

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: January 30, 2013

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Reconsideration of Resolution Vetoed by the Mayor

INTRODUCTION

On January 18, 2013, the Mayor vetoed the City Council resolution appointing two members to the San Diego Unified Port District Board of Commissioners (Port District Board). In a memo accompanying the veto, the Mayor gave four reasons for the veto. The fourth reason stated that the procedure followed by the Council to make the appointments and the resolution prepared by the City Attorney were flawed. This memorandum discusses these issues.

DISCUSSION

I. The Use of One Resolution for Two Port District Board Appointments Follows Historical Practice and is Legally Permissible.

The Mayor's memo states that the resolution was flawed because both appointments were presented on a single resolution for signature even though the Council took two separate actions to fill two vacancies.

Charter section 270 states that, "All substantive actions of the Council shall be passed by adoption of an ordinance or resolution." Unlike ordinances, the Charter does not require resolutions to be limited to one subject.¹ Under general law, the "single subject" rule applies to matters that will be placed before voters in an election to bar the practice of combining two or

¹ Charter section 275 states that *ordinances*, except for "annual appropriation ordinances and ordinances codifying or rearranging existing ordinances shall be confined to one subject, and the subject or subjects of all ordinances shall be clearly expressed in the title."

more unrelated provisions into one measure, thereby forcing a single take-it-or-leave-it vote on matters that properly should be voted upon separately.” *Californians for an Open Primary v. McPherson*, 38 Cal. 4th 735 (2006) (*McPherson*). The goal in classic logrolling is to bundle a provision attractive to voters with one that is less attractive, “simply to increase the likelihood that the proponent’s desired proposal will be adopted.” *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1142, 1151 (1999).

The test of whether a particular measure submitted to voters meets or violates the separate vote rule is the same test used to determine a violation of the single subject rule. *McPherson*, 38 Cal. 4th at 763. The court construes both in an “accommodating and lenient manner so as not to unduly restrict the Legislature’s or the people’s right to package provisions in a single bill or initiative.” *Id.* at 764. The court has “found the single subject rules to have been satisfied so long as challenged provisions meet the test of being *reasonably germane* to a common theme, purpose, or subject.” *Id.* The court went on to note that, “[i]n setting forth the ‘reasonably germane’ test, several of our prior decisions have stated or repeated language suggesting the standard requires that each of a measure’s parts be reasonably germane *to one another* as well as reasonably germane *to a common theme, purpose, or subject*. . . . In applying the reasonably germane test, however, our decisions uniformly have considered only whether each of the parts of a measure is reasonably germane to a common theme, purpose, or subject, and have not *separately* or *additionally* required that each part also be reasonably germane to one another.” *Id.* at 764 n. 29 (citations omitted, emphasis in original).

The Council historically has voted to fill vacancies on the Port District Board as one action item. Consistent with this practice, the Council proceeded to make the appointments with one resolution used to fill the two vacancies. The two appointments to the Port District Board were joined together and noticed as one action on the Council’s docket. The Executive Summary stated: “Council is being asked to select one candidate for each vacancy for appointment to the San Diego Unified Port District Board of Commissioners to replace Scott Peters and Lee Burdick whose terms expired on January 2, 2013.” The summary listed the six nominees to be appointed for the four-year terms ending January 2, 2017. This placement on the docket also was consistent with Council Policy 000-13, which contemplates a situation where the number of nominees is greater than the number of vacancies. In that case, the policy provides that “an election to fill all the vacancies shall be held at one time.”

Also consistent with past practice, this Office prepared one resolution to reflect the two appointments.² The resolution was part of the backup materials provided to the Council and the public prior to the meeting. During the Council meeting, Council President Gloria confirmed that there was only one resolution for the two appointments:

² Historically, this Office has memorialized the Port District Board appointments in one resolution when more than one vacancy was filled by the Council at the same time. *See*, San Diego Resolutions R-275038 (Jan. 23, 1990); R-281511 (Feb. 22, 1993); R-300096 (Jan. 31, 2005); and R-304347 (Nov. 19, 2008).

Councilmember Faulconer: “Mr. Gloria, just before the City Clerk passes out the ballots, . . . We’re going to have one resolution with both names if we’re able to come to an agreement? I just wanted to. . .”

Council President Gloria: “There’s only one resolution in the backup, Mr. Faulconer.”

