Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: March 21, 2017

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Permissible Activities for City Officials and Employees in Relation to Voter Initiatives

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INTRODUCTION

Investors have announced an effort to bring a Major League Soccer (MLS) franchise to the City of San Diego (City), in conjunction with a voter initiative approving a plan to redevelop Qualcomm Stadium and its surrounding areas (Measure).[1] The City has an interest in ensuring the Measure is legal and in understanding its effect on City operations. This Memorandum provides general guidance to City elected officials and staff regarding their ability to provide input on the Measure.

QUESTIONS PRESENTED

1. What input can City elected officials and staff provide to proponents of a voter initiative?

2. Can City input or City elected official campaign activities affect the implementation of an otherwise successful voter initiative?

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[1] In this Memorandum, "voter initiative" refers to ballot measures directly adopted or placed on the ballot as the result of a successful initiative or referendum petition and signature gathering campaign, "City measure" refers to ballot measures placed on the ballot by the City Council, and "ballot measure" refers to both voter initiatives and City measures. *See* San Diego Charter § 23; SDMC § 27.0103.

SHORT ANSWERS

1. City elected officials and staff may provide neutral input and take positions on voter initiatives, because those activities are not considered campaigning.

2. If a court determines that a voter initiative should be treated like a City measure, then procedural requirements that generally apply only to actions of a local government could be triggered. However, to date no court has invalidated a voter initiative on that basis.

ANALYSIS

I. CITY ELECTED OFFICIALS AND STAFF MAY PROVIDE NEUTRAL INPUT AND TAKE POSITIONS ON VOTER INITIATIVES, BECAUSE THOSE ACTIVITIES ARE NOT CONSIDERED CAMPAIGNING.

Public officials do not lose their First Amendment rights to free speech or their initiative rights because of their status as public officials. *Pickering v. Bd. of Ed. of Tp. High School Dist.*, 391 U.S. 563, 574 (1968); *Connick v. Myers*, 461 U.S. 138, 145-46 (1983). However, City elected officials and staff (collectively, City staff) can never use public resources like City funds or equipment to *campaign* for or against voter initiatives. *Stanson v. Mott*, 17 Cal. 3d 206, 209-10 (1976).[2,3]

A. City Staff Cannot Use City Resources to Campaign, But May Provide Viewpoint Neutral Input on a Voter Initiative.

Campaigning is any activity that sways voter opinion a particular way. *Id.* at 218. Informational activities that provide a neutral, fair presentation of a ballot measure or duties authorized by law, such as preparing ballot materials, are not campaigning and public resources may be used for those activities.[4] *Vargas v. City of Salinas*, 46 Cal. 4th 1, 24-25, (2009), *citing Stanson*, 17 Cal. 3d at 221. For instance, a city can prepare and submit its own measures to voters. Cal. Elec. Code § 9222; *League of Women Voters v. Countywide Crim. Justice Coordinating Com.*, 203 Cal. App. 3d 529, 547 (1988), *citing Stanson*, 17 Cal. 3d. at 218.

Pre-ballot activities can be considered campaigning if public resources are used to mount a voter initiative campaign or give an unfair advantage to proponents, even though there are no voters to sway yet. *League of Women Voters,* 203 Cal. App. 3d at 544. However, City staff may provide viewpoint-neutral input on a voter initiative, because there is no "taking sides" and "no attempt to persuade or influence *any* vote." 73 Cal. Op. Att'y Gen. 255 (1990) *citing Stanson*, 17 Cal. 3d

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[2] City resources include the use of City facilities, equipment, supplies, and the use of City employees (not elected officials) during working hours. San Diego Charter § 31, SDMC § 27.356(b). Unlike appointed City officials and other City employees, City elected officials can campaign during working hours so long as they do not use City funds, supplies, or equipment. *Id.*

[3] Violations of prohibitions on using public funds to campaign can lead to both criminal and civil penalties. *See* Cal. Penal Code §§ 72.5; 424; Cal. Gov't Code §§ 8314(c)(1); 83116; 91000-14; San Diego Charter § 31; SDMC § 27.3564(b).

