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DATE: March 3, 2003
TO: Charles J. Abdelnour, City Clerk
FROM: City Attorney
SUBJECT: Casting a Vote and Leaving Council Chambers

MEMORANDUM OF LAW

INTRODUCTION

Last November a Councilmember left the Council Chambers after casting a vote but before the roll was called and the votes recorded. After seeking our advice at the meeting, the City Clerk recorded the vote of the Councilmember who had left. Subsequent to the meeting, it was unclear whether recording the vote was the proper course of action. You have sought our review and opinion concerning the following question.

QUESTION PRESENTED

Should a Councilmember's vote be counted if he or she pushes the electronic button to cast a vote and then leaves the Council Chamber before the roll is called and the vote is recorded?

SHORT ANSWER

Yes. A Councilmember must be physically present in the Council Chambers in order to exercise the right to vote. The right to vote is exercised and a vote taken when the Councilmember expresses an intention to vote in favor or against the motion on the floor by pressing the electronic button signifying an “Aye” or “Nay.” After that point, if a Councilmember leaves the Council Chambers, the roll may be called and the Councilmember’s vote recorded.

DISCUSSION

There have been two Memorandums of Law [MOL] issued by our Office related to this question: one in 1988 and another in 1975. Each are discussed below.

A. The 1988 MOL - Physical Presence Required to Vote

In 1988, this Office issued an MOL to the City Clerk responding to the question of whether a Councilmember must be physically present in chambers to vote or whether the Councilmember may cast a vote from locations removed from the meeting where audio coverage is provided.

The MOL noted that Council meetings are governed by bylaws codified as The Permanent Rules of the Council. San Diego Municipal Code § 22.0101. Rule 2 pertains to parliamentary procedure, and states in pertinent part:

In all cases not provided by these Rules or by statute or other ordinance or resolution, the authority shall be Robert’s Rules of Order Newly Revised.

Relying upon the pertinent authority in Robert’s Rules of Order Newly Revised [Robert’s]¹, we concluded in 1988 that a Councilmember must be physically present in the Council Chambers to vote. This MOL was grounded upon an unambiguous rule in Robert’s which is in harmony with the San Diego Charter’s [City Charter] requirement for members elected to be present in the Council Chambers to constitute a legal quorum. *See* City Charter § 15.

B. The 1975 MOL - Is Physical Presence Required When Roll is Called and the Votes Recorded?

In 1975, the City Attorney was asked to determine “whether a Councilmember can be considered as having voted on a matter when the member has pressed the voting light and subsequently left the chambers before the vote was taken.” The question posed then was identical to the one we are being asked to review today. In 1975, citing to the same provision in Robert’s as was relied upon in 1988, in a tersely worded MOL (see attached) the question was answered with an emphatic “No.” The MOL simply stated: “[A] Councilmember must be present

¹ It is a fundamental principle of parliamentary law that the right to vote is limited to the members of an organization *who are actually present at the time the vote is taken* in a legal meeting . . .” Robert’s § 45 *Absentee Voting* (p. 408) (emphasis added).

at the time the vote is taken to be considered as voting. If the Councilmember is not present, his vote should not be recorded.”

Upon closer scrutiny, the answer may not be as simple as represented in the 1975 MOL. The Robert’s Rule relied upon in 1975 to answer this question, if broken into its essential elements, provides that the “right to vote” is predicated upon being “present at the time vote is taken.” What is missing from the 1975 MOL is any acknowledgment or analysis concerning the most critical element of the rule. That is, there is no discussion about exactly when the vote is taken. Is the vote taken when the Councilmember pushes the electronic button, or is the vote taken when the roll is called and votes recorded? An examination of the City Charter and other leading authorities on the law of municipal corporations is needed because the answer is not found in the Permanent Rules of Council.

C. When is a Vote “Cast” and “Taken”?

City Charter section 15 provides that “an affirmative vote of the majority of the members elected to the Council shall be necessary to adopt any ordinance, resolution, order or vote.” Interestingly, an additional requirement to record the vote applies only for the adoption of any ordinance. Specifically, City Charter section 13 provides that “[o]n the passage of every ordinance the vote shall be taken by yeas and nays and entered upon the journal and no ordinance shall be passed without concurrence of a majority of the members elected to the Council.” Because the obligation to record the vote technically only applies to the adoption of ordinances, the City Charter supports the concept that “casting” a vote and “recording of the vote” are separate and distinct components in the legislative process.

A leading treatise, McQuillin’s *The Law of Municipal Corporations* [McQuillan’s] also supports this concept. McQuillin’s provides that:

A vote is but the expression of the will of a voter. Whether the formula to give expression to such law be a ballot or viva voce, the result is the same; either is a vote.

3 McQuillin Mun. Corp. § 13.43.10 (3rd ed. 1990).

As to the “recording” of the vote, McQuillin’s states as follows:

Two principal reasons may be suggested in favor of the requirement that whenever a vote is taken by a local legislative body on a certain proposition, the yeas and nays must be taken and recorded. First, the most important is to obtain a definite and accurate record of the corporate action in order to determine whether all of the mandatory provisions of the charter have been observed. Only in this way may it be ascertained whether the particular act is legal or illegal. Second, another purpose is to make the members of the body feel the responsibility of their action and to compel each member to bear his or her share in the responsibility by making a permanent written record of his or her action which should not be afterwards open to dispute.

