meetings and provides transparency to the public.⁸

As the Council's decision whether to excuse absences is addressed to the sound exercise of the Council's discretion (*see* 1973 City Att'y MOL 194), this Office has also opined that the Council "may certainly call upon its members to justify their absences." *Id.* It may avoid any perception that a Council decision was made outside the public's view, or was an abuse of discretion made without regard for the reason for the absence. This practice also provides public transparency about the reasons for the absences. For these reasons, Councilmembers should include a reason for their absence that can be incorporated into the resolution.

III. COUNCILMEMBERS SHOULD PROCEED CAUTIOUSLY IF THEY WISH TO PROVIDE INPUT ON A COUNCIL ITEM AND ARE NOT PHYSICALLY PRESENT TO HEAR IT.

On rare occasion, a Councilmember may wish to participate in a Council meeting and cannot physically attend. In such cases, our Office advises that the Council office contact us for guidance in advance of the meeting to avoid situations in which an attempt to participate from afar may create legal issues.

For example, the Council President recently was asked to read a statement from an absent Councilmember during consideration of an item, including a statement indicating how that

⁸ Any excuse provided is not intended to invade a Councilmember's privacy. This Office is mindful that resolutions would not include any information that is legally protected, such as medical information that is safeguarded by laws such as the Health Insurance Portability and Accountability Act of 1996 (commonly known as HIPAA). Councilmembers might simply state, for example, they were absent due to illness.

Councilmember would vote, if present. Such statements may be legally problematic. Certain language may need to be included in a statement to potentially protect the City from legal challenge. Depending on the nature of the item, our Office also may advise against such a practice, as it may be legally inappropriate. In the case of a quasi-judicial item, for example, Councilmembers must be present to hear all facts and evidence presented during consideration of the item so they can make findings and then vote. Councilmembers are also reminded of their need to review the tapes of a missed meeting if they intend to participate in a vote on that issue at a later meeting.

CONCLUSION

Most Councilmembers infrequently miss Council or standing committee meetings, and absences generally are justified by the reasons they provide when seeking an excuse by resolution of the full Council. Councilmembers, however, have not always considered the ramifications for unexcused absences, and some choose not to submit agenda items to be excused by resolution. This memorandum is intended as a reminder that Councilmembers carefully consider their attendance and diligently process items for excused absences when warranted.

Charter section 12(e), and the Rules of Council modeled on that section, intend that all Councilmembers' absences from regular Council meetings or standing committee meetings be treated the same, whether they are absences from only part, or the entirety of those meetings. We conclude it is legally advisable for Councilmembers to provide reasons for absences from a meeting before seeking to be excused. Incorporating the reason for the absence within the resolution for the Council's consideration provides evidence of the proper exercise of the Council's discretion and avoids any perception a decision was made outside the public view. On the rare occasion in which a Councilmember wishes to participate in a meeting he or she cannot physically attend, we recommend that the Council office contact our attorneys in advance to determine whether that will present legal risk.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Sharon B. Spivak
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cc: Elizabeth Maland, City Clerk