Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: November 13, 2013

TO: Councilmember Sherman

FROM: City Attorney

SUBJECT: City Sponsorship of Candidate Debates

INTRODUCTION

In response to citizen comments suggesting the City Council sponsor debates among the candidates for Mayor, either in City Council chambers or on CityTV, you asked this Office to review and advise the City Council on the legality of such a proposal.

QUESTION PRESENTED

May the City Council expend City funds or use City resources to sponsor a debate among mayoral candidates in the upcoming election?

SHORT ANSWER

Probably not. The City cannot use public resources to either promote or oppose a specific candidate or ballot measure. Where an activity, such as a candidates' debate, is not clearly either a campaign activity or informational, a court would look to the style, tenor, and timing of the activity to determine if it were an attempt to influence the resolution of an election, which would violate the rule.

ANALYSIS

I. PUBLIC AGENCIES ARE CONSTITUTIONALLY PRECLUDED FROM USING PUBLIC FUNDS TO SUPPORT A CANDIDATE OR BALLOT MEASURE.

The California Supreme Court decisions addressing the issue of use of public funds in campaigns have largely been in the context of ballot measures. In *Stanson v. Mott*, 17 Cal. 3d 206 (1976), the court reviewed expenditures of public funds by the Director of the California Department of Parks and Recreation to promote a park bond measure. The standard articulated by the California Supreme Court established the distinction between "campaign" materials and activities that may not be paid for with public funds and "informational" material that would be an appropriate public expenditure. The court reaffirmed the holding of some 50 years earlier in *Mines v. Del Valle*, 201 Cal. 273 (1927) limiting campaign expenditures unless there was clear authority. In

Mines, the court was reviewing expenditures by a public utility on banners and other communications to promote passage of a bond measure. The court held that the utility did not have the authority to make the expenditures unless the power to do so was given to its board "in clear and unmistakable language." *Id.* at 287.

The *Stanson* court explained that "as a constitutional matter, 'the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave[s] to the free election of the people (*see* Cal. Const., art. II, § 2) . . . present[s] a serious threat to the integrity of the electoral process'." *Vargas v. City of Salinas,* 46 Cal. 4th 1, 24 (2009), *Stanson,* 17 Cal. 3d at p. 218. The court found that for activities that were not clearly either campaign activities or informational in nature, it was necessary to examine the "style, tenor, and timing" of the communication to determine whether it would be constitutionally permissible to use public funds. *Id.* at p. 222, n.8.

Although these cases have dealt primarily with ballot measures, in 1986, the California Supreme Court applied these principles to a judicial election. *Keller v. State Bar,* 47 Cal. 3d 1152 (1989) (reversed on other grounds, 496 U.S. 1 (1990)). There, the California Supreme Court upheld a challenge to actions taken by the State Bar of California in advance of the 1982 judicial retention election, in which the State Bar prepared various materials discussing the history of judicial independence and related information. None of the materials prepared and presented by the State Bar referenced specific judges whose names were on the ballot for retention. However, the court, referencing the *Stanson* decision, stated "it is not essential that [a] publication expressly exhort the voters to vote one way or another" in order to be considered improper campaign activity. *Keller,* 47 Cal. 3d at 1171, n 22. The court found the nature and timing of presentation of educational materials that might otherwise be within the State Bar's purview amounted to prohibited election campaigning because it amounted to an attempt to influence the outcome of the election.

In 2000, the State enacted Government Code section 54964, which provides, in pertinent part:

> (a) An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.
> . . . .
>
> (b)(3) "Expenditure" means a payment of local agency funds that is used for communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters.

While this section could be read to prohibit only "express advocacy," in 2009 the California Supreme Court clarified that the statute does not change the rule provided in *Stanson.* The Court stated:

> Section 54964 does not *clearly and unmistakably authorize* local agencies to use public funds for campaign materials or activities so

> long as those materials or activities avoid using language that expressly advocates approval or rejection of a ballot measure. Instead, the provision *prohibits* the expenditure of public funds for communications that contain such express advocacy, even if such expenditures have been affirmatively authorized, clearly and unmistakably, by the local agency itself.

Vargas, 46 Cal. 4th at 29 (Emphasis in original).

In reading the above-cited cases together, the applicable standard is that California law prohibits express advocacy, even if otherwise purportedly authorized; and that materials and activities which by their "style, tenor, and timing" could be considered advocacy, i.e., attempting to influence the outcome of an election, are likewise prohibited. Absent clear direction to the contrary, this office reads the cases to apply the same principles to activities related to individual candidates for public office. See also San Diego Municipal Code section 27.3564(b):

> It is unlawful for any *City Official* to engage in campaign-related activities, such as fund-raising, the development of electronic or written materials, or research, for a campaign for any elective office using *City* facilities, equipment, supplies, or other *City* resources.

This section is not directly implicated on the facts presented, but could be relevant depending upon facts.

On its face, a candidates' debate serves an informative function, giving the voters an opportunity to compare the candidates in an upcoming election, not unlike the informational materials provided by the State Bar in *Keller*. However, sponsorship of a debate necessarily includes the framing of questions, which then colors what information the voters are able to learn about the candidates. This kind of activity would fall in the grey area between express advocacy for a particular candidate and a purely informational item. As such, in keeping with the principles articulated in *Stanson* and *Keller*, any such activity would be evaluated for its style, tenor, and timing, and would be at risk of legal challenge by any constituent who viewed the proceeding as favoring a candidate or candidates.

II. THE CITY'S POLICY FOR USE OF CITYTV PRECLUDES ITS USE TO PROMOTE POLITICAL CANDIDATES.

This Office prepared a comprehensive analysis in 2009 on permissible uses of CityTV. *See* 2009 City Att'y MOL 59 (09-4; July 24, 2009), a copy of which is attached. The memorandum concludes that the City may broadcast programs produced by elected officials with *personal funds* provided that the shows satisfy the City's policies related to CityTV and that CityTV may broadcast programs *paid for by individuals or entities not employed by the City* provided the shows satisfy the City's policies related to CityTV.

Council Policy 700-37, "City Use of Cable Television," provides as follows:

> The Government Access Channel [CityTV] shall be used for the presentation of program material relating to the local government matters and may also be used for the presentation of material relating to community services with the approval of the City Manager or the committee provided for in this policy.

Consistent with strictures in State law prohibiting the use of public resources for campaign purposes, the Council Policy further states, "The Government Access Channel shall not be used for the promotion of any political candidacy or for the promotion of any ballot measure."

In keeping with the legal principles discussed above and with Council Policy 700-37, the City's Video Production Policies document provides as follows:

> The channel may not be utilized for the promotion or "use" of any elected official or candidate. Specific advertising messages on behalf of or opposing any political candidate or measure on a ballot shall not be permitted. Candidates for election or reelection to any office shall not be permitted to use the municipal cable channel, except as may be part of a formal public meeting from the time of their legally qualified candidacy until after the election.

CONCLUSION

The City cannot use public resources to either promote or oppose a specific candidate or ballot measure. Where an activity, such as a candidates' debate, is not clearly either a campaign activity or informational, a court would look to the style, tenor, and timing of the activity to determine if it were an attempt to influence the resolution of an election, which would violate the rule.

JAN I. GOLDSMITH, CITY ATTORNEY

By */s/ Prescilla Dugard*
Prescilla Dugard
Chief Deputy City Attorney

PMD:hm
Attachment
MS-2013-14
Doc. No. 667068

cc: Councilmembers
Andrea Tevlin, Independent Budget Analyst

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MEMORANDUM OF LAW
REVISED

DATE: July 24, 2009

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: CityTV, Channel 24 – Advertising, Sponsorship, and Programming

INTRODUCTION

This Memorandum of Law was prepared in response to various verbal requests from staff members of the Office of Community and Legislative Services and members of the Rules, Open Government and Intergovernmental Relations Committee of the City Council to examine the possibility of allowing (or expanding) the use of sponsorship arrangements and advertising on CityTV, Channel 24 [CityTV]. It also examines how funds received from advertising or sponsorship can be used and who may pay to produce programs that air on CityTV.

QUESTIONS PRESENTED

1. May CityTV accept sponsorship funds?

2. May CityTV broadcast paid advertising?

3. May CityTV broadcast programs produced by elected officials using personal funds?

4. May CityTV broadcast programs produced and paid for by individuals and entities not employed by the City?

5. May the City use revenue received from sponsorships or advertising to fund programs or activities other than public, educational, or governmental channel related activities?

SHORT ANSWERS

1. Yes, CityTV may accept sponsorship funds.

2. No, current City policies do not allow CityTV to broadcast paid advertising.

3. Yes, CityTV may broadcast programs produced by elected officials with personal funds provided that the shows satisfy the City's policies related to CityTV.

4. Yes, CityTV may broadcast programs produced and paid for by individuals or entities not employed by the City provided the shows satisfy the City's policies related to CityTV.

5. No, the City may only use revenue from sponsorships or advertising to fund public, educational, and governmental channel related activities.

BACKGROUND

The Federal Cable Communications Act of 1984 [Cable Act] allows franchising authorities to require cable television providers to designate channels to be used for "public, educational, or governmental use" [PEG Channels] and to institute rules to govern the use of PEG Channels. 47 U.S.C. § 531(b). Two types of franchise agreements govern the delivery of video and cable television services (other than satellite television) in the City of San Diego [City] and mandate the provision of PEG Channels: City-issued franchises and State-issued franchises.

The City has City-issued franchise agreements with two companies: CoxCom, Inc. [Cox] and Time Warner Entertainment-Advance/Newhouse Partnership [Time Warner]. Cox provides cable television services in an area south of the San Diego River under the terms of its City-issued franchise agreement [Cox Franchise]. The Cox Franchise was originally entered into in 1979 with a company that was a predecessor in interest to Cox.[1] It was significantly amended in 2002, and the term of the franchise was extended to January 31, 2019.[2]

Time Warner provides cable television services in the City in an area north of the San Diego River under the terms of its City-issued franchise agreement [Time Warner Franchise]. The Time Warner Franchise was originally entered into in 1980 with a company that was a predecessor in interest to Time Warner.[3] The agreement was significantly amended in 2004, and the term of the franchise was extended to April 9, 2020.[4]

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[1] San Diego Ordinance O-12543 (January 2, 1979).

[2] San Diego Ordinance O-19058 (May 14, 2002).

[3] San Diego Ordinance O-15213 (March 10, 1980).

[4] San Diego Ordinance O-19275 (December 8, 2004).

Section 10(d)(1) of the Cox Franchise and Section 10(d)(1) of the Time Warner Franchise require each of the respective companies to provide the City with one channel "for use by local governments for the distribution of non-commercial programming in the public interest." Cox and Time Warner broadcast the same programming on this government PEG Channel, and the City brands this channel as "CityTV, Channel 24."

After the Digital Infrastructure and Video Competition Act of 2006 [DIVCA] became effective on January 1, 2007, cable television providers (and other "Video Service" providers) in California gained the ability to apply to the California Public Utilities Commission (instead of local franchising authorities) to receive franchises for the provision of Video Service [State Franchises]. Cal. Pub. Util. Code § 5800, et seq. DIVCA defines "Video Service" to include cable television and video programming "provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology." Cal. Pub. Util. Code § 5830(s). "Video Programming" is defined in DIVCA as "programming provided by, or generally considered comparable to programming provided by a television broadcast system . . . ." Cal. Pub. Util. Code § 5830(r). Video Service other than cable television is generally delivered over fiber optic cables or existing copper wires (phone lines).

During 2007, the California Public Utilities Commission awarded State Franchises to two companies, AT&T California [AT&T] and Cox Communications, to provide Video Service in the City. AT&T's State Franchise allows it to operate within the entire City. Cox Communications was granted a State Franchise to operate in three discrete areas in the northern half of the City.[5] Because Section 5870(a) of DIVCA requires State Franchise holders to provide PEG Channels "under the terms of any franchise in effect in the local entity as of January 1, 2007," both AT&T and Cox Communications are required to carry CityTV.

This memorandum will examine the questions the Office of the City Attorney was asked to review within the context of both City-issued franchises and State Franchises.

ANALYSIS

I. CityTV May Accept Sponsorship Funds.

A. Existing City Policies

1. *Council Policy No. 700-37*

On July 20, 1977, pursuant to the federal rules in existence at the time, the City Council adopted Council Policy No. 700-37 [Council Policy 700-37] regarding City use of Cable Television (attached as Exhibit 1). As described in Section III of this memorandum, Council

[5] These three areas essentially cover Qualcomm Stadium, the Stonebridge development in Scripps Ranch, and portions of the Black Mountain area in Carmel Valley.

Policy 700-37 sets forth general rules regarding the presentation of program material on the government channel (which is now known as CityTV).

