

# **INVESTIGATION: Ballot Arguments – November 2012 Elections**

## **SUMMARY OF ISSUES, FINDINGS AND RECOMMENDATIONS**

In the November 2012 general election, City of Sacramento voters considered three local measures placed on the ballot by the City Council. These measures, designated Measures M, T, and U, respectively, pertained to the formation of a charter commission, yard refuse pickup, and a local sales tax increase.

In July 2012, pursuant to the California Elections Code, City Code, and City's Election Guidelines, and on the City Clerk's recommendation, the City Council adopted a resolution authorizing certain council members to author and file arguments in favor of and in opposition to the three local measures. As the City Clerk explained, the purpose of the authorization is to ensure that the Council's arguments are selected for printing in the official sample ballot, and secures its priority in the City Clerk's selection of ballot arguments should more than one argument for or against a measure be filed with the City Clerk.

Notwithstanding the City Council's resolution, the council members authorized to author arguments in favor of Measures M, T, and U did not author and file arguments with the City Clerk. Instead, the council members submitted arguments authored by various voters and citizen groups. Consequently, the City Council's arguments would not have received statutory priority had more than one argument been filed with the City Clerk.

Also, the Mayor, who was authorized by the City Council to write the argument in opposition to Measure U, the sales tax measure, authored but failed to timely file the argument with the City Clerk. Consequently, no argument in opposition to Measure U was included on the sample ballot.

The council members' failure to author arguments in favor of Measures M, T, and U, notwithstanding the City Council's resolution authorizing those members to author the arguments, the Mayor's failure to timely file an argument in opposition to Measure U, and the City Council's authorizing its members to author arguments both in favor of and in opposition to the measures, raise four issues addressed in this investigation:

1. Was the council members' failure to author arguments in favor of Measures M, T, and U, contrary to the City Council's intent adopting its resolution authorizing the council members to author those arguments?

2. Why did the Mayor fail to timely file an argument in opposition to Measure U?
3. Should the City Council authorize council members to author arguments both in favor of and in opposition to measures the council has placed on the ballot?
4. Did the City Clerk's Elections staff provide council members advice and direction inconsistent with its non-partisan role in municipal elections?

As the result of its investigation, the Grand Jury finds and recommends as follows:

1. The authorized council members' failure to author arguments in favor of Measures M, T, and U was contrary to the City Council's intent adopting its resolution authorizing the members to author those arguments, inconsistent with the California Elections Code, City Code, and City Election Guidelines, and contrary to best practices for transparent election procedures. The Grand Jury recommends that the City Clerk promulgate, and the City Council approve, election guidelines that ensure council members authorized by the City Council to author an argument respecting a measure, will do so.
2. The Mayor failed to timely file an argument in opposition to Measure U because his assistants responsible for preparing the argument for submittal to the City Clerk misunderstood the filing requirements for ballot arguments. The Grand Jury recommends that the City Clerk provide training for the City Council and staff, as well as the general voting public, regarding the filing requirements for ballot measures and arguments.
3. The City Council should not authorize its members to author arguments both in favor of and in opposition to a measure the Council has placed on the ballot. In the absence of state law barring such a practice, the Grand Jury recommends that the Council adopt rules and regulations precluding the practice.
4. City Clerk staff provided council members advice and direction inconsistent with its non-partisan role in municipal elections. The Grand Jury recommends that the City Clerk provide training to its staff regarding the Elections Office's non-partisan role with respect to municipal elections.

## **INTRODUCTION/BACKGROUND**

In the November 2012 general election, Sacramento city voters considered three local measures placed on the ballot by the City Council. In August and September 2012, the grand jury received two complaints relating to the ballot arguments for Measures M, T, and U. The complaints raised issues regarding the authorized council members' failure to author arguments as authorized by the City Council, the Mayor's failure to timely file an argument in opposition to Measure U, and the

City Council's authorization of its members to author arguments both in favor of and in opposition to a measure. Measures M, T, and U, pertained to the formation of a charter commission, yard refuse pickup, and an increase in the local sales tax.

Conscientious voters wishing to inform themselves about ballot measures may rely on a number of sources of information. Among those sources are the official ballot arguments for and against measures, which are mailed to voters a few weeks before the election.