[4] *See* City Att'y MOL No. 2016-06 (Mar. 18, 2016) for more discussion on permissible staff activities for City measures (attached).

at 218 and *League of Women Voters,* 203 Cal. App. 3d at 554. This means City staff may provide input to the proponents of a voter initiative to make sure the measure meets legal requirements and does not hinder City operations, because that input serves a government purpose.[5,6]

It would be considered campaigning for City staff to provide input intended to make a voter initiative more or less appealing to voters or use City resources to the advantage of the proponent. Using public resources to provide an advantage to the proponent of a voter initiative is campaigning because it amounts to "taking sides," even when the activity is not directed at voters. 73 Cal. Op. Att'y Gen. 255 (1990). For example, public resources cannot be used for collecting signatures for a voter initiative, because it gives an advantage to the proponents considered "taking sides." *Id.* Using City employees to develop a campaign strategy during working hours or using City email to raise money for a measure would be considered improper campaigning. 88 Cal. Op. Att'y Gen. 46 (2005). When engaging in direct advocacy, such as appearing at campaign rallies, City staff should be careful not to use any City resources and make it clear that they are participating in their individual capacity.[7]

B. When Using City Resources, Positions on Ballot Measures Must Use Neutral and Factual Language.

The City as a municipality or City staff in their official capacity can take positions on voter initiatives, before or after the initiatives are approved for the ballot, so long as they do not expressly advocate for that position. *League of Women Voters*, 203 Cal. App. 3d at 559-60; *Vargas*, 46 Cal. 4th at 34; *Choice-in-Educ. League v. Los Angeles Unified Sch. Dist.*, 17 Cal. App. 4th 415, 429 (1993).

In determining whether a communication is advocacy rather than information, courts consider the "style, tenor, and timing of the publication." *Vargas*, 46 Cal. 4th at 25, *citing Stanson*, 17 Cal. 3d. at 222. In *Vargas*, City of Salinas staff conducted research on the potential effects of a voter initiative and prepared materials detailing cuts to city services required by the measure, and did so during working hours, using city supplies and equipment. *Id.* at 10, 12-13. Articles explaining the impact of the measure on city services were included in the city newsletter, which was printed and mailed using city resources. The court found no unlawful campaigning because the materials were factual, "avoided argumentative or inflammatory rhetoric and did not urge voters to vote in a particular manner or to take other actions in support of or in opposition to the measure." *Id.* at 40. Thus, when using City resources, City staff should use factual, non-argumentative language and avoid encouraging voters to vote one way or the other.

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[5] City elected officials and staff may request a legal interpretation of a proposed voter initiative for use in their official capacities. *See* San Diego Charter § 40. The City may also fund a challenge to the legal validity of a voter initiative in court. *Yes on Measure A v. City of Lake Forest*, 60 Cal. App. 4th 620, 626 (1997).

[6] The MLS initiative petition is currently circulating, so any input is unlikely to change the initiative's terms. However, input discussing implementation issues can still serve government purpose, so long as it provides no advantage to the proponent.

[7] *See* 2004 City Att'y MOL 195 (2004-16; Oct. 14, 2004) for more discussion of the specific statutes prohibiting the use of public funds for campaigning (attached).

There are numerous resources available to guide City staff on campaign issues. The attached City Clerk and Ethics Commission publications provide specific examples of what City staff can and cannot do with City resources. The Institute for Local Government publishes an extensive guide on the use of public resources for ballot measures, available at www.ca-ilg.org. Our Office can advise on specific activities related to ballot measures or language in the measure itself.

