

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: June 4, 2014
TO: Honorable Council President and City Councilmembers
FROM: City Attorney
SUBJECT: Qualifications and Removal of Ethics Commission Members

INTRODUCTION

On April 17, 2014, *San Diego City Beat* ran an online article, "Sarah Boot tracks down Lorie Zapf at contentious candidate forum." Andrew Poat, a member of the San Diego Ethics Commission, posted online comments in response to the article:

I hope this campaign turns to some "REAL" issues. Council Member Zapf being reimbursed for the transportation costs to attend the many events she does, in my mind, is NOT an issue. The fact that she attends so many events is the issue - and a measure of her success in office.

In continuing the online discussion, Commissioner Poat posted the following comment:

I must not have been clear ... a Council member being reimbursed for expenses getting to events is NOT an issue. The fact that CM Zapf, like her colleagues, spend so much time in their Districts is something for which they ALL deserve credit - like being re-elected.

Mr. Poat's comments raise a question about whether his comments are a "public endorsement" of a candidate for City Council. The San Diego Municipal Code prohibits an Ethics Commission member from participating in a campaign or publicly endorsing a candidate during a Commission member's tenure on the panel. SDMC § 26.0406(d). The City Council can vote to remove a Commission member from the board if he or she is found to have engaged in such conduct. SDMC § 26.0408.

After Commissioner Poat posted the comments, the posts were brought to the attention of the Commission's Vice Chair. The Vice Chair then directed the Commission's Executive Director, Stacey Fulhorst, to forward the article to the Council President. (*See*, May 16, 2014

memorandum from Stacey Fulhorst to Council President Todd Gloria, attached). The Council President has asked the City Attorney's Office whether Commissioner Poat's comments trigger provisions of the San Diego Municipal Code that may lead to a Commissioner's removal for cause. (See, May 19, 2014, memorandum from Stacey Fulhorst to City Attorney Jan Goldsmith, attached).

QUESTION PRESENTED

Do Commissioner Poat's posted comments related to the *San Diego City Beat* article constitute participating in a campaign for City office or an endorsement of a candidate, triggering his potential removal from the Commission?

SHORT ANSWER

Whether Commissioner Poat's posted comments constitute "participating in a campaign supporting or opposing a candidate for City office," or constitute an "endorsement" of a candidate, is a factual question that would be decided by the City Council, and only after a public hearing. SDMC § 26.0408. This determination is not to be made in a legal opinion from this Office, but after a hearing before the Council. The Municipal Code provides that the hearing be held to afford Commissioner Poat due process and the opportunity to be heard. The Council would then vote to determine whether the Commissioner is qualified to continue to serve on the panel.

DISCUSSION

I. QUALIFICATIONS OF ETHICS COMMISSIONERS

The Ethics Commission monitors, administers, and enforces the City's governmental ethics laws, proposes new governmental ethics law reforms, conducts investigations, refers violations to appropriate enforcement agencies, audits disclosure statements, and advises and educates City officials and the public about governmental ethics laws. SDMC § 26.0401. The authority of the Commission to conduct investigations and take administrative enforcement actions extends to various individuals, including all current and former elected officials of the City and candidates for City office. SDMC § 26.0413(a).

The seven Ethics Commission members are appointed by the Mayor and confirmed by a majority of the Council to serve a four-year term. SDMC §§ 26.0404 and 26.0405. The qualifications for Commission members in Municipal Code section 26.0406 are intended to ensure members can be independent when they administer and enforce City ethics and campaign laws. For example, Commissioners are not allowed to contribute to a candidate for City office, participate in a campaign supporting or opposing a candidate for City office, or act as a lobbyist.

