

**January 29, 2008**

SUBJECT: Discussion of City Attorney Memorandum of November 27, 2007, Regarding Board and Commission Policy Limiting Speech on Official City Positions and First Amendment Analysis

REPORT IN BRIEF

On September 11, 2007, the City Council held a Study Session to discuss the City's policies for board and commission members related to providing official board and commission positions to the Council and guidelines for individual board and commission member communications to the Council. The City Attorney provided a summary overview of general First Amendment law as it relates to public employees but because of very short notice of the study session could not complete additional research specifically related to board and commission members. The Council requested the City Attorney to continue research after the September 11 Study Session into First Amendment and legal issues related to board and commission members addressing the Council in both official and unofficial capacities, and to provide a memorandum to the Council.

On November 27, 2007, the City Attorney provided the Council, Councilmember-elect, City Manager and City board and commission members with a memo titled: Board and Commission Policy Limiting Speech on Official City Positions and First Amendment Analysis. The Council requested that the memo be placed on the regular Council agenda to allow for public comment and Council discussion.

The legal conclusion is that the City's current policy requiring board and commission members to support the official City position and to refrain from addressing the Council except in an official capacity is not in violation of the *Pickering* First Amendment balancing test established by the US Supreme Court. That said, while not legally required to modify the current policy the Council has the option of modifying the policy to remove the limitation on board or commission members from addressing the Council other than in an official capacity on matters that have come before them.

BACKGROUND

The legal background for this Report is in the attached November 27, 2007 Memorandum: Board and Commission Policy Limiting Speech on Official City Positions and First Amendment Analysis.

Additional factual background is as follows:

March 20, 2007: Council conducts a study session, during which existing Council policy is reviewed, as are proposed “clarifications” and “revisions”. Issues surrounding “free speech” and representation of official board and commission positions are specifically addressed that evening, and Council is advised that some board and commission members believe these to be more than a simple clarification of existing policy.

May 1, 2007: RTC 07-148 brings this same information to a public hearing, with specific information regarding representation of official board and commission positions and “free speech” drawn to Council’s attention. Council adopts new language stipulating that “outside of official board or commission meetings, individual board and commission members are not authorized to represent the City or their board or commission unless specifically designated by the Council or the board or commission to do so for a particular purpose...Members shall represent the official policies or positions of the City to the best of their ability when designated as delegates for this purpose. When presenting their individual opinions and positions, members shall explicitly state they do not represent their body or the City of Sunnyvale, nor will they allow the inference that they do...Although a board or commission may disagree with the final decision the Council makes, the board or commission shall not act in any manner contrary to the established policy adopted by the Council.”

July 26, 2007: The City Manager advises Council that training of board and commission members has commenced and that part of that training includes advising members they should not appear before the council to advocate a position contrary to official positions taken by the advisory body to which they belong, as well as staff’s interpretation of Council policy limiting the person who appears before the Council to the chair or his/her designee. In that same communication, staff indicates it is receiving some push back from board and commission members, acknowledges the fact that the language in Council’s policy could be interpreted differently, and that staff intends to clarify that language in accordance with staff’s interpretation. The City Manager asks Council to contact her if it has any concerns.

August 20, 2007: Then-Mayor Lee sends a letter copied to all board and commission members making it clear that only the chair or their designee is allowed to communicate with Council (to which at least one board member responds, indicating that policy is very clear).

August 30, 2007: The City Manager reminds Council of her July 26 message (to which she received no response asking her to hold off on training) and of Mayor Lee’s interest in a September 11 study session to allow further discussion. The City Manager advises Council that in the meantime staff is

clarifying Council policy on these issues (copies of those clarifications included with the City Manager's message).

A review of the clarified board and commission policy was subsequently placed on all board and commission agendas for review.

September 11, 2007: Council conducts a study session (board and commission members invited). Council policy is reviewed once more, particularly those aspects requiring board/commission members to support official policies of their body and of Council, and limiting the appearance before the Council to the chair. No changes were directed, save to direct the City Attorney to determine whether the Council had the legal right to limit the speech of board/commission members, and to restrict their appearance before Council to share their individual opinions on official board and commission positions (i.e., this is what prompted this report from the Office of the City Attorney). Due to continued assertions at this meeting by a commission member that the Council's policy remains unclear as to who can and cannot represent the board/commission at a Council meeting, staff further clarifies in Council policy that this is limited to the chair and/or his/her designee.

EXISTING POLICY

Council Policy 7.2.19 Boards and Commissions
[Complete text of policy included as attachment to November 27, 2007 Memorandum.]

DISCUSSION

The legal discussion and analysis for this Report is in the attached November 27, 2007 Memorandum: Board and Commission Policy Limiting Speech on Official City Positions and First Amendment Analysis.

Further discussion is offered below by the Office of the City Manager:

Board and commission members are free to speak their minds, in fact are encouraged to share their opinions on subject matter which is on their agenda and comes before their particular body. But the time to do that is the night that item is on the agenda, and after the board or commission has conducted a public hearing on the item. The City does not prohibit, but it does discourage, board and commission members from lobbying or expressing any opinion or individual point of view to Council or anyone else prior to the completion of the public hearing. This is because board/commission members are charged with maintaining an unbiased perspective prior to the public hearing and prior to listening to all sides of a particular issue. To express an opinion prior to hearing all sides of an issue can cast doubt on a board or commission

member's ability to maintain a fair and impartial review of the matter before the body.

Following a board or commission public hearing and following the expression of individual opinions of all board/commission members, an official action is taken by the body. Once that vote is taken, and the full body of the board or commission has adopted an official position on a matter, then that is the position the City expects each individual board or commission member to support. As far as the City is concerned, there is only one official position of the board or commission, and if you are a member of that board or commission, you are expected to support it, regardless of whether you, as an individual, agree or disagree with it. This is no different than the City Council's expectation of its own members.

The fact that the City authorizes only the chair of each board or commission to present that official position to the Council is not a violation of any individual's rights. Rather, it is one means of ensuring Council meetings are run efficiently, and that as much time as possible is allowed for members of the general public to speak. The chair of the board or commission is not precluded from sharing the minority viewpoint of its members with the Council, but there is a clear distinction between the factual reporting of a minority opinion by the chair, and an attempt to lobby the Council by a member holding that minority opinion. It has been particularly troublesome when members of minority board/commission viewpoints have attempted to persuade the Council that the official position of their board/commission is in error when there has been no one present to represent the majority opinion.

One concern of board/commission members has been their ability to bring new information (raised subsequent to the official action of the board or commission) to the Council's attention. Under these circumstances, however, staff believes the appropriate action would be for the Council to refer the matter back to the board or commission.

Some have asserted that these limitations will severely impact the ability of the City to recruit new board and commission members, yet experience has shown otherwise. During the latest round of board and commission interviews (for which there was no lack of interest), Council asked each applicant to comment on these limitations. All applicants indicated that the policies seemed reasonable and were willing to comply with the policies if appointed.

