

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Abstention Ordinance

DATE: January 4, 2008

RECOMMENDATION

Discussion and direction on when to require any member of the Council to abstain from participating in and voting on a matter before the City Council if to participate in the particular matter would create an "appearance of bias."

BACKGROUND

On November 20, 2007, the City Council approved the Mayor's 2007 Biennial Ethics recommendations including seeking voter approval of an amendment to San Jose City Charter Section 600 in order to allow any member of the Council to voluntarily abstain from voting in situations where constituents may reasonably question the integrity of his or her decision.

Charter Section 600 requires all members of the Council present at the meeting to vote on every item "unless disqualified from doing so by law." Generally, the law prohibits participation by an elected official if he or she has a financial conflict of interest under (1) the Political Reform Act (PRA) or Government Code Section 1090; or (2) an actual common law bias. Although the prohibitions of the PRA and Section 1090 were intended to address the appearance of conflicts as well as actual conflicts, these legal authorities have evolved to primarily address economic interests which are easier to define because they are objective. However, the public's confidence and trust in representative government and the decision making process can be strongly influenced by a continuum of situations involving an appearance of bias that are not necessarily limited to financial interests.

The purpose of this memorandum is to discuss the issues associated with regulating the "appearance of bias", how other jurisdictions apply this standard, and how San Jose might apply the standard. In researching how to implement the Council direction to allow voluntary abstention in situations where constituents may reasonably question the integrity of a Councilmember's decision, we found that very few jurisdictions actually have an "appearance of bias standard." The City of Santa Clara Code of Ethics and Values provides that its officials must aspire to make impartial decisions free of "bribes, unlawful gifts, narrow political interests, and financial and other personal interests that impair" their judgment or action. The State of Massachusetts general law for conduct of

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public officials and employees prohibits participating in a matter that would create an appearance of a conflict unless disclosure of the facts are first publicly disclosed. The City of Seattle enacted an ordinance which disqualifies its employees from transactions or activities that would create an appearance of a conflict. However, the most detailed regulation requiring impartiality in the performance of official duties was issued by the Federal Office of Government Ethics for employees in the administration or executive branch.

It is important to note that this is a difficult area to regulate because the impression of possible bias has no bright lines. We recommend looking to the federal regulation for guidance because the regulation includes detailed commentaries on the purpose and limitations of each element of the rule. Further, the Office of Government Ethics has issued a number of advisory opinions interpreting the rule. The framework of an ordinance based, in part, on the federal regulation is attached.

ANALYSIS

Purpose of Regulating Appearance of Bias

The "appearance of bias" standard first appeared in the Model Code of Judicial Conduct and was later codified in federal law with respect to federal judges. The standard, which is grounded on the principle of preserving the public's confidence in the court's authority, prohibits judges from hearing cases in which his or her impartiality might reasonably be questioned. The Model Code defines the term "impartial" as "an absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge."

Public opinion regarding public officials is affected by perceptions of bias whether or not the official's decision was in fact unduly influenced. For example, in 2000, some argued that United States Supreme Court Justice Antonin Scalia should have recused himself from the *Bush v. Gore* case because his sons had connections to law firms that represented then Governor Bush. Although neither Justice Scalia nor his sons had a pecuniary interest in the outcome, the issue was whether the benefit to the professional reputation of Justice Scalia's sons' firms for representing and potentially winning the case on behalf of Governor Bush was sufficient to at least create an appearance of bias.

Amendment of Charter Section 600 or Adoption of an Ordinance

The Council directed that Charter Section 600 be amended to allow any member of the Council to voluntarily abstain from voting in situations where constituents may reasonably question the integrity of his or her decision. We can prepare an amendment to Section 600 which provides for voluntary abstention or the Council can direct that abstention be mandatory under certain circumstances. We offer the latter because

voluntary abstention could result in inconsistent abstentions and implicates competing public interests. Elected officials are voted into office because of identified positions on a wide variety of topics and should not be prevented from fulfilling his or her responsibility to vote on issues that their constituents care about. This public interest exists in tension with the public interest in preserving the public confidence and trust in decisions by making sure that the official is free from actual bias and the appearance of bias. Voluntary abstention creates uncertainty as to when the elected official would abstain and whether he or she is abstaining due to a concern regarding an appearance of bias or to avoid voting on a controversial and unpopular decision.

A third alternative is to enact an ordinance requiring abstention under certain specified situations. In order for any member of the Council to abstain from voting on an issue before the Council, Charter Section 600 requires that participation be prohibited by law. Thus, a Charter amendment is not necessary if the Council adopts an ordinance establishing situations requiring abstention that are not addressed by current laws. We recommend regulating abstention through adoption of an ordinance due to the difficulty and costs of amending the Charter.

