

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: January 22, 2021

TO: Councilmember Raul A. Campillo
Councilmember Marni von Wilpert

FROM: City Attorney

SUBJECT: Non-Agenda Public Comment at City Council Meetings

INTRODUCTION

You have requested an analysis of Rule of Council (Rule) 6.2 in the San Diego Municipal Code (Municipal Code) addressing Non-Agenda Public Comment at City Council meetings. A brief analysis follows.

The Ralph M. Brown Act (Brown Act) requires that every agenda for regular meetings provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public within the subject matter jurisdiction of the legislative body, as set forth in California Government Code section 54954.3(a). The Brown Act further provides that “[t]he legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, *regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.*” Cal. Gov’t Code § 54954.3(b)(1) (emphasis added).

San Diego Charter (Charter) section 14 states that the City Council (Council) shall determine its own rules and orders of business, which the Council did by adopting the Rules of Council, which are codified in Municipal Code section 22.0101, and are broken down into eleven rules with subparts.¹

Rule 2.6 concerns Non-Agenda Public Comment and mirrors the language of the Brown Act. Rule 2.6.1 states:

Every agenda for a regular Council meeting shall provide a period on the agenda for members of the public to address the Council on items of interest to the public that are not on the agenda but are within the jurisdiction of the Council. Non-Agenda Public

¹ The Rules also govern the conduct of Council Committee meetings, although each Committee may adopt additional non-conflicting rules for the conduct of Committee business. Rule 6.5.1.

Comment shall be subject to the exercise of the Council President’s discretion for a given agenda.²

Rule 2.6.4 prohibits discussion or action on any matter of Non-Agenda Public Comment. However, the Council President may refer matters to the Mayor or a Committee for consideration as appropriate. Rule 2.6.4.

This Office understands that the Rules have always contained limits on the length of public comment on a single topic, though the exact language has changed over time. The current language was adopted in 2015:

In order to ensure that the Council has time to consider all agenda items, Non-Agenda Public Comment on particular issues and for each individual speaker will be as follows:

- (b) Each speaker will be limited to two minutes. Speakers may not allocate their time to other speakers. *If there are eight or more speakers on a single issue, the maximum time for the issue will be 16 minutes.* The order of speaking generally will be determined on a first-come, first-served basis, however, priority may be given to speakers who have not addressed the legislative body during Non-Agenda Public Comment at the last regularly scheduled Council meeting.³

(Emphasis added.) *See* San Diego Ordinance O-20452 (Jan. 13, 2015).

Our Office has issued numerous memoranda addressing the legal limitations on public comment at Committee and Council meetings.⁴ As this Office has previously concluded, “[t]he Brown Act authorizes the City to adopt reasonable regulations for non-agenda public comment including regulations limiting the amount of time for each individual speaker. The Council has wide discretion to establish regulations but they must be reasonable and not arbitrary or capricious.” 2014 City Att’y MOL 172 (2014-16; Dec. 2, 2014) at p. 4. “So long as the body acts fairly with respect to the interest of the public and competing factions, it has great discretion in regulating

² The novel coronavirus COVID-19 has prevented the Council from holding in-person meetings. The Council now conducts meetings using a virtual platform that is accessible to Councilmembers and the public. The City has worked hard to provide members of the public the opportunity to orally comment at City Council meetings despite the challenges of the current virtual meeting format. Members of the public also have the opportunity to submit written Non-Agenda Public Comments.

³ The Council has adopted temporary rules to ensure it is able to address important City business despite pandemic-related challenges. *See* San Diego Resolution R-313082 (June 9, 2020) (Temporary Rules). Although the 16-minute cap in Rule 2.6.2(b) is not referenced, the Temporary Rules provide that “[p]ublic comment shall be subject to the exercise of the Chair’s discretion for a given agenda.” *See* Temporary Rule 2.6.1.

⁴ *See, e.g.*, City Att’y MS 2020-29 (Jul. 16, 2018); City Att’y MS 2017-11 (Apr. 24, 2017) (attaching 2014 City Att’y MOL 172 (2014-16; Dec. 2, 2014); City Att’y MOL No. 2017-2 (Mar. 24, 2017); 1994 City Att’y MOL 858 (94-95; Dec. 12, 1994); and 2003 City Att’y MOL 213 (2003-17; Sept. 19, 2003)).

the time and manner, as distinguished from the content, of testimony by interested members of the public.” 2014 City Att’y MOL 172 (2014-16; Dec. 2, 2014), citing from *The Brown Act: Open Meetings for Local Legislative Bodies*, at 19 (California Attorney General’s Office, 2003).

Similarly, the Council may regulate the time, place, and manner of public comment and testimony consistent with free speech rights under the United States and California Constitutions.⁵ In sum, any rules adopted by the Council concerning Non-Agenda Public Comment must be reasonable, fair, content-neutral, and consistently applied.

OPTIONS

If the Council would like to provide more time for public comment, it has the following options:

- At any Council meeting, the Council may temporarily suspend any Rule of Council by a vote of two-thirds of the Councilmembers. The suspension only applies to the matter under immediate consideration and is only effective during the current meeting. Rule 2.12.
- The Council may establish temporary Rules that conflict with a Rule of Council. Proposed Temporary Rules may be placed on the Council’s adoption agenda and adopted by resolution. Temporary Rules are effective for the day they are adopted or for the period specified in the Temporary Rule. Rule 9.
- The Council may amend a Rule of Council by ordinance. The ordinance must first be heard by the standing Committee on Rules before it may be considered by the Council. Amendments to the Rules by ordinance would require two Council hearings and would not be effective until at least thirty days after final passage. Rule 10; San Diego Charter §§ 275 and 295.
- The Council President may refer matters raised during Non-Agenda Public Comment to the Mayor or a Committee for consideration as appropriate.
- Councilmembers may request that items raised by the public that fall within the City’s jurisdiction be scheduled on a future Council or Committee agenda, to allow the Councilmembers a properly noticed opportunity to hear from the public and to participate in the discussion.

⁵ See City Att’y MOL 213 (2003-17; Sept. 19, 2003) (discussion of the Brown Act and free speech rights).

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Our Office stands ready to work with the Council to prepare any legal documents necessary should the Council wish to make changes to the Rules of Council.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Leslie A. FitzGerald
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Assistant City Attorney, Council Relations
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