THE CITY OF SAN DIEGO

OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

Date Issued: October 2, 2018 **IBA Report Number:** 18-33

Rules Committee Meeting Date: October 10, 2018

Item Number: TBD

Proposed Response to Grand Jury Report
"Improving the San Diego Citizens' Initiative Process"

On May 23, 2018 the San Diego County Grand Jury filed a report, titled "Improving the San Diego Citizens' Initiative Process." This report focuses on the concept of providing San Diego City voters with adequate information regarding citizens' initiatives.

The Grand Jury report includes four findings and one recommendation which are directed to the City Council, Mayor, and City Attorney. The proposed joint Council/Mayor/City Attorney response – see Attachment 1 – covers these findings and recommendations.

Per the Grand Jury report, the Council is required to provide comments to the Presiding Judge of the San Diego Superior Court on the applicable findings and recommendations within 90 days. However, the Council President's office requested and received an extension for the response to November 16, 2018.

In responding to each Grand Jury finding, the City is required to either (1) agree with the finding or (2) disagree wholly or partially with the finding. Responses to Grand Jury recommendations must indicate that the recommendation (1) has been implemented; (2) has not yet been implemented, but will be implemented in the future; (3) requires further analysis; or (4) will not be implemented because it is not warranted or is not reasonable. Explanations for responses are requested when applicable.

For this Grand Jury report, the City Attorney's Office, as the subject matter expert, assisted in the development of the proposed Council/Mayor/City Attorney response, working with the Office of the IBA. The IBA's Office then collaborated with the City Attorney's Office and Mayor's Office

to finalize the proposed response. We request that the Rules Committee provide feedback and forward its approved proposed response to the full City Council.

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APPROVED: Andrea Tevlin
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Attachments:

1. Proposed City Response to San Diego County Grand Jury Report titled "Improving the San Diego Citizens' Initiative Process"

2. San Diego County Grand Jury Report titled "Improving the San Diego Citizens' Initiative Process"

Proposed City Response to
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Pursuant to California Penal Code section 933(c), the City of San Diego Mayor, City Council, and City Attorney provide the following responses to the findings and recommendations which are included in the above referenced Grand Jury Report (Report).

FINDINGS 01 THROUGH 04

Finding 01: *The democratic process will work well when the voters receive reliable, verifiable, and objective information.*

Response: The Mayor, City Council, and City Attorney agree with the Grand Jury's finding.

See Response to Recommendation 18-20, as the Report does not consider the applicable information that the City of San Diego already provides to all voters.

Finding 02: *The California Election Code §9212 and the Ballot Initiative Transparency Act of 2014 provide an example for municipalities in evaluating the potential impacts of ballot initiatives.*

Response: The Mayor, City Council, and City Attorney partially disagree with the Grand Jury's finding.

The City notes that California Elections Code § 9212 and the Ballot Initiative Transparency Act of 2014 do not apply to Charter cities such as San Diego that have not adopted the California Elections Code for their elections law. Thus, the City is not in a position to assess them as examples. Additionally, in order to incorporate certain requirements of these laws (including an early public comment period and additional analyses beyond those San Diego already provides), the City would need to amend its elections laws and processes, and the San Diego County Registrar of Voters may be required to provide additional and earlier reports than currently required regarding signature verification. Under the City's elections laws, election timelines would not always be conducive to implementing portions of these laws. For example, measures may be qualified without sufficient time for the City to conduct certain analysis detailed in § 9212. Moreover, such analysis actually may be superfluous to what is already provided to all voters in the ballot pamphlet, as well as other analyses that may be prepared by the City Attorney's Office, Independent Budget Analyst, or other City departments during the Council's process of considering whether to adopt an initiative measure outright or place the initiative measure on a ballot.

Proposed City Response to
San Diego County Grand Jury Report Titled
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Finding 03: *The new California Election Code provides a model of how an extended period of review and analysis can provide unbiased and educational information to the voting public.*

Response: The Mayor, City Council, and City Attorney partially disagree with this finding.

The City notes that the initiative provisions of the California Elections Code do not apply to Charter cities such as San Diego that have not adopted the California Elections Code as their governing elections law. Additionally, as alluded to in the response to Finding 02, the timing of preparing a § 9212 analysis may not synchronize with the City's elections laws and processes. Whether the new "model" of the Ballot Initiative Transparency Act or § 9212 would result in an "extended period" of review at a local level could depend on when a given initiative is submitted and qualified, and the timing of this in connection with the date of the next election.