§ 26.0406 Qualification of Members

Each member of the *Commission* shall comply with the following qualifications during his or her tenure on the *Commission*:

- (a) Each Commissioner shall be a qualified elector of the County of San Diego.
- (b) Each Commissioner shall be of high moral character and integrity.
- (c) No member of the *Commission* shall make a financial contribution to a candidate for *City* office.
- (d) No member of the *Commission* shall participate in a campaign supporting or opposing a candidate for *City* office, nor shall any member of the *Commission* participate in a campaign supporting or opposing a *City* ballot measure unless such measure expressly pertains to the activities or authority of the *Commission* or to the laws under the jurisdiction of the *Commission*. Participating in a campaign includes engaging in fundraising activities and making public endorsements with regard to a *City* candidate or measure.
- (e) No member of the *Commission* shall become a candidate for *elective governmental office* during his or her tenure on the *Commission*, and for twelve months thereafter. Whether or not a Commissioner has become a candidate for *elective governmental office* will be determined by applying the appropriate laws and regulations governing the office sought. Each prospective Commissioner shall sign a written declaration agreeing not to run for *elective governmental office* for at least twelve months after completion of service on the *Commission*, and waiving the legal right to challenge this provision.
- (f) No member of the *Commission* is permitted to act as a lobbyist required to register with the City pursuant to Chapter 2, Article 7, Division 40 of this Code.

Some of these qualifications are so important that a Commissioner is deemed to have automatically resigned from the position if he or she violates them: “[a] Commissioner’s failure to comply with the qualifications listed in section 26.0406 (a) or (c) are treated as if the Commissioner had automatically resigned from the *Commission*.” SDMC § 26.0407.

Other qualifications may lead to a Commissioner’s removal from the panel after a public hearing. The Municipal Code states that a Commissioner’s failure to comply with section 24.0406, subsections (b), (d), (e), or (f), “constitute cause for purposes of determining whether a member should be removed from the *Commission*.” SDMC § 26.0408. The City Council may remove a member for cause by a vote of a majority of the members of the Council. *Id.* Before the Council may remove a member of the Commission, written charges shall be made against the

Commission member and an opportunity afforded for public hearing before the Council upon such charges. *Id.*

II. PUBLIC ENDORSEMENT OF A CITY CANDIDATE

The question presented is whether Commissioner Poat's online comments constitute "participating in a campaign supporting or opposing a candidate for City office," or "endorsing" a candidate, thereby subjecting him to possible removal from the Commission. (*See*, SDMC §§ 26.0406(d) and 26.0408). This is a factual question for the Council to decide. The Municipal Code provides guidance in determining whether the comments rise to the level of participation in a campaign or a public endorsement of a candidate.

"Participating" in a campaign includes "making public endorsements with regard to a City candidate." SDMC § 26.0406(d). The Municipal Code does not define "public endorsement." Accordingly, the Council may wish to look to other sources for guidance.

An "endorsement" is defined in the Merriam-Webster online dictionary as "a public or official statement of support or approval."¹ "Public" is defined as "exposed to general view."² The Commissioner's comments were made on an online website of a local news publication, generally open to view by anyone with access to that website. Accordingly, the comments were public in nature.

The Municipal Code does not define what constitutes an "endorsement." One usually thinks of an endorsement as being requested by the candidate and used in political campaigns. In this instance, Commissioner Poat's comments were in response to an article on a political debate.

One definition of whether a communication supports or opposes a candidate can be found in the regulations of the California Fair Political Practices Commission (FPPC). The FPPC regulations define the phrase "expressly advocates" in the context of expenditures used for communications which expressly advocate the nomination, election, or defeat of a clearly identified candidate or candidates as follows:

A communication "expressly advocates" the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for" or, within 60 days prior to an election in which the candidate or measure appears on the ballot, the communication otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election. Cal. Code Regs. title 2, § 18225(b)(2).

¹ *See*, <http://www.merriam-webster.com/dictionary/endorsement>.

² *See*, <http://www.merriam-webster.com/dictionary/public>.