It should be noted that a Councilmember could confront situations that trigger the PRA, Section 1090, common law bias, and/or other laws in addition to the new abstention requirement proposed here. In those instances, the requirements and procedures of the PRA, Section 1090, common law bias, and/or other laws would control to the extent these laws also require abstention. Only if the other laws would not treat the situation as a conflict requiring abstention, would a Councilmember look to the requirements and procedures being proposed in this memorandum for guidance on whether abstention is required.

Moreover, the City has enacted certain laws to avoid actual conflicts and the appearance of conflicts through the regulation of the receipt of gifts, nepotism, and prospective employment. Since abstention is specifically required under the Municipal Code for decisions that affect the hiring of a member of the Councilmember's immediate family (i.e. nepotism) or matters involving a prospective employer, the more general abstention requirement proposed here would not apply.

Understanding the Abstention Requirement

The sample language provides an analytical mechanism for a Councilmember to focus on situations where his or her impartiality could be subject to question. For example, a Councilmember would be required to abstain if the Council action involves a particular matter involving a specific party or parties which is (1) likely to have a direct and predictable effect on the financial interest of a member his or her household, or (2) a Councilmember knows that a person with whom he or she has a covered relationship is a party or represents a party to such matter.

The sample language does not follow the federal regulation governing federal employees entirely. Specifically, the federal regulation requires that the federal employee perform a "reasonable person" analysis once he or she determines that one of the above two criteria is triggered. The employee is required to determine whether a reasonable person with knowledge of the relevant facts would question his or her impartiality. If the answer is yes, then the employee must abstain unless an agency designee waives the appearance of conflict.

In addition, if the federal employee has concerns about a situation that falls outside of the specified relationships such as a matter where a close friend (e.g. boyfriend, girlfriend, or partner) is a party or represents a party, the employee is encouraged to determine whether a reasonable person with knowledge of the relevant facts would question his or her impartiality. If the answer is yes, the federal regulation would allow but not require abstention.

We do not recommend adopting the "reasonable person" analysis portion of the federal regulation because it is subjective and difficult to enforce. Pursuant to the federal regulation, employees can seek the assistance of an agency designee to determine if there is an appearance of bias or the agency designee may decide independently that the employee should not participate. By contrast, under the same language and unless a procedure for an impartial review is developed, a Councilmember would be the sole arbiter of whether, under the circumstances of a particular case, recusal is appropriate. Self-examination in these situations may be difficult and vulnerable to second guessing. Limiting the appearance of conflict situations to a defined set of personal or business relationships such as a member of the household and/or a person with whom a Councilmember has a covered relationship would establish clearer grounds for abstention.

Particular Matters Involving Specific Party or Parties

The ordinance would apply only to situations regarding "particular matters involving specific parties." The phrase "particular matters involving specific parties" is limited to a specific proceeding that affects the legal rights of the parties such as an enforcement action or permit, or transactions between identified parties. By limiting the scope to matters involving specific parties, a Councilmember can fulfill his or her duty to constituents and participate in decisions of general applicability such as adoption of policies or legislation even if there might be an appearance of bias. Since a potential conflict may evolve in stages from a broad concept to a discrete action that involves specific parties, it is important that each decision before the Councilmember be analyzed on case-by-case basis.

Example: The Council is considering an ordinance to limit construction hours. A Councilmember's wife is the office manager for a large corporation that will incur additional costs if the proposed ordinance is enacted. Because the ordinance is of

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general applicability and not a particular matter involving specific parties, the Councilmember must participate and vote on the proposed ordinance even if his impartiality may be questioned.

Covered Relationships Including Campaign Consultants

To focus the inquiry, the person with whom a Councilmember has a "covered relationship" must be a party or represent a party in the matter. A person is broadly defined to include, but not be limited to, an individual, entity, and partnership. The term "covered relationship" mirrors the federal regulation and pinpoints the areas and relationships that historically have raised the most significant problems with an appearance of bias. Specifically, a "covered relationship" under the federal regulation includes a person with whom the elected official has a current or prospective business or financial relationship, an immediate family member, a person with whom the elected official's spouse, parent, or dependent child is seeking particular positions with, and/or an organization for whom the elected official has been an active participant.

We need additional policy direction from the Council on whether the types of "covered relationships" should be more expansive or limited than what is proposed in the sample language. For example, it would be logical to expand the relationship to a person with whom the elected official's spouse, parent, or dependent child is seeking particular positions with to include a person with whom any child of the elected official is seeking a particular position. Also, a "covered relationship" includes any organization for whom the elected official is an active participant. If the Council would like to exclude certain organizations in order to encourage active participation, the sample language should be modified to limit the scope.