II. VOTER INITIATIVES ARE NOT SUBJECT TO THE SAME PRE-ELECTION LEGAL REQUIREMENTS AS CITY MEASURES.

City staff must ensure that all activities related to voter initiatives maintain a neutral process to avoid interfering with the people's power of initiative. Courts give "extraordinarily broad deference" to the power to enact laws by voter initiative and "jealously guard" this right. *Citizens for Planning Responsibly v. Cnty. of San Luis Obispo*, 176 Cal. App. 4th 357, 366 (2009) (internal quotation marks and citations omitted).

To that end, courts have held that voter initiatives are not subject to some of the same pre-adoption legal requirements as City measures, such as compliance with the California Environmental Quality Act ("CEQA"). *DeVita v. Cnty. of Napa,* 9 Cal. 4th 763, 793–95 (1995); *Tuolumne Jobs & Small Bus. Alliance v. Super. Ct.*, 59 Cal. 4th 1029, 1035 (2014). The California Supreme Court has extended this deference to a voter initiative even when a city has exercised its authority to directly adopt the measure, rather than submit it to the voters.[9] *Tuolumne Jobs,* 59 Cal. 4th at 1043.

In *Tuolumne Jobs*, the City of Sonora adopted a voter initiative approving a development project, rather than calling a special election. *Id.* at 1033-34. The Court ruled that CEQA procedures conflicted with the statutory deadlines dictated by the initiative process, including the provisions for direct adoption. *Id.* at 1040. The Court considered the opponents' argument that excluding direct adoption of voter initiatives from CEQA would lead to developers and friendly city councils "abusing" the process to "evade CEQA review." *Id* at 1043. The Court rejected treating coordination between developers and city councils as an abuse of the voter initiative process, because the process itself is *neutral* and "the possibility that interested parties may attempt to use initiatives to advance their own aims is part of the democratic process." *Id.*

Despite such judicial deference, if City input gives proponents of a voter initiative an advantage over opponents or other measures, a court may decide that the process is no longer neutral. Opponents could challenge a voter initiative, arguing that it was really a City measure and therefore invalid for not complying with procedures like CEQA. There is no case, to date, that has so ruled, but the courts have not given clear guidance.

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[9] Directly adopted means that the legislative body approves a voter initiative measure without amendment or putting it on a special election ballot. Cal. Elec. Code §§ 9214-15; SDMC §§ 27.1032, 27.1034.

CONCLUSION

City staff can campaign as private citizens, but no City resources can be used to campaign for a voter initiative. City resources can fund viewpoint-neutral activities that serve a government function, such as providing factual input to ensure a voter initiative is consistent with City operations and laws. City resources can never be used to expressly advocate for a voter initiative, but City staff can use City resources to take positions on voter initiatives so long as they do not attempt to influence voters one way or another. City staff must always be careful to preserve a neutral process in executing official City processes, such as compliance with City rules and regulations. As always, we are available should you have questions or require an in person briefing.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Jennifer L. Berry
Jennifer L. Berry
Deputy City Attorney

JLB:sc:jdf:ccm
MS-2017-6
Doc. No.: 1437939_15

Attachments:

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

Prohibition Against Using City Resources In Campaigns For Elective Office

City Att'y MOL No. 2016-06 (Mar. 18, 2016)

2004 City Att'y MOL 195 (2004-16; Oct. 14, 2004)

THE CITY OF SAN DIEGO

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

7/11

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 city e-mail, 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.

CITY EMPLOYEES MAY NOT...

...use City resources--such as computers, e-mail accounts; staff time; 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.

Ethics Commission

PROHIBITION AGAINST USING CITY RESOURCES IN CAMPAIGNS FOR ELECTIVE OFFICE

The City's Ethics Ordinance prohibits City Officials from using City resources in connection with a candidate election. This fact sheet is designed to offer general guidance concerning such activities, but should not be considered a substitute for the actual language contained within the Ethics Ordinance. Note that this fact sheet pertains only to City candidate elections; please consult the City Attorney's Office for guidance relating to the use of City resources for activities associated with ballot measure elections.

