Office of the City Attorney
City of San Diego

MEMORANDUM

MS 59
(619) 533-5800

DATE: March 8, 2022

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Legal Considerations for Council's Legislative Process

---

INTRODUCTION

The Council President has requested advice that will help the Council of the City of San Diego (Council) increase Councilmember engagement and deliberation during the legislative process. While the Rules of Council give the Council President considerable discretion to manage Council meetings and conduct public business, this Memorandum is intended to provide general guidance on the legal parameters within which the Council may act. The guidance may change depending on the situation under review.

DISCUSSION

I. THE RULES OF COUNCIL AND ROBERT'S RULES OF ORDER

The Rules of Council, Chapter 2, Article 2 of the San Diego Municipal Code (Municipal Code or SDMC), provide procedures for the conduct of Council business, including the order of business, the process for debate, and the procedure for reconsideration of motions. SDMC § 22.0101, Rules 2.2, 2.10, 2.11. When the Rules of Council are silent, Robert's Rules of Order Newly Revised "will be used as a guide to the Council's conduct." SDMC § 22.0101, Rule 2.8(a).[1] This Office's attached memorandum also provides some guidance on using Robert's Rules of Order in the administration of Council business. *See* City Att'y Memorandum (Sept. 10, 1997).

[1] Council could consider amending the Rules of Council to expressly state when and what provisions of Robert's Rules of Order apply during Council meetings, adopting Rosenberg's Rules of Order, or appointing a parliamentarian.

II. THE RALPH M. BROWN ACT AND CONSISTENCY WITH THE DESCRIPTION ON THE MEETING AGENDA

The Ralph M. Brown Act[2] (Brown Act) provides for transparency in the conduct of the people's business. It requires legislative bodies to hold open and noticed meetings and requires that meeting agendas be provided in advance. Cal. Gov't Code §§ 54952.2, 54954. The agenda must provide a "brief general description of each item of business to be transacted or discussed at the meeting." Cal. Gov't Code § 54954.2(a)(1). Unless certain limited exceptions apply, the Brown Act prohibits "action or discussion . . . on any item not appearing on the posted agenda." Cal. Gov't Code § 54954.2(a)(3).

Courts have determined that agenda descriptions must "give the public a fair chance to participate . . . by providing the public with more than mere clues from which they must then guess or surmise the essential nature of the business to be considered by a local agency." *San Diegans for Open Gov't v. City of Oceanside*, 4 Cal. App. 5th 637, 643 (2016). The agenda should provide notice of the "essential nature of the matter." *Id*. at 644. Additionally, courts require substantial compliance with the Brown Act's statutory requirements.[3]

The Brown Act notice provided to the public may limit the Council's authority to act on items raised at a meeting. For example, although a motion to amend the effective date of a new ordinance regulating a certain business in the City could be consistent with the Brown Act notice for an agenda item, a motion to add a separate business to the new regulations may not provide adequate notice for the public and impacted business owners to participate. Additionally, the Council may not take action on matters noticed as informational, except for certain procedural motions. *See* City Att'y MS 2017-25 (Sept. 27, 2017).

III. SEPARATION OF POWERS

The Charter establishes the roles of the Mayor and the Council. Generally, the Mayor is responsible for the administrative affairs of the City, including the execution and enforcement of all laws, ordinances, and policies of the City. San Diego Charter § 265. Charter section 270 establishes the City's legislative branch through its elected councilmembers. When taking legislative action on matters that impact the City's administrative affairs, the Council must respect the Charter's separation of powers and should consider the practical implications of its changes. *See* City Att'y MS 2019-1 (Jan. 7, 2019) (discussing limits on the Council's participation in contract negotiations); City Att'y Report RC 2010-30 (July 26, 2010) (discussing limits on the Council's role in staffing Fire-Rescue engines with minimum personnel). The Council may request additional information to guide their decision-making, including data about potential impacts to the City's personnel and financial resources. San Diego Charter § 270(h). The Council may continue a matter to a future meeting to obtain additional information from City staff, the Independent Budget Analyst, or this Office. The Council can also refer matters back to the appropriate Council Committee for further evaluation and discussion.

---

[2] Cal. Gov't Code §§54950 – 54963.

[3] "Substantial compliance . . . means actual compliance in respect to the substance essential to every reasonable objective of the statute." *Id.* at 643 (quotation and emphasis omitted).

