CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: RICHARD DOYLE
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SUBJECT: **Campaign Activities Update**

DATE: May 29, 2009

SUMMARY

We want to advise you about a recent case involving the age-old question of the use of public funds for ballot measures. On April 20, 2009 California Supreme Court ruled in *Vargas v. City of Salinas*, and re-stated the legal guidelines for the use of public funds for ballot measures or election campaigns as well as restrictions on political activities of public employees.

The Supreme Court held in *Vargas v. City of Salinas* that the "style, tenor and timing" guidance set forth in its 1976 case, *Stanson v. Mott*, provides the correct standard for determining whether a publicly funded ballot measure communication is a permissible "informational" communication or a prohibited "campaign" communication. Vargas v. City of Salinas, No. S140911 (Calif. Supr. Ct., April 20, 2009). The Court explained that the "express advocacy" rule set forth in Government Code Section 54964 creates a clear prohibition on certain activities, but that the rule is not adequate to cover all impermissible campaign communications.

The Court also held that, although permissible informational materials must contain a "fair and impartial presentation of facts," a governmental agency is not precluded from expressing a public opinion with regard to the merits of a proposed ballot measure, so long as the agency does not expend public funds to mount a campaign on the measure.

The Court found that City of Salinas' activities did not constitute campaign communications under the "style, tenor and timing" standard. As will be described below, the *Vargas* decision provides useful instruction by describing the factors the Court considered in making its decision and offering examples of activities that, although not "express advocacy" under Section 54964, would nonetheless constitute prohibited campaign activities under the "style, tenor and timing" analysis.

BACKGROUND

In February 2006, this Office distributed a memo that discussed the Sixth District Court of Appeal decision in *Vargas*, the first appellate court case to interpret Government Code Section 54964. Section 54964 prohibits the use of public funds on political

campaigns for both ballot measures and individual candidates. In particular, the Section prohibits publicly funded communications that "expressly advocate" for or against a ballot measure or candidate. The appellate court had determined that the previous guidelines in this area, set forth in the Supreme Court case of *Stanson v. Mott*, had, to some extent, been superseded by the provisions of Government Code Section 54964.

However, as explained in our January 2008 memo, the Supreme Court accepted review of *Vargas*, and as such, vacated the holding of the appellate court. Therefore, the "style, tenor and timing" standard under *Stanson v. Mott* remained in effect regarding the expenditure of public funds until the Supreme Court issued its opinion in *Vargas*.

On April 20, 2009, as explained above, the Supreme Court issued that opinion and upheld the "style, tenor and timing" standard.

ANALYSIS

I. Use of Public Funds for Ballot Measures or Election Campaigns

A. The General Rule

Although, in general, the City has broad discretion to make public expenditures, as a governmental agency, the City is prohibited from spending public funds for communications that promote a partisan position in an election campaign unless the expenditure is explicitly provided by law. A public agency may not make expenditures that mount a campaign on behalf of the passage or defeat of a ballot measure or election of a particular candidate, and communications that expressly advocate for or against a ballot measure or candidate are explicitly prohibited. This applies even when the Council has placed a measure on the ballot or the measure directly relates to a City program.

Government Code Section 54964 provides that "an officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters." Subdivision (a). "Expenditure" is defined as the use of local agency funds for "communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters." Subdivision (b).

B. Permissible Activities

1. Ballot Measures

The City may utilize publicly funded communications to provide impartial information about the subject matter of a ballot measure, but only if the communication provides a **"fair presentation of facts" and is informational rather than promotional**. A fair presentation must make full disclosure of the advantages, disadvantages and consequences so that voters can make an informed choice. As explained above, any such communication will be judged in terms of its "style, tenor, and timing."

According to the Court in *Vargas*, a "fair presentation of facts" does not require that the public entity include a forum in its communications for alternative viewpoints if it does not already do so. However, if a communication is argumentative in tone, if it advocates a position or if it is likely to offend those on the opposite side of the issue, it may be prohibited.