State and local codes govern the submission of official ballot arguments for city measures, including Sacramento City Code section 1.16.070 and California Elections Code sections 9280 – 9287, et seq. The Sacramento City Clerk publishes Guidelines for Preparation of Ballot Arguments (updated 2012), which contains information on the requirements for submitting arguments and rebuttals, including word counts, qualifications, signature requirements, and deadlines. In particular, the codes and guidelines provide the City Clerk an order of preference or priority if more than one argument is submitted for or against a measure. Elections Code section 9287 sets forth the order of preference the City Clerk must follow. If an argument authorized by the City Council is properly and timely submitted to the City Clerk's Office, no other arguments submitted to the City Clerk's Office may be included in the sample ballot.

Two years earlier, on July 20, 2010, the City Council passed Resolution #2010-433, which authorized Mayor Johnson, on behalf of the City Council, to author an argument against Measure B, the Utilities Rate Hike Rollback Act of 2010, and Councilmember Steve Cohn, on behalf of the City Council, to author an argument in support of Measure C, the Marijuana Business Tax.

On July 30, 2010, the deadline for submission of ballot arguments, the City Clerk received only one ballot argument against Measure B, but without the signature of the Mayor, and only one ballot argument in support of Measure C, but without the signature of Councilmember Cohn. Because the authorized members did not sign and thus did not authorize the arguments, the arguments would not have received the statutory preference provided by Elections Code section 9287, had more than one argument been submitted to the City Clerk. However, the arguments satisfied all other Elections Code requirements for submittal to the county for printing in the official sample ballot.

At its August 5, 2010 meeting, the City Council asked staff to report back on the issue of the ballot arguments authorship. The City Clerk's Office staff and the City Attorney's office prepared a report for the September 7, 2010 City Council

meeting. The report described the background and the legal issues regarding Council-authorized authorship of ballot arguments. The report stated that if multiple ballot arguments had been submitted, the City Clerk would have been required to select according to the priorities established by Elections Code section 9287 and the “city’s submittal” would not have been guaranteed priority, as the authorized elected official did not sign (and therefore did not author) the ballot argument.

In the same report, the City Attorney noted that Resolution #2010-433 did not expressly “require” or “direct” the authorized members to draft or submit the ballot arguments on the City’s behalf. The staff report recommended “information and direction to staff.” The matter was not discussed on September 7, and was continued to September 14. At the September 14 meeting the matter was “continued to a future date.” The matter was not thereafter taken up by the City Council.

## **INVESTIGATION METHODOLOGY**

The investigation began October 15, 2012, and consisted of interviews with the Sacramento City Clerk’s Office staff, Sacramento City council members, and members of the public. Documents reviewed included e-mails between the City Clerk’s Office, members of the general public, staff and members of the Sacramento City Council, as well as Council resolutions, analyses, guidelines, and procedures. The grand jury also reviewed pertinent sections of the California Elections and Government Codes, and the City Code.

Reports issued by the civil grand jury do not identify individuals interviewed. Penal Code section 929 requires that reports of the grand jury not contain the name of any person or facts leading to the identity of any person who provides information to the civil grand jury.
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## **ISSUES**

The grand jury investigated: (1) the authorized council members’ failure to author ballot arguments in favor of Measures M, T, and U, as provided by the resolution adopted by the City Council on July 31, 2012; (2) the Mayor’s failure to timely file a ballot argument in opposition to Measure U, as provided by the resolution adopted by the City Council; (3) the City Council’s authorization of council members to author ballot arguments both in favor of and against certain measures; and (4) the propriety of advice and direction by City Clerk’s Office staff to council members regarding the filing of ballot arguments.

## **DISCUSSION**

On December 11, 2011, the Sacramento City Council adopted a resolution calling for, and giving notice of, a General Municipal Election to be held on November 6, 2012.

On June 26, 2012, the City Council approved for placement on the November 6, 2012 ballot a measure to repeal the ordinance enacted by the adoption of Measure 'A' on September 27, 1977, relating to the deposit and collection of yard and garden refuse in the City of Sacramento.