Council Policy 700-37 states, in part, that FCC Rules require local cable franchises to make available one "local government" channel and one channel for "local public uses." Those requirements were superseded when the Cable Act went into effect (federal law no longer mandates provision of a government channel or a public access channel, but those requirements can be negotiated and imposed through franchise agreements). However, passage of the Cable Act did not supersede the portions of Council Policy 700-37 regarding the types of programming that may appear on CityTV, and those requirements remain in effect. Nevertheless, Council Policy 700-37 does not provide express guidance regarding the use of sponsorships to support programming on CityTV.

2. *Municipal Programming and Video Production Policies*

In 2008, the City's Office of Community and Legislative Services [OCLS] adopted "Municipal Programming and Video Production Policies" [OCLS Policy]. The OCLS Policy augments City Council Policy 700-37 and is used to address the issues of advertising and sponsorship on CityTV. To the extent there is any conflict between the OCLS Policy and City Council Policy 700-37, the Council Policy would control. The OCLS Policy (attached as Exhibit 2) provides that the City will "accept sponsorship of programming which meets the desired goals and objectives of [CityTV]" and that "[A]cknowledgment (including in-program recognition) is permitted for entities providing or sponsoring segments of programs produced by the City." Therefore, the OCLS Policy clearly allows for CityTV programming to be sponsored, and for those sponsors to receive certain types of acknowledgment.

3. *Resolution R-257330, Public Access Rules*

Section 10(g) of the Cox Franchise and Section 10(g) of the Time Warner Franchise require each of the respective companies to provide the City with one public access channel. On October 12, 1982, by Resolution R-257330, the City Council adopted "Public Access Rules and Regulations for Cable Television Franchise Holders Established by the City of San Diego" [Public Access Rules] (attached as Exhibit 3), that govern the City's two public access channels. The Public Access Rules define "Public Access" as a "term used to describe the right of parties (individuals and organizations), in addition to the [City], to use cable system transmission facilities at no direct cost for cablecasting and free from editorial control by the cable operator . . . in order to communicate with the public through television programs shown on cable television channels." Section II of the Public Access Rules defines the term "Public Access Channel" as "the designated channel and any combination of any additional channels designated by any Grantee for cablecasting of public access programs." Therefore, the Public Access Rules apply to the Public Access Channels within the City's franchise area, but not to other public interest channels (such as CityTV).

The Public Access Rules allow for limited recognition for sponsors of Public Access programming, providing in Section VII(B)(2)(c) that "persons or institutions providing grants or contributions to underwrite the costs of programs unrelated to the commercial interests of the donor may be identified by name only." Although this language does not directly impact the potential use of sponsorships to support CityTV programming, it indicates that, at least for Public Access Channels, the City intended to limit any "commercial" use of sponsorships.

4. *Municipal Marketing Partnership Program*

On June 8, 1999, the City Council approved a Municipal Marketing Partnership Program [MMPP] (attached as Exhibit 4) which sets out the rules governing most marketing partnerships with the City. Council Policy 000-40, February 1, 2000. A "Marketing Partnership" is defined as a "mutually beneficial business arrangement between the City and a third person, wherein the third person provides cash and/or in-kind services to the City in return for access to the commercial marketing potential associated with the City. Marketing Partnerships may include sponsorship of one or more of the City's programs, projects, events, facilities or activities." The MMPP provides that certain industries are generally not eligible for Marketing Partnerships, including: tobacco and alcohol companies when the targeted beneficiaries of the marketing partnership are youth under the legal drinking age, parties involved in a lawsuit with the City, and parties involved in any stage of negotiations for a City contract.

Although the MMPP was not implemented with the express purpose of applying to sponsorship of CityTV programming, its restrictions, in some cases, may apply to such sponsorships. Therefore, potential sponsorships on CityTV should be evaluated to determine whether they comply with the provisions of the MMPP.

B. State and Federal Law

Neither the Cable Act, nor any other federal law, expressly prohibits the use of sponsorship funds to support programming on government channels such as CityTV. Similarly, federal law does not prohibit PEG Channels from broadcasting some form of recognition for sponsors, such as a mention of the name of the sponsor. State law is even more explicit: Section 5870(b) of DIVCA provides that "[t]he PEG Channels shall be used only for noncommercial purposes. However, advertising, underwriting, or sponsorship recognition may be carried on the channels for the purpose of funding PEG-related activities."

II. Existing City Policies Prohibit Paid Advertising on CityTV.

A. Existing City Policies.

1. *Council Policy No. 700-37*

Although Council Policy 700-37 sets forth general rules regarding the presentation of program material on CityTV, it does not provide rules to expressly allow or prohibit advertising on CityTV.

2. *Municipal Programming and Video Production Policies*

The OCLS Policy prohibits most advertising on CityTV. It provides:"[t]here shall be no commercial advertising or other information which promotes the sale of any product or service offered, except for promotional announcements for City sponsored or sanctioned events."

Additionally, the OCLS Policy contains certain prohibitions on content that would apply even if advertising were allowed on CityTV, including prohibitions on religious programming, indecent or obscene content, and defamatory material. These restrictions do not specifically apply to advertising. However, if any type of advertising were allowed on CityTV, similar restrictions should be imposed as early as possible to prevent a potential argument that CityTV is a "public forum" and by limiting certain types of ads, it engages in viewpoint discrimination that violates the First Amendment. *See Putnam Pit, Inc. v. City of Cookeville*, 221 F. 3d 834 (8th Cir. 2000) (court found that where a city limited website links to nonprofit organizations only, and, upon receipt of a newspaper's First Amendment complaint changed its policy to require linked sites to promote the economic welfare, industry or tourism of the city, the city's action was not viewpoint neutral). Any proposed amendment to the OCLS Policy should be carefully reviewed by the Office of the City Attorney to ensure compliance with the First Amendment.

3. *Resolution R-257330, Public Access Rules*

Section VII(B)(2)(b) of the Public Access Rules states that "[m]essages of which the primary purpose is intended to promote a service, product, trade or business" may not air on the Public Access Channels. As described in Section I of this memorandum, the Public Access Rules do not apply to CityTV. However, the prohibition on advertising contained in the Rules suggests that the intent of the City Council was to prohibit advertising on the City's PEG Channels.

4. *Municipal Marketing Partnership Program*

Although the MMPP does not specifically address advertising, including advertising on CityTV, if City Policies allowed advertising on CityTV, then it would still be necessary to evaluate the ads to determine whether they comply with the terms of the MMPP.

5. *Product Endorsement Policy*

The City Council's Product Endorsement Policy (attached as Exhibit 5) provides direction to City employees and agencies or organizations funded by the City regarding endorsements of commercial products or services. Council Policy 000-41, February 1, 2000. The Product Endorsement Policy requires that:

> any advertisements referring to the City of San Diego as a user of a product or service will require prior written approval of the City Manager who will insure that: a. the facts in the advertisement are accurate, b. there are no references to City employees, and c. there

> is no indication of the City's endorsement of the product or service, except as approved by City Council and in accordance with a signed agreement between the City and provider of products or services.

Therefore, even if the OCLS Policy were modified to allow advertising on CityTV, any advertising would have to be reviewed to ensure compliance with the Product Endorsement Policy.

B. State and Federal Law

As described in Section I of this memorandum, Section 5870(b) of DIVCA provides that channels such as CityTV shall be used "only for noncommercial purposes," but that "advertising" may be carried on PEG Channels (provided that funds received are used for "PEG-related purposes"). The City-issued Cox and Time Warner Franchises do not expressly allow advertising, and Section 10(d)(1) of each of the agreements states that (what is now known as) City TV shall be used "for the distribution of non-commercial programming in the public interest." The question becomes what constitutes a "noncommercial" purpose.

Prior to passage of the Cable Act, the Federal Communication Commission's [FCC] rules prohibited the presentation of any advertising material designed to promote the sale of commercial products or services, including political advertising, on public and educational channels, but no prohibition on advertising existed for government channels. *See* 1972 Cable Television Report and Order, 36 F.C.C. 2d 143 (1972). The Cable Act does not expressly prohibit advertising on any type of PEG Channel. Franchising authorities are not prohibited from restricting advertising on PEG Channels. However, the City's Policies contain such prohibitions.

If City Policies did not contain advertising restrictions, it would be necessary to evaluate whether the language in the Cox and Time Warner Franchises stating that CityTV was to be used for the "distribution of non-commercial programming in the public interest" amounted to a prohibition on advertising. Although the courts have not addressed that specific question, the Second Circuit Court of Appeals did touch on the issue in *Time Warner Cable of New York City, a Div. of Time Warner Entertainment Co., L.P. v. Bloomberg, L.P.*, 118 F. 3d 917 (2nd Cir. 1997).

In *Time Warner,* the Court of Appeals issued an injunction barring the City of New York [New York] from broadcasting the 24-hour news services Bloomberg Information Television and Fox News on channels that its franchise with Time Warner Cable [TWC] reserved for educational and governmental purposes. TWC had entered into two franchise agreements with New York. The first agreement was entered into in 1983 and covered Brooklyn, Queens, and Staten Island [1983 Agreement]. *Time Warner*, 118 F. 3d at 920. The second agreement was entered into in 1990 and covered the northern and southern portions of Manhattan [1990 Agreement]. *Id.*

The 1983 Agreement stated that PEG Channels (referred to as "Municipal Channels" in the 1983 Agreement) were to be used "for the purpose of distributing noncommercial Services by the City or for any other lawful, governmental purpose . . . ." *Id.* The 1990 Agreement provided that "[t]he Governmental Channels shall be . . . used for distributing Services by the City or educational institutions for functions or projects related to governmental or educational purposes, including the generation of revenues by activities reasonably related to such uses and purposes." *Id.* at 921.

In determining whether injunctive relief was warranted, the Court of Appeals found that it: "need not decide what renders programming 'commercial' for purposes of the franchise agreements or whether programming is always precluded from PEG Channels solely because of its commercial nature." *Time Warner*, 118 F. 3d at 927. The opinion pointed out that in the lower court decision issuing an injunction in favor of TWC, not only did the District Court avoid making a finding that the Cable Act bans advertising on PEG Channels, but the judge in the case made it clear that she was not determining whether a government can ever run "commercial" programming on a PEG station. *Id.* (citing *Time Warner Cable of New York City v. City of New York*, 943 F. Supp. 1387 (S.D.N.Y., 1996).

Eventually, the Court of Appeals weighed New York's public interest claim that it was promoting diversity of programming on PEG Channels against Time Warner's claim that it was protecting the use of PEG Channels "for their intended, limited public purposes." *Id* at 923. The Court determined that New York's proposed use of PEG Channels for Bloomberg and Fox News would violate the franchise agreements between TWC and New York, and that the District Court did not exceed its discretion in concluding that a preliminary injunction was needed to prevent irreparable injury. *Time Warner*, 118 F. 3d at 927. Although the case does not explicitly dictate which type of advertising is permissible on a noncommercial, governmental channel, it suggests that at least some minimal advertising *may* be permissible.

III. CityTV May Broadcast Programs Produced By Elected Officials Using Personal Funds.

No federal, state, or local law or policy appears to prohibit CityTV from broadcasting programs produced by an elected official using personal funds. In fact, the OCLS Policy provides that "elected official offices may produce and provide their own individually hosted programming to be telecast on the municipal channel upon approval by the Mayor's office." However, any such programming must comply with the requirements set forth in Council Policy 700-37. In particular, CityTV "shall not normally be used for the telecasting of programs whose major issue is one which is controversial and which has not been decided by the City Council or the voters." Council Policy 700-37, Section A.2. Also, CityTV "shall not be used for the promotion of any political candidacy or for the promotion of any ballot measure." Council Policy 700-37, Section A.2.a.

It should be noted that this memorandum does not address any issue related to election laws. For example, this memorandum does not analyze whether an elected official may use campaign funds to produce programming. Any program produced or otherwise provided by an elected official should receive a separate opinion from the Office of the City Attorney based on the specific circumstances of the program.

IV. CityTV May Broadcast Programs Produced And Paid For By Individuals And Entities Not Employed By The City.

CityTV already airs programming that outside parties produce. Such programming must adhere to the requirements set forth in Council Policy 700-37 (as described in Section III of this memorandum). If the requirements are satisfied, then CityTV may air programming created by individuals and corporations that the City does not otherwise employ.

V. The City May Use Revenue from Sponsorships or Advertising Only for Funding PEG-Related Activities.

Section 5870(b) of DIVCA provides express guidance regarding the use of revenue from advertising and sponsorship on PEG Channels operated under State Franchises. Section 5870(b) states: "advertising, underwriting, or sponsorship recognition may be carried on the [PEG Channels] *for the purpose of funding PEG-related activities* (emphasis added)."

Since the content of CityTV broadcasts is identical not only on the City-issued Cox Franchise and Time Warner Franchise channels, but also on the AT&T and Cox State Franchises issued under DIVCA, the funds received from advertising, underwriting, or sponsorship recognition must be used for funding "PEG-related activities." The funds cannot be used for other General Fund purposes.