The Court noted in *Vargas* that a public entity is not precluded from expressing an opinion about the merits of a measure so long as public funds are not expended to mount a *campaign.* The Court explained that the potential danger to the democratic process is not presented when a public entity simply informs the public of its opinion on the merits of a pending ballot measure or the impact on the entity that passage or defeat of the measure is likely to have. Rather, the threat to the fairness of the electoral process arises when public funds are devoted to *campaign activities* favoring or opposing such a measure.

A review of the facts in *Vargas* is instructive. The Salinas city council responded to a ballot measure that aimed to eliminate the city's utility use tax, the source of 13% of the city's revenues, by issuing the following communications, all of which related to the reduction and elimination of city services, programs and facilities that the city council voted to implement should the measure be approved in the election:

1) Material posted on the city's official website, including minutes from council meetings, a report by the city manager setting forth the finance department's analysis of the financial impact of the measure and recommended program reductions, city department slide presentations, and a report by city staff responding to alternative implementation plans advanced by proponents of the measure;

2) A one-page document, made available to the public at the city clerk's office and in public libraries, which described the measure and listed services that the city council identified for elimination or reduction if the measure were to pass; and

3) Articles in the regular quarterly municipal newsletter, mailed to all city residents, which contained information similar to that in the one-page document, as well as frequently asked questions about the utility use tax and further information about proposed service cuts.

The Court found the above communications to be informational rather than campaign communications, and the court set forth the following factors for consideration:

1) The information conveyed generally involved past and present facts (such as how the utility use tax was enacted, what proportion of the budget was produced by the tax and how the city council had voted to modify the budget in the event that the measure were to pass);

2) The communications avoided argumentative or inflammatory rhetoric and did not urge voters to vote in a particular manner or to take other actions in support of or in opposition to the measure; and

3) The information provided and the manner in which it was disseminated were consistent with established practice regarding use of the city's website and regular circulation of the city's official newsletter.

Other examples of activities that have been deemed to be permissible with regard to ballot measures include:

- Participation by City employees and officials in radio and television debates where both sides are heard;

- Responses to questions about the City or a Councilmember's position by members of the public or the press;

- City officials and City employees campaigning for or against a ballot measure on their own time and away from City premises;

2. Candidates

As stated above, Government Code Section 54964 prohibits the use of public funds "to support or oppose...the election or defeat of a candidate". The law does not specify any permissible activities with regard to the use of public funds on campaigns for political office, as it does with ballot measures. As such, City expenditures, including the free use of City facilities for political events, should be carefully scrutinized to be sure that the expenditure cannot be construed in any way to be partisan.

For example, a candidate's forum, where all of the candidates running for a local seat are invited, would probably be a permissible event if all of the City funded communications were completely objective and access to the event were open to all. Since assuring unbiased communication and open access necessarily means controlling political speech, the only way to assure that an event does not run afoul of the prohibition on public funding and the First Amendment, is for the City to hold the event itself.

On the other hand, if another organization rents a City facility on the same terms and conditions as any member of the public, and no City funds are spent on noticing or staffing the event, then the City cannot control the content of the event and the event can be overtly partisan.

Furthermore, in any City meeting subject to the Brown Act, the public must be allowed to speak on any item under the "Open Forum" or "Public Comment" section of the agenda. The City cannot prevent these public comments even if they constitute express advocacy of a particular candidate.

C. Prohibited Activities

As stated above, under Government Code Section 54964, the use of public funds for communications that expressly advocate support or opposition to a ballot measure or election contest is prohibited. Communication that advocates a position, is argumentative in tone, or is likely to offend those on the opposite side of the issue may be considered express advocacy.

Furthermore, in *Vargas* the Court stressed that merely avoiding express words of advocacy is not sufficient to demonstrate that a public entity did not use public funds to "unambiguously urge a particular result." Therefore, when evaluating whether a communication is a prohibited campaign communication or merely informational, a public entity should apply the "style, tenor and timing" test, including the factors set forth in *Vargas*, before expending public funds for that purpose.

