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MEMORANDUM

TO: John Arntz, Director Elections
 FROM: Joshua S. White
 Deputy City Attorney
 DATE: March 18, 2014
 RE: Ballot arguments regarding Proposition B for the June 3, 2014 Election

SUMMARY

In this memorandum, at your request we confirm advice we have given you about ballot arguments for Proposition B, the waterfront height limits initiative measure on the ballot at the June 3, 2014 election. Jon Golinger, the campaign manager for the "Yes on B" campaign submitted 25 out of the 26 arguments in opposition to Proposition B, one of which the Department of Elections (the Department) selected as the official "No on B" argument for publication in the Voter Information Pamphlet (VIP). Today, Mr. Golinger requested to withdraw the selected argument as well as the other 24 he submitted.

You have asked for guidance about whether you may accept Mr. Golinger's withdrawal of these ballot arguments, whether you may select Vince Courtney's argument, the sole remaining official opposition argument, as the official opponent argument, and whether you may extend certain deadlines in the Municipal Elections Code to allow sufficient time for submission of rebuttal arguments and paid arguments.

Under the facts and circumstances here, the Charter provides the Director of Elections with the authority to take all of those actions. Specifically, you have the authority to do the following:

- Accept Mr. Golinger's withdrawal of all 25 ballot arguments he submitted in opposition to Proposition B, including the argument that the Department of Elections selected as the official "No on B" argument.
- Designate Vince Courtney's argument as the official opponent argument. This was the only other argument submitted by the deadline.
- Establish the following deadlines for ballot arguments regarding Proposition B:
 - Thursday, March 20, 2014 at 12:00 p.m. for submission of rebuttal arguments regarding Proposition B.
 - Friday, March 21, 2014 at 12:00 p.m. for submission of new paid arguments regarding Proposition B and for withdrawal of already submitted paid ballot arguments regarding Proposition B.

The public review period for all ballot arguments regarding Proposition B would conclude on March 28, 2014 at 12:00 p.m.

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For the reasons we describe below, and under these extraordinary circumstances, you have the authority to take these actions and preserve the integrity of the VIP. Allowing Mr. Golinger's argument to remain as the official "No on B" argument could allow for gaming the system and deception in future elections.

BACKGROUND

A consolidated special election is scheduled for June 3, 2014. One of the measures, Proposition B, would require voter approval for height limit increases on Port property.

The Department publishes a VIP and mails to all registered San Francisco voters 29 days before each election. The VIP includes information about the candidates, an objective digest for each member prepared by the Ballot Simplification Committee, and ballot arguments.

For each ballot measure, the VIP includes up to four types of ballot arguments: paid, proponent, opponent, and rebuttal. Any registered voter may submit a paid ballot argument for or against a measure. Additionally, for each measure the Department selects one proponent's argument and one opponent's argument. The selection of proponent and opponent arguments follows rules of priority established by local law. Under San Francisco Municipal Elections Code Section 545, if the Department does not receive an opponent argument from the Board of Supervisors or the Mayor but does receive more than one such argument from registered San Francisco voters, then the Department selects the "official opponent" argument by lottery. And under San Francisco Municipal Elections Code Section 550, the authors of proponent and opponent arguments have the opportunity to submit rebuttal arguments. Proponent, opponent and rebuttal arguments are printed free of charge.

Here, the Department received an official proponent argument from the proponent of the initiative petition that placed Proposition B on the ballot. As required under Municipal Elections Code Section 545, that argument will be published in the VIP as the Proponent's Argument.

The Department received no arguments opposing Proposition B from the Mayor or the Board of Supervisors. The Department did receive 26 proposed opponent arguments from registered voters. 25 of those proposed arguments were submitted by Jon Golinger, who is a leader of the "Yes on B" campaign and who the press has described as the campaign manager. Each of those arguments stated, "Who really doesn't like B? Greedy real estate interests. Don't B fooled by them." Vince Courtney submitted the only other argument against Proposition B.