CONCLUSION

The OCLS Policy prohibits the use of CityTV for the provision of commercial advertising or other information which promotes the sale of any product or service. If OCLS changed its Policy, no federal, state or local law would completely prohibit advertising. However, the parameters for the quantity and nature of allowable advertising are not clearly defined at the federal, state or local level. If the City decides to allow advertising on CityTV, OLCS should revise its current Policy to carefully consider the nature and extent of the advertising it broadcasts and make sure that such advertising does not push CityTV beyond the ephemeral boundaries of permissible content on a "noncommercial" channel. Additionally, the City should adopt a more comprehensive set of standards to define prohibited content and, to the extent there is overlap or interplay between the OCLS Policy and the City's MMPP, to make it clear where the City's MMPP restrictions would apply to advertising on CityTV.

Council Policy 700-37 states, in part, that FCC Rules require local cable franchises to make available one "local government" channel and one channel for "local public uses." Since those requirements were superseded when the Cable Act went into effect, the City Council may wish to revise the introductory language in Council Policy 700-37 to reflect the change in federal law.

JAN I. GOLDSMITH, City Attorney

By
Steven R. Lastomirsky
Deputy City Attorney

SRL:sc:mb
ML-2009-4

Attachments:
Exhibit 1 (Council Policy 700-37)
Exhibit 2 (OCLS Policy)
Exhibit 3 (Public Access Rules)
Exhibit 4 (Marketing Partnership Policy)
Exhibit 5 (Product Endorsement Policy)

EXHIBIT 1

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: CITY USE OF CABLE TELEVISION
POLICY NO.: 700-37
EFFECTIVE DATE: July 20, 1977

BACKGROUND:

Local cable television franchises must, in accordance with Federal Communications Commission rules, make available without charge at least one "specially designated channel for local government uses" and at least one "specially designated channel for local public uses." The Access Channel requirement offers the City and the public the opportunity to employ the most recent innovations in cable television technology in an effort to provide more efficient and more effective government and community service to the public. Although the channels are to be provided by the cable franchise without cost, government, agencies, and the public using the channels are requires to pay all program production costs on the Government Access Channel. The franchises will cooperate with other interested bodies in off-setting costs on the Public Access Channel (as provided for in F.C.C. regulations).

PURPOSE:

1. To provide an orderly procedure by which the Council, management and staff will be able to select potential program ideas, prioritize scheduling, and produce programs in the public interest suitable for transmission on local cable television systems.

2. To insure that members of the public will be able to submit suggested program ideas, and to provide for a review of the administration of the use of the Government Access Channel by a committee representing the offices of the Mayor, the City Council and the City Manager and including citizens with experience and/or interest in the subject.

3. To establish guidelines for the funding and disbursement of funds for City cable television program production.

POLICY:

A. General Policy

1. The Government Access Channel shall be used for the presentation of program material relating to the local government matters and may also be used for the presentation of material relating to community services with the approval of the City Manager or the committee provided for in this policy (Section B.5. (b)).

2. The Government Access Channel shall not normally be used for the telecasting of programs whose major issue is one which is controversial and which has not been decided by the City Council or the voters.

   a. The Government Access Channel shall not be used for the promotion of any political candidacy or for the promotion of any ballot measure.

b. To insure balanced presentation of any controversial program subjects, all such program proposals shall be submitted to the committee established under Section B.5.(b) of this Policy.

c. The Committee shall not finalize the program script or outline until it shall have afforded an opportunity to all Council members and other interested officials and organizations to submit suggestions for the purpose of assuring that all sides of the controversial issue are fairly and accurately represented.

d. Notwithstanding the above, this policy shall not be construed to discourage the use of the Government Access Channel for the telecasting, either in whole or in edited version, of any meeting of the City Council or its committees or other City boards, commissions or committees, when the subject under consideration is of interest to the public in the City of San Diego, irrespective of the fact that the subject(s) under consideration may be controversial.

3. Government access programming shall be directed toward effective delivery of government services and information. Specifically, programming should:

a. augment or improve delivery to the public of either (i) existing local government and community services or (ii) information describing such services; or

b. facilitate introduction to the public of new local government or community services and information; or

c. provide background information and alternative courses of action concerning policy issues of importance to the community.

4. The City will coordinate program scheduling and production efforts with similar programming efforts made by other local franchising authorities, provided all such programming conforms to the guidelines described herein under Section A., paragraphs 1, 2 and 3.

5. The City Council finds that public access television is of significant value to the community, and it shall be the policy of the City Council that the Council and the City staff shall make every reasonable effort to insure for the continued provision of public access channels. This policy may be exercised in dealing with franchises and with other regulatory agencies.

B. Operating Policy

1. The City Manager shall develop a procedure, subject to review by Council and the committee established under Section B.5. (b), for the coordination and prioritization of recommendations for production of scheduled programming. At the discretion of the committee, outside consultants and local community professionals may be requested to assist with the procedure.

2. In order to coordinate programming recommendations, the City Manager shall approve the programming recommendations for both Managerial and Non-Managerial Departments;

insuring that such approval is in conformance with the guidelines described under Section A (General Policy), and subject to review by the committee established under Section B.5. (b).

3. Priority for each approved program shall be determined after consideration of each of the following factors:

   a. estimated production costs and available program production resources within the City and including the community;

   b. degree of interest from Council, organizations and the public, as demonstration of an assessment of need for the program;

   c. timeliness, when it is appropriate to consider it as a factor;

   d. the value of the program in meeting program objectives of the City.

4. Production costs of the government access programming will be paid from the balance of funds generated by the cable television franchise fees after sufficient funds have been allocated for payment of all cable franchise administrative and regulatory costs and other related costs which have been approved by the Council.

5. a. Seventy-five percent of the funds available for production shall be allocated to production of regularly scheduled programming. A schedule of regular programming shall be included in the annual budget proposal submitted to Council by the Citizens Assistance and Information Department.

   b. The remaining twenty-five percent of the available production funds shall be included in the Citizens Assistance and Information Department budget as "unscheduled program funds" and shall be allocated at the discretion of a committee consisting of representatives of the City Manager's Office, Mayor's Office, City Council Office, and an equal number of individuals from the community at large (unless the above are appointed from the community). The Council's appointments shall be made by resolution of the Council. Further responsibilities of the committee are stated throughout this Policy and in Administrative Regulation referencing this Policy.

HISTORY:

Adopted by Resolution R-218886 07/20/1977

EXHIBIT 2

GOAL OF MUNICIPAL PROGRAMMING

The goal of municipal programming shall be to create greater awareness of local government and facilitate the community's participation in local decision making.

OBJECTIVES OF MUNICIPAL PROGRAMMING

Objectives of the cable television/video services program and the municipal channel shall include the following:

1. To make public proceedings and events more accessible to San Diego residents by providing live, gavel-to-gavel coverage of City Council meetings and other boards and commissions via cable television.

2. To increase community awareness of City services.

3. To aid in the City's economic development efforts by providing information on projects, development goals and services.

4. To promote special events in the community sponsored by the City and civic affiliated organizations.

5. To provide more extensive information on selected City topics and activities not fully covered by existing communications media.

6. To supplement public safety and disaster preparedness activities/information pertaining to the City of San Diego and surrounding communities.

7. To offer presentation alternatives to the departments and divisions of the City of San Diego.

8. To improve City services by enhancing and/or standardizing training of City employees through the production of video training tapes.

9. To document and archive City events and activities.

PROGRAMMING FORMATS

Municipal programming shall be established to provide direct, non-editorialized information to the citizens of San Diego. Programming formats will consist of the following:

City Council Coverage - All public meetings of the City Council may be telecast on the municipal channel according to the following editorial guidelines:

- Coverage of City Council shall be gavel-to-gavel excluding non-public agenda items or as otherwise directed by the City Council.

- Public meeting coverage shall not be edited or subject to editorial comment. Editing of technical difficulties is permitted.

- Coverage will be primarily focused on the officially recognized speaker, and on any visually displayed information that may be showing.

- A City-operated character message may indicate the name of the officially recognized speaker and may include the identification of the matter(s) being considered by the Council and the date of the discussion.

- Public meetings taped for telecast are to be re-telecast at least once if possible.

Council Committees, Special or Ad Hoc Committees, Task Forces and Other Public Hearings - Meetings of Council standing committees, special or ad-hoc committees, task forces, other events scheduled by City elected officials, City Commissions and City Boards may be covered and telecast on the municipal channel according to the following guidelines:

- Coverage will generally conform to all of the provisions for live cable telecasting of City Council meetings.

- Meetings not held in the Council Chambers may require special equipment and staffing and will be limited to staffing capabilities at hand. Requests for video coverage of Council standing committees, special or ad-hoc committees, task forces and other non-City Council hearings require a prior written request for coverage to the Cable TV Program Office at least seven business days in advance. Acceptance of coverage will be subject to the approval of the Mayor's office.

- Video coverage of Council standing committees, special or ad-hoc committees, task forces and other non-City Council hearings may not conflict with the videotaping or telecasting of City Council meetings.

Public Meetings of Other Government Jurisdictions - Public meetings held in the Council Chambers by other governmental jurisdictions such as State or Federal government may be covered live, or videotaped and aired if approved by the Mayor's office in advance of the event. The City maintains the right to request compensation for actual costs incurred for the coverage of other governmental jurisdiction meetings at the City=s discretion.

Videotapes of public meetings of other governmental jurisdictions may be telecast on the City=s government channel if approved in advance by the Mayor's office. The City maintains the right to request compensation for actual costs incurred for the telecasting of other governmental jurisdiction meetings at the City=s discretion.

Press Conference Coverage - The municipal channel will generally attempt to cover City Official press conferences, by request, on a first-come, first-serve basis, subject to equipment and staff availability and the lack of conflict with previously scheduled productions/events. Press conferences may be aired live, if technically possible and if not in conflict with previously scheduled programming. Otherwise, videotaped coverage of press conferences will be telecast as soon as possible on the municipal channel.

Informational Programs - Any City department or agency may produce, suggest or assist in the production of programming for the municipal channel. All programming shall be consistent with the objectives and goals of the municipal programming policies and guidelines. City agencies may submit program proposals or requests for production or telecast of programs which are appropriate. All programming is subject to approval by the Mayor's office.

Outside Programming - Outside programming consistent with the objectives and goals of the municipal programming policies and guidelines may be telecast on the municipal channel. Outside programming must be acquired or sponsored by a City department or agency. All outside programming is subject to approval by the Mayor's office. Outside programming must be in a format acceptable to the City and meet the minimal technical specifications identified in these municipal channel policies. Outside programming shall adhere to the copyright requirements contained in the AContent Restrictions@ Section of these policies.
Any programming prepared or provided by a City department, agency or producer may be modified or edited as appropriate for telecast.

Public Service Announcements - Public Service Announcements ("PSAs") will be solicited and produced by the Cable TV Office or other City agencies. PSA topics shall be consistent with the objectives of the municipal programming policies and guidelines. All PSAs must be in a format acceptable to the City and must meet the minimal technical specifications identified in the municipal channel policies. Public Service Announcements may be edited to provide clarity or to adhere to acceptable time standards. All Public Service Announcements are subject to approval by the Mayor's office.

Promotions - Subject to approval, all promotional announcements and Abumpers@ for events sponsored by a City department or agency are acceptable for telecast. Promotional announcements for events, charities, or outside nonprofit organizations in which the City has no official interest or sponsorship are subject to approval by the Mayor's office.

Character Generated Information - City information for character generated presentation (City Access Magazine) shall be sponsored by a City department, agency or Elected Official Office. Promotional announcements for events, charities, or outside nonprofit organizations in which the City has no official interest or sponsorship are subject to approval by the City. Character generated information and announcements may be edited to provide clarity or to adhere to acceptable time standards and are all subject to the approval of the City Manager or his/her appointee.

Programming For Elected Officials - Due to the limited resources of the Cable TV/Video Services Office, and in the interest of fairness, it shall be the policy of the Cable TV Office to not provide production services or facilities for an elected official to host their own series programming. The Cable TV/Video Services Office will provide a series magazine-type talk-show, with a designated host, that will be made available to all elected official offices and the City Manager or department head offices generally on a first-come, first-serve basis. To afford the greatest diversity of opportunities for all elected officials, the Cable Television Program may grant priority to new or infrequent elected official applicants in preference over repeat and frequent elected official users.

Elected official offices may produce and provide their own individually hosted programming to be telecast on the municipal channel upon approval by the Mayor's office.

OMISSIONS AND ERRORS

Should human or technical error result in the telecast of incorrect information over the municipal channel, the City of San Diego, its officers and agents shall not be liable for the inaccuracy of the information.