Finding 04: *The City of San Diego may use public funds to educate the voters in an unbiased and informative way on issues raised by initiatives.*

Response: The Mayor, City Council, and City Attorney partially disagree with the Grand Jury's finding.

The City agrees that unbiased education of voters is critical and that California Government Code section 54964 allows public funds to be used for specific educational purposes. The section prohibits the use of public funds unless the exception below applies:

> (c) This section does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:
>
> (1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.
>
> (2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure.

The Report does not consider the full extent of how the City of San Diego already educates voters in an "unbiased and informative way" about initiatives. This is accomplished through public hearings and the recitals in an underlying ordinance placing a measure on the ballot, the Ballot Title and Summary, the Fiscal Impact Analysis, and the Impartial Analysis of all ballot measures. These materials (other than the ordinance recitals) are provided in the voter pamphlet sent to all voters. All of the materials are freely available on the City Clerk's website, under a tab devoted to election materials.

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Additionally, the City Attorney's Office, Independent Budget Analyst, or other City departments may provide additional public reports about issues related to initiatives as they come before the City Council for discussion.

RECOMMENDATION

Recommendation 18-20: *Consider a standard practice of commissioning a report through city agencies to detail the possible impact of an initiative on the city.*

Response: The recommendation will not be implemented because it is not warranted.

Legal Background: The City of San Diego is a Charter city with its own election code.

The California Constitution grants charter cities complete authority over their municipal affairs. Cal. Const. art. XI, §§ 5, 11(a). The California Constitution states that this includes authority to provide for the "conduct of city elections." *Id.,* § 5(b).

The San Diego Charter governs City elections and requires the City to adopt an election code ordinance, "providing an adequate and complete procedure to govern municipal elections." San Diego Charter § 8. The Charter states, "All elections provided for by this charter, whether for choice of officers or submission of questions to the voters, shall be conducted in the manner prescribed by said election code ordinance." *Id.*

San Diego Charter § 23 requires the Council to include in the election code ordinance an "expeditious and complete procedure for the exercise by the people of initiative." The City thus adopted Municipal Code sections 27.1001 through 27.1051 to set forth the City's initiative procedures. The initiative sections in the California Elections Code do not apply to the City of San Diego.

Additionally, San Diego Municipal Code (SDMC) § 27.0101 states that the purpose and intent of the City's election code is: ". . . to provide an expeditious and complete procedure for the people's right to exercise the vote. If there is any ambiguity or contradiction between the provisions of general law and the provisions of this article, the provisions of this article shall govern. The divisions relating to initiative, referendum and recall (including the initiative provisions relating to Charter amendments) are exclusive as required by the Charter."

San Diego's election laws regarding initiative, as stated in its Charter and Municipal Code, exclusively constitute its governing law. The City's Elections Ordinance states, however, that if there is no controlling provision in San Diego's election laws, state elections law may be relied upon for guidance. SDMC §

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27.0106(d) ("All elections shall be conducted under the Charter and this article. The City Clerk and City Council may rely on state elections law for guidance if there is no controlling provision in this article.").

Response to Recommendation

The City notes that the provision of the California Elections Code addressed in this Grand Jury Report (§ 9212) does not apply to Charter cities such as San Diego. For that reason, the City has no experience with this process and cannot independently assess whether it has resulted in a "model" of "unbiased" information being provided to the public. Additionally, as alluded to in the response to Finding 02, the timing of preparing a § 9212 analysis may not synchronize with the City's elections laws and processes.

The City of San Diego already provides "reliable, verifiable, and objective information" in the public hearings and ordinances placing individual measures on the ballot, and in the Ballot Title and Summary, the Impartial Analysis, and the Fiscal Impact Analysis its attorneys, Auditor, Independent Budget Analyst and mayoral staff prepare for every City ballot measure. This information (other than the ordinance recitals) is provided to voters in the ballot pamphlet sent to every City voter.

All of this information is available to all voters on the City's website (along with arguments submitted in favor of or against a measure). These materials are well-disseminated and freely available to all voters. There is nothing in the Report that suggests why the materials produced under the current process are insufficient. To the extent that voters do not review the materials provided, an additional analysis, as suggested by the Grand Jury, may not address that issue.

To the extent that the "fact" portions of the Report disregard or do not mention the work that the City does to educate voters about every municipal ballot measure, the City disagrees with statements in the Report. For example, the Report does not cite the SDMC sections and the provision for an Impartial Analysis of every ballot measure, which the City Attorney prepares. Although certain ballot materials are labeled "analyses," they are based on facts and presented neutrally, without advocacy, to voters, in compliance with legal standards.