California courts have discussed the question of express advocacy in the context of using public resources to support or oppose a ballot measure. In that situation, the court looks to the “style, tenor, and timing” of the communication: “. . . even when a publication or communication imparts useful information and does not expressly advocate a vote for or against a specific candidate or ballot measure, the expenditure of public funds to prepare or distribute the communication is improper when the “style, tenor, and timing” [citation omitted] of the publication demonstrates that the communication constitutes traditional campaign activity.” *Vargas v. City of Salinas*, 46 Cal. 4th 1, 27 (2009).

Commissioner Poat’s second posted comment uses a variation of the word “elect”: “The fact that CM Zapf, like her colleagues, spend so much time in their Districts is something for which they ALL deserve credit - like being re-elected.” The Council would determine whether this statement is a public endorsement of the Councilmember, or of all incumbents on the Council, and if so, whether the Commissioner should be removed from the panel.

III. OVERVIEW OF PROCEDURE TO DETERMINE QUALIFICATIONS AND REMOVAL

A Commissioner whose qualifications are questioned is entitled to written notice of the charges and an opportunity afforded for a public hearing before the Council upon such charges. SDMC § 26.0408. Because specific removal procedures are not provided in the Municipal Code, the Council may adopt a process as long as it is consistent with the due process provided in section 26.0408.

One option is a two-step process. The Council could have an initial hearing to determine whether the comments constitute a failure to comply with the qualifications of a Commissioner. If the determination is that the comments do not rise to the level of “participating in a campaign supporting or opposing a candidate for City office,” including “making public endorsements with regard to a City candidate,” the matter would end. On the other hand, if the comments demonstrate a failure to comply with the qualification requirements, the Council would set a second public hearing, in which the Council could hear any additional testimony, consider the facts, and give the Commissioner an opportunity to respond to the question of whether he should be removed from the Commission.

The other option is to combine the determinations in one public hearing.

In either case, the May 16, 2014 memorandum from Stacey Fulhorst to Council President Todd Gloria provided sufficient notice to the Commissioner of the charges.³ The memorandum refers to the sections of the Municipal Code relating to qualifications and removal of Commissioners and attaches the *San Diego City Beat* article dated April 17, 2014, which includes the Commissioner’s comments.

³ We are advised that Executive Director, Stacey Fulhorst provided Commissioner Poat a copy of the May 16, 2014 memorandum and the May 19, 2014 memorandum, attached.

If this matter proceeds to a hearing on removal, this Office will provide further guidance on timing, witnesses, and other issues that may arise during the process.

CONCLUSION

The Ethics Commission was created to monitor, administer, and enforce the City's governmental ethics laws. The Commission's jurisdiction to conduct investigations and take administrative enforcement actions extends to current and former elected officials of the City and candidates for City office. Accordingly, Commissioners must refrain from participating in campaigns supporting or opposing those candidates. Such conduct can raise questions about a Commissioner's qualifications to serve and can result in his or her removal from the Commission.

Whether Commissioner Poat's posted comments constitute "participating in a campaign supporting or opposing a candidate for City office" or "endorsing" a candidate is a factual question that must be decided by the City Council after a public hearing. SDMC § 26.0408. This determination is not to be made in a legal opinion from this Office, but after a hearing before the Council. The Municipal Code provides that the hearing be held to afford Commissioner Poat due process and the opportunity to be heard. The Council would then vote to determine whether the Commissioner is qualified to continue to serve on the panel.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Catherine M. Bradley

Catherine M. Bradley
Deputy City Attorney


CMB:SBS:sc
Attachments
MS-2014-10
Doc. No.: 796425

cc: Mayor Kevin L. Faulconer
Stacey Fulhorst, Executive Director, Ethics Commission

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

M E M O R A N D U M

DATE: May 19, 2014
TO: City Attorney Jan Goldsmith
FROM: Stacey Fulhorst, Executive Director 
SUBJECT: San Diego Municipal Code section 26.0406

As you know, San Diego Municipal Code [SDMC] section 26.0406(d) states as follows with respect to the qualification of Ethics Commissioners:

No member of the *Commission* shall participate in a campaign supporting or opposing a candidate for *City* office Participating in a campaign includes engaging in fundraising activities and making public endorsements with regard to a *City* candidate or measure.

