

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** June 12, 2018  
**TO:** Honorable Councilmember Scott Sherman, Council District 7  
**FROM:** City Attorney  
**SUBJECT:** City and Councilmember Liability for Actions Related to SDSU West

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**INTRODUCTION**

In a March 22, 2018 memorandum, you asked several questions regarding the legality of the proposed “SDSU West Campus Research Center, Stadium and River Park Initiative” (SDSU West). Voters affiliated with a competing voter initiative measure, known as Soccer City, have sued the SDSU West proponents and named the City of San Diego (City) as an additional defendant. That litigation addresses questions identical to those raised in your memorandum.<sup>1</sup> For that reason, this memorandum addresses only your question regarding whether the City or individual Councilmembers could face legal liability for placing an initiative on the ballot that is later found to be unlawful.

**QUESTION**

If a court rules that the content of a voter initiative measure is unlawful, could the City or individual Councilmembers be held criminally or civilly liable for damages for putting the measure on the ballot?

**SHORT ANSWER**

No. The City and Councilmembers have broad immunity from criminal and civil liability for damages related to enacting legislation, even if the legislation itself is challenged and found to be unlawful.

**BACKGROUND**

On February 15, 2018, the City Clerk certified that at least ten percent of voters registered in the last general election had signed the SDSU West petition, requiring the City Council (Council) to adopt the measure as written or place it on a Citywide election ballot. *See San Diego Charter*

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<sup>1</sup>*See Taylor v. Maland*, San Diego Superior Court Case No. 37-2018-00019172-CU-MC-CTL (Apr. 18, 2018), Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief, ¶¶ 46-50. The Office of the City Attorney can provide an update on the status of the pending litigation in a closed session meeting of the San Diego City Council (Council).

§ 23; San Diego Municipal Code (SDMC) §§ 27.1034, 27.1035, 27.1037. The City Clerk presented the certification and petition to the Council on March 12, 2018. *See Id.* § 27.1027. At that meeting, the Council approved San Diego Resolution R-311595 (Mar. 12, 2018), declaring its intention to place the measure on a Citywide special election ballot rather than adopting the measure outright.<sup>2</sup>

## ANALYSIS

Under California law, when the Council performs its policy-making duties, any statements or publications resulting from that exercise are absolutely privileged, also known as the legislative privilege. Cal. Civ. Code § 47; *People ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 921, 944 (2013) (*Rizzo*). When a statement or publication is absolutely privileged, the legislators cannot be held liable for passing legislation, even if the legislation itself turns out to be unlawful. *Id.*

Courts have ruled that legislative privilege extends to municipal legislators and ordinances. *Id.* In *Rizzo*, the California Attorney General pursued multiple causes of action against the City of Bell and city officials for approving excessive salaries violating the city charter. *Id.* at 928. The Attorney General accused the mayor and city councilmembers of fraud and negligence for approving the excessive salaries by passing an ordinance with a misleading title and text. *Id.* at 932-33. The court dismissed the negligence and fraud actions based on the ordinance's title and text, explaining that "[we] can conceive of few statements which come so completely within the scope of the legislative privilege more than the title and text of actual legislation." *Id.* at 944. An ordinance approving the salaries in violation of the charter could be voided, but the mayor and councilmembers could not be liable just for passing the ordinance.<sup>3</sup> *Id.* at 945

In addition to legislative privilege under the California Civil Code, the California Government Code provides broad immunities to public entities and public officials in exercising legislative authority. California Government Code section 818.2 specifies that, "[a] public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." Public employees are also immune from injuries caused by acts or omissions when exercising discretion, regardless of whether discretion was abused.<sup>4</sup> Cal. Gov't Code § 820.2.

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<sup>2</sup> The Council has not yet determined the date in which the measure will be considered by voters. *See* SDMC §§ 27.0504-27.0506. The Council declined to adopt the measure outright. Accordingly, its duty to place the measure on the ballot is "ministerial and mandatory." *Native Am. Sacred Site & Env'tt. Prot. Ass'n v. City of San Juan Capistrano*, 120 Cal. App. 4th 961, 966 (2004). When the Council votes to put the measure on the ballot, it does not have another opportunity to directly adopt the measure. SDMC § 27.1034; San Diego Resolution R-311595 (Mar. 12, 2018).

<sup>3</sup> Although the councilmembers could not be held liable for the title and text of the ordinance, the court ruled that they could be liable for repaying improperly expended public funds if they did not exercise "due care or reasonable diligence in authorizing the expenditure of public funds." *Rizzo* at p. 923.

<sup>4</sup> The term "discretionary," as used to determine whether an action qualifies for immunity, refers to whether the action is done in a legislative versus operational capacity. *See Jamgotchian v. Slender*, 170 Cal. App. 4th 1384, 1397 (2009). The Council had discretion to place the measure on the ballot rather than passing the measure outright. Thus, its action to place the measure on the ballot qualifies for immunity as an exercise of that discretion, even though it is now ministerial and mandatory.

