

## JENKINS &amp; HOGIN, LLP

A LAW PARTNERSHIP

## MEMORANDUM

TO: MAYOR GOODHART AND HONORABLE MEMBERS OF THE CITY COUNCIL

FROM: JOHN C. COTTI, ASSISTANT CITY ATTORNEY

DATE: JANUARY 7, 2016

RE: CAMPAIGN RESTRICTIONS APPLICABLE TO CITY OFFICIALS AND EMPLOYEES

Palos Verdes Estates voters approved a parcel tax to fund fire, paramedic and related services in 2007. Unless renewed by the voters, the parcel tax will expire at the end of June, 2017.

On January 13, 2016, the Council will decide whether to renew the parcel tax by placing an initiative measure on either the November 2016 or March 2017 ballot. Since a ballot measure of this type involves issues connected with City business, our office thought it prudent to briefly outline the “dos” and “don’ts” for campaigning on the ballot measure. Many are commonsensical and probably old news to most of you – the general rule being that you cannot use City resources to support or oppose the parcel tax measure.

A. City’s Position on Ballot Measures

1. *Prohibitions*

California law prohibits expenditure of public resources to support or oppose ballot measures.<sup>1</sup> “Public resources” includes more than simply money,<sup>2</sup> it also includes employees’ time<sup>3</sup> and any use of publicly-owned property.<sup>4</sup>

<sup>1</sup> Government Code (“GC”) § 54964(a); *Vargas v. City of Salinas* (2009) 46 Cal.4<sup>th</sup> 1, reh’g. den.; *Stanson v. Mott* (1976) 17 Cal.3d 206, 213; *League of Women Voters v. Countywide Criminal Justice Coordinating Committee* (1988) 203 Cal.App.3d 529, rev. den.

<sup>2</sup> *League of Women Voters*, 203 Cal.App.3d at 556.

<sup>3</sup> *People v. Battin* (1978) 77 Cal. App.3d 635, cert. den. *Battin v. California* (1978) 439 U.S. 862.

<sup>4</sup> *League of Women Voters*, 203 Cal.App.3d at 555-56; *Bagley v. Washington Township Hospital District* (1966) 65 Cal.2d 499.

Along with these restrictions, the Government Code lists several additional prohibitions:

- It is unlawful to use one's government office for improper influence;<sup>5</sup>
- It is unlawful for an officer or employee to knowingly solicit political funds or contributions from other public officers or employees;<sup>6</sup> and
- It is unlawful for employees to wear a city uniform when engaging in political activities, even during off-duty hours.<sup>7</sup>

2. *Permissible actions*

Cities may use public resources to educate the electorate.<sup>8</sup> Under such circumstances "the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the [activity]; no hard and fast rule governs every case."<sup>9</sup> Accordingly, the activity must: (1) present facts and not advocate a position; (2) present both sides of an issue; (3) be informational or analytical in style and tenor; and (4) be timed to educate, not persuade, the electorate.<sup>10</sup>

Government may also use public resources to objectively evaluate how a ballot measure will affect the agency.<sup>11</sup> Employees may, therefore, provide information regarding a ballot measure based the city's fair and objective factual analysis of that measure.<sup>12</sup> Thus, information provided by the City may (a) present objective facts (e.g., historical information); (b) must avoid argumentative or inflammatory rhetoric; (c) must avoid urging voters to vote in a particular manner or take other actions in support or in opposition to a measure; (d) distribute such information in a manner consistent with the City's established practices (e.g., posting on the City's webpage and the City's regular newsletter sent to residents).<sup>13</sup>

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<sup>5</sup> GC § 3204.

<sup>6</sup> GC § 3205.

<sup>7</sup> GC § 3206.

<sup>8</sup> *Vargas, supra*; *Stanson, supra*; *Choice-in-Education League v. LA Unified School Dist.* (1993) 17 Cal.App.4th 415.

<sup>9</sup> *Vargas*, 46 Cal.4<sup>th</sup> at 34; *Stanson*, 17 Cal.3d at 222.

<sup>10</sup> *Vargas*, 46 Cal.4<sup>th</sup> at 34; *Stanson*, 17 Cal.3d at 220-22; GC § 54964(c).

