



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: SEE BELOW

DATE: March 22, 2007

**SUBJECT: RESPONSE TO THE REPORT OF THE GOVERNMENT REFORMS
AND ETHICS SUBCOMMITTEE OF THE MAYOR'S TRANSITION
COMMITTEE—LOBBYIST REFORMS**

RECOMMENDATION

Discussion and direction regarding amending Chapter 12.10 of the San Jose Municipal Code ("the revolving door ordinance") from 1 to 2 years; and amending Chapter 12.12 of the San Jose Municipal Code ("the lobbyist ordinance") to require disclosure and/or ban of success fees, to reduce the number of hours required to register as a lobbyist from 20 hours within any three month period to 10 hours within any twelve month period, to aggregate the number of hours for individuals who lobby for the same organization, and to create an exception for tax exempt Internal Revenue Code Section 501(c) 3 organizations.

OUTCOME

Direction to the City Attorney to draft amendments to the revolving door ordinance and the lobbying ordinance.

BACKGROUND

On January 24, 2007, the Rules and Open Government Committee considered several proposals by Mayor Reed in response to the Report by the Government Reforms & Ethics Subcommittee of the Mayor's Transition Committee ("Report"). One proposal was to agendaize, for Council consideration, amendment of the Municipal Code to require lobbyists to disclose success fees to City officials when meeting to discuss projects, and on the lobbyist's quarterly reports.

The Committee also directed the City Manager and City Attorney to consider all remaining final recommendations from the Report, and report back to the Committee by

February 28, 2007. On February 23, 2007, the City Manager and the City Attorney issued a memorandum that discussed the remaining recommendations (See Attachment A).

On February 27, 2007, the City Council discussed the recommendation to require disclosure of lobbyist contingency fees and requested that the City Attorney address the contingency fee issue in more detail when the issue of prohibiting contingency fees comes before the Committee.

On February 28, 2007, and March 7, 2007, the Rules and Open Government Committee deferred action on the lobbyist recommendations in the Report, but received testimony from the public. As a result of the public testimony, the Committee requested that the City Attorney address additional issues with regard to the imposition of the City's lobbyist regulations on non-profit organizations. These issues are addressed in the memorandum from the City Attorney to the Rules and Open Government Committee dated March 9, 2007. (See Attachment B)

At the March 14, 2007 Rules and Open Government Committee, the Committee approved forwarding the following recommendations to the City Council on April 3, 2007 for discussion and direction:

1. Amend the City's revolving door ordinance to extend the existing prohibitions from one (1) year after a designated employee leaves City employment, to two (2) years.
2. Amend the City's lobbyist ordinance to prohibit lobbyists from being paid on a contingency basis, and in those cases where the City cannot regulate fees, such as for attorneys and real estate brokers, to require disclosure of the contingency fee to the City Clerk for posting on the internet prior to the lobbyist meeting with City officials.
3. Amend the City's lobbyist ordinance to reduce the number of hours spent on lobbying activities required for an In-House lobbyist to register, from 20 hours within any three month period, to 10 hours within a twelve month period, and to aggregate the number of hours spent by different individuals from the same entity, in determining the 10 hour threshold to register.
4. Amend the City's lobbyist ordinance to create an exception for employees of tax exempt organizations under Internal Revenue Code Section 501 (c) 3 from having to register as lobbyists.
5. Amend the lobbyist ordinance to consider different registration thresholds for land use actions as oppose to other legislative and administrative actions.
6. Amend the lobbyist reporting form to require more detailed disclosure of income received, particularly, whether it is contingent on the outcome of the lobbying effort, and adding more income categories.

ANALYSIS

The attached memoranda discuss most of the legal issues raised by the above recommendations. However, the following issues were raised at the Rules and Open Government Committee meeting of March 14, 2007, and have not been addressed in writing by this Office.

1. Disclosure of Attorney's Fees and Broker's fees.

The Committee recommendation with regard to prohibiting contingency fees for lobbying included an acknowledgement that the City is preempted by State law from regulating attorney's fees and broker's fees. We need to clarify that the preemption does not extend to fees for lobbying activities that are performed by lawyers and brokers. In other words, the City can prohibit lawyers and brokers from accepting compensation on a contingency basis for lobbying activities. Therefore, a separate disclosure requirement for these professionals would not be required.