Lastly, it is important to note that there has never been any attempt to limit the ability of board or commission members wishing to speak on issues which do not pertain to their particular board or commission. The City does require that they identify the fact that they are a board/commission member, and that they are speaking as an individual rather than a representative of their board or commission, but then they are like any other member of the public, free to

say whatever they would like. This agenda item is, in fact, a great example of that. There is no board or commission charged with advising the Council on the framework of the board or commission program, or how it should be run. However, all board and commission members have been advised that this issue is being considered by Council, and all have been advised that they are free to attend this public hearing to provide whatever insights or opinions they might have to Council.

FISCAL IMPACT

There is no fiscal impact resulting from maintaining or modifying the current Board and Commission policy on individual board and commission member communications to the Council.

CONCLUSION

The conclusion of the legal analysis is on page 5 of the November 27, 2007 Memorandum, subsection 4: *Pickering* Balancing Test Applied to Sunnyvale Board and Commission Policy.

In short, Sunnyvale's policy permits board or commission members to advance and discuss any viewpoint from the dais on an issue coming before the board or commission of which they are a member. After full debate and a majority vote adopting the official position/recommendation of the board or commission on an issue, individual members are not permitted to advocate for or address the Council on either the majority or minority views on that issue. The official spokesperson is the chair or his/her designee. Of course, board and commission members retain the First Amendment right to speak to the Council on any issues not related to a matter that has come before or will come before the board or commission they serve on.

Applying the U.S. Supreme Court's First Amendment balancing test, the City can, based on public efficiency and avoiding confusion, legally prohibit board and commission members from addressing the Council on matters that have come before the board or commission on which they sit and where an official position or recommendation has been reached.

PUBLIC CONTACT

Public contact was made through posting of the Council agenda on the City's official notice bulletin board, posting of the agenda and report on the City's web page, and the availability of the report in the library and the City Clerk's Office.

ALTERNATIVES

1. Maintain existing policy as detailed in Attachment 2.

2. Modify the City's current policy and allow comments by any board and commission member (not just the chair) to the Council either in a public meeting or private communication and to advocate for or against an official position of the board or commission.

RECOMMENDATION

If the legal research and analysis had resulted in the conclusion that the City's current board and commission policy is in violation of First Amendment free speech protections, then the recommendation from the City Attorney would be to modify the policy to comply with First Amendment standards. Based on the Memorandum's conclusion that the City's current policy is consistent with First Amendment standards and case law, there is not a recommendation based on the legal analysis to modify the current policy.

The Council could, however, decide, based on public policy reasons, that although not legally mandated to modify the board and commission policy it nonetheless desires to do so. The policy basis for limiting board and commission comments is efficiency of public service and the avoidance of undue delay, and this is consistent with the First Amendment. The City Manager and Assistant City Manager reviewed the November 27, 2007 Memorandum and legal analysis. Both the City Manager and Assistant City Manager concluded that based on City interests in efficiency of public services and avoiding undue confusion the current City policy should be continued without modification.

If the Council determines that the City's interest in unrestricted public comment overrides the City's interest in efficiency of public services and avoiding undue confusion, it has the option of directing that the policy be modified.

In sum, the current City policy is consistent with First Amendment standards and case law and accordingly the recommendation from the City Attorney is Alternative 1. Concerns about significant new information arising after the board or commission decision and that could not reasonably have been presented earlier should be addressed by remanding the matter to the board or commission for reconsideration based on the significant new information. The recommendation from the City Manager is Alternative 1 based on public efficiency and avoidance of confusion policy considerations.

No motion is necessary for Alternative 1 to continue current City board and commission policy.

A motion is required if the Council selects Alternative 2.

Prepared by:

David E. Kahn, City Attorney

Robert Walker, Assistant City Manager

Reviewed by:

Amy Chan, City Manager

Attachments

1. Memorandum, Board and Commission Policy Limiting Speech on Official City Positions and First Amendment Analysis, November 27, 2007; including current Council Policy governing boards and commissions.
2. Agenda of March 20, 2007 Study Session.
3. Agenda and attachments of September 11, 2007 Study Session.



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MEMORANDUM

TO: Mayor Otto Lee
Vice-Mayor Tony Spitaleri
Councilmember John Howe
Councilmember Ron Swegles
Councilmember Dean Chu
Councilmember Melinda Hamilton
Councilmember Chris Moylan

COPY TO: Councilmember-Elect Dave Whittum
City Manager Amy Chan
Assistant City Manager Robert Walker
Sunnyvale Boards and Commissions

FROM: David Kahn, City Attorney *DEK*

DATE: November 27, 2007

RE: **Board and Commission Policy Limiting Speech on Official City Positions and First Amendment Analysis**

QUESTION

The City has written policies covering City board and commission members.¹ City policy is that only the Chairperson of a board or commission should present the official position on a matter that has been the subject of board or commission action to the City Council. Furthermore, City policy provides that individual members of a board or commission should not appear before the Council (even if the commissioner states that his or her appearance is as a private citizen) to present a minority viewpoint on an issue that was voted on and a position taken by a majority of the board or commission of which they are a member.

In the July 26, 2007, Weekly City Manager's Report, the City Manager reported on the policy that a board or commission member should support the official board or commission action on a matter rather than express a divergent personal viewpoint (Attachment 1). The City

¹ Code of Ethics for Elected and Appointed Officials, Code of Conduct for Elected Officials, Council Policy 7.2.19, Boards and Commissions



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Manager reported that staff intended to provide training to board and commission members on the policy that individual members should not appear before the Council to advocate a position that differs from the official position of the board or commission on which they serve and that concerns were raised by board and commission members about their free speech rights to appear before the Council as a private citizen on any matter.

The August 30, 2007, Weekly City Manager's Report, stated that the Council had not responded to the July 26 Weekly Report expressing any concerns that staff had misinterpreted Council policy limiting individual member contact on issues that he or she had considered as a board or commission member. Mayor Lee, however, requested a study session on September 11 to discuss board and commission policies related to protocols for conveying board and commission positions to the Council and protocols on individual members speaking to the Council.

The City Attorney provided a summary overview of First Amendment law as it applies to public employees. Due to the extremely short notice provided for the study session, there was inadequate time prior to the study session to research how First Amendment law for public employees applies to appointed board and commission members. There was also discussion of due process requirements when the board or commission sits as a quasi-judicial ("judge-like") body and rules on land use applications.

At the end of the study session on September 11, the Council did not provide direction to modify any of the existing policies for board and commission members. The City Attorney was asked to continue research into First Amendment and other legal issues related to the policy limiting how board and commission members can address the Council on matters that come before the board or commission, and to report back in a confidential memorandum to the Council on the results of that research. The Council would then decide if further study or changes to the policy are required by applicable law or the desire of the Council to modify the current policies, and agendaize (or not) the matter as the Council deems appropriate.

This memorandum provides the follow-up research and analysis on the board and commission policy issues discussed in the September 11, 2007 Study Session.