On June 27, 2012, the City Clerk's Office, in the capacity as City Elections Official, provided all council members with instructions for the preparation of ballot arguments for the November 6, 2012 election. The instructions advised the council members that arguments would be due in the City Clerk's Office August 8, 2012 by 4:30 p.m., rebuttal arguments would be due August 15, 2012 by 4:30 p.m., the forms must be printed and signed, and that the "argument author" form must be completed and signed by all authors. The Statement of Argument Authors form provides that the authors of ballot arguments must sign the form and attest that the argument is true and correct to the best of his or her knowledge and belief.

In June and July 2012, the City Council approved for placement on the November 6, 2012 ballot, measures relating to formation of a charter commission, yard refuse pickup, and a transactions and use tax, designated Measures M, T, and U, respectively.

On June 19, 2012 and July 31, 2012, the City Clerk, in the capacity as City Elections Official, presented a recommendation to the City Council to pass resolutions authorizing members of the City Council to author and submit arguments "in opposition to" and/or "in support of" the various measures to be presented to the voters on the November 6, 2012 General Municipal Election ballot. As the City Clerk explained, taking this action would ensure that the City Council's argument(s) are selected for printing in the official sample ballot pursuant to the selection criteria contained in California Elections Code section 9287. If the action recommended was taken, the City Council would secure its priority in the City Clerk's selection of ballot arguments should more than one argument be submitted in opposition to or in support of the measure(s). If more than one argument for or against any approved measure is filed with the City Clerk, and the City Council has selected and authorized argument authors by resolution, the City Clerk would be required to select the City Council's argument.

As the City Clerk explained in its recommendation to the City Council, if the City Council, as a body, chooses to submit an argument, at least one council member should be designated as the author. California Elections Code section 9283 and the City of Sacramento Guidelines for preparation of ballot arguments provide that ballot arguments must be signed by the authorized authors in order to obtain priority in the selection process.

The City Clerk further explained in its recommendation that the primary arguments would be due in the Office of the City Clerk by Wednesday, August 8, 2012 at 4:30 p.m. The rebuttal arguments would be due in the Office of the City Clerk by Wednesday, August 15, 2012 at 4:30 p.m.

On July 27, 2012, the City Clerk's staff provided the Mayor's staff with the instructions for preparation of ballot arguments, including that the arguments would be due August 8, 2012 by 4:30 p.m., the rebuttal arguments would be due August 15, 2012 by 4:30 p.m., the forms must be printed and signed, and the "argument authors" form must be completed and signed by all authors. The City Clerk's staff also explained to the staff member that the City Clerk's Office urges the City Council to authorize its members to author and submit arguments to ensure that the arguments are selected for printing in the sample ballot, guaranteeing the City Clerk gives priority to that argument in the event that more than one argument is submitted.

At the June 19, 2012 and July 31, 2012 meetings, the City Council, because it "desires to submit argument(s) for the measure," adopted resolutions authorizing members of the City Council to submit on behalf of the City Council, written arguments for Measures M, T, and U. The City Council authorized members Kevin McCarty and Steve Cohn to author the argument in favor of Measure M (Charter Review Commission) and member Angelique Ashby to author the argument in opposition to Measure M; authorized members Cohn, McCarty, and Darrell Fong to author the argument in favor of Measure T (Yard and Garden Refuse); and authorized members Darrell Fong, McCarty and Cohn to author the argument in favor of Measure U (Transactions and Use Tax), and Mayor Kevin Johnson author the argument against Measure U. The resolutions further provided that the arguments shall be prepared in accordance with the California Elections Code and the Election Official's printing guidelines available from the City Clerk. The City Council adopted the resolution unanimously, with one member absent.

In July 2012, the three council members authorized by the City Council to author the argument in favor of Measure U decided to substitute non-council members to author those arguments. They did so because in their view the arguments would be

more persuasive to voters if the arguments were authored by public officials or citizens impacted by the measure. The council members did not publicly disclose their intention to substitute those authors before submitting the arguments to the City Clerk for filing.

One council member who was authorized to author arguments in favor of the measures asserted that the City Council's resolution authorized the members only "to file" the argument, not to author the argument. That interpretation conflicts with the plain meaning of the City Council resolution; the Elections Code, City Code, and Guidelines; the City Clerk's interpretation of the pertinent codes and guidelines; and the interpretation of three council members authorized to author arguments by the City Council. Moreover, there is no evident statutory purpose for the City Council to authorize its members to file a ballot argument authored by others, and council members need no Council authorization to file the argument authored by others.