2. Aggregation of hours spent lobbying by individuals from the same entity.

As discussed in the attached memo dated March 9, 2007, the regulation of lobbyist registration requirements is constitutional as long as the proposed regulation is rationally related to a government interest. The purpose stated by the Rules and Open Government Committee is to make sure that the registration requirements are capturing lobbying activities of the principals of development companies even if they hire outside lobbyists. This is the rationale behind the proposed reduction in the number of hours spent on lobbying activities from 20 hours within any three month period to 10 hours within any 12 month period.

In our previous memoranda, we concluded that a proposal to reduce the threshold to 3 hours within any 12 month period would withstand legal challenge. However, aggregating the number of hours spent by individuals within the same entity could trigger the registration requirement for any individual for time that is even less than 3 hours. This could be difficult to enforce because aggregation could require registration for someone who spent as little as 15 minutes talking to a Councilmember.

An alternative could be that an entity be required to register if its employees or officers spend an aggregate number of 10 hours within any twelve month period, but no individual needs to register until they have spent 3 hours on lobbying activities in any twelve month period.

3. Applying different requirements to lobbying activities for the purpose of influencing land use decisions.

One of the stated intents of the proposed reforms is to provide more disclosure of the lobbying activities by developers without burdening other entities, such as non profit

organizations and small business owners. The City's interest in this regulation is largely based on the significant and unique role that local governments play in the land use process. Indeed, land use decisions can materially increase the economic value of the property or the proposed project that is the subject of the decision.

One way to do that is to create a third category of In House Lobbyist with lower reporting thresholds for individuals who lobby to influence land use decisions on behalf of an entity that has a direct financial interest in the outcome of the decision. The definition of "land use decision" could be drafted to apply only to projects of a certain size. Although such a requirement may include some small business owners if they are seeking to influence a land use decision, this is a legitimate distinction that would withstand an equal protection challenge.

4. Ordinance amendment required to change lobbyist disclosure form.

With regard to the recommendation to amend the lobbyist reporting form to include more specific disclosure on income received from lobbying, that will also require a change to the ordinance. This is because the current ordinance specifies the income categories required to be disclosed.

5. Exception for 501(c) 3 organizations.

In our memorandum dated March 9, 2007, we analyze the City's ability to treat different organizations differently under these disclosure requirements and conclude that the distinction can be justified from a constitutional perspective. However, we should point out that we could find no other jurisdiction that exempts 501 (c) 3 organizations from its lobbying regulations.

POLICY ALTERNATIVES

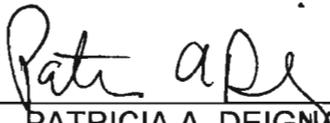
Not Applicable.

PUBLIC OUTREACH/INTEREST

The contemplated action does not appear to qualify as an item of significant interest based on the established criteria. This memorandum and attachments are posted on the City's website for the April 3, 2007 Council Agenda.

CEQA : Not a Project

RICHARD DOYLE
City Attorney

By 
PATRICIA A. DEIGNAN

cc: Les White

For questions please contact Patricia Deignan, Chief Deputy General Counsel,
at (408) 535-1201.

Attachment A



Memorandum

TO: RULES & OPEN GOVERNMENT
COMMITTEE

FROM: Les White
Rick Doyle

SUBJECT: SEE BELOW

DATE: February 23, 2007

**SUBJECT: RESPONSE TO THE REPORT OF THE GOVERNMENT REFORMS &
ETHICS SUBCOMMITTEE OF THE MAYOR'S TRANSITION
COMMITTEE**

RECOMMENDATION

- (a) Accept the response to the Report of the Government Reforms & Ethics Subcommittee of the Mayor's Transition Committee; and,
- (b) Provide direction on the recommended methodology to implement a pilot program for cost benefit analyses for projects, activities, and events seeking public funding.

OUTCOME

On January 24, 2007, the Rules & Open Government Committee considered several actions proposed by Mayor Reed regarding the Government Reforms & Ethics Subcommittee Report. This report responds to the specific directives referred to the City Attorney and City Manager.

BACKGROUND

The Mayor's Government Reforms & Ethics Subcommittee Report directed:

- (1) The City Attorney to take the Campaign Finance Reform section of the Report to the Elections Committee for review and comment in order to help define the scale and scope of the election audit it will be conducting.
- (2) The City Attorney and City Manager to consider all other final recommendations from the Report and report to the Rules & Open Government Committee by February 28, 2007.