IV. ADOPTION OF ORDINANCES

Charter section 275 requires all ordinances be introduced to the Council in writing. San Diego Charter § 275(a). Most ordinances must be considered by the Council twice – once for the introduction and a second time for the adoption.[4] Ordinances must be confined to one subject and that subject must be clearly expressed in the ordinance title. San Diego Charter § 275(b). If the Council makes significant substantive amendments to an ordinance, its introduction may be continued, in some instances, or the ordinance may require reintroduction at a later date to allow proper notice to the public and preparation of an ordinance that incorporates the amendments. *See* City Att'y MOL No. 86-116 (Sept. 29, 1986). Substantive changes include changes that require additional legal or staff review or involve substantive drafting or policy changes. Examples of substantive changes that likely may not occur during the introductory hearing include changes that impact other ordinances, changes to tables in the Land Development Code, and changes that require drafting significant new language. A simple guidance tool is this: if the proposed change may have resulted in a person commenting at the hearing, it is likely substantive.

The Council may make limited, non-substantive changes during the introductory hearing by interlineation. Any interlineated changes must be able to be included in the ordinance in writing during the hearing to comply with the Charter. Some examples of changes that potentially could be made during the introductory hearing include changing effective dates, changing numbers, striking out language, or the addition of limited language, such as additional locations subject to the ordinance.

V. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

CEQA is intended to ensure governmental decision makers and the public are informed about potential, significant environmental effects of proposed activities. Cal. Code Regs., title 14, §15002(a)(1). CEQA requires public agencies to adopt a process "for the evaluation of projects and the preparation of environmental impact reports and negative declarations." Cal. Pub. Res. Code § 21082. The City's CEQA process is found in Chapter 12, Article 8 of the Municipal Code, which assigns responsibility for implementing the City's compliance to the Planning Department. The Planning Department must maintain independence and objectivity in its review and analysis of the environmental impacts of the projects under its purview. SDMC § 128.0103(b).

CEQA applies to "projects" as defined in the CEQA Guidelines. *See* Cal. Code Regs., title 14, § 15378; SDMC § 128.0202(a). Many of the actions presented to the Council are considered "projects" subject to environmental review and are accompanied by an environmental determination analyzing the potentially significantly impacts of approval.[5] Before proposing changes, the Council should consider whether those changes require evaluation for consistency with the environmental determination for the project already in the record. Councilmembers

[4] Ordinances that may be adopted by the Council on the same day of their introduction include the annual appropriation ordinance, ordinances related to elections, and emergency ordinances. San Diego Charter § 275(c). Any interlineated changes to ordinances effective on the day they are introduced require that the entire ordinance be read into the record during the Council meeting.

[5] Since this Memorandum focuses on the Council's legislative activity, it does not address quasi-judicial matters where the Council is asked to apply existing standards and rules to determine the rights of another. If the Council wants to engage in multiple motions on quasi-judicial actions, we recommend discussing with our Office in advance.

could work with City staff before the introductory hearing to determine whether the desired changes require further environmental review. A need for additional environmental review could require the matter to be brought back to the Council at a later date, after the proper review was completed.

VI. SPECIAL REQUIREMENTS

Every proposed ordinance presented to the Council has to be thoroughly reviewed by the City Attorney's Office to ensure compliance with all applicable laws. Some of these ordinances could have specifically applicable laws that require additional considerations if the Council proposed amendments during the introductory hearing. For example, amendments to the City's Land Development Code, in Municipal Code Chapters 11 through 15, are generally subject to detailed state and local noticing laws that apply in addition to the Brown Act noticing requirements. *See* Cal. Gov't Code § 65850, Cal. Pub. Res. Code § 30514, SDMC §§ 112.0301, 112.0305. Amendments to zoning regulations in the Land Development Code must be considered by the Planning Commission before introduction to the Council, and certain modifications during the introductory hearing may need to return to Planning Commission for a recommendation before the Council can adopt them. Additionally, some items may require specific written findings in the public record or studies to support the action that could constrain changes during the Council meeting. *See* City Att'y Report RC-3 (May 9, 2019) (discussing economic feasibility study requirement to support zoning ordinances imposing inclusionary affordable housing). In those circumstances, the Council would return the matter to City staff for additional consideration of the changes desired.

CONCLUSION

Each matter before the Council is nuanced and there may be specifically applicable laws that require additional consideration. Additionally, practical drafting and governance considerations could prevent a legislative change from happening during the Council meeting. In such case, the Council could adopt a motion directing amendments and docketing those amendments for approval at a subsequent meeting. The City's process allows for communication before a matter is presented to the full Council for consideration. The Independent Budget Analyst hosts staff docket briefings before items are heard. Further, Councilmembers may contact City staff for information briefings or additional data between Council Committee and the Council meetings. This Office is always available to assist Councilmembers with questions and motions in advance of the Council meeting, although we request sufficient lead time so that we can provide the best advice possible.