CONTENT RESTRICTIONS

All content of the municipal channel shall be under the sole responsibility of the City of San Diego. All content on the channel shall be subject to approval by the Mayor's office. The following content guidelines shall be adhered to:

Political Use of Municipal Channel - The channel may not be utilized for the promotion or "use" of any elected official or candidate. Specific advertising messages on behalf of or opposing any political candidate or measure on a ballot shall not be permitted. Candidates for election or re-election to any office shall not be permitted to use the municipal cable channel, except as may be part of a formal public meeting from the time of their legally qualified candidacy until after the election. The municipal channel is exempt from providing equal opportunities to a candidate under Section 76.205 of the Rules and Regulations of the Federal Communications Commission (FCC) for time incumbents spend on the channel when performing the routine duties of their position, including participation at regular and special sessions of the City Council, other public meetings and bonafide news events.

Position Advocacy - Any direct advocacy messages including specific promotional messages on behalf of or opposing any ballot initiative, measure proposed by a City department, or items under consideration of the City Council or its commissions or advisory bodies shall generally not be permitted. Issues of controversy covered by the municipal channel shall be presented in a reasonably fair and equitable manner.

Commercialism - There shall be no commercial advertising or other information which promotes the sale of any product or service offered, except for promotional announcements for City sponsored or sanctioned events. All programming shall be consistent with the appropriate Council Policies pertaining to commercialism.

Lotteries - Advertising or other information concerning any lottery, gift enterprise or similar promotion is prohibited.

Promotion of Religion - Programming which directly promotes religious beliefs or religious philosophies shall not be presented on the municipal channel.

Defamatory Material - Subject matter which is defamatory in nature (i.e. slander) shall not be presented on the municipal channel.

Indecent or Obscene Content - There shall be no presentation of programming content which, in the opinion of the City Manager or his/her designee, is indecent, obscene or illegal.

Acceptable Mature Programming - It shall be the policy of the municipal channel to telecast acceptable and approved mature content programming during FCC specified Asafe harbor hours@ when children are less likely to constitute a significant portion of the viewing audience. When possible, acceptable mature programming will be preceded by verbal and/or text information stating that the programming content is intended for a mature audience.

Copyright Restrictions - Programs containing copyrighted materials will not be telecast without proper copyright authorization. Outside agencies submitting programming for telecast are responsible for obtaining all necessary copyright clearance and shall hold the City, its officers and agents, harmless in any case of copyright infringement.

COMPLAINT PROCEDURES

Complaints regarding municipal programming shall be submitted to the Program Manager of the Cable TV/Video Services Office and are to be acted upon within 15 days. Complaint appeals shall be submitted to the director of the department and are to be acted upon as promptly as possible. Subsequent appeals shall be submitted to the City Manager.

INTERDEPARTMENTAL PRODUCTION SERVICES

City departments are eligible to request video production services in accordance with the municipal channel's goals and objectives. The Cable TV/Video Services Office shall review all requests for programming services and confer with the program liaison or other designee of the department or agency. Upon approval of production services, the Cable TV Office shall develop an estimated production schedule and program completion date. The production schedule shall be subject to availability of personnel, facilities, equipment and other commitments.

The Cable TV/Video Services Office may, subject to approval, establish a charge-back schedule and user fees for such purposes.

The Cable TV/Video Services Office shall use reasonable discretion in determining the priority of use of personnel, equipment or facilities in the event of conflicting requests.

INTERGOVERNMENTAL PRODUCTION SERVICES

Other government agencies may request production assistance and use of the Cable TV Office facilities and equipment. Such requests shall be considered on the basis of availability of personnel, facilities, equipment and other programming commitments. Intergovernmental uses of the facilities and equipment must be consistent with the goals and objectives of the municipal channel's policies and guidelines.

Upon approval of intergovernmental production services, an estimated production schedule and program completion date will be established. The Cable TV Office may, subject to approval, establish a production fee agreement for such services. The agreement shall include the method and timetable of payment by the non-City government agency.

USE OF CITY PROGRAMMING AND EQUIPMENT

All programming produced by the City, its officers and agents shall be deemed property of the City. Programs produced by contract agents of the City shall be the property of the City and shall not be sold or commercially distributed without the written permission of the City.

Use of City-owned equipment and related production facilities and equipment shall be restricted to City use and operation thereof to City employees, officers or approved agents of the City. Loaning of equipment for personal use shall not be permitted or authorized. Outside agencies may utilize equipment, staffing and facilities as outlined in the Intergovernmental Production Services section listed above.

City Departments and agencies may request production facilities and equipment including field production equipment and equipment operators for activities which are not intended for telecasting

on the municipal channel. Such requests shall require sufficient advance notification to the Cable TV/Video Services Office and are subject to the availability of equipment and other prior commitments. The Cable TV/Video Services Office may, subject to approval, establish a schedule of charge-back and user fees for such purposes.

PROGRAMMING ACQUISITION AND EXCHANGE

Liaison and exchange with other local governments involved in programming/telecasting shall be established and maintained. Cooperative arrangements and agreements with local educational programmers, broadcasters, cable companies and other production groups may be established for efficient operations and communications in the community.

PROGRAM SPONSORSHIP

The City of San Diego will accept sponsorship of programming which meets the desired goals and objectives of the municipal channel. Any program sponsored (in full or in part) by a commercial, civic or private entity may carry a brief sponsorship statement at the beginning, end or beginning and end which states the following:

"*This program is made possible through a grant from* _____"

Video footage during sponsorship acknowledgment may include a logo, name, and address of a sponsor.

Acknowledgment (including in-program recognition) is permitted for entities providing or sponsoring segments of programs produced by the City.

PRODUCTION PERSONNEL POLICIES

Cable TV Program facilities and equipment shall be utilized only by qualified and proficient personnel. All equipment users are subject to approval by the Cable TV/Video Services Office.

City staff, interns, contract or free-lance personnel shall maintain themselves in accordance with the conduct guidelines of the Information Technology and Communications Department of the City of San Diego and all City administrative regulations and Civil Service Rules.

The following abuse of privileges shall be included as grounds for disciplinary action including the withholding of equipment usage privileges or other actions as outlined by the City of San Diego Civil Service Rules and administrative regulations..

- Damage, abuse or mishandling of video production equipment.
- Unauthorized use of video production equipment and facilities, particularly if used for private or commercial purposes.

- Use of video production equipment or facilities while under the influence of alcohol or illegal drugs.

TECHNICAL STANDARDS

All programs submitted or produced for telecast must meet the following technical standards:

1. Master Telecast videotapes shall be in the appropriate video format for telecast. Acceptable formats shall include:
   - Full-size 3/4" U-Matic or U-Matic SP videocassette
   - Betacam
   - S-VHS
   - Full-size DVCAM digital videocassette
   - Acceptable newly developed formats
2. Program audio must be audible with minimal noise levels when amplified.
3. Program must be no more than a second generation video duplication with a minimum of color smearing. Tapes with excessive "drop-outs" or other technical problems will not be accepted.
4. Tapes submitted for telecast or produced by the Cable TV Office shall be clearly labeled with the following information:
   - Title of program
   - Name of producer
   - Total running time ("TOT") in Minutes : Seconds from fade-up to fade-out.
   - Audio channel designation on Channel one, two or both channels.
   - Number of segments on each tape (if applicable).
   - Generation of dub if not telecast master
   - Multiple tapes for a single program shall be clearly labeled (ex. Title, Tape #1 of 3, Tape #2 of 3 etc.).
5. All tapes (with exception of public meeting coverage) must begin with a title slate and time with no less than 10 seconds of color bars followed by a10 second countdown and 2 seconds of studio black.
6. Tapes should have no less than 15 seconds of black at the end.
7. All tapes must be electronically edited.

PROGRAM PLAYBACK LOG

A daily log shall be kept of all programming telecast on the municipal channel for each playback day. Log information shall include program title, airtime, length of program or other information as deemed appropriate.

RETENTION OF VIDEOTAPED EVENTS AND PROGRAMS

Telecast master videotapes of City Council meetings will be kept by the Cable TV/Video Services Program Office for a minimum of 3 months. Videotapes may be recycled after being maintained for the minimum amount of time. A duplication tape will be made of each telecast master utilizing VHS videotape format or better and maintained by the Cable TV/Video Services Program Office for a minimum of three years.

Programming produced and telecast by the Cable TV/Video Services Office shall be kept as long as deemed necessary by the City. Raw, stock footage of events shall be maintained solely at the discretion of the City.

Programming accepted for telecast from other sources may be retained for repeat telecasting at the discretion of the City unless other arrangements are made in writing. Upon request, videotapes will be returned to the owner/producer after final telecast. Tapes not returned may be recycled by the Cable TV Office for other programming.

VIDEOTAPE DUPLICATION GUIDELINES

Requests for duplication of videotapes from the Cable TV/Video Services Office shall be submitted in a reasonable length of time prior to the requested completion date. At the option of the Cable TV Office, a "Video Duplication Request Form" may be required.

All requests for duplication of videotapes shall be accompanied by appropriate videotape format to be provided by the individual or organization requesting the dub unless the videotape is provide by the Cable TV Program Office at its option. If videotape is provided by the Cable TV Office for dubbing, the requesting individual or organization may be billed, at cost, for the quantity of tape used for the dubbing

The requesting individual or organization may be billed for the appropriate personnel costs for duplication. Staff duplication charges may be waived for City departments or City agencies seeking a limited number of dubbing requests.

The Cable TV/Video Services Office may bill the requesting individual or organization, at cost, for time incurred to search and queue videotaped coverage of City Council and other agency or board meetings.

COPYRIGHT ISSUES

All regular City TV productions (i.e., meeting coverage and public affairs programs) and all special video works produced by City TV will be under the copyright control of the City of San Diego unless one or more of the following apply:

1. The work is produced as strictly a "work for hire" for, and funding is provided by, an entity other than the City.

2. Language in a grant, or other funding source which pre-exists the production of the work, establishes a different, related entity as the copyright holder.

3. An agreement is signed, prior to production of the work, granting ownership of copyright to a different, related entity, such as the funding source or the host or moderator of the program.

For productions copyrighted by the City of San Diego, the practical exercise of copyright control shall belong to the agency within the City which funded the production of the work.

Nothing in the above paragraph as regards to public meetings is intended to excuse City TV from the requirements of the State of California's Open Records Act. All requests for video copies of such meetings will be granted, and City TV has the right to require compensation for expenses involved in creation of those copies as per City TV's rate structure.

USE OF MUNICIPAL CHANNEL DURING EMERGENCIES

Government use of the municipal channel during emergencies and disasters declared by the Mayor of the City of San Diego or his/her designee has absolute priority over other programming. During such emergencies or disasters, the municipal channel shall be permitted to accept live, taped, character-generated and audio information from other governmental or non-governmental entities when such announcements are deemed by the Mayor, City Manager or their designee to provide important public information pertaining to the emergency or disaster or other conditions requiring protection of the public health, safety and welfare.

EXHIBIT 3

PUBLIC ACCESS RULES AND REGULATIONS FOR CABLE TELEVISION FRANCHISE HOLDERS ESTABLISHED BY THE CITY OF SAN DIEGO

I. Introduction

Each Cable Television Franchise Grantee ("Grantee") shall operate the public access channel provided for in their franchise agreement with the City of San Diego under the following Rules and Regulations.

II. Definitions

"Public Access" is the term used to describe the right of parties (individuals and organizations), in addition to the Grantee, to use cable system transmission facilities at no direct cost for cablecasting and free from editorial control by the cable operator (except as provided for in Section VIII) in order to communicate with the public through television programs shown on cable television channels.

For purposes of these Rules and Regulations, the term "public access channel" shall refer to the designated channel and combination of any additional channels designated by any Grantee for cablecasting of public access programs.

III. Availability of Access Channel

Any party who is qualified within the meaning of these Rules and Regulations (as provided for in Section V) will be permitted to use the Grantee's public access production facility for the purpose of producing a videotaped or live (as provided for in Section XII) public access program, or to submit a videotaped program for cablecasting on the Grantee's public access channel.

IV. Operation of Access Channel

The Grantee shall be solely responsible for the operations of the public access channel; provided, however, that the Grantee may contract with one or more independent organizations to provide services to the Grantee to assist in and coordinate the production and cablecasting of public access programs in accordance with these Rules and Regulations.

V. Qualified User

Application to use the public access production facility or for submission of a prerecorded program for cablecasting will be accepted only from responsible persons residing within the County of San Diego and who are at least 18 years of age. It is not necessarily the intent to restrict the use of the public access channel to persons 18 years or older, but in all cases where satisfactory proof of minimum age cannot be made, an adult citizen must make formal application for the user and must accompany and supervise the user at all times while using the public access production facility. In the case of local organizations, all applications shall be signed by a responsible principal or officer of the organization who resides within the County of San Diego.