On Tuesday, August 7, 2012, at 8:11 a.m., the City Clerk's staff sent a reminder to all council members that ballot arguments were due in the City Clerk's Office on Wednesday, August 8 by 4:30 p.m., and requested that council members notify the City Clerk's Office when they would be filing their arguments, because of the significant impact on the City Clerk's Office of candidates filing for the office of charter commissioner. Given the possibility that arguments submitted to the City Clerk's Office for filing fail to comply with the City's ballot argument preparation guidelines and require corrections, it is generally in the argument author's interest to submit the argument as much in advance of the filing deadline as possible.

On August 7, 2012, at 9:47 a.m., one council member authorized to author the ballot argument in favor of Measure U responded to the City Clerk staff's 8:11 a.m. request, suggesting that he would file his argument that day at 4:00 p.m. At 10:34 a.m. that day, the City Clerk staff responded to the council member and stated, "If you are ready with the "yes" on Measure U (tax) or Measure M (charter), I'm wondering if you want to wait until right before the deadline Wednesday. Otherwise, the opponents and media will have access to the argument in advance of the opposition's submission. Not sure if this matters. Let me know."

In the same 10:34 a.m., response, the City Clerk staff also informed the council member that "[t]he "no" on T (yard)/garden) opponents are coming in at 4 pm today. If that is ok, then we will see you then. If not, perhaps 4:15 or end of day Wednesday."

At 11:16 a.m., the council member responded to the City Clerk staff's suggestion, stating, "Better yet, how about tomorrow 2-430 range? What slot works?" At 12:36 p.m., the City Clerk staff responded, "I have open Wednesday at 3:30 or 4:00 p.m. Which works better for you?" The next day, August 8, at 3:37 p.m., the council member responded, "4 pm is my appt. correct?" At 3:40 p.m., the City Clerk staff responded, "Yes." On August 7, 2012, the three council members authorized to author and file the ballot argument in favor of Measure U agreed to file the argument close to the deadline on August 8. On August 8, 2012, at 3:25 p.m., one of the three council members presented the argument in favor of Measure U to the City Clerk's Office. The argument was not signed by any of the three council members authorized by the City Council to author the argument on its behalf. Instead, the argument was signed by the five non-council members selected by the three authorized council members. Because the council members authorized by the City Council to author the argument in favor of Measure U did not sign the ballot argument, the City Council's argument would not have received the statutory priority in the event that another argument had been filed.

On August 8, 2012 at 4:16 p.m., the council members authorized to author the argument in favor of Measures M and T presented the arguments in favor of Measures M and T to the City Clerk's Office. The City Clerk staff identified formatting problems with both arguments and advised the City Council members that the City Clerk's Office would correct the formatting errors for publication in the sample ballot. On August 8, 2012, the council member authorized to author the argument in opposition to Measure M timely filed the argument with the City Clerk.

On August 9, 2012 at 5:00 p.m., the Mayor's ballot argument opposed to Measure U was e-mailed to the City Clerk's Office. Because the argument was not timely submitted, the City Clerk's Office refused to file the argument. The Mayor failed to timely file the argument because his assistants assigned to prepare and submit argument misunderstood the deadline.

A citizen's group opposed to Measure U would have prepared and submitted argument to the City Clerk in opposition to Measure U, but, in reliance on the City Council's resolution authorizing the Mayor to author an argument against Measure U, did not submit an argument. As a result, no argument against Measure U was included on the ballot.

After all ballot arguments were submitted, the City Clerk's Office reviewed the submission of ballot arguments that were signed not by the authorized council members but by non-council members selected by the three authorized council



members. The City Clerk's Office concluded that the substitution of signatures by the authorized council members, by which the City Council lost statutory priority for its argument, was contrary to best practices for conducting municipal elections. First, the substitution was contrary to the City Council's intent to obtain priority for its argument by authorizing the council members to author the argument. Second, the substitution of signatures by the three council members was not authorized by the City Council and was not publically disclosed before the filing deadline, and therefore lacked transparency. Third, others who may have submitted ballot arguments but did not in reliance on the City Council's decision to obtain priority, were misled by the lack of transparency and failed to file arguments.