EXECUTIVE SUMMARY

- **The City's current policy requiring board and commission members to support the official city position and to refrain from addressing the Council except in an official capacity is not in violation of the *Pickering* First Amendment balancing test established by the US Supreme Court.**



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DISCUSSION AND LEGAL ANALYSIS

1. Current City Policy and Board and Commission Concerns

The current City policy is that Council members and Board and Commission members representing the City must support the official City position on an issue, even if they had a minority viewpoint. This policy includes direction to board and commission members that the chair is the official representative of the board or commission before the Council. Other board or commission members, whether in the majority or minority on an issue voted on, are instructed that they should not appear before the Council on a matter that came before their board or commission. This policy applies whether or not a commissioner states that he or she is appearing as a "private citizen" rather than a board or commission member, because of the difficulty in separating the role as a board or commission member from a "private" role on an issue that was before the commission and on which he or she participated in the formal vote and decision. See Council Policy 7.2.19, Boards and Commissions (Attachment 2).

The City Manager's Weekly Report of July 26, 2007, states that the City Manager received comments from various board and commission members who believed that their "free speech" rights as private citizens to address elected officials on matters of public interest were violated by the City policy limiting their speech before the Council to matters they were not involved in their capacity as a board or commission member. At the study session on September 11, 2007, several board and commission members spoke about wanting to be able to address or write to the Council as "private citizens" on matters before their respective boards or commissions, where they were not the chair or official designated spokesperson to the Council. They stated that want to be permitted to either support or oppose the official board and commission positions as determined by majority vote, and to express their personal viewpoint and position when the matter comes before the Council.

2. Pickering v. Board of Education – Public Employee Free Speech

The leading case that established that public employees do not relinquish First Amendment rights to speak on issues of public importance is *Pickering v. Board of Education (1968)*. In *Pickering*, the Board of Education dismissed a teacher for sending a letter to a newspaper that was very critical of the Board's vote on a measure to increase the school tax based on alleged poor use of current tax revenues. The US Supreme Court held that public employees retain the First Amendment right to speak on issues of public importance. That right, however, is not absolute and the Court stated:

At the same time, it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the



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interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The US Supreme Court applied this balancing test to limit a public employee's First Amendment rights in the subsequent case of *Connick v. Myers (1983)*. The circulation of an internal questionnaire by a deputy district attorney disputing personnel actions and policies was held not to be a matter of public interest subject to First Amendment protection.

3. Application of *Pickering* to Board and Commission Members

The California Supreme Court has said that the "right to hold public office, either by election or appointment, is one of the valuable rights of citizenship which the First Amendment protects against infringement."² As a result, "[t]here is a 'federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.'" The government must show a "compelling interest" to justify any impairment of a public official's First Amendment rights.

At the Study Session on September 11 on board and commission First Amendment rights and limits, I stated a preliminary opinion that the standards for public employee free speech would apply to board and commission members, although would possibly not allow for the same consideration of organizational effectiveness and public efficiency as the reported cases involving paid public employees rather than volunteer commissioners. Subsequent research has disclosed that although relatively few reported cases involve First Amendment claims by political appointees such as members of boards and commissions, the courts in such cases have followed the law that has developed in the context of public employment, known as the *Pickering* test.³ The *Pickering* test basically requires the court to balance the employee's First Amendment rights against the employer's interest in promoting the efficiency of public service.

Applying these principles, the Ninth Circuit held that San Francisco Mayor Frank Jordan did not violate the First Amendment when he removed a member of the City's Human Rights Commission for making offensive comments about gays on a local radio program.⁴ Among other things, the commissioner expressed agreement with Biblical passages calling for death of homosexuals. The Court found that the commissioner's statements were incompatible with the purpose of the Human Rights Commission, which was to formulate, implement, and explain the City's anti-discrimination policies. The court determined that, notwithstanding First Amendment protections, the City had a legitimate expectation that its Human Rights Commissioners would not make public statements mocking the City's antidiscrimination policy.

² (*Zeilenga v. Nelson*, 4 Cal.3d 716, 720.)

³ After *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731.

⁴ *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997),



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Similarly, the 11th Circuit Court of Appeals held that the Board of County Commissioners could properly remove an appointed member of the Miami-Dade County Film Advisory Board for failing to represent their interests.⁵ She got into a dispute with the Board after it refused to fund a Latin music event because the organizers had dealings with Cuba. The board member made public comments critical of the Commissioners and accused them of caving into the interests of the Cuban exile community. The Commissioners voted to remove the plaintiff from the Film Board. The Eleventh Circuit upheld their decision, finding that the plaintiff was in a position of trust which required her to be responsive to policy decisions of the authority she served.

Likewise, the Fifth Circuit held that a City Council could remove a councilmember from her seat on a regional planning commission because she failed to support a transportation plan approved by the Council.⁶ The Court held that the councilmember "was appointed to the [planning commission] . . . to assume one of the seats allocated to the city council. Inasmuch as she failed to represent the interests of that body on the issue of which highway access proposal to support, the council was within its discretion to remove her from that position."

The cases discussed above support the premise that appointed officials can be removed from their positions if they disagree with the policies of body they serve. The plaintiffs in these cases were all removed because they made public statements in direct conflict with their appointed roles, even though they were not necessarily speaking as an official representative of their board or commission. In *Lumpkin*, the plaintiff had a fundamental disagreement with the non-discrimination policy he was appointed to promote as a Human Rights Commissioner. In *McKinley*, part of the plaintiff's job was to represent the County Commissioners in dealings with the entertainment industry and the public but instead she criticized the Commissioners for their decision about a Latin music event. Finally, in *Rash-Aldridge*, the plaintiff was acting as the Council's representative on a regional planning board and she had an obligation to advance positions that the majority of Council voted to support.

4. Pickering Balancing Test Applied to Sunnyvale Board and Commission Policy

Sunnyvale's policy permits board or commission members to advance and discuss any viewpoint from the dais on an issue coming before the board or commission of which they are a member, and it does not limit in any way the First Amendment right to advocate for a position on an issue whether for the majority or minority view. On the other hand, after full debate and a valid majority vote with a quorum adopting the official position/recommendation of the board or commission on an issue, individual members are not permitted to advocate for or address the Council on either the majority or minority views on that issue.⁷ Of course, board and commission members retain the First Amendment right to speak to the Council on any issues or matters not directly related to a matter that has come before or will come before the board or

⁵ *McKinley v. Kaplan*, 262 F.3d 1146 (11th Cir. 2001)

⁶ *Rash-Aldridge v. Ramirez*, 96 F.3d 117 (5th Cir. 1996)

⁷ The Chair or his/her designee is the official representative if a report is presented.



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commission they serve on.. Board and commission members should, however, also be cautious about speaking as advocates on matters that may come before them as decision-makers, to avoid the perception that they can not be a fair and impartial quasi-judicial decision maker.