VI. Conduct of User

Applicants and users of the public access production facility must conduct themselves in a law-abiding manner and adhere to all Rules and Regulations. In cases where any applicant has previously used the public access production facility and/or public access channel and has violated any of these Rules and Regulations, or has been negligent in the

use of access equipment, such violations can cause subsequent applications to be rejected.

Any applicant or user denied access because of alleged violations of these Rules and Regulations or alleged unlawful conduct may seek redress in accordance with the provisions of Section 73.0105(c) of the San Diego Municipal Code.

VII. Program Content and Restrictions

A. General Policy

Generally, public access programs can concern any topic or subject of a nomcommercial nature and the City encourages the widest possible selection of topics and subjects. However, in order to insure compliance with Federal, State and local laws, rules and regulations, the Grantee may reject all applications for time on the public access channel if the presentation violates the restrictions set forth below.

B. Content Restrictions

Applications for time on the public access channel shall not be rejected because of the content of the program, except as provided in the following subsections:

1. Illegal Conduct

Public access programming may not be used for illegal purposes. Users responsible for illegal programming or programming containing information intended to defraud the viewer may forfeit their right to use time on the Grantee's facilities for the presentation of public access programming.

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Accordingly, there shall be no:

a. Information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

b. Material which is intended to defraud the viewer or designed to obtain money by false or fraudulent pretenses, representations, or promises.

c. Indecent or obscene matter, as defined by law.

d. Libelous or slanderous matter, as defined by law.

2. Advertising Material

Public access programming may not be used in connection with any advertising material designed to promote the sale of commercial products. Accordingly, there shall be no:

a. Advertising by or on behalf of a candidate for public office. However, this provision shall not preclude the use of the channel by a candidate in order to state positions on public issues, or by other discussants of political issues.

b. Messages of which the primary purpose is intended to promote a service, product, trade or business.

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c. Program material made available by persons, corporations, or institutions which have a commercial interest in the subject matter. This provisions shall not prevent the identification by name only of persons or institutions providing grants or contributions to underwrite the cost of programs unrelated to the commercial interests of the donor as defined below in Section f.

d. Material which identifies any product, service, trademark, or brand name in a manner which is not reasonably related to the noncommercial use of such product, service, trademark, or brand name on the program.

e. Audio or visual reference to any business, service, or product for which any economic consideration was received by anyone in exchange for the display, announcement and/or reference to such business, enterprise, product or service.

f. Material directly used or designed for use to solicit funds, support, or other property of value, for any business enterprise, or person engaged in a commercial or profit-making activity. However, this provision shall not restrict creative credits to writers, producers, directors, actors, etc. Additionally, it is recognized that from time to time, grants and/or other types of support may be made available to individuals or groups for the purpose of underwriting the cost of creation

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or production of programs. In such instances, a standard nondescript "patron's acknowledgment" may be placed at the beginning and end of the subject presentation (e.g., "this program was made possible by a contribution from the XYZ Corporation").

C. User Responsibility

Users of public access time assume complete responsibility for the content of the programming provided. Any disputes which arise concerning the programming shall be resolved between the user and the complaining party. The Grantee undertakes no responsibility to the user or any other party for any legal liabilities which may arise as a consequence of presentation of public access programming and users shall indemnify and hold the Grantee harmless for all liability of any kind whatsoever, including costs of legal defense arising from the presentation of public access programming by the user.

With regard to copyright, users providing public access programming shall be required to advise the Grantee whether or not their programs involve the use of copyrighted material or material subject to other ownership or royalty rights. If so, evidence that the user has obtained all necessary clearances and made all necessary arrangements with the program owners, copyright owners, and owners of any performing or royalty rights shall be provided to the Grantee by the user before the program may be presented over the facilities of the cable system.

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VIII. Use and Scheduling of the Production Facility

Use of any public access production facility shall be scheduled on a first come, first served, nondiscriminatory basis. Reservations for use of the public access productions facility shall be made at the time of filing an application. There is no express time limit for use of the public access production facility during regularly scheduled hours of operation provided that no applicant will be allowed to use more than the time reasonably required for the production of the public access program, nor be permitted to monopolize the use of the production facility. It is the intent of this section to ensure fair and equitable access to the production facility.

IX. Charges for Use

No charge will be made for the cablecasting of any public access program. No charge will be made for the production facilities in producing a noncommercial program.

X. Scheduling of Programs

Public access programming refers to noncommercial programs provided by organizations and/or members of the public and retransmitted by the Grantee on the designated public access channel. Public access programming shall have priority over any other types of programming on the designated public access channel, including programming originated by the Grantee.

In the scheduling of public access programming, time shall be allocated on a first come, first served, nondiscriminatory basis. Whenever requests for time exceed availability, the following rules shall apply:

A. First time users shall have priority over regular users.

B. A previous user who has not been scheduled in prime time shall have priority for prime time scheduling.

C. Timeliness shall be considered when appropriate.

D. A priority will be given to users from the geographical area which the cable system serves.

E. Some time slots may be allocated to regularly scheduled public users so long as ample time remains available for spontaneous unscheduled community expression.

Prerecorded programs submitted by an applicant shall be scheduled at the time of filing the completed application form and programs produced at the public access production facility shall be scheduled for cablecasting upon completion of production. All programs shall be scheduled for cablecasting during the normal hours of operation of the public access channel unless another schedule is expressly approved in writing by the Grantee. In exceptional circumstances, an applicant may request a specific cablecasting date and time during the regularly scheduled hours of operation which would be in excess of the forty-five (45) days period as provided for in Section XI below. A written statement of the reasons for such a request should be submitted at the time of filing the application. The Grantee shall respond in writing within ten (10) working

days, and should the Grantee intend to deny such a request, its response must present a detailed statement of the basis for such a denial.

XI. Limitation of Program Hours

The actual cablecasting of a particular program may be delayed as a result of public access demand exceeding available programming time, but in no event may the delay exceed forty-five (45) days following submission. If a program is delayed more than 45 days, notification of such delay must be made to the City of San Diego Council's Transportation and Land Use Committee for possible consideration of the need for additional public access hours or channels.

The Grantee has the obligation to expand the hours of public access channel operation to accommodate the demand for the cablecasting of public access programming provided for the public.

XII. Live Cablecast

In order to insure compliance with these Rules and Regulations and otherwise allow for the efficient operation of the public access channel, most public access programs shall be videotaped, but some live cablecasts may be permitted under such supervision and guidelines as the Grantee directs. Any request for a live presentation shall be submitted directly to the Grantee in writing and shall include a detailed statement of the basis for such a request. The Grantee shall respond in writing to such a request within ten (10) working days, and, should the Grantee intend to deny such a request, it's response must present a detailed statement of the basis for such a denial.

XIII. Grantee's Additional Procedures

All procedures established by the Grantee in order to implement public access cable television shall be consistent with these Rules and Regulations and pursuant to San Diego City Council Policy No. 700-37 (7/20/77) which states:

> The City Council finds that public access television is of significant value to the community, and it shall be the policy of the City Council that the Council and the City staff shall make every reasonable effort to insure for the continued provision of public access channels. This policy may be exercised in dealing with franchisees and with other regulatory agencies.

XIV. Review of Rules and Regulations

Once adopted, the public access Rules and Regulations shall be reviewed, with appropriate notification to all public access entities, during the designated review of the Grantee's cable franchise.

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Passed and adopted by the Council of The City of San Diego on OCT 12 1982 by the following vote:

Councilmen	Yeas	Nays	Not Present	Ineligible
Bill Mitchell	☑	☐	☐	☐
Bill Cleator	☑	☐	☐	☐
Susan Golding	☑	☐	☐	☐
Leon L. Williams	☑	☐	☐	☐
Ed Struiksma	☐	☐	☑	☐
Mike Gotch	☑	☐	☐	☐
Dick Murphy	☑	☐	☐	☐
Lucy Killea	☑	☐	☐	☐
Mayor Pete Wilson	☐	☐	☑	☐

AUTHENTICATED BY:

PETE WILSON
Mayor of The City of San Diego, California.

(Seal)

CHARLES G. ABDELNOUR
City Clerk of The City of San Diego, California.

By Barbara Bennigan, Deputy.

Office of the City Clerk, San Diego, California

Resolution Number R- 257320 Adopted OCT 12 1982

CC-1272 (REV. 1-82)

01079

EXHIBIT 4

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: MARKETING PARTNERSHIP POLICY
POLICY NO.: 000-40
EFFECTIVE DATE: February 1, 2000

BACKGROUND:

On June 8, 1999 the City Council unanimously approved a strategic marketing plan for corporate partnerships with the City of San Diego called the Municipal Marketing Partnership Program (MMPP.) The MMPP seeks opportunities for the City to generate revenue from partnerships with the corporate community in order to enhance municipal services and facilities in the City. The specific objectives of the MMPP are as follows:

1. To establish and guide relationships with existing and potential business partners who share the City's commitment to provide the highest quality civic environment through the City of San Diego.
2. To generate revenue to fund existing and additional facilities, projects, programs and activities.
3. To minimize the perception that the City has become "corporatized" by limiting the number of corporate partners while maximizing the cumulative revenue from the partners.

In conjunction with City Council's approval of the MMPP, the City Manager has developed the following Marketing Partnership Policy to provide general guidelines for the implementation of the MMPP.

PURPOSE:

To provide guidelines for developing and managing municipal marketing partnerships which ensure that all marketing partnerships support the City of San Diego's goals of service to the community and remain responsive to the public's needs and values. The following guidelines are established to maintain flexibility in developing mutually beneficial relationships with the corporate sector.

DEFINITIONS:

Marketing Partnership:
A mutually beneficial business arrangement between the City and a third person, wherein the third person provides cash and/or in-kind services to the City in return for access to the commercial marketing potential associated with the City. Marketing Partnerships may include sponsorship of one or more of the City's programs, projects, events, facilities or activities.

Request for Sponsorship
An open and competitive process whereby third persons may express their interest in participating in marketing partnership opportunities with the City of San Diego. All Request for Sponsorships (RFS) will include a summary of the partnership opportunity, benefits for participation, and a description of the open and competitive procedure for expressing interest in participating in marketing partnership opportunities.

General Principles

a. The City of San Diego accepts the principle that third persons may become marketing partners with the City in the sponsorship of City-approved programs, projects, events, facilities or activities where such partnerships are mutually beneficial to both parties and in a manner consistent with all applicable policies and ordinances set by the City. Under the conditions of this policy, City staff may solicit such marketing partnerships for the City.

b. At all times, recognition for marketing partners must be evaluated to ensure the City is not faced with undue commercialism and is consistent with the scale of each partner's contribution.

c. Restrictions on Partnerships

In general, the following industries and products are not eligible for marketing partnerships with the City of San Diego.

1. Police-regulated Businesses
2. Companies whose business is substantially derived from the sale or manufacture of tobacco products.
3. Alcoholic beverages when the targeted beneficiaries of the marketing partnership are youth under the legal drinking age.
4. Parties involved in a law suit with the City.
5. Parties involved in any stage of negotiations for a City contract unless contract is directly linked to a marketing partnership opportunity.

The City may elect to enter into marketing partnerships with restricted partners when it is deemed appropriate and tasteful for the project.

d. Exclusions to Marketing Partnership Policy:

1. Gifts or unsolicited donations to a department or the City where no business relationship exists.
2. Marketing partnership proposals forwarded to the City may not be subject to the Marketing Partnership Policy if the proposed sponsorship is determined through a good faith effort to be unique and without interested competitors.

Marketing Partnership Process

The general procedure for developing marketing partnerships will be as follows:

a. Define scope of marketing partnership program or project, including a description of the community need, financial goals and general marketing strategy.

b. Develop a RFS for each partnership opportunity valued at $250,000 or greater and submit to City Council for approval. City-originated marketing partnerships valued below $250,000 may be subject to the RFS process if participation in the partnership opportunity is deemed to be competitive and issuance of an RFS would benefit the City.

c. Advertise RFS and implement an open and competitive bidding process for interested partners.

d. Review and analyze all responsive proposals received through the RFS process and award partnership.

e. Develop a Marketing Partnership Agreement with corporate sponsor which is consistent with all applicable City policies and ordinances, including Equal Employment Opportunity Outreach Program and Drug Free Workplace. Marketing partnerships with individual sponsors and marketing partnerships with an aggregate value to the City below $250,000 may be subject to Marketing Partnership Agreement clauses to the extent legally required.

f. Submit all Marketing Partnership Agreements with an aggregate value of $50,000 or greater to the appropriate Council Committee for review.

g. For the first year of the Marketing Partnership Program, submit all Marketing Partnership Agreements with an aggregate value of $50,000 or greater to City Council for review. Thereafter, Marketing Partnership Agreements will utilize the following review and approval process:

Submit all Marketing Partnership Agreements with an aggregate value of $250,000 or greater to the City Council for final approval. Marketing Partnership Agreements with an aggregate value to the City below $250,000 are subject to the following levels of review and approval:

1. Less than $50,000: Department Head or Director approval required.
2. From $50,000 to $250,000: City Manager approval required.