GENERAL RULES

- The Ethics Ordinance prohibits City Officials, including all unclassified employees who file a Statement of Economic Interests, from engaging in campaign-related activities, such as fundraising, developing campaign materials, conducting polls, and performing campaign research when such activities involve the use of City facilities, City equipment, City supplies, or other City resources.

- City Officials may not use City telephones, computers, Outlook e-mail accounts, fax machines, copiers, or similar equipment for campaign-related activities. City Officials who engage in campaign-related communications must use telephones, computers, and e-mail accounts that they own personally or are provided by the campaign.

- The City's internet connection may not be used to access campaign e-mail accounts, conduct campaign research, or perform work on a campaign website (except when such access is intended for public use, such as in a library).

- If a City Official receives a campaign-related e-mail on a City e-mail account, the official should direct the individual to the campaign committee's e-mail address. Similarly, if a City Official receives a campaign-related telephone call on a City line, the official should refer the caller to a campaign telephone number.

- E-mail lists that have been generated with City resources may not be used for campaign purposes. For example, if a Council District website invites constituents to join an e-mail list, that list may not be exported or otherwise appropriated for campaign-related purposes.

- City Officials may not use City office space for campaign-related activities. This prohibition does not apply, however, to the use of a City facility that is equally available to all candidates (such as a park or recreation center) provided that the City Official does not use the power or authority of his or her position to obtain special access to the facility.

- These prohibitions apply to campaigns for persons running for elective City office, as well as to campaigns for persons running for elective office in the County of San Diego, another city or county, the state, or for federal office. City resources may not be used for any campaign for elective office.

CITY TIME

- City Officials must provide the City with the full amount of work for which they are being paid (typically 40 hours per week). In this regard, while on City time, City Officials may not prepare campaign materials, make fundraising calls, conduct research to be used against an opponent, or otherwise work on a candidate's campaign.

- The prohibition against using City resources for campaign-related purposes does not apply to the time spent by the candidate personally. In other words, a Councilmember running for re-election may participate in campaign-related activities at any time, including during normal working hours. Although the City's elected officials are expected to spend a substantial amount of their time working on City matters, they are ultimately answerable to their constituents with respect to the time they spend on campaign-related activities.

- The Ethics Ordinance also prohibits City Officials from inducing or coercing someone else to engage in campaign-related activities while on City time. An official seeking re-election, for example, may not ask a member of his or her City staff to engage in campaign activities while on City time.

- Keep in mind that the prohibition against using City time for campaign-related activities applies even if a City Official is using personal equipment. For example, a City Official may not engage in telephone conversations, tweet messages, or exchange e-mails regarding a campaign-related issue while on City time, even if the City Official is using his or her own computer or telephone for such communications.

CITY RESOURCES AND SOCIAL MEDIA

- Elected officials typically link to social media websites (e.g., Facebook, Twitter) from their official City websites as a means of communicating with constituents. City Council websites also routinely include links to official newsletters and press releases, which may in turn include links to social media accounts.

- City equipment and City staff time may be used to communicate with constituents via social media websites regarding official City business; they may not, however, be used to communicate with anyone regarding campaign-related matters.

- When social media accounts are maintained by City staff or linked directly from an official City website, they may not contain campaign-related material, including campaign-related material posted by other users.

- A social media website containing campaign material is treated no differently than a website created by a candidate to promote his or her candidacy. City resources may not be used to maintain or drive Internet traffic to either type of website.

- In order to ensure that a social media account using City resources or a direct City link contains no campaign content, City Officials must routinely monitor their accounts and promptly remove campaign-related messages, photographs, etc., posted by others. When an elected official is running for office, he or she will be expected to check the account for campaign content at least every other day. Both City staff and campaign staff may assist the official in this regard.

- City Officials may choose to re-designate their social media accounts, changing the focus from official City business to campaign advocacy. If an account is used (in whole or in part) for campaign-related purposes, however, no City resources, including City staff time, may be used to maintain the account, and any links to the account from a City website must be removed.