Applying the *Pickering* balancing test, as extended to appointed boards and commissions by the *Lumpkin*, *McKinley* and *Rash-Aldridge* cases, it is our opinion that the City can prohibit board and commission members from addressing the Council on matters that have come before the board or commission on which they sit and where an official position or recommendation has been reached. This opinion is the same whether or not the board or commission member states that he/she is addressing the council as a "member of the public" rather than a member of the board or commission.

The City Council has an interest in making sure that issues before boards and commissions are subject to open and vigorous debate with multiple viewpoints. This interest parallels the first amendment right that all board and commission members have to advocate for their position or recommendation when a matter comes before the board or commission for deliberation and a vote. On the other hand, after the board or commission has taken an official position on a recommendation or application, the City Council has an interest in avoiding the confusion and perception that a minority board or commission viewpoint could still prevail based on who decides to come down to the Council meeting to argue his/her position. There is a legitimate public interest in encouraging the open First Amendment debate of issues when they are before a board or commission prior to board or commission action, and also a legitimate public interest in presenting to the City Council the official action of the board or commission without having individual board or commission members continue to advocate for positions that were not accepted and adopted.⁸ Since all board and commission members would have already had the full First Amendment right to speak for their position when an issue was before the board or commission, there is a good argument that the *Pickering* balancing test allows the City to limit First Amendment free speech rights of a board or commission member after an official board or commission action based on the interest in public efficiency and prevention of confusion.

Furthermore, citizens sitting on a board with "quasi-judicial" authority such as the Planning Commission would jeopardize their ability to participate as a member of the Planning Commission on an issue that they appeared as an advocate on before the Council that is subsequently remanded by the City Council for additional consideration to the Planning Commission. The Planning Commission member advocating as a "private citizen" before the City Council on an issue would most likely be required to recuse him/herself from further participation on the matter because of the perception that speaking as an advocate is inconsistent with the requirement to be a fair and impartial decision-maker. This is another public efficiency reason supporting the City's ability to prohibit individual board and commission member

⁸ The City Council and public are informed of the minority viewpoints through the minutes of the board or commission meeting on the debate and vote. And any citizen not a member of the board or commission is free to address the Council and object or support the official recommendation.



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advocacy on issues upon which the board or commission has taken an official position or that will come before the board or commission.

5. **Alleged Mis-Interpretation Of Council Policy Direction**

One of the speakers at the September 11 study session submitted a letter to the Council contending that the City Manager's direction to board and commission chairs that members should not address the Council after an official position is taken exceeded the Council authority when it approved Council policy revisions on May 1, 2007. Specifically, the speaker believes that the following policy approved on May 1, 2007 has been misinterpreted:

Members shall represent the official policies or positions of the City to the best of their ability when designated as delegates for this purpose. When presenting their individual opinions and positions, members shall explicitly state they do not represent their body or the City of Sunnyvale, nor will they allow the inference that they do so.

The speaker argues that this policy permits board and commission members to present their individual opinions on any matter, including matters that were before the board or commission they serve on, if they state that they are not representing their board or commission. The City Manager's direction is that board and commission members may, with the disclaimer, speak on any matter that was not before their board or commission but, even with a disclaimer, should not speak on issues that were before the board or commission on which an official position was taken.

The City Attorney's Office does not agree with the speaker that the City Manager's administration of this policy to limit board and commission members to speaking on issues that were not before their board or commission is exceeding the Council policy direction. The Council policy phrase "When presenting their individual opinions and positions...." can reasonably be interpreted as referring to only those opinions and positions on other than official board and commission positions.⁹ That said, the language could be clarified. In fact, the City Manager's Office has already presented a clarification to this language, which was before the Council at the September 11 study session. The revised language states:

Members shall represent the official policies or positions of the City to the best of their ability. Members shall not represent positions which are contrary to official policies of the City or official positions of the board/commission to which they belong. Individual opinions and positions may be expressed regarding items that have not come before the particular board/commission to which they belong. When presenting their individual opinions and positions, members shall explicitly state they do not represent their body or the city of Sunnyvale, nor will they allow the inference that they do. (*Source: Code of Ethics for Elected and Appointed Officials*)

⁹ There is also an argument to the contrary; the language is somewhat ambiguous.



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This revised language was provided to the Council on July 26, 2007, with the request to respond if the policy clarification was not consistent with Council intent. No responses were received.

5. Conflict With Sunnysvale Municipal Code Section 19.98.070

As discussed above, a policy encouraging speech by board and commission members on matters that come before their board or commission but subsequently limiting comments to the City Council except when they are the official representative of the board or commission is legally supportable under a *Pickering* analysis. That being said, the City's current general appeal procedures for zoning matters is not consistent with that policy. Sunnysvale Municipal Code Section 19.98.070, Appeals, provides in relevant part:

Appeal of All Other Permits and Actions. Any person aggrieved, including a member of the planning commission or city council, by the decision of the director of community development, heritage preservation commission or planning commission may file an appeal after the date of such decision. The appeal shall be in writing stating the grounds therefore. All proceedings initiated by the decision of the director of community development or planning commission shall be suspended pending a determination on the merit of the appeal.

The City ordinance code permits a planning commissioner, heritage preservation commissioner or arts commissioner to file an appeal of a decision made by the planning commission or heritage preservation commission.¹⁰ This is inconsistent with a City policy requiring all board and commission members to support the official position of the board or commission, since it authorizes the filing of an appeal by an individual board or commission member who disagrees with the official position.¹¹ While it would be legally permissible for the City to have a policy that limited speech by a planning commissioner after official action to an appeal, the City would also have to allow any other commissioner wanting to speak in support of the official action to also address the Council. Furthermore, the current policy allowing certain board and commission members to exercise speech rights after an official position by filing an appeal would be difficult to reconcile under First Amendment analysis with a prohibition on members of other commissions from addressing the Council after an official position is taken.

6. City Options for Board and Commission Policy

- A. Maintain existing policy limiting board and commission members from addressing the Council either in a public meeting or privately to advocate for or against an official position of the board or commission, except in an official capacity.

¹⁰ SMC 19.96.060(a), 19.96.090(i), 19.52.060(d).

¹¹ See June 4, 2002, Memo Re: Appeal Process.



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The balancing test for First Amendment rights against public efficiency and avoiding confusion set out in *Pickering* supports the City of Sunnyvale's current policy prohibiting board and commission members from advocating a position that differs from the official position of the board or commission of which they are a member.¹² While there is no guarantee that a federal court would sustain the policy if challenged under the First Amendment, there is substantial support for the City's policy in legal precedent which have considered board or commission First Amendment rights. It follows that the City's current policy is not, in our opinion, in violation of the *Pickering* balancing test such that it is required to be abandoned. The City Manager's Office recommends maintaining the current policy. If this option is selected, then the City's zoning code must be amended to delete the provision allowing a planning commission member to appeal the official decision of the Planning Commission, along with any other conflicting provisions for other boards or commissions in the Sunnyvale Municipal Code. It would also be advisable to clarify the Council Board and Commission policy on presenting individual opinions and positions as referring only to those issues and matters that were not the subject of official action by the board or commission.

