



AGENDA ITEM
CITY COUNCIL MEETING DATE – OCTOBER 19, 2021
BUSINESS ITEMS

TO : City Council

FROM : City Attorney

SUBJECT : **CONSIDERATION OF PROPOSING UPDATES TO THE CITY'S CAMPAIGN ORDINANCES**

EXECUTIVE SUMMARY:

At the September 7, 2021 City Council meeting, the Mayor and Vice Mayor's two-step request was presented to the Council to consider updates to the City's campaign ordinances. The Council directed staff to agendaize the item for discussion. Staff has included some preliminary research on this subject.

RECOMMENDATION:

Provide direction on whether or not to propose updates to the City's campaign ordinances to be considered by the City's Open Government Commission.

BUDGET INFORMATION:

If Council gives direction to propose updates to the City's campaign ordinances, the costs associated with this would consist of the City Attorney's Office's fees for researching and drafting the updated ordinances.

BACKGROUND:

The two-step request (Attachment 1) seeks a review of the City's campaign finance ordinances to consider changes that would seek to provide less false statements and/or manipulation of digital photos. Benicia has three campaign related ordinances, which are located in the Benicia Municipal Code. Chapter 1.36, the Voluntary Code of Fair Campaign Practices, was adopted in 2007. Chapter 1.40, the Disclosure of Contributions and Expenditures in Candidate and Ballot Measure Elections, was adopted in 2007. Chapter 1.42, the Contribution and Voluntary Spending Limits, was adopted in 2009.

In analyzing potential pathways to fact check claims made in the course of an election campaign, there are two overarching legal issues City decisionmakers should be apprised of: (1) Freedom of speech, and (2) Proscriptions on the conduct of government actors in elections under the cases of *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 36 and *Stanson v. Mott* (1976) 17 Cal.3d 206 (*Stanson/Vargas*).

Under the First Amendment, the Supreme Court has recognized that freedom of speech “has its fullest and most urgent application to speech uttered during a campaign for political office.” (*Eu v. San Francisco Cty. Democratic Central Comm.* (1989) 489 U.S. 214, 223.) Accordingly, government regulation of speech on matters of politics generally garner strict scrutiny, which means that such regulations are presumed invalid unless the government proves that the regulations are narrowly tailored to serve a compelling state interest. (*U.S. v. Alvarez* (2012) 567 U.S. 709, 717.) This is a relatively high bar to satisfy. In recent years, four states’ regulations on false elections-related speech were invalidated under the First Amendment, particularly after the Supreme Court’s 2012 decision of *U.S. v. Alvarez*, which held that purely false speech is protected under the Constitution. However, each of those laws included criminal penalties, and did not involve circumstances where government actors merely evaluated the truth of campaign claims and informed the public of its evaluations.

Another doctrine to consider is the proscription of government actors’ conduct in elections contests under *Stanson/Vargas*. Courts have explained that under the California Constitution, voters are entitled to fair elections that are free of government influence. (*Stanson*, 17 Cal.3d at p. 218 [“the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave to the “free election” of the people (see Cal. Const., art. II, § 2) does present a serious threat to the integrity of the electoral process.”].) Accordingly, the general rule is that cities may not utilize taxpayer-funded resources to take sides or otherwise advocate or promote any particular position in an election contest. Thus, the government’s involvement in assessing election claims would need to be analyzed to ensure that it was not construed as government involvement in elections contests, which is prohibited activity.

The City’s Voluntary Code of Fair Campaign Practices (Attachment 2) may provide an opportunity to further revise to address issues of falsity in an election contest. In order to potentially improve application and enforcement of the Voluntary Code of Fair Campaign Practices, the City could revise to the Code to (1) remove subjective standards of compliance, (2) add objective standards for determining compliance with the Code, and (3) add a clarified process for “adjudicating” or evaluating whether candidates have violated the Code. If the City Council so desires, the following options could be reviewed by the Open Government Commission (“OGC”) for further study:

- 1) Add a section entitled “Standards of Compliance.” This section would establish certain objective mandatory standards of conduct including publishing statements regarding other candidates, when and how a candidate should repudiate actions taken that hurt an opponent’s candidacy, and/or when a candidate should repudiate negative and attack advertising made by third parties.
- 2) Add section(s) entitled “Procedures” and “Violations for Failure to Comply.” This section would describe what happens when a candidate who has taken the pledge violates the Code.
- 3) Revise the candidate forum section of the BMC (1.42.120) to make clear that the forum is not limited to candidates who are the subject of “hit pieces.”

Given that the City’s Voluntary Code is just that, the City has more flexibility establishing standards and review procedures for statements made to those who voluntarily subscribe to the Code. Should the Council direct the OGC to further review the Voluntary Code, the City Attorney’s Office will work closely with the OGC and the City Clerk to make sure that any suggested edits are objective and easy to administer.

NEXT STEPS:

If Council gives direction to propose updates to the City’s campaign ordinances, then the City Attorney’s Office will proceed with researching and drafting the updated ordinances for the OGC’s consideration.

ALTERNATIVE ACTIONS:

Council could choose to give direction to either propose or not propose updates to the City’s campaign ordinances.

General Plan	N/A
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Priority Based Budgeting	Strategic City Result Impacted by this Agenda Item
	<p>The City Council and community identified six (6) key “Results” that establish the key goals for which the City of Benicia aspires to achieve with our programs and services. Agenda Items often influence multiple Results, the primary Result impacted by this Agenda Item is (please check one):</p> <ul style="list-style-type: none"> <input type="checkbox"/> Protect Community Health & Safety <input type="checkbox"/> Maintain & Enhance A High Quality of Life <input type="checkbox"/> Preserve & Enhance Infrastructure <input type="checkbox"/> Strengthen Economic & Fiscal Conditions <input type="checkbox"/> Protect & Enhance the Environment <input checked="" type="checkbox"/> High Performing Government
	City Programs Impacted by This Agenda Item (Top 3):
	<ol style="list-style-type: none"> 1. Boards and Commissions - Open Government Commission 2. Legal Counsel for City Council 3. Elections Administration

CEQA Analysis	<p>Pursuant to Title 14, the California Code of Regulations, Section 15378(b)(5) of the California Environmental Quality Act (“CEQA”) guidelines, the proposed action is an administrative activity of the City that will not result in direct or indirect physical changes to the environment.</p>
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ATTACHMENTS:

1. Two-Step Request - Mayor Young & Vice Mayor Campbell
2. Voluntary Code of Fair Campaign Practices

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