- Notwithstanding the above, City resources may be used to maintain and/or link to a social media account that, in turn, links to a campaign website or to a separate social media account containing campaign content. This is permissible if the link to campaign content exists only within the contact information for the account holder on the social media account and if the social media account contains no other campaign material. Note that this allowance for second-tier links would not permit a City Official to use City resources to disseminate a message via Facebook or Twitter that encourages others to access a link to campaign materials.

- When distributing newsletters and issuing press releases, City Officials may not include links to social media websites that have evolved into campaign websites. On the other hand, they need not take any action with regard to links to social media websites that were properly included in prior City newsletters or press releases.

SOLICITING CITY EMPLOYEES

- In addition to the above prohibitions, City Officials may not knowingly solicit campaign contributions from City employees, even outside of regular working hours. Note that this prohibition does not prevent a City employee from making a contribution; it only prohibits City Officials from soliciting that contribution.

- The term "City employees" includes all paid City officers and employees, as well as the paid officers and employees of the City's agencies (Civic San Diego; San Diego Housing Commission; San Diego Data Processing Corporation; and San Diego Convention Center Corporation).

- This prohibition applies to solicitations made to City employees regardless of whether or not they are at work. For example, you may not send a campaign solicitation to the personal e-mail address of someone you know is a City employee.

- The prohibition on soliciting contributions from City employees applies to both direct and indirect solicitations. In other words, City Officials may not communicate with a City employee in any manner that suggests the City employee should make contributions to a City candidate. Some examples of indirect solicitations include:
  - ✓ inviting or encouraging a City employee to attend an upcoming fundraising event;
  - ✓ informing a City employee that a candidate needs to collect additional contributions to send out more campaign mailers before an election, or to keep pace with his or her opponent; and
  - ✓ asking someone else to solicit City employees for campaign contributions.

ADDITIONAL NOTES

- ❖ It is important to keep in mind that the Ethics Ordinance does not in any way impair the ability of a City Official to spend personal time supporting someone's candidacy for elective office. City Officials may volunteer their personal time to support a candidate's campaign and may publicly advocate for a candidate, as long as all such activities take place without the use of City resources. City Officials may also make contributions to City candidates as discussed above.

- ❖ Additional campaign-related restrictions (e.g., posting political signs, collecting contributions in City buildings) are set forth in the City Charter, the City's Council Policies, and in other sections of the Municipal Code. For a summary of these restrictions, consult the City Clerk's pamphlet "Political Activity, Public Funds, and City Officials and Employees."

For additional information regarding the prohibitions against using City resources in candidate elections, please contact the Ethics Commission at (619) 533-3476.

Rev. 4/16/13

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MEMORANDUM OF LAW

DATE: March 18, 2016

TO: Andrea Tevlin, Independent Budget Analyst

FROM: City Attorney

SUBJECT: Drafting of Ballot Measure and Fiscal Impact Analysis

INTRODUCTION

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

QUESTION PRESENTED

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

SHORT ANSWER

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

ANALYSIS

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

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

> *"Ballot Materials"* means those items printed on the ballot or in the *voter pamphlet* relating to *measures* or *candidates.*
>
> (a) For ballot *measures, ballot materials* include the ordinance placing the *measure* on the ballot, which contains the *ballot question.* They also include the impartial analysis, if any; the fiscal impact analysis, if any; and arguments for and against the *measure*, if any.

SDMC §27.0103.