- B. Modify the City's policy to allow comments by board and commission members to the Council either in a public meeting or private communication to advocate for or against an official position of the board or commission.

The *Pickering* First Amendment balancing test would allow the City to limit the speech of board and commission members on official positions and recommendations made by their board or commission but does not require such limits. The City Council could, if it desired to do so, modify the current policy to remove the limitation on board or commission members addressing the Council, other than in an official capacity, for or against matters on which their board or commission has taken an official position. Such a modification would be based on a policy decision that the First Amendment interest in allowing unlimited speech by board and commission members that differs from the official city position on an issue is more important than the City's interest in public efficiency and avoiding confusion. Encouraging board and commission members to not speak against an official position would be up to the individual chairs and peer members, and compliance would be voluntary and possibly inconsistent.

RECOMMENDATION

The direction to the City Attorney was to provide an analysis of whether the City policy limiting board and commissioner speech on matters where there is an official position is in violation of legal precedent on First Amendment speech. Of course, if the legal research demonstrated that the City's policy is in violation of the First Amendment the strong recommendation would have been to delete or modify the policy to comply with First Amendment standards. Based on the results of the legal research discussed in this memorandum,

¹² This prohibition would apply whether or not the board or commission member actually participated in the official decision.



To: City Council
From: City Attorney
Date: November 27, 2007
Re: Board and Commission Policy Limiting Speech on Official
City Positions and First Amendment Analysis
Page: 10

such a recommendation is not required. Nonetheless, the policy option of modifying the City's current policy is provided for the Council's consideration.

Because boards and commissions are supervised by and work with the City Manager's Office, a recommendation to change the City's current policy would come from the City Manager. The City Manager and Assistant City Manager have reviewed this memorandum and the legal analysis. Both the City Manager and Assistant City Manager state that based on City interests in efficiency of public services and avoiding undue confusion, their recommendation is that the current City policy be continued without modification.

DEK:sam

David's Folder\Council\MemoBoardsFreeSpeech112707.doc

Attachments:

- 1 - August 30, 2007, Weekly City Manager's Report (with excerpt from July 26, 2007 Weekly Report)
- 2 - Council Policy 7.2.19, Boards and Commissions



Issues of Representation

Weekly City Manager's Report, August 30, 2007:

Board and Commission Policy

In my July 26 weekly report to you, I shared the following:

Council policy dictates that elected and appointed officials representing the City (including board and commission members) support and advocate the official City position on an issue, not a personal viewpoint. Staff is currently in the process of training Board and Commission chairs, and is advising them that this code of conduct means that Board and Commission members should not appear before the Council (or e-mail them, or communicate in any other fashion) to advocate a position contrary to official positions taken by the Boards and Commission they represent. In fact, Council policy dictates that the chair or his/her appointee present the official actions of their Board or Commission to Council – note that the policy does not preclude the chair from informing Council that there was a minority opinion, or prohibit the chair from sharing what that minority opinion was based on if the Board or Commission members provided that information during its public hearing.

Staff is already receiving some push back in this regard. Increasingly, Board and Commission members feeling that they are exercising their right to free speech when appearing before Council “not as a member of board x, but as a member of the general public” to present a position that does not support an official position taken by the Board or Commission to which the individual belongs. This clearly undermines the basic intent of Council's code of conduct, as there is no way for a Board or Commission member to do so and continue to maintain the appearance of supporting the official position of their Board or Commission.

Council policy does suggest that “when presenting their individual opinions and positions, members shall explicitly state they do not represent their body or the City of Sunnyvale, nor will they allow the inference that they do” and this has likely contributed to Board/Commission member confusion on this issue and increased appearances before Council. However, this language was intended to apply to issues that either are not the purview of the Board/Commission which the individual serves on, or that the Board/Commission has not yet taken an action on – in both these cases it would be acceptable for the individual to state their opinion, making it clear to the public that they are not speaking as a Board or Commission member and/or representing that body.

Staff intends to clarify the language in Council's policies to help promote a better understanding of this important issue. In the meantime, training will continue and Council can expect to receive some feedback from Board and Commission members. Should Council feel staff has misinterpreted the intent of its policies, please let me know sooner than later so that we can take an alternative course of action.

I did not receive a response from Council regarding staff's interpretation of the Council policy since I shared the above captioned item. However, early this week, Mayor Lee directed a study session be scheduled for September 11 to allow Council an opportunity to discuss Board and Commission management and counseling issues. On this Tuesday, Councilmember Hamilton also mentioned she had heard some feedback from Board and Commission members on this interpretation. During the interim, staff is *clarifying* pages 9 and 10 of Council policy 7.2.19 as depicted by Attachment 1 (clarifications highlighted in red). From staff's perspective, this does not change Council's existing policy; it simply clarifies related issues for board and commission members and the public.

Attachment 1

Council Policy Manual HomePagePrintable Version (.doc)**Policy 7.2.19 Boards and Commissions**

POLICY PURPOSE:

The purpose of this policy is to outline those Council policies pertaining to the City's Boards and Commissions Program.

POLICY STATEMENT:

This policy pertains only to Council-appointed boards and commissions. Many of its provisions are rooted in the City Charter, and where any conflict exists between this policy and the City Charter, the City Charter shall prevail.

Boards and commissions are created by the City Council for the following general purposes:

- To recommend to City Council specific policy-related issues for possible Council study and action, and to provide a forum and opportunity for broad community participation in the identification and prioritization of those issues; and
- To advise City Council on specific policy issues Council has chosen to study, and to provide a forum and opportunity for broad community input on those issues.
- See also Section 6: Duties.

Boards and commissions shall not involve themselves in administrative/operational matters or the implementation of Council policy.

Boards and Commissions Structure

The City maintains ten Council-appointed boards and Commissions:

- Arts Commission: a 5-member body formed by Council Resolution 262-82, September 14, 1982.
- Bicycle and Pedestrian Advisory Commission: a 7-member body formed by Council Resolution 173-92, August 4, 1992.
- Board of Building Code Appeals: a 5-member body formed by Municipal Code Ordinance 1315.
- Board of Library Trustees: a 5-member body formed by City Charter Section 1013.
- Child Care Advisory Board: a 7-member body formed by Council action, May 26, 1992.
- Heritage Preservation Commission: a 7-member body formed by City Charter Section 1015.
- Housing and Human Services Commission: a 9-member body formed by Council resolution 134-85, March 19, 1985.
- Parks and Recreation Commission: a 5-member body formed by City Charter Section 1011.
- Personnel Board: a 5-member body formed by City Charter Section 1007.
- Planning Commission: a 7-member body formed by City Charter Section 1009.

1. Eligibility

No board or commission members shall hold any paid office or employment in the City Government. All persons appointed shall be registered voters of the City and shall maintain their principal place of

Attachment 2

residence within the City at the time of their appointment. (Please see exceptions for the Child Care Advisory Board and the Bicycle and Pedestrian Advisory Commission below.) If at any time during their term any member of a board or commission shall cease to be an elector of the City or shall cease to maintain their principal place of residence within the City, then such person shall become ineligible to continue to serve as a member of the board or commission and said position shall be declared vacant by the City Council.