On March 13, 2014, the Department's staff conducted the lottery and selected one of Mr. Golinger's arguments as the official "No on B" argument. Five days later, on March 18, 2014, Mr. Golinger notified the Department by mail and by phone that he wished to withdraw all of the ballot arguments he submitted, including the one that the Department had selected as the official "No on B" argument.

Printing the VIP requires the Department to work with an outside typesetter and printer. You have informed us that to meet production deadlines and to be sure that the VIP is mailed by the legal deadline, the Department must provide the typesetter with the final text of the ballot arguments no later than 5:00 p.m. on April 2, 2014.

ANALYSIS

The San Francisco Charter creates the Department "to conduct all public federal, state, district and municipal elections in the City and County." S.F. Charter § 13.104. The Charter further provides that,

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The department shall be administered by the Director of Elections, who shall be vested with the day-to-day conduct and management of the Department and of voter registration and matters pertaining to elections in the City and County.

For purposes of this section, the conduct of elections shall include, but not be limited to: voter registration; the nomination and filing process for candidates to City and County offices; the preparation and distribution of voter information materials; ballots, precinct operations and vote count; the prevention of fraud in such elections; and the recount of ballots in cases of challenge or fraud.

The Municipal Elections Code sets forth the procedures for the submission and publication of ballot arguments. S.F. Municipal Elections Code §§ 525, *et seq.* Neither the Municipal Elections Code nor the California Elections Code includes a procedure for withdrawing ballot arguments. But, a manifest injustice would result if, as here, Mr. Golinger were precluded from withdrawing his ballot arguments. As noted above, Mr. Golinger is the campaign manager for “Yes on B.” Allowing the campaign manager for “Yes on B” to masquerade as the official opponent of “No on B” would run afoul of California Elections Code Section 9295, which prohibits including “false [or] misleading” arguments in the ballot pamphlet.

A similar situation occurred in 1997 in connection with Propositions D and F – a revenue bond measure and a land use ordinance for a new 49ers stadium and entertainment/retail development project. An opponent of the measures submitted a paid, satirical ballot argument purporting to support the measures. The City Attorney’s Office, on behalf of then-Director of Elections Germaine Wong, filed a petition for writ of mandate under Section 9295, arguing that, “The argument lampoons the use of public money to build the new stadium,” and “no reasonable party . . . who is familiar with Proposition D could conclude that the argument is for rather than against the measure.” In the petition we also argued that running such an argument in the support section is “inconsistent with the purpose” of the ballot pamphlet, and allowing the argument to remain “will lead to further abuses.” The Superior Court agreed with the City, and ordered that the argument be moved to the portion of the VIP devoted to arguments against the measures. *Wong v. Board of Supervisors*, S.F. Superior Court Case No. CGC-97-985-747.

Mr. Golinger’s argument is more deceptive than the one at issue in *Wong*, where the author of the ballot argument was not formally connected to the campaign of the measures that he opposed. By contrast, Golinger is intimately connected to the “Yes on B” campaign – he is the campaign manager. It is even more misleading to permit the campaign manager for a measure to submit bogus arguments purporting to oppose that measure, particularly for the official “No on B” argument. Also, allowing Mr. Golinger’s argument to remain in the VIP would deprive an actual opponent of Proposition B – here, Mr. Courtney – of the opportunity to have an official argument in the VIP and to provide voters with legitimate arguments on both sides of the measure.

For these reasons, under the Charter, you have the authority as the Director of Elections to preserve the integrity of the electoral process and permit Mr. Golinger to withdraw his bogus ballot arguments. You also have the authority, as a necessary consequence of the withdrawal of Mr. Golinger’s arguments, to do the following:

- Designate Vince Courtney’s argument as the official opponent’s argument for Proposition B. This was the only other argument submitted by the deadline.

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We trust that this memorandum addresses your questions.