On Friday, May 14, 2014, the Commission's Vice Chair, John O'Neill, directed me to forward the attached memo to the Council President concerning public comments recently made by Ethics Commissioner Andrew Poat in connection with a story published online by *San Diego City Beat* on April 17, 2014. This information was provided to the Council President because of the City Council's role as outlined in SDMC section 26.0408:

Failure to comply with the qualifications listed in Section 26.0406(b), (d), (e), or (f) shall constitute cause for purposes of determining whether a member should be removed from the *Commission*. The City Council may remove a member of the *Commission* for cause by a vote of a majority of the members of the Council. Before the Council may remove a member of the *Commission*, written charges shall be made against the *Commission* member and an opportunity afforded for public hearing before the Council upon such charges.

In response to the attached memo, the Council President's Office asked us to obtain an opinion from your office regarding the applicability of SDMC section 26.0406 before proceeding further. Accordingly, Commissioner O'Neill directed me to forward this information to you in the context of requesting that you render an opinion as to whether or not Commissioner Poat's comments on the *City Beat* website establish a failure to comply with the qualifications listed in SDMC section 26.0406(d) and thereby trigger the provisions of SDMC section 26.0408.

Page 2
City Attorney Jan Goldsmith
May 19, 2014

Because this matter affects the ability of an Ethics Commissioner to continue to serve on the Commission, we would appreciate receiving a written opinion at your earliest opportunity.


Attachment

cc: Mayor Kevin Faulconer
Council President & Members of the City Council

CITY OF SAN DIEGO
ETHICS COMMISSION

Office of the Executive Director

MEMORANDUM

DATE: May 16, 2014
TO: Council President Todd Gloria
FROM: Stacey Fulhorst, Executive Director 
SUBJECT: San Diego Municipal Code section 26.0406

Ethics Commission Vice-Chair John O'Neill has directed me to provide you with the attached copy of a story published online by *San Diego City Beat* on April 17, 2014, as well as the comments posted by Ethics Commissioner Andrew Poat on April 19 and 23, 2014. As you know, San Diego Municipal Code [SDMC] section 26.0406(d) states as follows:

No member of the *Commission* shall participate in a campaign supporting or opposing a candidate for *City* office, nor shall any member of the *Commission* participate in a campaign supporting or opposing a *City* ballot measure unless such measure expressly pertains to the activities or authority of the *Commission* or to the laws under the jurisdiction of the *Commission*. Participating in a campaign includes engaging in fundraising activities and making public endorsements with regard to a *City* candidate or measure.

In addition, SDMC section 26.0408 provides as follows:

Failure to comply with the qualifications listed in Section 26.0406(b), (d), (e), or (f) shall constitute cause for purposes of determining whether a member should be removed from the *Commission*. The City Council may remove a member of the *Commission* for cause by a vote of a majority of the members of the Council. Before the Council may remove a member of the *Commission*, written charges shall be made against the *Commission* member and an opportunity afforded for public hearing before the Council upon such charges.

Attachment

cc: Mayor Kevin Faulconer



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Thursday, Apr 17, 2014 - 28 days ago

Last Blog on Earth | News

Sarah Boot tracks down Lorie Zapf at contentious candidate forum

City Council District 2 race heats up

By Joshua Emerson Smith



Lorie Zapf (left) and Sarah Boot - Photo by Joshua Emerson Smith

MP3

What does a voter need to do to get a debate around here?

Wednesday night's Q-and-A session featuring City Council District 2 candidates Lorie Zapf and Sarah Boot was a long time in the making.

Held by the Pacific Beach Town Council at its monthly meeting, the debate-like event had originally been scheduled as a solo forum for Zapf who currently represents District 6. That is until Boot, who'd been trying to square off with her opponent for months, got wind of the event and scheduled a simultaneous appearance.