3 McQuillin Mun. Corp. § 13.45 (3rd ed. 1990).

As previously mentioned, the Permanent Rules of the City Council are silent on the issue of when a vote is cast. While the City Council's Permanent Rules do not establish a definitive point in time for when a vote is or should be considered cast, this issue is addressed in Robert's:

When the debate appears to have closed, the chair may ask, "Are you ready for the question?" If no one rises to claim the floor, the chair proceeds to put the question — that is, he puts it to a vote after once more making clear the exact question the assembly is called upon to decide.

Robert's § 4 *The Handling of a Motion* (p. 42).

Therefore, as long as the "debate appears to have closed" and there was clarity at the time the electronic button was pushed as to the "exact question before the Council for action," then the recordation of the vote that is the subject of this MOL was proper. The recordation advanced all three of the basic policy objectives outlined above by giving meaning to the expressed intention of the voter and accurately reflecting that vote in the recording of it. On the other hand, had the vote not been recorded, relying upon a strict and stilted application of section 45 of Robert's Rules regarding the presence or absence of the Councilmember, the basic policy objectives of making a proper record would not have been fulfilled. The better view, in our opinion is to treat the vote as being cast when the Councilmember pressed the voting button.

This is not to say that section 45 of Robert's is meaningless. A reasonable interpretation of section 45 is that the "right to vote" (i.e., the right to cast a vote by pushing the button) requires the physical presence of the Councilmember. This would be consistent with our 1988 MOL. section 45 a step further, as was done in the 1975 MOL, to require presence when the roll is called and the votes recorded appears to be excessive insofar as it compromises the obligation (in the case of an ordinance) and the function of the City Clerk to make an accurate and proper record of the votes (valid expression of intention) of the Councilmembers. Perhaps this is why in *The California Municipal Law Handbook* [2002 Edition] published by the League of California Cities, the following cautionary language appears regarding Robert's Rules:

Many city councils use the latest edition of Robert's Rules of Order as a non-binding guide to the conduct of meetings. *Because Robert's Rules of Order does not directly apply to city council meetings, Robert's cannot be strictly followed and should not be formally adopted by the council except as a guide to conduct.*

California Municipal Law Handbook, page II-32 (emphasis added).

In light of the analysis set forth above, the 1975 MOL is overruled. Today our recommendation is that the gap identified in the Permanent Rules of the City Council concerning the voting process be addressed to clearly identify appropriate circumstances when a vote should be considered legally cast by a Councilmember. We recognize that it would be a practice fraught with peril if Councilmembers are allowed to cast a vote at anytime after an item is called on the agenda. The risk, as summarized in Robert's, is:

The votes of those present could be affected by debate, by amendments, and perhaps by the need for repeat balloting, while those absent would be unable to adjust their votes to reflect these factors. Consequently, the absentee ballots would in most cases be on a somewhat different question than that on which those present were voting, leading to confusion, unfairness, and inaccuracy in determining the result.

Robert's § 45 *Absentee Voting* (p. 409) (emphasis added).

Without an amendment to the Permanent Rules, conceivably it could be left to the exercise of discretion by the City Clerk on a case-by-case basis, as was done last November, to make the determination as to whether a vote was properly cast. In other words, the City Clerk could ascertain whether the "debate appears to have closed" and whether at the time the button was pushed there was clarity as to the "exact question before the Council for action" as specified in Robert's Rule section 4. However, vesting this kind of responsibility with the City Clerk puts him in a very untenable position which cannot be recommended. Alternatively, it could be left to the Mayor to make this determination as a part of exercising his charter mandated responsibility to "preside at the meetings of the Council." *See* City Charter § 24. The current Mayor has adopted a practice of requesting the Councilmembers to vote by saying "Please vote, call the role." However, this procedure is not mandated by the Permanent Rules and, depending on the circumstances, this procedure of "calling for the vote" may or may not correlate with the point in time when the "debate appears to have closed."

One way to clarify the Permanent Rules would be to require the Councilmember's presence at the time the roll is called and the vote recorded. In other words, amend the rules to expressly codify the conclusion expressed in the 1975 MOL. Alternatively, Rule 9 of the Permanent Rules, which outlines the Procedure for Debate at Council, could be amended to require that the Mayor or Councilmember presiding over the meeting declare on the record that "debate is closed and voting open as to the motion on the floor." The rule could be written to provide that once this procedural declaration is made, the votes are allowed to be cast and taken. If a Councilmember were to subsequently leave the Council Chambers, they would, of course, lose out on the ability to debate or vote on any amendments subsequently made to the motion on the floor. The record of the vote would need to reflect the Councilmember's affirmative or negative vote on the main motion and his or her absence for the vote on the amendment. Whether or not absence for the subsequent action is proper or excusable is another question beyond the scope of this memorandum.

CONCLUSION

The opinion of our Office in 1988 stands valid in that a Councilmember must be physically present in Council Chambers in order to exercise the right to vote. However, our 1975 MOL requiring presence of a Councilmember at the time the roll is called and the vote recorded is expressly overruled by this opinion. A vote is properly "cast" or "taken" when the debate appears to have closed and there is clarity at the time the electronic button was pushed as to the exact question before the Council for action. To carry an interpretation of section 45 of Robert's to the extreme of requiring presence at the time that the roll is called may be convenient and simple to apply, but it is not supported by any interpretation of the City Charter and has the practical effect of potentially disenfranchising the legitimate vote (clear expression of intent) of a Councilmember. It is our recommendation that the Permanent Rules of the Council be amended to clarify the criteria for when a vote is legitimately cast and taken from a Councilmember. Alternatives are suggested above, and our Office stands ready to assist you in processing any proposed changes.

CASEY GWINN, City Attorney

By

Richard A. Duvernay
Deputy City Attorney

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Attachments
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