A. Spouses, Household Members, and Relatives

No individual shall be eligible to serve on a City board or commission, chartered or otherwise, who has a spouse, household member living under the same roof, or designated relative (parent, step-parent, grandparent, child, sister, brother, niece, nephew, uncle, or aunt of the individual or of the individual's spouse), currently serving as a member of the City Council, or employed as the City Manager, Assistant City Manager, Assistant to the City Manager, City Attorney, Department Director or Assistant Director or equivalent for the City of Sunnyvale.

B. Concurrent Service

No member of any board or commission listed herein, chartered or otherwise, may serve on more than one board or commission at the same time.

C. Specific membership requirements for charter-related Boards and Commissions are as follows:

(I) Personnel Board:

To be eligible for appointment, each appointee shall neither be a candidate for any other public office or position and shall not be an officer of any local, state, or national partisan club or organization, nor a former City employee. (Source: City Charter Section 1007)

No individual shall be eligible to or continue to serve on the Personnel Board who has a spouse, household member, or designated relative (parent, step-parent, grandparent, child, sister, brother, niece, nephew, uncle, or aunt of the individual or of the individual's spouse), employed by the City of Sunnyvale *in a position which has the right to have a disciplinary matter heard before the Personnel Board.*

(II) Planning Commission:

To be eligible for appointment, each appointee shall not hold any paid office or employment in the City government, *except that the City Manager or his/her designated representative, shall serve as an ex-officio member of the Commission.* (Source: City Charter Section 1009)

D. Specific membership requirements for non-charter-specified Boards and Commissions are as follows:

(I) Arts Commission:

The members of this commission shall have a demonstrated interest in the arts and in the art programs of the City. Strong consideration shall be given to applicants with a background in the arts. (Source: Resolution No. 193-84).

(II) Housing and Human Services Commission:

The members of the Housing and Human Services Commission shall have a demonstrated interest in housing or human services issues. (Source: Resolution No. 134-85).

(III) Board of Building Code Appeals:

To be eligible for appointment, each appointee shall be qualified by experience and training to pass upon matters pertaining to building construction. (Source: Municipal Code, Chapter 16.08)

(IV) Child Care Advisory Board:

The board membership shall consist of representatives of 1) community care licensing and resource/referral agencies; 2) community colleges, school districts and County Office of Education; 3) child care centers and family child care services; 4) business community; 5) parents; 6) related fields. No more than two representatives of a category will serve at any given time. In the event there are unfilled vacancies due to lack of participation from one of the above groups, vacancies may be filled by representatives of other agencies with a role in child care or the community at large. (Source: City Council motion May 26, 1992)

All persons appointed to the Child Care Advisory Board at the time of his or her appointment shall be affiliated with (either through employment or an official membership) the above noted organizations. In the event that the affiliation ceases, that person shall be ineligible to continue to serve as a member of the CCAB. (Source: City Council motion May 26, 1992)

E. Limitation on Terms

Any person appointed to a board or commission shall be immediately eligible, upon the expiration of their term, to serve on a different board or commission (for the purposes of this policy, the resignation or removal of a member from a board or commission does not constitute the expiration of their term—i.e., a board or commission member is not eligible to serve on a different board or commission until the unexpired term from which he/she has resigned or was removed, has expired).

All board and commission members are eligible to serve two successive four-year terms on the same board or commission. No person who has served two such successive four-year terms shall be eligible for appointment to that same board or commission for two years following the expiration of the second full term for which the member was appointed and served. Serving an unexpired term of up to 2 years in length shall not count toward years served in terms of eligibility.

The members of the CCAB shall serve for a term of four years and until their respective successors are appointed. Membership terms shall be staggered. The designated agencies are required to identify the most appropriate representative, which could result in an individual serving multiple terms as the designated agency representative. The limitation on terms that is policy for most of the existing boards in the City may be waived for those categories of membership in which there is only one designated agency.

2. Recruitment

Through the Office of the City Manager, efforts will be made to fill board or commission vacancies as soon as practical. Upon notification of a vacancy, whether planned or unplanned, staff shall inform Council of the status of recruitment efforts to fill the vacancy.

3. Appointment/Removal

Appointments and removals of board and commission members shall be agendaized at a City Council meeting.

The appointment process will be conducted as follows:

The Mayor will announce by board or commission each vacancy including its term, and then will read each applicant's name. Council will vote on each applicant. The candidate receiving the most affirmative votes and at least four affirmative votes will be appointed. Should no candidate receive at least four affirmative votes, the vacancy will remain. Should a tie between the candidates receiving the most

affirmative votes occur, the affected applicants will be voted on again. If a tie still remains, and the affected applicants each have received at least four affirmative votes, the Mayor would ask the City Attorney to draw the name of the person to be appointed. The process is repeated for each board or commission.

If vacancies still exist after the appointment process is conducted, staff shall inform Council of alternative courses of action.

The members of each board or commission shall be subject to removal by motion of the City Council approved by at least four affirmative votes, for the following reasons:

- Failure to maintain eligibility requirements
- Failure to take the required Oath of Office
- Failure to complete required training
- Failure to meet attendance requirements
- Failure to fulfill board or commission duties
- Failure to adhere to Council policy governing boards and commission member interaction with City Council, the public, staff, and/or other board or commission members.
- Violation of Code of Ethics

A. Exceptions:

(I) Personnel Board:

Two of the five members shall be appointed by the City Council from a list of five persons to be nominated by election of the employees in the classified service. (Source: City Charter Section 1007)

(II) Child Care Advisory Board:

(a) Designated Agency Appointments:

When a vacancy occurs in the following categories: 1) community care licensing and resource/referral agencies; 2) community colleges, school districts and County Office of Education; 3) child care centers and family child care services; representative agencies shall be contacted to make an appointment to the CCAB. The City Council will ratify the appointment. In the event that one or more of the designated agencies elects not to participate in the CCAB, the City may accept applications from other agencies involved in child care and will consider these applications amongst the multiple agency/individual appointments as described below.

(b) Multiple Agency or Individual Appointments:

For those membership categories for which there is more than one agency or organization which may be interested in seeking membership on the CCAB, i.e., child care centers and family day care providers (includes one alternate), Sunnyvale businesses, religious institutions and parent representatives, the child care staff shall seek applicants through mailings and other targeted recruitment efforts. Child care staff will recommend appointments which will be ratified by the City Council. (Source: City Council motion May 26, 1992)

(III) Bicycle and Pedestrian Advisory Commission

The members of the commission shall be selected from two categories:

- (a) Category One shall be bicyclists or pedestrians in the City of Sunnyvale. Every person in this category shall, at the time of his or her appointment, be a registered voter of the City and shall maintain his or her principal place of residence within the City. Should any person so appointed cease to be an elector

- of the City or cease to maintain his or her principal place of residence within the City, that person shall be ineligible to continue to serve as a member of the commission.
- (b) Category Two shall include members of the PTA or other parent groups, administrations of schools in Sunnyvale, commute coordinators for major employers within the City, members of neighborhood associations, principals or teachers from Sunnyvale schools or persons interested in park and recreational activities in the City. (Source: Resolution No. 173-92.)