MARA W. ELLIOTT, CITY ATTORNEY

By */s/ Heather M. Ferbert*
Heather M. Ferbert
Chief Deputy City Attorney

HMF:sc
MS-2022-3
Doc. No.: 2909719

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
City Attorney

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM
MS 59

DATE: September 10, 1997

TO: Mayor Susan Golding

FROM: City Attorney Casey Gwinn

SUBJECT: Robert's Rules of Order

Rule 2 of the Permanent Rules of the City Council (San Diego Municipal Code § 22.0101, Rule 2) provides that Robert's Rules of Order Newly Revised ("Robert's") "shall be" the authority for the conduct of all Council meetings absent other applicable statues, ordinances or resolutions.[1] As you know, Robert's provides that you, as chair of the City Council, have the authority to rule upon questions of order (unless overruled by a majority of the Council). Robert's, §§ 24, 46, pp. 254, 440-442, 456 (9th ed. 1990). During the last few meetings of the Council before the summer legislative recess, several procedural issues arose on some of which there was discussion as to the appropriate ruling. I have reviewed Robert's concerning those issues and offer my observations on the appropriate procedures to assist you in your role as chair. I have enclosed copies of the cited pages of Robert's for your convenience.

The first issue relates to the making of a "substitute motion." It appears to me that the practice of the Council is to treat the making of a substitute motion as the making of the substantive motion itself. Robert's provides, however, that the making of a "substitute motion" is a separate motion to *amend* the original motion, not the making of a substantive motion. Id. at § 12, ¶ 3(b), pp. 150-159. In other words, upon the making of a motion to substitute (and second) the correct procedure is to vote on what is in essence a motion to amend. If the motion to substitute passes, the Council must then vote on the amended motion. Id. at p. 152 If the motion to substitute fails, the main motion remains pending before the Council for a vote. Id.

---

[1]Pursuant to Rule 32, however, the Council may waive or suspend any Permanent Rule, including the applicability of Robert's, by a 2/3 vote. Municipal Code § 22.0101, Rule 32.

The second issue relates to the status of a main motion upon the adoption of a motion to reconsider. Similar to a motion to substitute, a motion to reconsider is a separate motion from the main motion - it is a motion to reconsider the *vote* on the main motion. Thus, the adoption of a motion to reconsider places back before the Council the main motion in the exact position it was in immediately prior to the original vote. Id. at § 36, p. 318. There is thus no need for the making of a new *main* motion, although any subsidiary motions, such as a motion to amend or substitute, may be made.

Finally, I offer some observations regarding the status of a motion upon a tie vote, or upon a vote of fewer than five in the affirmative and negative (i.e., 4-3). The long standing practice of the Council has been to consider the motion "trailed" until such time as the matter receives five votes. This practice is supported by a Memorandum of Law prepared by John Witt, dated June 4, 1986. In that memorandum (a copy of which is enclosed) Mr. Witt concludes that, because the City Charter requires the "affirmative vote of a majority of the members elected to the Council" to adopt any ordinance, resolution or other act, a matter requiring the resultant five votes for adoption would "trail" as unfinished business if the matter received fewer than five votes on either side. See Charter § 15. Mr. Witt acknowledged that his conclusion differed from Robert's, but his conclusion was based upon a 1970 version of the work.

I have reviewed the newest version of Robert's on the issue, however, and conclude that Mr. Witt's interpretation is no longer valid. Robert's provides that in cases where a majority vote is needed for passage, a tie causes the motion to fail, as a tie is not a majority. Id. at § 43, pp. 400-401. This conclusion would seem to apply no matter how many votes are needed for the matter to pass (i.e., a super majority or other set number). Id. Mr. Witt's rule, on the other hand, would apply if the Charter provided that five votes were necessary to adopt *or defeat* a measure. Because the Charter language is limited to the adoption or passage of a measure or other action, I conclude that the rule announced in Robert's is applicable, and in any matter where fewer than five affirmative votes exist, the matter is defeated.[2] To conclude otherwise would seem to be counter productive, as the Charter allows business to be conducted with a bare quorum of five Council members, even though five affirmative votes are needed to take any action.[3] Charter § 15. In such an instance, application of Mr. Witt's rule might conceivably result in the Council's business never concluding and being endlessly trailed, as no matter might receive five votes for

---

[2]A motion may thus "trail" or be continued indefinitely only upon an affirmative vote to do so either by a motion to continue indefinitely or a motion to "lay on the table." Id. at §§ 11, 17, pp.123-127, 207-216.

[3]This result thus applies to a substitute motion, as discussed above: if the motion ends in a tie, or receives fewer than five votes, it fails and the main motion remains before the Council for a vote.

passage or rejection. This could allow for Council members to engage in endless stalling tactics merely by absenting themselves from a meeting for a period of time. Application of the rule in Robert's at least allows for business to be concluded.