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

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

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

II. DRAFTING BALLOT MEASURES IS NOT CONSIDERED ADVOCACY.

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

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

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

CONCLUSION

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

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Jennifer L. Berry
Jennifer L. Berry
Deputy City Attorney

JLB:sc
ML-2016-6
Doc. No. 1239789_1
Attachment: 1990 City Att'y MOL 510 (90-50; Apr. 13, 1990)

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

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

OFFICE OF
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JOHN W. WITT
CITY ATTORNEY

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SPECIAL PROJECTS

MEMORANDUM OF LAW

DATE: April 13, 1990

TO: Ann Van Leer, Council Representative

FROM: City Attorney

SUBJECT: Political Activity of City Staff on Open Space and Park Bond Committee

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

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

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

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

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

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

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

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

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

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

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

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

JOHN W. WITT, City Attorney

By Ted Bromfield
Ted Bromfield
Chief Deputy City Attorney

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MEMORANDUM OF LAW

DATE: October 14, 2004

TO: City Clerk Charles Abdelnour

FROM: City Attorney

SUBJECT: Use of Title by City Employee, Officeholder, or Appointee in Election Related Activity

INTRODUCTION

A number of questions have arisen in the context of the November 2, 2004, election regarding the use of official title by City officials and appointees in election related activities. You have asked this Office to clarify whether City employees, officeholders, or appointees are legally permitted to use their official titles for election related purposes, such as endorsing a ballot measure or candidate, or signing a ballot argument.

QUESTION PRESENTED

Is a City employee, officeholder, or appointee legally permitted to use his or her official title in association with election activity, such as endorsing a candidate or ballot measure, or signing a ballot argument?

SHORT ANSWER

Yes. There is no legal prohibition on the use of official title by a City employee, officeholder, or appointee for election related purposes. However, the election activity must be conducted by the City official on his or her own time, without the use of public resources, and the use of title must be done so that it is clear the official is acting in an individual capacity. Certain employees or appointees may be subject to an internal policy that prohibits or restricts use of City title or affiliation in political activity, therefore, an employee or appointee should investigate whether such a policy exists prior to using a City title for election related purposes.

ANALYSIS

I. Legal Authorities Governing Political Activity by City Officeholders, Employees, and Appointees.

A review of the relevant legal authorities governing political activity of public employees reveals that there is currently no prohibition on the use of official title by a City employee, official, or appointee for election related purposes. The following is a summary of the relevant legal authorities governing political activity of City officials and employees.

A. San Diego Charter section 31

Charter section 31 provides:

> (a) No officer or employee of the City, except elected officers and unsalaried members of commissions, shall during regular hours of employment take an active part opposing or supporting any candidates in any City of San Diego political campaign or make contributions thereto in behalf of any candidates, nor shall such person seek signatures to any petition seeking to advance the candidacy of any person for any municipal office. Nothing in this section shall be construed to prevent any officer or employee, whether Classified or Unclassified, from seeking election or appointment to public office or from being active in State or Federal political campaigns, in any bond issue campaign including municipal bond issues, or from being active in local political campaigns.
>
> (b) Every municipal employee shall prohibit the entry into any place under his control occupied for any purpose of the municipal government, of any person for the purpose of therein making, collecting, receiving, or giving notice of any political assessment, subscription, or contribution.

Section 31 prohibits certain political activity by officers and employees during hours of regular employment, and in municipal government facilities, but contains no prohibition on the use of official title in election activity. This section exempts elected officers and unsalaried members of boards and commissions from its prohibitions, and clarifies that City officers and employees are otherwise permitted to be active in local political campaigns.

B. California Government Code sections 3201 – 3209

Prior to the 1960's, a number of local and state provisions existed which broadly prohibited political activity by public employees. For instance, prior to 1979, San Diego Charter section 31 prohibited City employees from taking part in a county or municipal political campaign, even on private time. Challenges to these types of laws in the 1960's resulted in court decisions which held that public employees have a fundamental right to engage in political activity, and that restrictions placed on that right must be based on a showing of "compelling

need". *Kinnear v. City and County of San Francisco*, 61 Cal. 2d 341, 343 (1964). See also *Fort v. Civil Service Commission of the County of Alameda*, 61 Cal. 2d 331, 338 (1964) (restrictions on officers and employees cannot be "broader than required to preserve the efficiency and integrity of its public services"); *Bagley v. Washington Township Hospital District*, 65 Cal. 2d 499 (1966). The *Bagley* decision sets forth a three part test for determining the constitutionality of restraints on the political activity of public employees, as follows: (1) the restrictions must have a rational relationship to the enhancement of public service, (2) the benefits which the public gains by the restrictions must outweigh the impairment of constitutional rights, and (3) there are no alternatives less injurious of constitutional rights. *Bagley v. Washington Township Hospital Dist.*, 65 Cal. 2d 499, 501-502 (1966).

