

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: March 13, 2019
TO: Honorable Councilmembers
FROM: City Attorney
SUBJECT: Councilmember Abstention from Voting on Matters

Our Office has been asked whether a Councilmember may abstain from: 1) voting on minutes for meetings the Councilmember did not attend; and 2) voting in open session on matters (*e.g.* a litigation settlement) when the Councilmember did not attend the earlier closed session on the same item. These are not permissible grounds for abstention. Councilmembers have a duty to review materials from missed meetings to be prepared to vote. There are only two legal grounds for Councilmembers to abstain from voting: 1) when they have a personal conflict; and 2) when they cannot make an unbiased decision on a quasi-judicial matter.

The San Diego Charter (Charter) provides that Councilmembers have not only the right, but also the duty to vote. *See* Charter §§ 270(b) and 15. It only permits an abstention or recusal¹ in very limited circumstances. Charter section 15 provides that “[n]o member shall be excused from voting except on matters involving the consideration of how his own official conduct or in which his own personal interests are involved.” This means that, under the Charter, Councilmembers have a duty to vote on all items unless the Councilmember is personally conflicted.

The Charter section 15 obligation for Councilmembers to vote on all matters, except those on which they are personally conflicted, accords with the Councilmembers’ public duties and the Charter’s requirement that Councilmembers attend all meetings of the Council. Charter §12(e). It

¹ For purposes of this memorandum, we make no legal distinction between the terms “abstention” and “recusal.” In practice, the latter is more commonly used when a Councilmember declines to vote due to a conflict.

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is also consistent with state financial conflict of interest laws, which require a public official to recuse on matters in which the official has a financial interest.²

The only other circumstance in which this Office has recommended that a Councilmember not participate in voting is in quasi-judicial matters in which the Councilmember cannot be a fair and unbiased decision-maker, thus raising due-process concerns. Quasi-judicial proceedings are those involving the application of law to facts where the San Diego City Council essentially sits as judge in a matter, such as land use hearings.³ A quasi-judicial decision-maker has a duty to review the record, and recuse if he or she cannot be fair and impartial. *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928) (citation omitted); *Jarrott v. Scrivener*, 225 F. Supp. 827, 833 (1964).

If faced with an upcoming matter for which the Councilmember was not part of the prior meeting, the Councilmember must educate herself or himself on the item by reviewing the minutes and supporting agenda materials in advance of the vote. SDMC § 22.0101, Rule 3.3. This Rule ensures Councilmembers are properly informed before voting on an item.⁴ Rule 3.3 must be interpreted consistent with the Charter, meaning that a Councilmember cannot avoid triggering the duty to vote by failing to review relevant materials prior to the hearing on a matter. In a quasi-judicial proceeding, it would be improper and violate our Charter for a Councilmember to intentionally not familiarize himself or herself with the record to avoid voting on the matter.

In sum, a Councilmember's lack of familiarity with a matter, by itself, is not legally sufficient grounds for abstention under the Charter. We are happy to provide additional legal guidance to Councilmembers regarding the appropriateness of abstentions on a case-by-case basis.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Prescilla Dugard

Prescilla Dugard

Senior Chief Deputy City Attorney

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cc: Honorable Mayor
Andrea Tevlin, Independent Budget Analyst
Elizabeth Maland, City Clerk

² See also RONR (Robert's Rules) (11th ed. 2011) p. 355, XI. 8-11 (members of a body are not required to have attended a meeting to later vote to correct or approve the minutes of that meeting). The City Council relies on Robert's Rules to guide its meetings. San Diego Municipal Code (SDMC) § 22.0101, Rule 2.8(a).

³ See 1990 Op. City Att'y 10 (90-2; June 15, 1990), for a detailed discussion of quasi-judicial proceedings and the constitutional due process principles involved.

⁴ For open meetings, these materials are available on the City's website. For closed session materials, the Councilmember may make an appointment with this Office to review the materials.