On January 28, 2013, Assembly Member Logue introduced Assembly Bill 193, which amends Elections Code section 9287 to limit ballot arguments submitted by a legislative body to an argument consistent with the position taken by the legislative body on the measure.

## **FINDINGS AND RECOMMENDATIONS**

Finding 1: The Grand Jury finds that the council members authorized by the City Council to author arguments in favor of Measures M, T, and U did not author those arguments submitted to the City Clerk, and did not publicly disclose their intention not to author the arguments before submitting the arguments to the City Clerk. The council members' failure to author the arguments deprived the City Council of statutory priority for its arguments in the event other arguments in favor of each measure had been submitted to the City Clerk. The council members' failure to author the arguments and to disclose their intention not to author the arguments was contrary to the City Council's intent in authorizing the members; contrary to the California Elections Code, City Code, and City Elections Guidelines provisions for obtaining priority; and contrary to the best practices for transparent election procedures.

Recommendation 1: The Grand Jury recommends that the City Clerk promulgate, and the City Council approve, election guidelines that ensure that council members authorized by the City Council to author an argument respecting a measure, will do so.

Finding 2: The Grand Jury finds that the Mayor failed to timely file a ballot argument in opposition to Measure U because his assistants who were assigned to prepare and submit the argument to the City Clerk misunderstood the filing requirements. This failure to timely file the argument was negligent, not intentional.

Recommendation 2: The Grand Jury recommends that the City Clerk develop and provide formal training for the City Council and staff, as well as the general voting public, regarding the filing requirements for ballot measures and arguments.

Finding 3: The Grand Jury finds that the City Council authorized council members to author arguments both in favor of and in opposition to measures it approved for placement on the ballot. Given the statutory preference accorded arguments authorized by the City Council, the Council's authorization of arguments both in favor of and in opposition to a measure it has approved for placement on the ballot can preclude the filing of other opposition arguments to a measure or, at minimum, may discourage the submission of other opposition arguments, creating the possibility that the City Council could effectively limit legitimate opposition to a measure, either by submitting a token opposition argument or failing to submit an opposition argument.

Recommendation 3: In the absence of state law barring such a practice, the Grand Jury recommends that the City Council adopt guidelines precluding authorizing council members to author arguments both in favor of and in opposition to a measure that the City Council approves for placement on the ballot.

Finding 4: The Grand Jury finds that the City Clerk's Office staff advised a council member authorized to author arguments in favor of measures placed on the ballot by the City Council, to delay submitting the arguments to the City Clerk's Office until just before the filing deadline and until after the opposition argument had been submitted (informing the council member of the date and time a measure opponent was scheduled to submit its opposition), in order to prevent the media and measure opponents from reviewing the argument in advance of the opposition's submission. In response to the staff's advice, the council member delayed submitting arguments to the City Clerk's Office until just before the filing deadline and after the measure opponent had submitted its argument. The staff's communication with the council member was inconsistent with the non-partisan role of the City Clerk's Office with respect to municipal elections.

Recommendation 4: The Grand Jury recommends that the City Clerk provide training to its staff regarding the Elections Office's non-partisan role with respect to municipal elections.

## **REQUEST FOR RESPONSES**

Pursuant to Penal Code section 933.05, the Sacramento County Grand Jury requests that Sacramento City Council and Sacramento City Clerk respond to all findings and recommendations contained in this report. The Sacramento City Council response must comply with the notice, agenda, and open meeting requirements of the Brown Act.

The response should be submitted by September 28, 2013, to:  
The Honorable Laurie Earl, Presiding Judge  
Sacramento County Superior Court  
720 9th Street, Department 47  
Sacramento, CA 95814

In addition, the response should be emailed to Rebecca Castaneda, Grand Jury Coordinator at: [castanb@saccourt.com](mailto:castanb@saccourt.com).

## **DISCLAIMER**

This report was issued by the grand jury with the exception of one member of the jury who is a former Sacramento City council member. This juror was excluded from all parts of the investigation, including interviews, deliberations, and the making and acceptance of the report.