Marketing Partnership Agreements

All Marketing Partnership Agreements will include contractual language consistent with all applicable City policies and ordinances and good business practices. In general, Marketing Partnership Agreements should include:

a. Contractual Relationship
b. Term
c. Renewal
d. Consideration
   - Marketing Rights Fee
   - Commissions
   - In-kind Goods
   - In-kind Services
e. Description of Programs, Projects and Activities

f. Marketing Rights and Benefits
g. Termination Provisions

Responsibilities

a. All marketing partnership activities will be coordinated by the Development Office, or its successive office, under the Direction of the appropriate Deputy City Manager.

b. The Development Office will be responsible for:

1. implementing the City-wide Municipal Marketing Partnership Program.
2. providing guidance to all City departments regarding the interpretation and application of this policy;
3. providing assistance and advice to departments regarding marketing partnership activities;
4. reviewing and assisting in the development of partnership arrangements as requested;
5. tracking and reporting on a quarterly basis all marketing partnerships developed by City Departments.

HISTORY:

"Marketing Partnership Policy"
Adopted by Resolution R-292719 02/01/2000

EXHIBIT 5

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: PRODUCT ENDORSEMENT
POLICY NO.: 000-41
EFFECTIVE DATE: February 1, 2000

PURPOSE:

To provide direction to City employees and agencies or organizations funded by the City of San Diego regarding endorsements of commercial products or services.

POLICY:

It is the policy of the City Council to prohibit endorsements, either implied or direct, of commercial products or services by the City, its employees, and agencies or organizations funded either in whole or in part by the City when such endorsement will be used for advertising purposes except as approved by City Council and in accordance with a signed agreement between the City and a provider of products or services.

1. No City employee, in his/her capacity as a City employee, shall endorse a product or service nor comment on that product or service if it is the intent of the solicitor of the endorsement, or of the provider of that product or service, to use such comments for purposes of advertisement. City employees are not prohibited from responding to inquiries regarding effectiveness of products or services used by the City unless it is the inquirer's intention to use those comments for purposes of advertisement.

2. All City contracts or agreements with consultants, vendors, sponsors, advertisers, etc., shall include a condition stating that any advertisements referring to the City of San Diego as a user of a product or service will require prior written approval of the City Manager who will insure that:

   a. the facts in the advertisement are accurate,
   b. there are no references to City employees, and
   c. there is no indication of the City's endorsement of the product or service, except as approved by City Council and in accordance with a signed agreement between the City and provider of products or services.

3. It is to be expressly understood that the acceptance by the City of donations, sponsorships, advertising revenues, etc. does not imply or grant the City's endorsement of the product, service, or organization except as approved by City Council and in accordance with a signed agreement between the City and a provider of products or services.

4. All contracts or agreements with agencies or organizations to fund that agency or organization either in whole or in part with City funds shall include a condition requiring that agency or organization to adopt and follow a similar policy prohibiting that agency's or organization's endorsement of commercial products or services. When such a condition is prohibited by state or federal regulation due to the fund source or type of program, the City of San Diego hereby requests those agencies which receive such funding from the City to adopt a similar policy.

HISTORY:

Renumbered from 000-23 by Resolution R-292719 02/01/2000

CITY EMPLOYEES MAY NOT...

...use City resources--such as computers, staff time or interoffice mail--to campaign.

...use their office, position or title to suggest directly or indirectly that the City is advocating a particular position in a campaign through the employee. Among other things, this means that City employees may not wear their uniforms when engaging in political activities after hours.

...solicit a political campaign contribution from anyone known to be a City employee, unless the solicitation is part of a broader solicitation to a significant segment of the public.

...favor one side of a proposition by agreeing to meet on City time or on City property with representatives of one side of a proposition but refusing to meet with representatives of the other side of the proposition.

...allow some political signs to be posted on employee-controlled bulletin boards, but prohibit others which express an opposing view.

...remove a political sign from a community bulletin board (where material is posted by members of the community) solely because of the sign's content. Employees may enforce regulations governing posting and removal as long as those regulations are not based on a sign's content.

...allow political signs to be posted on public property (lawns, for example) in violation of the Municipal Code.

...allow people to come into City buildings for the purpose of collecting political contributions.

...be required to "volunteer" as campaign workers or engage in campaign fundraising as a condition of continued employment with the City.

This information will be made available in alternative formats upon request.

[redacted]

POLITICAL ACTIVITY, PUBLIC FUNDS, AND CITY OFFICIALS AND EMPLOYEES

A Basic Guide to What the Law Allows in the City of San Diego Regarding Public Employees' Involvement in the Political Process

ELIZABETH MALAND, City Clerk
Office of the City Clerk
202 C Street, MS 2A
San Diego, CA 92101
(619) 533-4000
www.sandiego.gov/city-clerk

Form #CC-1649 7/05

The following information is of a general nature only, regarding the rights and responsibilities of public servants engaging in political activity. The City Clerk cannot interpret the law, nor give legal advice. You should address specific questions to your attorney.

THE CITY MAY...

...use public resources to objectively analyze a proposition's effect, and make the results of the analysis available to the media and to the public.

...prepare and distribute purely informational material about a proposition that is a full and impartial "fair presentation of the facts."

...go on record supporting or opposing a proposition, with Council's passage of a resolution made at a regular Council meeting, open to the public, where citizens have the opportunity to express their views.

THE CITY MAY NOT...

...use public funds to campaign for or against a proposition that has qualified for the ballot.

...use staff, equipment, supplies or other resources to create or distribute promotional material for a proposition that has already qualified for the ballot. A publication's style, tenor and timing help determine whether it is impermissibly "promotional," or permissibly "informational." (A pamphlet that presents only the positive aspects of a proposition is promotional, whereas one that simply presents facts is informational.)

ELECTED OFFICIALS MAY...

...speak out on a proposition, even during a Council meeting.

....use campaign funds to qualify, support or oppose a proposition subject to compliance with City and state campaign finance laws and federal laws.

...do everything that non-elected City employees may do.

ELECTED OFFICIALS MAY NOT...

...use City staff, equipment, supplies or other resources to campaign for or against a proposition, or a candidacy.

...do anything that non-elected City employees are prohibited from doing.

CITY EMPLOYEES MAY...

...support or oppose a candidate or a proposition--on their own time and not on City property--for example, by making a contribution, stuffing envelopes, passing out flyers, or other campaign activity.

...wear a lapel button or similar accessory in support of a candidate or proposition, even on City time, unless the button or accessory could get caught in machinery or otherwise threaten the safety of the wearer or others.

...post political signs in their offices or cubicles unless the signs are posted in a manner readily visible to the public.

...allow citizens to post political signs or information regarding a proposition on a community bulletin board (where material is posted by members of the community), even on public property, to the same extent that non-political signs or information are allowed.

...allow citizens to place campaign materials on publicly accessible counter-tops, if the employees' workplace allows citizens to place non-political materials in that area. The materials may not be censored based solely on their content. However, the employees in charge of the workplace may impose reasonable restrictions on the size of the materials and the manner of their display.

...speak about a proposition in response to a citizen's request for information, if they give a fair presentation of the facts. City employees may also present the City's view of a proposition at a meeting at a public or private organization if the presentation is requested by that organization and authorized by the City.

...use a City-owned public access computer--on their own time and without using their office, position or title to suggest directly or indirectly that the City is advocating a particular position in a campaign--the same way that any other citizen may use that terminal.

For more information,
call the City Clerk's Office
at (619) 533-4000.

The Prohibition on Use of Public Funds for Political Purposes by Local Governments in the Election Context[1]

LEAGUE OF CALIFORNIA CITIES
2008 City Attorneys Continuing Education Seminar

Issues in Election Law

February 14, 2008 – Emeryville
February 28, 2008 – Redondo Beach

Presented by

Vanessa W. Vallarta, Esq.
City Attorney
City of Salinas
200 Lincoln Avenue
Salinas, CA 93901
Telephone: (831) 758-7256

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[1] The presenter wishes to gratefully acknowledge that the authorship and source of much of the information in this paper is drawn from the briefs filed by the City of Salinas appellate counsel Joel Franklin in the case of *Vargas v. City Salinas,* currently pending before the California Supreme Court and the excellent Amicus Curiae Brief of League of California Cities, *et al* in support of the City of Salinas by Karen Getman, Esq. of Remcho, Johansen & Purcell.

I. Introduction

Increasingly, significant issues of state and local public policy are being decided by the voters at the ballot box. An important consideration for city attorneys advising local governments is just what kind of information can be provided by a local entity to the voters about the impact of a proposed ballot measure. Although the courts and Legislature have long recognized the important informational role played by government in our democratic process, (e.g., *Keller v. State Bar of Cal.* (1990) 496 U.S. 1, 12-13), in the thirty years since *Stanson v. Mott* (1976) 17 Cal. 3d 206, was decided, cities and counties have struggled with how to inform voters about pending ballot measures without being accused of using public funds for improper campaign purposes.

For example, the City of Salinas and its City Manager were sued for their action in connection with preparing a budget to meet potential substantial cuts from a proposed local tax repeal measure (Measure O) and for informing the public of those actions. That case is now pending before the California Supreme Court. (*Morfin Vargas v. City of Salinas, et al.*, Cal S. Ct. Case No. S140911.)

The purpose of this paper is to provide a general overview of the current state of the law governing the use of public funds in the election context. The paper will consider what type of local agency speech is proper in the context of an election and what is the correct standard for such speech. This subject is treated exhaustively in the numerous briefs filed by the parties and *amici curiae,* including the League of California Cities, in the pending *Vargas* case and may be viewed on-line on the California Supreme Court web site.

II. The "Traditional" *Stanson v. Mott* Test

The expenditure of public funds in connection with a ballot measure election has traditionally been interpreted in light of the California Supreme Court's decisions in *Stanson v. Mott* (1976) 17 Cal. 3d 206 and *Mines v. Del Valle* (1927) 201 Cal. 273.

In *Mines*, a citizen-taxpayer brought action against the City of Los Angeles requesting the repayment of money expended by the City to advocate an affirmative vote on a city bond measure. The City had used public funds to pay for a number of promotional materials that were sent to voters throughout the City. The Supreme Court determined that the City's activities were illegal, and held that a public agency may not use public funds to advocate a position on a ballot measure "unless the power to do so is given ... in clear and unmistakable language" by the Legislature. (*Mines*, 201 Cal. At 287.)

Nearly fifty years later in *Stanson v. Mott*, the California Supreme Court considered a legal challenge to the Director of California Department of Parks and Recreation expending public funds to "promote" the approval of a statewide park bond measure. The director conceded that he had used public funds to engage in a variety of activities

supporting the bond measure including "promotional" mailings, speaking engagements, and travel expenses. (*Stanson* at 211.) [This is in marked contrast to the facts concerning the City of Salinas in *Vargas* and many other subsequent examples where the local entity did not expressly advocate a vote.] Procedurally, the case was presented on demurrer, where the factual allegations were limited to those plead in the complaint. The Department had argued that promotion of public support for the measure was a proper use of public funds. (*Id.*, at 211.)

The Supreme Court disagreed, saying "expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment." (*Id.*, at 213.) As to the expenditures before it, the Court found "no legislative provision accorded the Department of Parks and Recreation such authorization." (*Id.*, at 209-210.) The Court reviewed cases from this and other states regarding the use of public funds for campaign purposes, concluding that

> "Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in a election contests or bestow an unfair advantage on one of several factions." (*Id.* at 217.)

The Court never reached the constitutional issue in *Stanson* however, holding instead that in the absence of "clear and unmistakable" legislative language authorizing such expenditures, "defendant could not properly authorize the department to spend public funds to campaign for the passage of the bond issue." (*Id.* at 220.)

The Court acknowledged that it would not be easy to separate proper informational activities from improper campaign expenditures. (*Id.* at 221.) In the context before it, the Court said that the Department could pay for informational activities, or provide a "fair presentation of the facts" in response to a citizen request for information, and could authorize an "agency employee to present the department's view of a ballot proposal at a meeting of" a public or private organization, upon request. (*Id.*)

The *Stanson* Court noted the following as examples of what the Department clearly could not do:

> [T]he use of public funds to purchase such items as bumper stickers, posters, advertising "floats," or television and radio "spots" unquestionably constitutes improper campaign activity [citations omitted], as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure. [Citations.]
>
> (17 Cal. 3d at 221.)

In between these two extremes, the Court noted that the determination of the propriety or impropriety of a particular expenditure "depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." (*Id* at 222 (emphasis added).)

And therein lies the gray area that has led to litigation and confusion ever since the *Stanson v. Mott* opinion was issued.