Example: A Councilmember has made an offer on a home owned by a local developer and the developer has submitted an application for a land use permit. Under these circumstances, the Councilmember would be correct in concluding that his impartiality would likely be questioned because he is participating in a decision on whether to grant or not grant the land use permit to a person with whom he has a covered relationship (i.e. prospective business/financial relationship).

Example: A Councilmember is a member of a private nonprofit organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. However, she is not a board member or officer of the organization. Under the circumstances, the Councilmember would be required to recuse herself from participating in the decision of whether to give the organization a grant. This is more restrictive than state law which allows members of a nonprofit organization to participate as long as the Councilmember discloses her affiliation.

We recommend that "campaign consultants" be included as a "covered relationship." This is a relationship which could raise the appearance of bias issue if a

Councilmember were to participate in a matter in which his or her campaign consultant was a party or represented a party. The campaign consultant relationship is the subject of regulation in other contexts. For example, in 2004, San Francisco adopted an ordinance which prohibits former or current campaign consultants of elected officials from lobbying their client. The purpose of the San Francisco ordinance is to protect the public confidence in government decisions by preventing corruption and the appearance of corruption.

Federal Regulation Includes Criteria to Waive the Abstention Requirement

The federal regulation provides that the agency designee may waive an appearance of bias based on balancing the public interest in participation of federal employees in the efficient administration of government affairs versus the public interest in preventing an appearance of bias. The criteria they consider include the nature of the relationship involved; the financial effect of the decision on the person involved in the relationship; the extent to which the federal employee is called upon to exercise discretion in the matter; the sensitivity of the matter; the difficulty of the administration taking action on the matter without the employee's participation; and any adjustments that can be made to reduce or eliminate the likelihood of an appearance problem.

We don't recommend adopting this aspect of the federal regulation. It is easier to apply a rule consistently if the universe of situations when abstention is required is known and cannot be waived. As previously noted, the "reasonable person" analysis subjects the federal employee to a myriad of situations that could require abstention. In the context of the federal regulation, it is crucial that the federal administration reserves the ability to waive certain appearance of bias situations in order to operate. The drawback to this approach is that it can lead to inconsistent abstentions because the facts of each case will differ and the individuals who engage in the balancing test on whether waiver should be granted or not may arrive at different results.

If the Council decides that the benefits of reserving the ability to waive an appearance of bias situation are greater than not having this ability, we recommend that the decision to waive be made by the entire Council. Moreover, similar to the federal regulation, once a waiver is issued by the Council, the Councilmember cannot later seek to abstain from his or her duty to vote on the item unless new facts or concerns are raised that would change the decision to waive the appearance of bias.

Stating the Reason for Abstaining on the Public Record

The sample language requires the Councilmember to state on the public record the basis for his or her abstention and leave the meeting room during the deliberations. The requirement that a statement be made of the relevant facts in sufficient detail for the public to understand is consistent with disclosures under other conflict laws. Public disclosure should also encourage consistency in abstentions and prevent abstentions

which are motivated by other concerns such as not wanting to make a potentially unpopular or controversial decision.

Enforcement and Effect of a Violation on the Council Action

We need additional policy direction from the Council regarding enforcement and the effect of a violation on the validity of the Council action. The sample language does not include procedures for how a violation of the appearance standard would be enforced. If the Council enacts a new ordinance, it would fit best in Title 12 of the San Jose Municipal Code which encompasses the City's ethics regulations. Currently, the San Jose Elections Commission has authority to investigate allegations of Title 12 violations and to impose fines and penalties when appropriate. Title 12 violations, however, may not be prosecuted as crimes.

The effect, if any, of a violation of the "appearance standard" on the validity of the Council action is an important issue. As points of reference, in situations involving actual conflict under Section 1090 or the PRA, a contract may be declared void or the elected official could incur up to a \$5,000 fine per violation, respectively. The Council's direction regarding the effect of a violation on the validity of its actions may have severe ramifications on matters involving significant amounts of money such as the issuance of bonds or whether a large ongoing development project would be delayed and/or stopped.

PUBLIC OUTREACH/INTEREST

A copy of this memorandum and the sample language is posted on the City's website for the January 15, 2008 Council Agenda.

CONCLUSION

An ordinance can be drafted to allow or require any member of the Council to abstain from participating in or voting on matters where constituents may reasonably question his or her impartiality. Alternatively, the Council may wish to proceed by proposing an amendment to the City Charter. In such case, the issues identified in this memorandum with respect to a proposed ordinance would also be applicable to a Charter amendment.