4. Oath of Office

Each board and commission member (and alternates for the Child Care Advisory Board), before entering upon the discharge of the duties of his/her office, shall sign the City's Code of Ethics document and take, subscribe to, and file with the City Clerk the following oath or affirmation:

"I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of (here inserting the name of office) according to the best of my ability." (Amended effective December 31, 1975) *City Charter Section 910*

After taking the Oath of Office and signing the Code of Ethics in the Office of the City Clerk, each board and commission member shall have the opportunity to receive a ceremonial Oath of Office at a regularly scheduled Council meeting.

5. Required Training/Conferences

Mandatory training shall be provided to all board and commission members by the City through the Office of the City Manager, including an orientation session for new members. Training shall be delivered as deemed necessary by the Council and/or City Manager and may include topics germane to a specific board or commission and/or training generic to all boards and commissions (e.g. ethics training or "how to run a meeting" for board and commission chairs).

Conferences are conducted periodically by outside groups to assist members of boards and commissions in meeting their respective responsibilities more effectively. The City's interests are often served by participation in the educational and training programs offered at the conferences. Each member of City boards and commissions may attend related training and/or conferences, provided that the conference subject matter pertains directly to the function of the board and commission and that funds for this purpose have been budgeted.

6. Meetings, Attendance and Quorums (see also Council Policy 7.3.8 Posting of Agendas and Procedure for Confirming Proper Posting and Notice of Meetings)

A. Meetings

Each board and commission shall hold regular meetings and special meetings as it may require. All meetings shall be open to the public and meet Brown Act requirements (with the exception of certain disciplinary review proceedings of the Personnel Board).

All board and commission meetings shall operate under Parliamentary Procedure. Should this policy and Parliamentary Procedure conflict, this policy shall take precedence.

B. Attendance

Each member of a City board or commission is expected to attend all regularly scheduled meetings (as identified for each board and commission on the official roster). Attendance of less than 75% (regardless of whether excused or unexcused) of the regularly scheduled meetings OR two consecutive unexcused absences in 12 months may result in a letter from the Mayor requesting improved attendance and reminding the member of the Council policies on absences.

If the member has three consecutive unexcused absences from regularly scheduled meetings, the member's seat will be declared vacant by Council action.

Each board or commission will record their respective members' absences as excused or unexcused and shall include that record in the minutes of the meeting at which the member is absent. Excused absences shall be limited to those which meet both of the following requirements:

(I) The absent member must have informed the chair and/or the City staff liaison to the board or commission, of their intended absence prior to the scheduled meeting.

(Failure to inform the chair or the staff liaison prior to the meeting will result in an unexcused absence, unless extenuating circumstances prevent advance notice.),
and

(II) The absence is due to one of the following:

- (a). A death in the family,
- (b). Personal illness,
- (c). Board or commission-related business,
- (d). Personal leave (limited to one per fiscal year) or emergency, or
- (e). Decision by member's supervisor in employment or required military service.

Staff shall prepare for the City Council a quarterly attendance report of all the City's boards and commissions showing the attendance of each member during the past 12 months. Attendance issues will be highlighted by the staff.

(III) Exception:

Attendance policies for the Child Care Advisory Board will be consistent with those of other boards and commissions in the City with the exception that members may send alternates in their stead. In order to have full voting rights, the alternate must be approved by Council in advance and take the oath. The member shall be reflected in the minutes as having been in attendance through the alternate.

C. Quorums

Boards and commissions have a quorum when 51% of their current membership is present. "Current membership" is defined as the official membership, less any seats that are formally vacant through resignation, unfilled vacancy or removal.

D. Majority and Abstentions

Board and/or commission motions shall be approved by a majority of legal votes cast. Members who fail to vote are presumed to have waived the exercise of their right and to have consented to allow the will of the organization to be expressed by those voting. The tabulation of a vote is based on the number of members present *and* voting. Abstentions are not counted, since a member who abstains voluntarily relinquishes his or her vote, and is not counted in the results. (*The Standard Code of Parliamentary Procedure*, 4th Edition)

7. Duties

Aside from obligations related to attendance and training noted elsewhere in this policy, the general duties for all board and commission members are:

A. Work Plans

Each board and commission shall create an Annual Work Plan which is a 12-month calendar of the policy issues the board/commission will be acting on during the year.

B. Study Issues Process

The Study Issues process is designed to assist City Council with setting priorities for the coming calendar year. Board and commission members have two roles in this process:

- To advise Council regarding the identification of policy issues to study
- To advise Council on those issues Council has decided to study

Within one month of origin, new study issue papers sponsored by Council or a board or commission will be presented to respective boards or commissions, or at the next regular meeting of the respective board or commission.

C. Budget

Board and commission members have two roles in the budget process:

- To advise Council regarding the identification of budget issues
- Provide Council a recommendation regarding the City Manager's recommended budget for content under the purview of their board or commission.

D. Chairperson's Role and Responsibilities

- (I) Attends training in how to be an effective chair prior to assuming the role.
- (II) Presides at meetings of the board or commission, and follows Brown Act requirements for conducting meetings.
- (III) Serves as a liaison to Council at City Council meetings.
- (IV) Coordinates the scheduling of special meetings or cancellation of a meeting with the staff liaison.
- (V) Coordinates the setting of the agenda with the staff liaison. Should the chair and the staff liaison disagree regarding the agenda, the City Manager shall have final authority.
- (VI) Board and commission chairs are encouraged to attend Council meetings (or to appoint an alternate) when the board or commission has a recommendation to provide input to Council or the board or commission's position on an item. The chair shall report back to their board or commission on Council's discussion and ultimate decision.

E. Vice-Chair

- (I) Attends training in how to be an effective vice-chair prior to assuming the role.
- (II) Serves as the presiding officer in the absence of the chair.

F. Additional Duties

Additional duties may be conferred upon specific boards and/or commissions by the City Council. These shall be memorialized via the City Charter or Council resolution. By-laws shall be established by all boards and commission and be approved by Council prior to taking effect.

8. Interaction with City Council, Public, Staff, and other Board and Commission Members

The City Manager shall appoint a staff liaison to support each board and commission.

In addition to their role as advisors to the Council, boards and commissions serve as liaisons between the City and the general public regarding issues under their purview at City sponsored meetings or events. Each board and commission functions as a communication link between the community and the City, explaining City programs and recommendations, advocating established City policy and services, as well as providing a channel for citizen expression.

Outside of official board or commission meetings, individual board and commission members are not authorized to represent the City or their board or commission unless specifically designated by the Council or the board or commission to do so for a particular purpose. Only the chair or his/her appointee shall appear before the Council to speak on board or commission issues.