The City Attorney's Office, Independent Budget Analyst, or other City departments may also prepare additional public reports about issues related to initiatives as they come before the City Council for discussion.

The Report reviews some sections of the SDMC, but does not consider California

case law that governs the content of ballot materials and sets legal standards the City must follow when preparing such materials for voters. The SDMC also sets out standards that are not captured in the Report. (For example, see SDMC § 27.0404, noting that a voter can bring a writ of mandate to seek judicial remedies for materials that are false or misleading; thus, this requires impartial ballot materials).

Lastly, requiring an additional analysis does not take into account the required staff time and resources and the timing of submission to the City Clerk of a given ballot measure. Measures may be qualified without sufficient time for the City to conduct separate studies, and such analysis may be superfluous to what is provided to all voters in the ballot pamphlet.

IMPROVING THE SAN DIEGO CITIZENS' INITIATIVE PROCESS

Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education.

Franklin Delano Roosevelt

SUMMARY

The 2017/2018 San Diego Grand Jury (Grand Jury) undertook an analysis of the San Diego citizens' initiative process. The process allows California voters to bypass legislative bodies and enact laws directly. The Grand Jury's investigation revealed that, depending upon the complexity of the subject; voters have a low level of awareness of the issues presented by initiatives. As a consequence, many voters do not vote on initiatives or vote based on inadequate information.

Following an investigation of the initiative process, the policies and practices of governmental entities concerning initiatives, and the sources of information available to the voters about issues raised by initiatives, the Grand Jury recommends that the San Diego Mayor, City Council, and City Attorney consider investigating and determining ways of better informing the voting public on issues raised by the citizens' initiative process.

INTRODUCTION

This year marks the 107th year since the creation of the California citizens' initiative process, a system designed to allow voters to enact new laws, repeal current laws, and make changes to the State Constitution. Adopted in 1911 as a constitutional amendment, the state's initiative process gives the voters a power equal to that of the state legislature. This form of direct democracy was a response to the actions of moneyed interests, such as the railroad barons, who controlled the state government.

Comparable to the statewide initiative process, the California Legislature also created an *"indirect initiative process"* for city, county and district governments. Under state law these local initiatives will not be submitted to the voters unless the measure has (1) qualified through the signing of a petition by a certain percentage of the registered voters, and (2) been presented to the local legislative body but not acted upon by that body. Only then can the local initiative go to the voters for approval.

Over the years the initiative process at the state and local level has increased dramatically. Of particular note is the use of the local initiative to make complex land-use decisions. Although there are numerous pros and cons regarding the use of local initiatives to set land-use policy, the most striking criticism is the lack of independent, verifiable information and analysis of initiatives.

PROCEDURE

The Grand Jury reviewed:

- the San Diego City Charter
- the San Diego Municipal Code

- legal treatises and opinions regarding California Charter Cities

The Grand Jury interviewed individuals with knowledge of the initiative process.

DISCUSSION

Background

There are no provisions in the San Diego City Charter or the San Diego Municipal Code that require the city to analyze the potential economic and societal impacts of an initiative. Likewise there is nothing in the Charter or the Municipal Code prohibiting such an extensive and informative report. As a Charter City, San Diego may regulate its own initiative processes.

The San Diego City Charter and the San Diego Municipal Code govern the placement of measures on city ballots. Under these provisions, when a certified citizens' initiative is presented to the City of San Diego, the city has two options: (1) adopt the initiative/ordinance without alteration; or (2) order an election to submit the initiative/ordinance to the voters without alteration.

Voters often receive inadequate information about initiatives and as a result have low levels of awareness and knowledge about them. One critical problem with initiatives today is that they are difficult for the average voter, or even the more knowledgeable voter, to understand the issues and policy choices as they are presented on the ballot and in the voter pamphlet. The lack of available, well-disseminated, and accurate information has been said to be a generic problem of direct democracy, particularly of initiatives.

In 2009, the California Supreme Court ruled that public agencies may generally publish a fair representation of facts relevant to an election matter. The Court went on to state that the information must provide an accurate, fair, and impartial presentation of relevant facts in order to aid voters in reaching an informed judgment regarding the ballot measure. In support of its findings, the Court stated that Government Code §54964, which prohibits public funds from being used for or against an initiative, does not prohibit a public agency from using public funds to provide educational information to the public about a ballot measure.

How should local governments implement reforms in order to provide fair and unbiased information to voters about issues raised by initiatives? The Grand Jury recommends that San Diego alter how it handles initiatives by providing voters a more complete analysis of initiatives beyond the fiscal impact an initiative may have on the city and its citizens.