"We definitely think that district residents should be able to ask questions and hear the candidates' views, and we're committed to that as many times as possible," said Boot's campaign manager, Laura Plink.

Ron Pattinson

May 16, 2014

Meet beer historian and author of *The Home Brewers Guide to Vintage Beer* for a book signing event. Attendees may purchase a copy of his newly released book featuring a collection of homebrew beer recipes from 1800 to 1980.

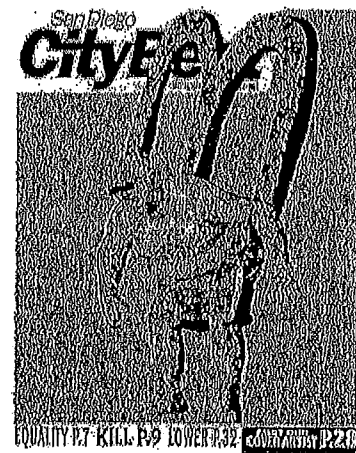
[62 other events on Friday, May 16](#)



\$15.00 for \$30.00
Riviera Supper Club

Time Left: 15 days

San Diego CityBeat



In February, Boot publicly called for a series of debates. However, Zapf never agreed. The issue got more attention in March when Zapf was the only candidate not to attend a forum set up by the Ocean Beach Town Council.

"We were only given two dates to choose from and neither worked for the Councilmember's schedule," said Zapf's campaign manager, Sara Kamiah, in an email. "The President of the OB Town Council, who is a supporter and major donor to Ms. Boot, was unwilling to look at any additional dates."

Wednesday's event drew more than a hundred people, many with questions for the candidates. But before voters could lob their queries, the candidates explained who they are and flossed their credentials.

Zapf, who was elected to represent District 6 (Claremont, Linda Vista and Kearny Mesa) in 2010, lives in Bay Ho. Redistricting, in 2011, put her home in District 2, which also includes Ocean Beach, Pacific Beach and Point Loma.

Zapf noted she was the first Latina elected to the City Council, and outlined a childhood riddled with poverty. "I had a very tumultuous upbringing and at one point, the result was that my brother, my sister and I, we were split up and put into foster homes."

That experience helped make her a fiscal conservative, she added. "So I've been [on the City Council] the last three-and-a-half years working on reforms that have brought a lot more money into our coffers. And you just saw that just this week. Our budget is well above what we had projected. The pension savings, the managed comp savings, the efficiencies from the audits, all of that's paying off."

In her opening remarks, Boot, who lives in Midway, said she's "passionate" about public service, citing her time as a federal prosecutor and president of the Lawyers Club of San Diego. She also talked about her work in the private sector as a consultant for companies such as Google and Yelp.

"I'm running for City Council because I'm going to fight for our neighborhoods, like Pacific Beach, that have been neglected by the city for so long," she said. "Let me give you an example of that. In Mission Beach, yesterday, we had a big water-main breakage, and that was destructive and costly. And things like this are all too common. That's the kind of neglected I'm talking about."

"Throughout my career, I've been a strong advocate for justice, for equality for the community," she added. "I plan to take those advocacy skills to the City Council and fight to make sure that our neighborhoods get their fair share of resources and that we're not just investing all of our money in downtown."

Boot ended her introduction by slamming Zapf for taking a monthly car allowance available to council members. "My opponent Lorie Zapf is the only person on the council to take the \$800-a-month car allowance," she said.

However, Zapf's campaign team was on hand fact-checking, and political strategist John Hoy bellowed from the crowd, "Not true!"

Later, CityBeat confirmed that councilmember Myrtle Cole also receives a car allowance.

That exchange set the tone for the rest of the debate, which went on for roughly 40 minutes, touching on topics ranging from potholes to height limits on development to crime to gay marriage. A full recording of the debate is available at the top of this post.