Absent further questions or discussion on the issue of one resolution, the Council proceeded with the election and voted for Marshall Merrifield to fill the first vacancy and Rafael Castellanos to fill the second vacancy. Although separate votes were used to select the appointees from a choice of six nominees, there is nothing impermissible about reflecting the appointments in a single resolution.³

The two appointments to the Port District Board are one subject matter – City representation on the Port District Board. In this particular appointment situation, the Council could decide how to present the resolution to the Mayor. We note that combining provisions into one legislative item often occurs on a federal and state level. As noted above, a court may decline to unduly restrict a legislative body’s right to package provisions into a single bill or initiative, or in this case, a resolution presented to the Mayor for approval or veto.

Whether these appointments should be presented in one resolution or two is a decision for the Council. The resolution and Council action followed historical practice and were entirely legal and appropriate.

II. The Council May Establish the Procedure for Making Appointments to the Port District Board.

The memo accompanying the Mayor’s veto stated the process used by the City Council to make the appointments to the Port District Board was “flawed.” The memo claims that the Council failed to follow the procedures outlined in Council Policy 000-13 and failed to formally waive the policy.

A legislative body’s actions are generally presumed to be valid. Municipal Law Handbook, § 2.54. The City Council is empowered to choose the rules it uses for its meetings. San Diego Charter §§ 14, 270(d) (“The Council shall have the right to determine its own rules and order of business as provided for in Charter section 14 . . .”). Although the City Council historically has applied Council Policy 000-13 to appointments to the Port District Board, the City Council may waive the Policy and adopt rules of its own choosing.⁴

³ Resolutions are used to memorialize policies or administrative decisions of a legislative body. California Municipal Law Handbook § 1.243; 5 McQuillin, *Municipal Corporations* § 15:2 (3d ed.) A legislative body may establish rules on the procedure to be followed in adopting resolutions, but when such rules are not complied with, that failure is not jurisdictional and does not invalidate an action that is otherwise valid. California Municipal Law Handbook § 1.246; *City of Pasadena v. Paine*, 126 Cal. App. 2d 93 (1954), (resolution valid when read by title only, although rules required full reading).

⁴ A city council has broad authority to appoint boards and commissions as part of the sub-government of the city, unless otherwise limited by city charter or, for general law cities, state law. California Municipal Law Handbook

Council Policy 000-13 was amended on February 16, 2012. For the recent Port District Board appointments, the Council was provided with an interpretation of the amended Council Policy 000-13 by the City Attorney's Office, and also told it could waive the policy and adopt a procedure of its choice to fill the appointments. After Council discussion, a majority of the Council voted to use Council Policy 000-13 as interpreted by the City Attorney's Office to make the appointments. This complied with governing law. (*See* Charter § 270(c), "No . . . action of the Council shall be passed or become effective without receiving the affirmative vote of five members of the Council . . .") This choice was within the Council's inherent powers, set forth in the City Charter and Municipal Code, to set its own rules for the conduct of its meetings. As a majority of the Council voted to choose a method to fill the appointments, it acted in accordance with its governing rules.

III. The Council Must Reconsider the Resolution Vetoed by the Mayor.

It is not the role of the City Attorney to determine whether the Mayor was justified in vetoing the resolution. The Charter states that if the Mayor decides to veto an ordinance or resolution, he must return it to the City Clerk "with his or her written objections." Charter § 280(c)(3). The Charter does not require that the Mayor's objections be valid or justifiable. The resolution must be reconsidered by the Council within thirty calendar days of the veto. Charter § 285. At that time, the Council can consider whether to override the Mayor's veto. If the Council fails to override the veto, the item will be deemed disapproved and have no legal effect. *Id.*

§ 1.249. The Port District Board appointments are governed by state law. *See*, San Diego Unified Port District Act (Act). However, the method of appointment by each city council is not prescribed by the Act. *Id.* at §§ 16-17. Unless limited by state law or city charter, the method of appointment should be established by the city council. California Municipal Law Handbook § 1.249.

CONCLUSION

Questions about the legality of the Council resolution confirming the appointments, and the Council's use of rules governing its meeting to make the appointments, lack merit. The resolution confirming the Council's recent appointments to the Port District Board is a legally appropriate document, complying with governing law. Additionally, the Council has the inherent authority to determine the rules governing its appointment process, and a majority of the Council voted to approve the procedure it used to appoint members of the Port District Board. The Charter requires the Council to reconsider the resolution vetoed by the Mayor.

Respectfully submitted,

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