III. Post-*Stanson* Case Law

Since *Stanson*, the courts of appeal have been called upon repeatedly to clarify what constitutes impermissible campaign activities for which public funds cannot be spent without express legislative authorization.

In *Miller v. Miller* (1978) 87 Cal.App.3d 762,764-766 [*Miller I*"], the issue was the legality of expenditures by the California Commission on the Status of Women to advocate the state Legislature's ratification of the Equal Rights Amendment to the U.S. Constitution. The Commission had engaged in traditional lobbying, but had also conducted "grass roots lobbying" in which it urged voters to contact the Legislature in support of ratification. The *Miller I* court disallowed such expenditures, construing *Stanson v. Mott* as prohibiting the agency from making a direct appeal to the voters. (*Id.* at 768-769, 771-772.)

The Legislature then enacted a statute specifically authorizing the Commission to disseminate its views on a wide variety of women's issues. On its second review, the court of appeal held that the new legislation "can only be interpreted as s legislative warrant to advocate and promote the commission's positions on these subjects." (*Miller v. California Com. On the Status of Women* (1984) 151 Cal.App.3d 693, 698 [*Miller* II"].) The court rejected the plaintiff's claim that the Commission's actions, even if legislatively authorized, unlawfully infringed his speech rights as a citizen by expending public funds to promote controversial issues with which he disagreed. (*Id.* at 700.)

> This claim fails to make the critical First Amendment distinction between "the government's addition of its own voice [and the] government's silencing of others.' [Citation.] "That government must regulate expressive activity with an even hand if it regulates such activity at all does not mean that government must be ideologically 'neutral.'" [Citations.] [*Miller II* at 700.]

The Court acknowledged that "[o]rdinarily, government may not compel citizens to express a view any more than it may forbid someone to express a view." (*Id.*) "But none of this means that government cannot add its own voice to the many it must tolerate, provided it does not drown out private communications." (*Id.*, internal quotation marks and citations omitted.)

The *Miller* decisions were followed by *League of Women Voters of Cal. v. Countywide Crim. Justice Coordination Com.* (1988) 203 Cal.App.3d 529. Here, plaintiff's challenged public expenditures made to assist in the drafting of a statewide initiative measure that would change existing law. The court of appeal rejected the challenge, holding that "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." (*Id.* at 550.) The court held that a "ballot measure" does not become an official measure triggering any prohibition on the use of public funds to advocate a single viewpoint, until the measure begins circulating among the voters for potential qualification. (*Id.* at 555, 556.)

The court in *League of Women Voters of Cal. v. Countywide Crim. Justice Coordination Com.* also found that various materials prepared by public employees regarding the proposed initiative were 'relatively balanced and neutral in tone" and provided "a considerable body of useful information," thus providing "'a fair presentation' of relevant information..." (*Id* at 559, quoting *Stanson* at 221.) Finally, the court held that the board of supervisors did not unlawfully expend public funds by holding a hearing at which it officially recorded its support for the qualification of the proposed initiative. (*Id* at 560.)

Other decisions similarly have drawn the line at prohibiting active campaigning for or against a ballot measure. (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 187-188 [city lawfully expended public funds on a voter registration program encouraging residents to register and vote even though city was on record as opposing a measure that would appear on the ballot]; *Yes on Measure A v. City of Lake Forest* (1997) 60 Cal. App.4th 620, 625-626 [city's expenditure on a pre-election challenge to the legality of a ballot measure are not reportable political expenses under the Political Reform Act]; *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 429-431 [school district did not illegally expend public funds by holding and broadcasting school board meeting at which the board took a position opposing a statewide ballot initiative]; *cf. California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 747-749 [upholding attorneys' fees award to plaintiff who successfully stopped a sheriff from ordering his deputies while in uniform and on duty, to distribute literature prepared by a private campaign committee].)

In *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, the court considered the wording of a ballot form drafted by a municipality seeking voter approval of a proposed card room. At issue was the city's inclusion of unnecessary and arguably partisan language in a ballot form used for a local initiative[2]. (*Id.* at 1224-1225.) The court held that the particular language before it violated Business &

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[2] The proposed ballot form provided as follows:

Shall ordinance 94-011, a gaming ordinance, zoning modification and development agreement, as printed in the voter pamphlet, be enacted to allow and regulate card room gaming at Golden Gate Fields, at which controlled games permitted by law, such as draw poker, low ball poker, and Panguingue (PAN) are played, in order to provide revenue for the City of Albany, create jobs, provide an Albany Bay trail, and allow Albany waterfront access?

Professions Code section 19819, which prescribes the ballot form for local initiatives seeking approval of new gaming clubs. Although the court reviewed *Stanson v. Mott*, its holding went no further than finding the language at issue "directly conflicts with the legislative intent [in section 19819] to submit the measure to the voters in a concise and neutral manner." (*Id.* at 1227-1228.)

IV. Recent Legislation: The State Legislature has Authorized Local Government to Inform Voters About its Views on Pending ballot Initiatives

Under *Stanson v. Mott*, the first question is whether the expenditures at issue have been authorized by statute. As is outlined further below, local governments have been authorized to analyze proposed ballot measures and formulate their own views as to the impacts, merits and detriments of a proposal, but not to expressly advocate the passage or defeat of the measure.

A. General Broad Authority

By operation of the Constitution and statute, local governments have been provided broad authority to make fiscal decisions concerning their constituents. Charter cities thus have "broad discretion to make public expenditures, subject to the limitations that the expenditure be for a public purpose and not expressly forbidden by law." (*Schroeder v. Irvine City Council*, 97 Cal.App.4th at 184-185, citing *West Coast Advertising Co. v. City and County of San Francisco* (1939) 14 Cal.2d 516, 521-522.) General law cities, unless otherwise prohibited by law, may expend funds "'where it appears that the welfare of the community and its inhabitants is involved and ... benefit results to the public.'" (*Albright v. City of South San Francisco* (1975) 44 Cal.App.3d 866,869, quoting 4 McQuillin, *Municipal Corporations* (3d ed.) p. 66.) What constitutes a public purpose justifying the expenditure is primarily a legislative determination that will be upheld so long as it has a reasonable basis. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 746, citations omitted.)

B. Elections Code Section 9212

In addition to the broad authority outlined above, local governments have specific authority to analyze and speak about local initiatives. Under Elections Code section 9212, proposed initiatives that would enact or amend city ordinances may be referred by a city council to any city agency or agencies for a report on any or all of the following:

> (1) Its fiscal impact.
>
> (2) Its effect on the internal consistency of the city's general and specific plans, including the housing element, the consistency between planning and zoning, and the limitations on city actions under Section 65008 of the Government Code and Chapters 4.2 (commencing with Section 65913) and 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.

(3) Its effect on the use of land, the impact on the availability and location of housing, and the ability of the city to meet its regional housing needs.

(4) Its impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure costs or savings, including the costs of infrastructure maintenance, to current residents and businesses.

(5) Its impact on the community's ability to attract and retain business and employment.

(6) Its impact on the uses of vacant parcels of land.

(7) Its impact on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization.

(8) Any other matters the legislative body requests to be in the report.

(Cal. Elec. Code, § 9212(a).)

Unlike the analysis prepared for measures that qualify for the ballot, there is no statutory requirement that reports prepared under section 9212 be balanced or impartial (*Compare* Elec. Code § 9212 (report on effect of measures) *with id.*, § 9280 (impartial analysis of city measures).) Indeed, the specificity of the items listed in section 9212(a) indicates that the Legislature intended to give local government the means to explain to the voters all the negative or positive consequences that might flow from a particular measure.

The Section 9212 report is prepared very early in the process: either while the initiative petitions are being circulated for signatures, or within 30 days from when the initiative is certified for the ballot. (*Id.* § 9212(a) & (b).) It is a preliminary view only.

Once an initiative qualifies for the ballot, a city council may take a position on the measure and even "file a written argument for or against any city measure" that appears in the voter information pamphlet. (Elec. Code § 9282; *cf. Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 429-431 [local school district may go on record opposing a ballot measure at a public meeting]; *League of Women Voters of Cal. v. Countywide Crim. Justice Coordination Com.* (1988) 203 Cal.App.3d 529, 560 [same for county board of supervisors]; *Stanson v. Mott*, 17 Cal. 3d at 221 [state agency may send an employee to present the department's view of a ballot proposal" when requested by a public or private organization.].) The local legislative body is not required to do this in a vacuum, but rather can research the merits and faults of the initiative, assess its impact on the constituency, hear arguments from the public for and against the measure, and discuss its own views in public session, prior to voting on an endorsement or the wording of the ballot argument.

Nor is the local government's authority restricted to analyzing and commenting on initiatives submitted by others. The local legislative body may submit to the voters its own measure for the repeal, amendment or enactment of an ordinance. (Elec. Code, §§ 9140 [county board of supervisors] & 9222 [legislative body of municipality]; *see also*

League of Women Voters of Cal. v. Countywide Crim. Justice Coordination Com., 203 Cal.App.3d at 550.) The mere fact of doing so puts local government squarely on one side of the issue. Similarly, local government must submit to the voters proposals to amend or repeal a city or county charter. (Elec. Code, § 9255.) Presumably it submits only those proposals that it believes should be approved by the voters.

By statute, then, local governments are not required to remain impartial about local initiatives. Whether the initiative has been prepared by the government itself, or by other interested citizens, local government is affirmatively authorized to analyze and speak about the impacts of the measure.

C. Government Code section 54964 – Express Advocacy

Recent enactments by the Legislature have also clarified what local governments are not permitted to do. In 2000, the Legislature enacted Government Code section 54964, which expressly prohibits the expenditure of local agency funds "to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters." (Gov. Code § 54964(a).) The statute also defines prohibited expenditures.

> **§ 54964. Local agency expenses**
>
> (a) An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.
>
> (b) As used in this section the following terms have the following meanings:
>
> (1) "**Ballot measure**" means an initiative, referendum, or recall measure certified to appear on a regular or special election ballot of the local agency, or other measure submitted to the voters by the governing body at a regular or special election of the local agency.
>
> .....
>
> (3) "**Expenditure**" means a payment of local agency funds that is used for communications that **expressly advocate** the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters. ....
>
> .....
>
> (c) This section does not prohibit the expenditure of local agency funds to provide **information** to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:

> (1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.
>
> (2) The information provided constitutes an **accurate, fair, and impartial presentation of relevant facts** to aid the voters in reaching an informed judgment regarding the ballot measure.
>
> (Gov. Code § 54964 (emphasis added).)

The definition of the term "expenditure" to only include funds used for communications that "expressly advocate" the approval or rejection of a specified ballot measure is a significant and welcome shift away from the arguably vague and constitutionally infirm rule of *Stanson v. Mott*.

The phrase "expressly advocate" is a term of art that appears frequently in state and federal election law. Courts have looked to the Political Reform Act of 1974 ("PRA"), Government Code sections 81000 *et seq.*, and regulations adopted by the Fair Political Practices Commission ("FPPC") to determine whether communications expressly advocate a particular result in an election. (*California Pro-Life Council, Inc. v. Getman* (9th Cir. 2003) 328 F.3d 1088, 1096-1100; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 461-463, 470-471; *Schroeder v. Irvine City Council*, 97 Cal.App.4th at 185; *League of Women Voters v. Countywide Crim. Justice Coordination Com.*, 203 Cal.App.3d at 550.)

For example, a Fair Political Practices Commission regulation defines "expenditure" as "any monetary or nonmonetary payment made by any person . . . that is used for communications which expressly advocate the . . . qualification, passage or defeat of a clearly identified ballot measure." (Cal. Code Regs., tit. 2, § 18225(b).) The regulation further states that a communication "expressly advocates" the passage or defeat of a measure if:

> [I]t contains express words of advocacy such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for," or otherwise refers to a clearly identified . . . measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.
>
> (*Id.*, § 18225(b)(2)(empahasis added).

"[T]he definition of 'express advocacy necessarily requires the use of language that explicitly and by its own terms advocates the election or defeat of a [ballot measure]. If the language of the communication contains no such call to action, the communication cannot be "express advocacy."'" (*Governor Gray Davis Com. v. American Taxpayers Alliance*, 102 Cal.App.4th at 471, quoting *Chamber of Commerce of U.S. v. Moore* (5th

Cir. 2002) 288 F.3d 187, 197.) The inquiry focuses on the plain meaning of the words of the communication: "the overall impressions of the hypothetical, reasonable listener or viewer" are irrelevant. (*Id.* at 469, quoting *Virginia Society for Human Life v. FEC* (4th Cir. 2001) 263 F.3d 379, 391-392.)