The Type of Information To Be Provided

California Election Code, §§9200 – 9226, provides a very usable example of how local governments can analyze citizens' initiatives. Section 9212 provides a model of what a city can do when providing an impartial analysis of an initiative and how it will affect a city. Specifically, section 9212(a) states that a legislative body (city, county government, district, etc.) may refer a proposed initiative to any city agency or agencies for a report on any or all of the following:

1. Its fiscal impact
2. Its effect on the internal consistency of the city's general and specific plan

3. Its effect on the use of land, the impact on the availability and location of housing
4. Its impact on funding for infrastructure of all types
5. Its impact on the community's ability to attract and retain business and employment
6. Its impact on the uses of vacant land
7. Its impact on agricultural land, open space, traffic congestion, existing business districts, and developed areas designated for revitalization
8. Any other matters the legislative body requests to be in the report

San Diego Municipal Code §27.0501, et. seq. outlines how ballot measures are to be prepared for voter review and what information may be included on the ballot. Section 27.0504 explains how a ballot measure is to be titled and how a ballot statement is to be prepared. However, the content of a ballot statement is not specified, except that it is limited to 500 words.

A review of several years of San Diego citizens' initiative ballot statements prepared by the City Attorney found that such statements discussed only the fiscal impact of the initiative.

Besides the fiscal impact a ballot measure may have on a city and its residents, a review of initiatives submitted to voters indicates that such measures also impact a city's general and specific planning processes, including zoning, housing, transportation infrastructure, and traffic congestion. Also impacted is the ability of the city to attract and maintain business and employment in current business districts and areas designated for revitalization. Such issues not only have a fiscal impact on a city but also significant effects on the quality of life of its residents.

Means of Providing Information to the Voters
The City of San Diego has departments and employees who routinely provide analysis and evaluation of issues confronting the city, including the City Attorney, City Auditor, and an Independent Budget Analyst. Each of these offices is charged to provide the city and the public with unbiased and impartial analysis of issues facing the city. With such resources available as well as the model of section 9212, the voting public can be provided valuable information on any issue raised by an initiative.

In 2014, the California State Legislature revised the State Election Code to better inform the voting public on initiatives set for a statewide vote. The Ballot Initiative Transparency Act of 2014 ("BITA"), had the express intent of:

- providing voters with more useful information so they are able to make informed decisions about an initiative measure
- providing a voter-friendly explanation of each initiative measure
- identifying and correcting flaws in an initiative measure before it appears on the ballot.

BITA requires the Secretary of State to give access to information about the initiative measure on an internet site. Such a website must include a plain language summary of the initiative measure, including who supports or opposes the measure, how, and who is financing the initiative measure.

The Grand Jury believes the Ballot Initiative Transparency Act of 2014 provides an excellent model on how local municipalities and districts can reform their election codes to better inform the voting public. The establishment of a comment period at the local level could be done through a series of public hearings where the public and its elected officials explore the issues raised by the initiative, thus providing a forum for comment and deliberation not available under the current initiative process.

If city leaders pursue such an information process, then direct democracy will not only flourish but, most importantly, become a positive, constructive contributor to the city government process.

FACTS AND FINDINGS

Fact: Voters often lack available, well-disseminated, and accurate information on ballot initiatives.

Finding 01: The democratic process will work well when the voters receive reliable, verifiable, and objective information.

Finding 02: The California Election Code §9212 and the Ballot Initiative Transparency Act of 2014 provide an example for municipalities in evaluating the potential impacts of ballot initiatives.

Finding 03: The new California Election Code provides a model of how an extended period of review and analysis can provide unbiased and educational information to the voting public.

Fact: Government Code §54964 does not prohibit a local government from providing unbiased information in order to educate the voters on a ballot measure.

Finding 04: The City of San Diego may use public funds to educate the voters in an unbiased and informative way on issues raised by initiatives.

RECOMMENDATION

The 2017/2018 San Diego County Grand Jury recommends the City of San Diego Mayor, the San Diego City Council and the San Diego City Attorney:

18-20: Consider a standard practice of commissioning a report through city agencies to detail the possible impact of an initiative on the city.

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official

(e.g. District Attorney, Sheriff, etc.), such comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

(a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
    (1) The respondent agrees with the finding
    (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

(b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
    (1) The recommendation has been implemented, with a summary regarding the implemented action.
    (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
    (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
    (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

(c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

Responding Agency	Recommendations	Date
Mayor, City of San Diego	**18-20**	**8/22/18**
San Diego City Council	**18-20**	**8/22/18**
San Diego City Attorney	**18-20**	**8/22/18**