Following these court decisions, the state legislature enacted California Government Code sections 3201-3209, entitled "Political Activities of Public Employees." The primary purpose of this legislation was to set forth the general rule that state and local agencies cannot place restraints on the political activity of their employees. Cal. Gov't Code § 3203. The legislation then sets out some narrowly tailored exceptions to that rule, including:

- Section 3205, regulating the solicitation of political campaign contributions by public officers and employees
- Section 3206, prohibiting officers or employees of a local agency from participating in political activities of any kind while in uniform
- Section 3207, which authorizes local agencies to enact prohibitions on political activity during working hours and on the premises of the local agency

None of the exceptions to California Government Code section 3203 addresses the use of official title by state or local employees in election materials.

C. San Diego Municipal Code section 27.3564 (Ethics Ordinance)

The City of San Diego Ethics Ordinance contains a provision entitled "Misuse of City Position or Resources," however that provision does not address the use of official title in election materials. SDMC § 27.3564. Subsection (a) of section 27.3564 provides, "It is unlawful for any City Official to use his or her position or prospective position, or the power or authority of his or her office or position, in any manner intended to induce or coerce any person to provide, directly or indirectly, anything of value which shall accrue to the private advantage, benefit, or economic gain, of the City Official or his or her immediate family." Subsection (b) prohibits a City Official from engaging in campaign related activities "using City facilities, equipment, supplies, or other City resources." Neither of these provisions contains any prohibition on the use of official title in campaign activity, as long as no benefit or advantage accrues to the official or his or her immediate family as a result of the activity, and no City resources are involved.

The only other provisions of the Ethics Ordinance relevant to the political activity of City officials are provisions related to the use of influence or official authority to secure a City

position for someone as a reward for political service, and solicitation of political campaign contributions from City employees. SDMC §§ 27.3570; 27.3571.

D. Prohibition on the Use Of Public Funds to Support or Oppose a Candidate or Ballot Measure

The prohibition on the use of public funds for political advocacy is set forth both in statutory and case law. California Government Code section 54964(a) states "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." San Diego Administrative Regulations 45.50 and 95.60 both prohibit the use of City labor, facilities, equipment, or supplies for private purposes.

The California Supreme Court has held: "A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions." *Stanson v. Mott*, 17 Cal. 3d 206, 217 (1970). Based on that reasoning, it is unlawful for City officers or employees to use public resources or personnel to engage in political activity. *Id.*; *Mines v. Del Valle*, 201 Cal. 273 (1927); *People v. Battin*, 77 Cal. App. 3d 635 (1978). In the case of a local ballot measure, a distinction is made between advocacy and informational purposes. Although public funds may not be used for ballot measure advocacy directed at voters, they may be used to provide neutral, factual information to the public about a ballot measure. Cal. Gov't Code § 54964(c); *Stanson,* 17 Cal. 3d at 220.

These rules on the use of public funds for political advocacy do not resolve the question of whether an officer, employee, or appointee can use his or her official title for political activity. While these rules make it clear that public facilities and resources cannot be used to support or oppose a ballot measure or candidate, they do not address whether an official title can be used in political activity by an officer, employee, or appointee, if that activity takes place during private time and without using public resources.