D. Government Code section 8314

Another relevant and similar statutory provision is Government Code section 8314. Added in 1990, this section prohibits the use of public resources as follows:

> **§ 8314. Use of public resources for unauthorized purposes**
>
> (a) It is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.
>
> (b) For purposes of this section:
>
> (1) "Personal purpose" means those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. "Personal purpose" does not include the incidental and minimal use of public resources, such as equipment or office space, for personal purposes, including an occasional telephone call.
>
> (2) "Campaign activity" means an activity constituting a contribution as defined in Section 82015 or an expenditure as defined in Section 82025. "Campaign activity" does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.
> .....
>
> (d) Nothing in this section shall prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the informational activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.
> .....

(Gov.Code § 8314.)

Once again, the question becomes whether the expenditure was used for "communications which expressly advocate the . . . qualification, passage or defeat of a clearly identified ballot measure." This is the language of the Fair Political Practices Commission's regulation clarifying the definition of "expenditure" in Government Code section 82025(b). (Cal. Code Regs., tit. 2, § 18225(b).) As noted earlier, in *Yes on*

Measure A v. City of Lake Forest, 60 Cal.App.4th 620, the Court of Appeal held that a city-funded, preelection challenge to the validity of an initiative did not constitute a reportable expenditure within the meaning of section 82025. The court expressly rejected the argument "that removing a measure from the ballot represents the ultimate political act and attempt to influence the electorate because it prevents them from participating in the political process." (*Id.* at 626.)

V. Vargas v. City of Salinas

Many of the issues raised above were considered by the Sixth District Court of Appeal in *Vargas v. City of Salinas* (2005) 135 Cal.App.4th 361, *review granted*, April 26, 2006. In *Vargas*, plaintiffs filed an action against the City of Salinas and its City Manager alleging improper government expenditures for communications concerning a local initiative election ("Measure O") that would have repealed the City's long-standing utility users tax (UUT). That tax provides the city with approximately $8 million in annual revenue, representing about 13% of the city's general fund budget.

The facts as explained by the Court of Appeal:

> "In response to the qualification of Measure O for the November 2002 ballot, city staff prepared a series of reports analyzing the effect of the loss of utility tax revenue and recommending the reduction or elimination of services and programs. Starting in November 2001, over the course of several public hearings, the city manager and the city's department heads presented fiscal impact reports to the city council. The departments' presentations, which were made in August 2002, took the form of slide presentations. The presentations embodied staff recommendations for service cuts, some in dire terms. In July 2002, the city council adopted the departments' recommendations as presented, thereby identifying the service cuts that would be implemented in the event of Measure O's passage.
>
> The staff's reports, analyses, and presentations concerning Measure O were placed on the city's website. As a matter of course, the website also includes minutes of city council meetings; the minutes of the meetings at which these reports were presented and discussed thus were posted on the website. The city also informed the electorate of its analysis of Measure O through articles in the Fall 2002 edition of the city's periodic newsletter to residents, and by means of a one-page summary of the anticipated service cuts, which the parties sometimes refer to as a leaflet or flyer. Like the reports and presentations, the flyer was posted on the city's website.
>
> Plaintiffs disagreed with the city's analysis of the consequences of Measure O. In plaintiffs' view, repeal of the UUT would benefit the city's residents by reducing their taxes and by eliminating local government waste. They made written and oral presentations to the city council in August 2002. The minutes of those

meetings were placed on the city's website." (*Vargas*, 37 Cal.Rptr.3d 506, 510 – 511.)

The City challenged the pleadings filed by plaintiffs by opposing the application for a temporary restraining order and by filing a motion for judgment on the pleadings, which the court granted as to several causes of action. Plaintiffs petitioned for writ of mandate, which was denied. Thereafter plaintiffs moved for permission to amend their complaint, based on a new tax measure that the city had placed before the voters, Measure P. The superior court granted plaintiffs request to "supplement" the complaint. In April 2004, following the filing of the supplemental complaint, the City responded by filing a special motion to strike plaintiff's complaint as a strategic lawsuit against public participation ("anti-SLAPP"), pursuant to Code of Civil Procedure section 425.16. In May 2004, the court heard and granted the motion to strike.

On appeal, plaintiffs contended that the City had improperly engaged in partisan campaigning intended to influence city voters in favor of Measure O. Plaintiffs argued that the style tenor and timing of defendants' communications constituted impermissible advocacy under *Stanson v. Mott*. Amicus Californians Aware agreed, arguing against a bright line standard for judging whether political speech constitutes advocacy and urging that government speech is not desired or protected in the election process.

The City asserted that the trial court properly granted the special motion to strike since plaintiffs' failed to carry their burden of showing that the City engaged in impermissible express advocacy. The League of California Cities supported the City's position and argued for a bright line rule to determine what constitutes advocacy, asserting that such a rule is workable and that it furthers the goal of open government.

The Court of Appeal agreed and affirmed the granting of the City's special motion to strike. The Court first concluded that the City and its manager had carried their initial burden of demonstrating that plaintiffs' claims arose from constitutionally protected speech within the meaning of section 425.16. On the second prong of the statutory analysis, the Court concluded plaintiffs had not established a probability of prevailing on the merits. (*Vargas* at 520.) The Court concluded "that the proper measure for judging whether defendants' communications were promotional is the express advocacy standard" as embodied in the Government Code section cited. [Citations omitted.] "A communication meets that standard when it ' contains express words of advocacy' or when 'taken as a whole, [it] unambiguously urges a particular result in an election.'" (*Vargas* at 525, citing *Schroeder* at 186, quoting Cal. Code of Regs., tit.2 § 18225(b)(2).)

The Court noted that the City's communications did not contain words of express advocacy or exhortation. Rather, in the Court's opinion, the City's communications "present a balanced picture of the consequences of the passage of the measure." (*Vargas* at 525-526.)

The City of Salinas and *amici* League of California Cities, California State Association of Counties and League of Women Voters of the Salinas Valley, have urged the California Supreme Court to affirm the standard set forth by the Sixth District Court of Appeal as a clear, workable standard for local government. The City, in its argument to the Supreme Court, has defined the proper standard as follows:

> [A] governmental entity constitutionally and properly speaks to inform citizens of the effects pending ballot measures may have on the municipal government's functioning and services, *as long as* the government does not use "express words of advocacy" ("magic words") and does not "unambiguously urge" passage or defeat of the ballot measure. This second class of speech exists if the language of the speech is susceptible of only one reasonable interpretation, and no reasonable person could find it to have any plausible meaning or purpose other than to unmistakably call for clearly-identified action.
>
> (*Vargas*, Respondents' Answer to Briefs of Amici Curiae, p. 3.)

It is hoped that the *Vargas* case, which has been fully briefed and is ready for oral argument before the Supreme Court, will resolve these issues and clarify the correct standard for government speech in the election context.

VI. *Stanson v. Mott* Does Not Set Forth a Constitutional Test for Government Speech

The City expenditures at issue in *Vargas* were for informational materials authorized by law. The materials contained none of the express advocacy prohibited by statute. That should end the inquiry. Nonetheless, appellants have urged to Supreme Court to go further and hold that even legislatively authorized expenditures are unconstitutional if they contain "partisan" speech.

In the event that the Supreme Court accepts some of this argument and determines that the government stop short of certain conduct with respect to pending initiatives, the League and City have urged the Court to draw the line with greater precision than the murky and subjective "style, tenor and timing" test set forth in *Stanson v. Mott*.

As discussed earlier, the bright-line express advocacy standard set forth in Government Code sections 8314 and 54964 arises from the standard used by California courts and statutes to distinguish speech that can be regulated as a political expenditure. (*See Governor Gray Davis Com. v. American Taxpayers Alliance*, 102 Cal.App.4th at 461-463, 470-471; *see also California Pro-Life Council, Inc. v. Getman*, 328 F.3d at 1096-1100.) It was used first by the U.S. Supreme Court to save an otherwise unconstitutionally vague statute in *Buckley v. Valeo* (1976) 424 U.S. 1, 80.

Any standard that applies an inherently subjective analysis of the "style, tenor and timing" of a communications is dangerous and constitutionally infirm as it is judged

solely through the eye of the beholder. What is informational to one person can easily be seen as partisan by another. A subjective and vague standard puts local government at risk of litigation each time it says anything about the possible consequences of a local initiative. Local governments deserve, and Supreme Court jurisprudence requires, a clear, workable standard as set forth in Government Code section 54964 and its accompanying regulations.

VII. Anti-SLAPP Protections Apply to Litigation Challenging the Legality of Government Speech

Like others who engage in public debate about public issues, local governments face the danger of being sued by those seeking to eliminate or minimize their participation in the debate. There can be no question that *Vargas* is such a lawsuit – appellants disagreed with the City of Salinas' perspective and sued to enjoin the City from communicating that perspective to its citizens.

The Legislature has responded to this risk by enacting anti-SLAPP laws to protect those engaged in public debate. As the Supreme Court recently reaffirmed, anti-SLAPP laws express "the Legislature's unqualified desire to 'encourage continued participation in matters of public significance.'" (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61 [quoting Code of Civ. Proc., § 425.16(a)].) The laws do so by establishing a "summary-judgment-like procedure" to end meritless lawsuits "early and without great cost" before they chill debate by "deplet[ing] 'the defendant's energy and drain[ing] his or her resources.'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312, citations omitted; *see also Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th at 60-61.)

Although there is no California Supreme Court case that directly addresses the issue to date, California appellate courts that have considered the question agree with the Sixth District below that "[g]overnment agencies and public employees are among those entitled to protection from strategic lawsuits against public participation." (Slip Opn. at 9.) Simply put, "[g]overnment has a legitimate interest in informing and educating the public. *It must be able to communicate.*" (*Bradbury v. Superior Court* (1997) 49 Cal.App.4th 1108, 1118, emphasis added, citation omitted.) Accordingly, the anti-SLAPP laws must be available to ensure that the government's role in the public "exchange of ideas" is not "unduly curtailed." (*Id.; see also Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1246-47 ["For the purposes of the anti-SLAPP statute, the word 'person' includes governmental entities."]; *Visher v. City of Malibu* (2005) 126 Cal.App.4th 364, 367 fn. 1 ["The anti-SLAPP statutes treat[ ] a government entity as a 'person' entitled to the statute's protection."]; *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 353 ["We have no doubt that a public official or government body, just like any private litigant, may make an anti-SLAPP motion where appropriate."]; *Schroeder v. Irvine City Council*, 97 Cal.App.4th at 183, fn. 3 [government should have anti-SLAPP protection when it is "sued based on the content of its speech."].

Thus the Court of Appeal properly considered whether appellants' lawsuit could withstand the special motion to strike under the anti-SLAPP statutes. (*See generally* Slip Opn. at 6-9.) That analysis involves a two-step process. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) First, the court decides whether the defendant has made a threshold showing that the lawsuit against it challenges an act in furtherance of the defendant's constitutional "right of petition or free speech." (*City of Cotati v. Cashman*, 29 Cal.4th at 76; Code Civ. Proc., § 425.16(b)(1).) If so, the court considers "whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman*, 29 Cal.4th at 76.)

When used to protect government, the anti-SLAPP laws prevent "disgruntled" individuals aggrieved by government decisions from "frivolously [tying] up the resources of government agencies and the judiciary" through meritless lawsuits. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, 65 Cal.App.4th at 730.) Under current anti-SLAPP laws, those who are genuinely concerned that government speech has crossed the line into unlawful express advocacy may sue, and meritorious lawsuits will survive special motions to strike.

If, on the other hand, most publicly funded speech were exempted from current protections, it will become dramatically more risky and expensive for government to communicate with its citizens, and the effect on public debate will be chilling.

The City of Salinas' position, as articulated in *Vargas,* is that when speaking from their knowledge of government operations, public employees are protected in performing an important function when conveying information to the public concerning the actions of the government. Likewise, in performance of the public entity's governance functions, the public employees act within the scope of their employment and yet retain their First Amendment speech protections. The public entity, likewise, is protected in carrying out its governing, both in determining discretionary policy and decision-making, and in informing the citizenry about such actions.

The city's communications of such information to the public validly exercises its constitutional rights to speak. Such speech is not illegal as a matter of law under the first prong of the anti-SLAPP inquiry. (Code Civ. Proc., § 425.16, subd. (b)(1); *see Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-321.) Salinas has contended that a city has a right and obligation to speak, at least when it is not expressly advocating, and instead is providing information on the impacts of ballot measures on its operations. That speech should be protected.

VIII. Conclusion

The people of this state must have the best information, and all possible information, available to them when making critical decisions at the ballot box. The Legislature has manifested a clear desire to foster the dissemination of such information by local government, while stopping short of allowing government expenditures on express advocacy. This line, urged by the League and City of Salinas, allows the voters freedom to make their own choices, but ensures the choices they make will be informed ones. Nothing in *Stanson v. Mott* requires the contrary. Whether the Supreme Court agrees shall soon be decided and will provide valuable guidance to all local government entities.