In brief, the areas which require Council direction are:

- Whether the abstention should be allowed by amending the Charter Section 600 (as either a voluntary or mandatory provision) or by adoption of an ordinance (mandatory provision);
- Whether the basis for requiring abstention should include a "reasonable person" analysis;

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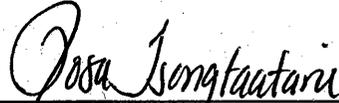
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- Whether the definition of "covered relationship" should be expanded or limited;
- Whether the Council should have the ability to waive an appearance of bias and/or override a decision to abstain; and
- Enforcement of and the effect of a violation of the abstention provision.

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By



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Attachment

SAMPLE ABSTENTION REQUIREMENT LANGUAGE

Purpose and Application

Purpose

It is the purpose and intent of the City of San José in enacting this Chapter to protect the public confidence and trust in the electoral and government processes by requiring abstention in certain situations where the Mayor or Councilmember's participation may create an appearance of loss of impartiality.

Application

Pursuant to Charter Section 600, this Chapter requires the Mayor or Councilmember to abstain from voting in decisions involving persons with whom the Mayor or Councilmember has a certain business or personal relationship when the relationship would not otherwise require him or her to abstain under other laws.

Requirement

Impartiality in Performing Official Duties

The Mayor or Councilmember must abstain from Particular Matters Involving A Specific Party before the City Council if he or she knows that a decision on the matter is likely to have a direct and predictable effect on the financial interest of a Member Of The Household, or knows that a person with whom he or she has a Covered Relationship is or represents a party to such matter.

Statement of the Basis for Abstention

The Mayor or Councilmember abstaining from voting on a Particular Matter Involving Specific Party or parties must identify on the public record of the meeting in which the matter is being considered the basis for the abstention including the relevant facts in sufficient detail for the public to understand. After making this statement, the Mayor or Councilmember must not be present for the discussion and leave the meeting room until after the discussion.

Definitions

Active Participant

An "Active Participant" or "Active Participation" means service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson; directing the activities of the organization; or devoting significant time to promoting specific programs of the organization including coordination of fundraising efforts. Payment of dues or the donation or solicitation of financial support alone does not constitute active participation.

Campaign Consultant

A "Campaign Consultant" means any person or entity that receives or is promised economic consideration for campaign consulting services. The term "Campaign Consultant" includes any person or entity that subcontracts with a Campaign Consultant to provide campaign consulting services, and that receives or is promised economic consideration for providing campaign consulting services. The term "Campaign Consultant" does not include persons who are employees of a Campaign Consultant, attorneys who provide only legal services, accountants who provide only accounting services, pollsters who provide only polling services, and treasurers who provide only

those services which are required of treasurers by the Political Reform Act, California Government Code Section 81000, et seq., as may be amended.

Covered Relationship

A "Covered Relationship" means:

- A. A person with whom the Mayor or Councilmember has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;
- B. An immediate family member of the Mayor or Councilmember;
- C. A present or prospective employer of a spouse, parent or child; a person for whom the Mayor or Councilmember's spouse, parent or dependent child is, to the Mayor or Councilmember's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee;
- D. Any person for whom the Mayor or Councilmember has within the 12 months, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;
- E. A former or current Campaign Consultant of the Mayor or Councilmember. A former Campaign Consultant provided campaign consulting services to the Mayor or Councilmember in the 12 months preceding the election to office; and
- F. An organization in which the Mayor or Councilmember serves or has served within the last 12 months as an active participant.

Direct and Predictable Effect

- A. A particular matter will have a “direct effect” on a financial interest if there is a close causal link between a City Council action in the matter and any expected effect of the matter on the financial interest. An effect may be “direct” even if it does not occur immediately. A particular matter will not have a direct effect on a financial interest if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effect on the general economy does not have a direct effect within the meaning of this Section.
- B. A particular matter will have a “predictable effect” if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. The magnitude of the gain or loss is immaterial.

Immediate Family Member

The term an “Immediate Family Member” has the same meaning as Section 12.20.220 of Chapter 12.20, the Nepotism and Consensual Personal Relationships Ordinance.

Member Of The Household

The term “Member Of The Household” means any individual who resides in the same dwelling unit as the Mayor or Councilmember including, but not limited to, a roommate who shares the rent or mortgage payment. A guest who is visiting briefly or up to a month is not a “Member Of The Household.”

Particular Matter Involving A Specific Party

The term "Particular Matter Involving a Specific Party" means any quasi-judicial proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, or other particular matter involving a specific party or parties in which the City of San José is a party or has a direct and substantial interest. A policy or regulation applicable to a discrete and identifiable class of persons is not a particular matter involving a specific party. A person who is merely a member of an organization or association that is involved in a specific matter is not a party.

Person

The term "Person" means any individual, business entity, trust, corporation, association, committee, or any other organization or group of persons acting in concert.