E. Opinions from Other Agencies

An examination of the authorities discussed above reveals no clear prohibition in California law on the use of official title by a City employee, official, or appointee for political purposes. That conclusion is consistent with the opinions of other agencies in California. In a February 1, 2002, memorandum entitled "Political Activities by City Officers and Employees," San Francisco City Attorney Dennis Herrera wrote:

> City officers and employees may not use their official positions to influence elections. This prohibition, however, does not affect the ability of individual officers and employees to take a public position, as private citizens, on an electoral race or a ballot measure. In addition, acting as private citizens, City officers and employees may endorse candidates or measures even

> where the commission as a group may not. For example, the members of a commission, acting as private citizens and not using City time or resources, may join in submitting a ballot argument in support of a measure and may even identify themselves by the City office they hold as long as the argument does not mislead the public into thinking that the commission itself is taking the position.[1]

Similarly, the City of Los Angeles Ethics Commission has written that City officers and employees may endorse candidates and take a position on a ballot measure, as long as these activities do not involve City resources. The Comission also noted: "With regard to candidate and ballot measure endorsements, City employees should make clear that they are acting as individuals and avoid giving the impression that the City supports the candidate." *Political Participation: On Your Time, With Your Dime*, City of Los Angeles Ethics Commission (March 2000).

II. Restrictions Imposed by Policy

Although there is no legal prohibition on the use of title in political activity by City officers, employees, and appointees, the use of title may violate a City or department policy applicable to a particular official or employee. City Council Policy 000-04 provides, "No elected official, officer, appointee or employee of The City of San Diego shall engage in any enterprise or activity which results in any of the following: (a) Using the prestige or influence of The City of San Diego office or employment for anyone's private gain or advantage." An argument can be made that this language prohibits the use of official title in the endorsement of a candidate, because such an endorsement would result in a private advantage for the candidate.

An example of a City departmental policy which prohibits the use of title in political activity is San Diego City Attorney Policy No. 1998-04, entitled "Political Activity by City Employees." That policy states: "City employees may not use their offices, titles or positions to support or oppose a candidate for office. This includes the use of City title as identification in news releases, flyers or other campaign material." The City Attorney's Office policy is just one example of a department level policy prohibiting the use of an employee's title in certain political activity. There may be other departments, programs, or appointed bodies that have similar policies prohibiting the use of official title in political activity.

Although these policies do not have the force and effect of law, violation of a policy could result in discipline of an employee, or could lead to other consequences, such as the failure of an appointing authority to reappoint a member of a board or commission. Therefore, any employee or appointee intending to use his or her title in political activity should become familiar with any

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[1] A use of title in ballot materials that is misleading, such as one that implies an entire agency or commission is taking a position, rather than an individual, is subject to legal challenge pursuant to San Diego Municipal Code section 27.0404. That section allows the City or any voter of the City to seek a writ of mandate or injunction to have ballot materials amended or deleted based on content that is false, misleading, or inconsistent with law.

relevant policies that may exist, and should seek the approval of the department head or appointing authority before proceeding with the activity.

CONCLUSION

There are no legal authorities that expressly prohibit the use of title in ballot materials by a City employee, official, or appointee. In the absence of controlling authority and because public employees have a fundamental constitutional right to engage in political activity, the conclusion of this Office is that an employee, official, or appointee may use a City title in ballot materials, as long as the activity does not involve City time or resources, and as long as the wording in the ballot materials makes it clear that the action is being taken in an individual capacity.[2]

Because, in the absence of any clear City guidance, the use of official City titles in ballot materials has been controversial, there may be interest in having the City Council consider an ordinance, perhaps as a part of the Ethics Ordinance, to clarify the proper use of City titles in ballot materials. Any proposal to restrict the use of City title for political activity should take into consideration the constitutional limitations that would apply to such a restriction, as described in Section I(B) of this memorandum.

CASEY GWINN, City Attorney

By
Lisa A. Foster
Deputy City Attorney

LAF:jab
cc: Joyce Lane
Bonnie Stone
Stacey Fulhorst
ML-2004-16

[2] To the extent that prior memoranda issued by this office have concluded differently, they are superseded, including 1985 City Att'y MOL 56, 1975 City Att'y MOL 408, and 1967 City Att'y MOL 180.