

## **Termination of Recount for Measure OO (Increase in Hotel Guest Tax)**

Below is an excerpt from the City Council minutes of December 20, 2016. Staff provided an explanation during the below agenda item relative to the circumstances that resulted in the termination of the recount for Measure OO (Increase in Hotel Guest Tax).

### **B. Alleged Violation of City Code of Ethics Policy 1202-1**

Report from the City Clerk concerning an alleged violation of City Code of Ethics Policy 1202-1.

City Clerk Baade reported that she received a written complaint on December 15, 2016 that alleged that the City Manager violated City Code of Ethics Policy 1202-1; noted that the complaint is attached to the Administrative Report for this item; explained that the City Manager indicated prior to the complaint being received that he would be unable to attend this meeting, but stated that she is prepared to answer questions in his absence since she was involved in the issue.

Jim Bieber, San Clemente, narrated a PowerPoint presentation that is on file with the City Clerk; alleged that a letter was sent by the City Manager, on City letterhead, to the Registrar of Voters that requested a recount of the votes cast in the November 8, 2016 election relating to Measure OO (Increase in Hotel Guest Tax); stated that three Councilmembers, at the Council meeting of December 6, 2016, voted to request a recount at taxpayer expense and opined that such action is illegal; conveyed his opinion that Council allocated public funds to advocate for Measure OO; stated that the Orange County Board of Supervisors has asked the Registrar of Voters to itemize the costs that were incurred with regard to preliminary recount actions and stated that Councilmembers who voted in support of the recount should reimburse the taxpayers.

Brad Malamud, San Clemente, urged that Council determine the facts relating to the subject issue and, if it is found that inappropriate actions were taken, that steps be taken to ensure that they do not recur in the future; opined that ethics complaints are not productive and stated that City representatives try to act in the community's best interests.

During the ensuing discussion, Staff (consisting of the Assistant City Manager, City Attorney and City Clerk), reviewed the history of the recount issue as follows:

On December 6, 2016, the City of San Clemente received the certified election results for the November 8, 2016 General Municipal Election from the Orange County Registrar of Voters. Measure OO

(Increase in Hotel Guest Tax), that appeared on the November 8, 2016 General Municipal Election ballot, received 15,035 votes in favor of the measure, and 15,043 votes in opposition to the measure (a difference of 8 votes). Because of the closeness of the vote, Council added Measure OO to the agenda for its December 6, 2016 meeting to enable it to consider whether or not to pursue a recount. The California Brown Act allows items to be added to an agenda by a 4/5s vote when 1) there is a need to take immediate action and the need for action came to the City's attention after the agenda was posted, and 2) action cannot be deferred to the next meeting. Measure OO qualified for addition to the published agenda because of the strict time constraints associated with submitting a recount request. Specifically, the California Elections Code requires that recount requests be submitted within five days of the completion of the certified election results. The election results were completed and certified on December 6, 2016; hence, the deadline to submit the paperwork necessary to pursue a recount was Sunday, December 11, 2016.

Council ultimately voted at its December 6, 2016 meeting, by a majority vote, to pursue a recount. Subsequent to this action, however, the Registrar of Voters informed the City that Elections Code Section 15620(a) requires that a recount request be submitted by a voter with a stated position (affirmative or negative) in the matter, as opposed to being submitted by the City as a non-partisan entity. Because the City lacked the legal standing to request a recount, the City's recount request could not be implemented.

At this point, Staff considered whether alternative options would be available to enable it to follow through with Council's direction for a recount. One possibility that was considered was that of the City Manager submitting the recount request in his capacity as a registered voter of the City. While the Registrar of Voters was willing to accept a recount request by the City Manager as a registered voter, additional complications came to light, including the issue of financial responsibility for the recount since the registered voter who requests a recount is the person financially responsible for the cost of the recount. Because of the compounding factors that arose with regard to this option, City Manager Makshanoff determined to not request the recount in his personal capacity as a registered voter.

In summary, the City lacked the legal standing to request a recount, and because no other appropriate alternative existed, the recount effort could not move forward.

With regard to the ethics complaint under consideration, City Clerk Baade pointed out that the letter from the City Manager to the Registrar of Voters that was displayed by Mr. Bieber was a draft that was submitted for preliminary content approval; noted that it was standard procedure for her to send a draft letter to the Registrar of Voters to ensure that it would be accepted by the County, if issued; noted the importance of ensuring that the letter met all legal and procedural requirements, because the failure of the City to submit an acceptable request letter to the Registrar of Voters by the statutory deadline of Sunday, December 11, 2016 at 5:00 p.m. would have negated the City's opportunity to seek a recount; stated that the complainant's letter incorrectly stated that the draft letter triggered the Registrar of Voters to start work on the recount; reported that the Registrar of Voters commenced preliminary work on the recount on December 7, 2016 (the day immediately following Council's action to pursue the recount), but the draft letter was not sent to the Registrar for content approval until December 8, 2016.

Mayor Pro Tem Brown voiced concern that the City has received four ethics complaints in the last six months, noting that all of the letters seem to have originated from the same person; read an email, dated December 20, 2016 (which is on file with the City Clerk), that was sent to the Deputy City Clerk earlier today along with a PowerPoint that the sender requested be displayed during the public comments portion of this agenda item; voiced concern that the email is abusive and unwelcome.

**MOTION BY COUNCILMEMBER HAMM, SECOND BY MAYOR PRO TEM BROWN, CARRIED 4-0 (COUNCILMEMBER DONCHAK ABSENT), to direct the City Clerk to dismiss the complaint and notify the complainant and the person named in the complaint of that action.**

Mayor Pro Tem Brown requested that Staff prepare detailed minutes of this agenda item and that the explanation for not pursuing the recount be posted to the City's website.

[Link to Full Minutes to Regular City Council Meeting – December 20, 2016](#)