The next candidates forum is scheduled for Thursday, May 1, at 7 p.m. in the Cadman Elementary School cafeteria (4370 Kamloop Ave.). The event will be hosted by the Claremont Town Council and moderated by Janet Poutré, publisher of Claremont Community News. Both Zapf and Boot have promised to be there.

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14 comments



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Laurie Black · Top Commenter · San Diego, California
 Colla Ballesteros was the first Latina on the council in the 1980's
 Reply · Like · April 26 at 1:30pm



Gary Whaley · Top Commenter
 Didn't Zapf vote for items that curtailed business in the City? No plastic bags, no puppy sales, no related jobs, etc?
 Reply · Like · April 19 at 10:29am



Andrew Post · George Washington University
 I hope this campaign turns to some "REAL" issues. Council Member Zapf being reimbursed for the transportation costs to attend the many events she does, in my mind, is NOT an issue. The fact that she attends so many events is the issue - and a measure of her success in office.
 Reply · Like · April 19 at 9:56am



Michael Gardiner · Top Commenter · Partner at Law Offices of Michael A. Gardiner
 So she should get extra credit for doing her job? Look, I frankly think that Councilmembers are under paid. There are a lot of people who would be excellent Councilmembers who choose not to run because of the pay cuts they would have to take. I would support higher pay. But the idea that the "real issue" is that she attends events in her district is, frankly, ridiculous.
 Reply · Like · April 23 at 8:55pm



Andrew Post · George Washington University
 Michael Gardiner! I must not have been clear, Michael - a Council member being reimbursed for expenses getting to events is NOT an issue. The fact that CM Zapf, like her colleagues, spend so much time in their Districts is something for which they ALL deserve credit - like being re-elected.
 Reply · Like · April 23 at 9:06pm



Michael Gardiner · Top Commenter · Partner at Law Offices of Michael A. Gardiner
 Andrew Post, perhaps you missed the point. Most council members do not take that car allowance. As for showing up at District events meriting re-election, that's not enough for me.
 Reply · Like · April 23 at 9:44pm



Xenubarb Goromasa · Top Commenter · Tilden, Nebraska
 Zapf supports things like increasing the building height limit to six stories on Morena Blvd, which would destroy the view for many people on the hill east of Mission Bay. They say growth is good, but that is the same as peeing on your shoe and telling you it's raining. Zapf can take a hike. She is not good for San Diego's future.
 Reply · Like · April 16 at 4:22pm



Steven Greer · Top Commenter · Works at Top Quality Mundito
 If Lori Zapf can't stop her own home from being noticed for non-payment, what is she going to do to our city?
 Reply · Like · April 18 at 2:34pm



Brent Beltran · Top Commenter
 Zapf, for the first time publicly, claims her latnaded yet when she had the opportunity to support Latinos in Barrio Logan she chose to side with the lying, polluting marlino industry. She's Latina when it is convenient to her political ambitions and not when her people need her support.
 Reply · Like · 2 · April 18 at 10:24am



Jessica Gordoya · University of California, San Diego
 I noticed that too!
 Reply · Like · April 18 at 1:13pm

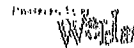


Nicole Sears Larson · Top Commenter · Works at Freelance Writer
 At the town council meeting Zapf really reframed her background and transformed herself into someone more likely to appeal to Dems. Suddenly she's saying she's the first Latina on the council - first I've heard of that, and I've been following her political career - and grew up dirt poor in Colorado. What happened to the glamorous television anchor she previously claimed to be, with prior residences in Orange County coastal communities? She also wouldn't give a straight answer to most questions and claimed she supported the 30-foot height limit while later admitting she felt it needed to be raised to allow greater density. Zapf wouldn't say whether she supports a CUP for alcohol licensing, particularly in the beach communities. Not a very impressive performance, especially in contrast to Boot's knowledge and directness.
 Reply · Like · April 17 at 11:59pm

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