I recognize that you are the arbiter of procedure in Council meetings, and you may decide to continue with the rule announced by Mr. Witt on matters receiving fewer than five affirmative or negative votes, or on any other issue. As is true with each of the items I have raised, you as the Chair are solely responsible for decision-making on these matters, but I did want to offer my thoughts for your consideration. If you have any questions about these issues, please do not hesitate to contact me. Thank you for your consistent leadership with both the Council meetings and the many issues facing the City.

CASEY GWINN
City Attorney

CG:LJG:ljg:Civ.
enclosures
A:\RBTRLS.WPD

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

CURTIS M. FITZPATRICK
ASSISTANT CITY ATTORNEY
RONALD L. JOHNSON
SENIOR CHIEF DEPUTY CITY ATTORNEY

CITY ADMINISTRATION BUILDING
SAN DIEGO, CALIFORNIA 92101-3863
(619) 236-6220

MEMORANDUM OF LAW

DATE: June 4, 1986

TO: Honorable Deputy Mayor and City Council

FROM: John W. Witt, City Attorney

SUBJECT: Status of agenda items failing to receive five affirmative votes

Twice in one recent legislative day the question was presented: If a dispositive motion on an agenda item fails to receive five affirmative or negative votes, what is the disposition of the item? The answer is that, with one important exception, it will be continued to the next meeting as "unfinished business."

The problem arises from a clause found in Section 15 of our City Charter: "[T]he affirmative vote of a majority of the members elected to the Council shall be necessary to adopt any ordinance, resolution, order or vote; . . ." [Emphasis added.] This rule differs from the Robert's Rules of Order provision on the same subject, which merely requires a majority of members present and voting on a particular matter for action to be taken on it. See Robert's Rules of Order Newly Revised, §1, p.3 (1970).

The question of what happens when a Council item receives less than five votes has come up rather frequently over the years. It rarely comes without confusion, however. Therefore, I thought it might be helpful to set down in writing what I believe to be my office's consistent position on the question.

As stated in the first paragraph of this memorandum, the rule is: When a motion dispositive of an agenda item fails to receive five affirmative or negative votes, the item is continued or "trailed" to successive meetings until it is adopted or rejected by five votes. The question arose most recently in your consideration of Item 207 on your June 2, 1986 docket and of Items 2 through 5 on

the Redevelopment Agency docket for the same date. As to the former, the vote was four to three in favor of a motion to approve the resolution which would have authorized the sale of some City-owned land. I advised you that the four-to-three vote meant the matter would be trailed to the next regular Council meeting, on June 9. The Deputy Mayor, as presiding officer, so ruled and that was the end of that.

The Redevelopment Agency items presented more difficulty, however. They constituted four resolutions concerning amendments to the Horton Plaza Theatre Budget and the construction agreements for the Lyceum Theater. At the last Redevelopment Agency meeting, the resolutions had received only four affirmative votes from five members present. At the time, I correctly advised you that they would trail to the next meeting, but I believe I may have implied a wrong reason (that somehow the Redevelopment Agency's rules differ from the Council's on the subject and that the Deputy Mayor was free to trail the resolutions without reference to the Council's procedural rules). In the resulting confusion on June 2, to be on the safe side Councilman Gotch moved for reconsideration and both reconsideration and the four resolutions passed, six to one. Under the rule as I have stated it in this memorandum, however, reconsideration was not necessary because the resolutions were automatically trailed to the June 2 docket when they failed to get five votes. There is no difference between the way such a situation is handled when the City Council is in its own session and when it sits in some other capacity.

As I also mentioned in the first paragraph, there is an important exception to the general rule, however. When a matter comes to the Council on appeal of a decision by a lower City agency and the decision appealed would have been final if not appealed, the appellant must receive five affirmative votes to prevail on appeal. If he fails to get five votes, the appeal is denied and the decision of the lower agency is final. The most common types of matter of this nature are appeals from otherwise final decisions of the Planning Commission or the Board of Zoning Appeals.

Here is a concluding restatement of the rule and its exception:

> When a motion dispositive of an agenda item (i.e. not a procedural motion such as a continuance or the like) fails to receive five or more affirmative or negative votes, the item is continued or trailed to successive meetings until it is

adopted or rejected by five or more votes; Except when a matter comes to the Council on appeal of a decision of a lower agency and the decision appealed would have been final if not appealed, there must be five or more votes to grant the appeal or the appeal is denied and the decision of the lower agency is final.

JOHN W. WITT
City Attorney

JWW:c:011(043.2)
ML-86-63