For example, the public entity could overwhelm the voters by using public funds to finance bumper stickers, posters, television and radio advertisements and other campaign material containing messages that, while eschewing the use of express advocacy, effectively promote one side of an election. The Court explained that, if the City of Salinas had posted large billboards around the city prior to the election stating in capital letters, "If measure O is approved, six recreation centers, the municipal pool and two libraries will close," it would defy common sense to suggest that the city had not engaged in campaign activity.

Specific prohibited activities include:

- Having an employee do campaign work on City time. For example, employees should not advocate or urge a position on a bond measure or a candidate to a citizen during work time;
- Using public funds for printing or distributing a publication or pamphlet that expressly advocates a position on a ballot measure or candidate;
- Using City publications as a means of disseminating information in a manner that expressly advocates a position on a ballot measure or candidate;
- Making written materials available on City premises, including libraries and community centers, in a manner that expressly advocates a position on a ballot measure or candidate;
- Use of City staff to write campaign speeches for ballot measures or candidates;
- Using City telephones, computers, copiers or fax machines for communications that expressly advocate a position on a ballot measure or candidate;
- Use of City mail routing to distribute materials that expressly advocate a position on a ballot measure or candidate even though the materials are prepared outside of the City;
- Preparing or sending out press releases in a manner that expressly advocates a position on a ballot measure or candidate;
- Use of City stationary in a manner that expressly advocates a position on a ballot measure or candidate.
- Using public funds to produce bumper stickers, billboards, posters, television and radio advertisements and other campaign material, regardless of whether such media expressly advocate a position.

D. Penalties

City officials can be held personally liable for authorizing the improper expenditure of public funds for campaign purposes. City officials are held to a "standard of due care" which means that an official who fails to exercise "reasonable diligence" in authorizing

the expenditure of public funds is subject to liability. Reasonable diligence will be evaluated by taking such factors as the following into account:

- Whether the impropriety was obvious or not;
- Whether the official had notice of the improper nature of the expenditure;
- Whether the official relied on legal advice.

The unauthorized expenditure of public funds can also result in criminal sanctions under Penal Code Section 424. A conviction under this section is a felony and results in disqualification from holding public office in the future. A member of the Board of Supervisors of Orange County was convicted under this section for authorizing county payments of salary to his office staff for work performed on his campaign for Lieutenant Governor. People v. Battin, 77 Cal.App.3d 635 (1978).

Additionally, under new FPPC Regulation 18420.1, which went into effect on February 7, 2009, expenditures by local agencies of $1,000 or more for communications that expressly advocate for or against a ballot measure also trigger campaign finance reporting requirements which may, in turn, subject the agency to administrative fines or other penalties under the Political Reform Act.

II. Prohibition on Political Activities of City Commissioners

In addition to the state law prohibition on use of public funds for political activity, City Council Policy prohibits City Boards, Commissions and Committees from endorsing any candidate and taking any independent position on any ballot measure. An individual Commissioner may not use his or her Commission title in making personal political endorsements. Additionally, Boards, Commissions and Committees cannot be involved in gathering or disseminating information on candidates or campaigns (e.g. surveys, public debates, mailings, etc.) (City Council Policy 0-36.)

III. Prohibition on Political Activities of Public Employees

The following state law prohibitions apply specifically to activities of City and Agency employees:

- A public employee may not participate in political activities while in uniform. Government Code § 3206.
- An employee of a public agency may not, directly or indirectly, solicit a political contribution from an officer or employee of that agency with knowledge that the person is employed with the agency unless the

solicitation is also made to a significant segment of the public which may include employees of the agency. Violation of this prohibition is a misdemeanor. Government Code § 3205.

CONCLUSION

Neither the City nor Agency may expend any funds in support or opposition to any ballot measure or for any campaign for public office. Because the penalties are severe, it is important to exercise extreme care in providing information or engaging in activities which may be construed as promoting a partisan position in an election campaign.

Please feel free to call this Office with any questions you may have about these requirements and to distribute this memo to all employees.

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