Members shall represent the official policies or positions of the City to the best of their ability. Members shall not represent positions which are contrary to official policies of the City or official positions of the board/commission to which they belong. Individual opinions and positions may be expressed regarding items that have not come before the particular board/commission to which they belong. When presenting their individual opinions and positions, members shall explicitly state they do not represent their body or the City of Sunnyvale, nor will they allow the inference that they do. (*Source: Code of Ethics for Elected and Appointed Officials*)

Although a board or commission may disagree with the final decision the Council makes, the board or commission shall not act in any manner contrary to the established policy adopted by the Council.

Board and commission members shall adhere to the City's Code of Ethics. Council conduct with boards and commissions is covered in the City's Code of Conduct for Elected Officials adopted in April 2000.

Council shall be kept informed of the activities of boards and commissions by virtue of the board and commission minutes.

Council shall consider joint study sessions with boards and commissions as warranted. Council shall encourage members of the public to submit issues and/or concerns to the appropriate board or commission prior to Council considering the matter. (*Community Participation Sub-Element 7.2C.5(a)*)

Board and commission members with questions or concerns about board or commission administrative matters are to first contact staff, in the manner prescribed by the city manager via administrative policy, for resolution. Only when this process does not result in satisfactory resolution are they to so inform the City Council.

9. Recognition

An annual event to recognize the service of all board and commission members, as well as citizens serving on special Council ad-hoc committees, shall be coordinated through the Office of the City Manager.

Outgoing board and commission members who have served their full term shall receive a certificate of appreciation and a small memento of appreciation. The type of certificates and mementos provided are at the discretion of the Office of the City Manager, shall not exceed the gift limit established by the Fair Political Practices Commission in effect at the time, and will be suitable for the occasion.

10. Resignation/Completion of Term

When a board or commission member resigns from his or her seat, the member shall notify the Mayor in writing (email, fax or letter), with copies to the staff liaison, City Clerk and City Manager, indicating the effective date and the reason(s) for resignation. When the resignation notice is received by the Office of the City Clerk, staff shall notify Council of the resignation and the status of recruitment efforts to fill the vacancy.

Upon resignation or completion of board or commission assignment, individuals shall not represent themselves further as a board or commission member.

11. Administrative Policies

The City Manager shall have full authority to develop and implement any administrative policies and practices deemed necessary to support the operation of all boards and commissions.

((Adopted: RTC 07-148 (5/1/07); clarity update 9/21/07))

Lead Department: Office of the City Manager

**CITY OF SUNNYVALE
City Council Study Session
Council Policy Related to Boards and Commissions
March 20, 2007, 5 p.m.
West Conference Room**

AGENDA

- I. Background**
- II. Review of Clarifications to Existing Policy**
- III. Review of Study Issue Papers**

ATTACHMENT 3

CITY OF SUNNYVALE
City Council Study Session
Review of Council's Policy
Regarding Boards and Commissions
September 11, 2007
West Conference Room

AGENDA

- I. Call to Order
- II. Roll Call
- III. Introductions
- IV. Study Session Presentation
 - A. Mayoral Introduction to Topic
 - B. Staff Comments
- V. Council Discussion & Comments and Questions of Staff
- VI. Public Comments
- VII. Adjourn Study Session

Issues of Representation

City Policy

If the Councilmember is representing the City, the Councilmember must support and advocate the official City position on an issue, not a personal viewpoint. (CC)

Outside of official board or commission meetings, individual board and commission members are not authorized to represent the City or their board or commission unless specifically designated by the Council or the board or commission to do so for a particular purpose. (CP)

Chairperson's Role and Responsibilities (CP)

- Serves as a liaison to Council at City Council meetings.
- Coordinates the scheduling of special meetings or cancellation of a meeting with the staff liaison.
- Board and commission chairs are encouraged to attend Council meetings when the board or commission has a recommendation to provide input to Council or the board or commission's position on an item. The chair shall report back to their board or commission on Council's discussion and ultimate decision.

Members shall represent the official policies or positions of the City to the best of their ability when designated as delegates for this purpose. When presenting their individual opinions and positions, members shall explicitly state they do not represent their body or the City of Sunnyvale, nor will they allow the inference that they do. (*Source: Code of Ethics for Elected and Appointed Officials*) (CP)

Although a board or commission may disagree with the final decision the Council makes, the board or commission shall not act in any manner contrary to the established policy adopted by the Council. (CP)

Advocacy. Members shall represent the official policies or positions of the City Council, board or commission to the best of their ability when designated as delegates for this purpose. When presenting their individual opinions and positions, members shall explicitly state they do not represent their body or the City of Sunnyvale, nor will they allow the inference that they do. (CE)

Representation of Private Interests. In keeping with their role as stewards of the public interest, members of Council shall not appear on behalf of the private interests of third parties before the Council or any board, commission or proceeding of the City, nor shall members of boards and commissions appear before their own bodies or before the Council on behalf of the private interests of third parties on matters related to the areas of service of their bodies. (CE)

CE: Code of Ethics for Elected and Appointed Officials

CC: Code of Conduct for Elected Officials

CP: Council Policy 7.2.19, Boards and Commissions

Issues of Representation

Weekly City Manager's Report, August 30, 2007:

Board and Commission Policy

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Staff is already receiving some push back in this regard. Increasingly, Board and Commission members feeling that they are exercising their right to free speech when appearing before Council “not as a member of board x, but as a member of the general public” to present a position that does not support an official position taken by the Board or Commission to which the individual belongs. This clearly undermines the basic intent of Council's code of conduct, as there is no way for a Board or Commission member to do so and continue to maintain the appearance of supporting the official position of their Board or Commission.

Council policy does suggest that “when presenting their individual opinions and positions, members shall explicitly state they do not represent their body or the City of Sunnyvale, nor will they allow the inference that they do” and this has likely contributed to Board/Commission member confusion on this issue and increased appearances before Council. However, this language was intended to apply to issues that either are not the purview of the Board/Commission which the individual serves on, or that the Board/Commission has not yet taken an action on – in both these cases it would be acceptable for the individual to state their opinion, making it clear to the public that they are not speaking as a Board or Commission member and/or representing that body.

Staff intends to clarify the language in Council's policies to help promote a better understanding of this important issue. In the meantime, training will continue and Council can expect to receive some feedback from Board and Commission members. Should Council feel staff has misinterpreted the intent of its policies, please let me know sooner than later so that we can take an alternative course of action.

I did not receive a response from Council regarding staff's interpretation of the Council policy since I shared the above captioned item. However, early this week, Mayor Lee directed a study session be scheduled for September 11 to allow Council an opportunity to discuss Board and Commission management and counseling issues. On this Tuesday, Councilmember Hamilton also mentioned she had heard some feedback from Board and Commission members on this interpretation. During the interim, staff is *clarifying* pages 9 and 10 of Council policy 7.2.19 as depicted by Attachment 1 (clarifications highlighted in red). From staff's perspective, this does not change Council's existing policy; it simply clarifies related issues for board and commission members and the public.