<sup>11</sup> See *Lehane v. City and County of San Francisco* (1972) 30 Cal.App3d 1051.

<sup>12</sup> See *Stanson*, 17 Cal.3d at 221.

<sup>13</sup> *Vargas*, 46 Cal.4<sup>th</sup> at 40.

Finally, the City may express its own viewpoint regarding a particular ballot measure. Typically, the only permissible means of presenting such a viewpoint is during a public session at which dissenters may respond.<sup>14</sup>

Nothing prevents individual councilmembers or public employees from advocating a particular position regarding a ballot measure *on their own time*.<sup>15</sup> They simply cannot use public resources when doing so.<sup>16</sup>

#### B. Campaigning at City Council Meetings

It is important to remember that City Council meetings are government proceedings that are necessary to conduct City business.<sup>17</sup> While the City Council may regulate the activities of persons attending a City meeting to facilitate the orderly progression of the meeting,<sup>18</sup> it must not generally restrict the content of that person's speech.<sup>19</sup> The City Council cannot, therefore, prohibit public criticism of the City's policies, procedures, programs, or services or the acts or omissions of the Council itself.<sup>20</sup>

The City Council may, however, prevent members of the public from commenting on matters that are not within the City Council's subject matter jurisdiction.<sup>21</sup> This generally means that public discussion is limited "to such matters that serve the purposes of the [City Council] in holding meetings."<sup>22</sup>

Generally, campaigning for candidates or ballot measures is an inappropriate topic for public comment since elections are unaffected by City Council meetings. Accordingly, if the City Council has not taken a position regarding a ballot measure, the City Council may ordinarily prevent discussion regarding ballot measures during public comment. Such action is further justified by the significant public resources expended during a City Council meeting, e.g., staff time, publicly funded television, and the City Council Chambers. Under these circumstances, the City has

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<sup>14</sup> *Choice-in-Education League*, 17 Cal.App.4th at 429-30; *League of Women Voters*, 203 Cal.App.3d at 545, 560.

<sup>15</sup> *League of Women Voters*, 203 Cal.App.3d at 560-61.

<sup>16</sup> *Id.* at 556.

<sup>17</sup> *White v. City of Norwalk* (9<sup>th</sup> Cir., 1990) 900 F.2d 1421, 1425.

<sup>18</sup> GC §§ 36813, 54954.3(b).

<sup>19</sup> GC § 54954.3(c); *In re Kay et al.* (1970) 1 Cal.3d 930, 942.

<sup>20</sup> GC § 54954.3(c).

<sup>21</sup> GC § 54954.3(a); 78 Op. Cal. Att'y. Gen. 224 (1995).

<sup>22</sup> 78 Op. Cal. Att'y. Gen. at 226.

significant interest in preventing campaigning in order to avoid the impermissible use of public resources.

However, if the City Council takes a position regarding ballot measures at a public meeting, it invites public criticism and comment regarding such action.<sup>23</sup> Those activities can blur the line between commenting on City Council actions and outright campaigning. Regrettably, the law does not resolve this potential conflict between First Amendment protections, the Brown Act, and the prohibitions on expenditure of public resources. Accordingly, the City Council may be required to give greater leeway for public comment when the City Council takes a position regarding a ballot measure than when it does not; each situation will require an independent determination for what is permissible.

C. The Rules are Applicable to a Committee Appointed by the Council

The rules set forth above apply equally to any committee established by the Council to promote the ballot measure. While the Council can establish a committee to assist in the development of the ballot measure, it cannot use City resources to thereafter support the parcel tax measure.

The appointed committee can, however, use City resources to provide a fair and objective factual analysis of the ballot measure. In doing so, the committee should present facts and not urge a position or action, and present both sides of the ballot measure in an attempt to educate, not persuade, the electorate.<sup>24</sup>

D. Conclusion.

It is well established that public funds may not be expended to advocate passage or defeat of a local ballot measure. Councilmembers can endorse and advocate for the passage of the ballot measure. They cannot, however, spend public money to further that end.

Let me know if you have any questions regarding these matters.

cc: Anton Dahlerbruch, City Manager  
All Employees

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<sup>23</sup> GC § 54954.3(c).

<sup>24</sup> See *Stanson*, 17 Cal.3d at 220-222.