

RESOLUTION NO. 2006-216

**A RESOLUTION OF THE CITY OF ELK GROVE
APPROVING THE MAYOR'S COMMENT
AND SUBMITTING THE COMMENT OF THE CITY COUNCIL
TO THE REPORT OF THE SACRAMENTO GRAND JURY**

<p>To the Hon. Roland L. Candee Presiding Judge Superior Court of California County of Sacramento:</p>	<p>In re: Elk Grove City Council – The Handling of Political Dissent Sacramento Grand Jury Report June 30, 2006</p>
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Whereas, the Sacramento County Grand Jury has directed the City of Elk Grove to provide comment to both the findings and recommendations to the Presiding Judge of the Sacramento Superior Court as required by Penal Code Sections 933 and 933.05; and

Whereas, Penal Code Sections 933 and 933.05 require, in the case of a city, that the Mayor shall also comment on the findings and recommendations: and

Whereas, the Mayor and City Council of the City of Elk Grove has reviewed the report by the Grand Jury;

Now, Therefore, the Mayor and City Council of the City of Elk Grove do hereby resolve and comment as follows:

Finding 1 and Recommendation 1. Comment: The City Council disagrees. No one was prohibited at that subject meeting or at any other time from levying public criticism of the City or the City Council. If anything, the Council's meetings have been extremely open to comment and free debate. An expression of disagreement about process is a part of healthy democratic debate. At the time the remarks were made, no member of the public was before the Council and no individual nor entity's name was used though the context of the discussion was about community grants to the Historical Society among others.

The Grand Jury findings and recommendations concern matters dating to April of 2005, some fourteen months earlier. The matter is stale at best merely assuming anything should or could be done by the Council at this point in time. The City Code of Ethics recommended by Citizens of Elk Grove was subsequently adopted and has assisted in framing subsequent debates.

There are several constitutional limits on the City Council's authority to censure members of the City Council that are not reflected in the Grand Jury's

recommendation. First, censure is not an appropriate remedy where doing so would impinge on the First Amendment rights of a Council Member. (*Richard v. City of Pasadena* (1995) U.S. Dist. Ct. C.D. Cal—Case CV 94-3418 RAP (“*Richard*”).) Second, this policy cannot violate the doctrine of “legislative immunity”. (*Bogan v. Scott-Harris* (1997) 523 U.S. 44 (“*Bogan*”).) Third, the City must afford the person being censored the due process rights of notice and an opportunity to be heard. (*Little v. City of North Miami* (11th Cir. 1986) 805 F.2d 962, 969 (“*Little*”).)

The City Council cannot censure members of the City Council for speech that is protected by the First Amendment. (*Kucinich v. Forbes* (N.D. Ohio 1977) 432 F. Supp. 1101, concluding that a City Council could not suspend a council member for making allegedly defamatory remarks about the council president.) Generally, the City may censure for conduct but not speech. (Compare, *White v. City of Norwalk* (1990) 900 F.2d 1421 and *Richard, supra*. The only appellate level California case which deals with the authority of a City to censure a fellow Council Member is *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, in which case the Court set aside the Council’s censure.) If the City adopts a policy which permits censure of City Council members, the City must clearly state in advance what conduct will constitute grounds for a censure. Additionally, if the City decides to censure any Council Member, the City should state that it is basing its censure upon inappropriate conduct rather than speech, to ensure it does not trigger legal challenges on First Amendment grounds.

Additionally the City cannot censure members of the City Council for purely legislative actions. The United States Supreme Court has recognized absolute immunity for local legislative bodies for legislative actions. (*Bogan, supra*, at 54.) “Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it.” The court will simply look at whether the official was acting in a legislative capacity and if the official was acting in a legislative capacity, then the Council Member is entitled to absolute immunity for this conduct. This immunity only covers the decision itself, the content of the decision, any steps the Council Member took to render that decision and any statements made during a public meeting in which the official made the determination.

The recommendation will not be implemented because it violates the First Amendment and the Doctrine of Legislative Immunity.

Finding 2 and Recommendation 2. Comment: The City Council disagrees.. See Comment to Recommendation 1. In addition, the Mayor and at least one other council member clearly distinguished the rights, obligations, positions and statements of individuals from that of various organizations with which they might be associated. That admonition was acknowledged when all the grants were adopted save one which was deferred to a later meeting for other reasons.

The recommendation will be not be implemented because it is not warranted and because it violates the First Amendment and the Doctrine of Legislative Immunity.


Finding 3 and Recommendation 3. Comment: The City Council disagrees. See Comment to Recommendation 1. Additionally, The Code of Ethics was carefully considered and recommended by the citizens of Elk Grove and adopted subsequent to the events discussed. The Code is working. Further, the recommendation does not recognize the strict limits on the inherent authority of the City Council over the performance in office of any individual elected member of the Council.

The recommendation will not be implemented because it is not warranted and because it violates the First Amendment and the Doctrine of Legislative Immunity.

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By action of the City Council of the City of Elk Grove at its regularly scheduled meeting on August 9, 2006, this is the comment of the City of Elk Grove and the comment of the City Council of the City of Elk Grove and is submitted pursuant to the Laws of the State of California.

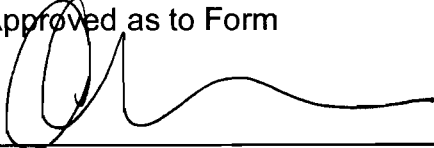
APPROVED AND ADOPTED this 9th day of August, 2006.



Elk Grove City Council
by Richard Soares, Mayor

Attest:

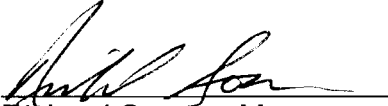
Peggy Jackson
Elk Grove City Clerk

Approved as to Form


Anthony B. Manzanetti

By my signature below, I adopt this as the comment of the Mayor of the City of Elk Grove and it is hereby submitted pursuant to the Laws of the State of California.

August 10, 2006
CITY OF ELK GROVE



Richard Soares, Mayor

**CERTIFICATION
ELK GROVE CITY COUNCIL RESOLUTION NO. 2006-216**

STATE OF CALIFORNIA)
COUNTY OF SACRAMENTO) **ss**
CITY OF ELK GROVE)

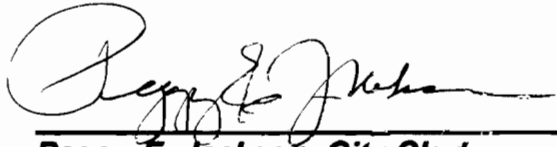
I, Peggy E. Jackson, City Clerk of the City of Elk Grove, California, do hereby certify that the foregoing resolution was duly introduced, approved, and adopted by the City Council of the City of Elk Grove at a regular meeting of said Council held on August 9, 2006 by the following vote:

AYES : COUNCILMEMBERS: Soares, Scherman, Briggs, Leary

NOES : COUNCILMEMBERS: None

ABSTAIN : COUNCILMEMBERS: None

ABSENT: COUNCILMEMBERS: Cooper



**Peggy E. Jackson, City Clerk
City of Elk Grove, California**