This report responds to the above directives and provides a recommended methodology for Council consideration for implementing a program that results in the completion of a cost benefit analysis for projects, activities, and events seeking public funding.

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ANALYSIS

On January 8, 2007, the Government Reform & Ethics Subcommittee of the Mayor's Transition Committee issued its Final Recommendations to Mayor Chuck Reed. On January 24, 2007, the Rules & Open Government Committee considered several actions proposed by Mayor Reed regarding the Government Reforms & Ethics Subcommittee Report. This report provides the City Attorney and City Manager's response to the recommendations/comments made in the Subcommittee's report and is structured consistent with the Government Reform & Ethics Subcommittee Report.

Lobbyist Reforms

Recommendation 1: A change to the definition of a "Lobbyist" closer to the definition used by the State of California which is "a person paid for the purpose of affecting legislation." This definition is not complete but is far easier to understand than the current definition used by the City today.

Response: The definition of "Lobbyist" under the State Political Reform Act (Gov. Code Section 82039) is as follows:

"(a) "Lobbyist means any individual who receives \$2000.00 or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. An individual is not a lobbyist by reason of activities described in Section 86300.

(b) (Exception for certain PUC hearings)"

The City's lobbying ordinance could be revised to mirror the above definition as appropriate. The definition in the ordinance must be precise enough to enforce.

Recommendation 2: Increase the revolving door standard from 1 year to 4 years.

Response: Courts have found revolving door ordinances to be socio-economic regulations that do not impact any fundamental rights and, consequently, are properly reviewed using the "rational basis" test established by the United States Supreme Court. To meet the rational basis test, the regulation must be rationally related to the problem that the City is trying to address. The problems that revolving door restrictions generally are intended to address are: (1) to assure independence, impartiality and integrity in the City's actions and decisions; (2) to prevent former employees and officials from profiting from their prior City service; and (3) to prevent a private business from obtaining a perceived unfair advantage in dealing with the City by hiring a former employee.

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Durational limits ("cooling off limits") prohibit a former public official or employee from having certain contact with a former agency for a specific period of time. A review of such restrictions nationwide shows that the prohibition is substantively often broad, but effective for only a limited period. Permanent bans on the subsequent activities of former employees have been upheld where the ban applies to matters in which an individual was personally involved as a government employee. The current San Jose ordinance places a one year ban on both: (1) matters in which the individual was personally involved; and (2) representation before the City on any matter.

With regard to the broad-based, general type of restriction, research has not revealed any existing revolving door limits of more than two years, and, thus no challenges that would provide judicial insight on the viability of longer limits. Therefore, the safest route would be to extend the general prohibition to two years and, if needed, impose a longer prohibition to narrow, specific situations where the risk of undue influence is unacceptably high or the existence of a conflict is unavoidable. For example, the ordinance could be tailored to address the relative risk of lobbying of different classes of employees.

The Subcommittee Report also noted that the majority of its member felt that all City employees should be restricted from lobbying for four years. Extending the existing prohibition to all employees may be too broad to be rationally related to the goal of reducing undue influence in local government.

Finally, although the meet and confer requirements of the Meyers-Milias-Brown Act and Section 16600 of the Business and Professions Code (prohibiting contracts that restrain individuals from engaging in a lawful profession) could be considered in this analysis, it is our opinion that neither of those laws apply to increasing the restrictions of the revolving door ordinance.

Recommendation 3: Prohibit Lobbyists from donating to campaigns or from bundling contributions from their clients to candidates.

Response: The Council could consider prohibitions on campaign contributions to City officials and candidates. Under State law, State lobbyists are restricted from making contributions to an elected State officer or candidate if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected State officer.

As to a prohibition on "bundling", given the legitimate government interest in restoring public confidence in government and reducing undue influence that underlies extensive campaign finance legislation, it is difficult to imagine what countervailing public interest served by bundling might motivate a court to find a prohibition against bundling unconstitutional. While freedom of political speech and association are implicated with regard to campaign contributions, as the Supreme Court recently noted, restrictions on political contributions are considered "marginal" speech restrictions "subject to relatively complaisant review under the

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First Amendment, because contributions lie closer to the edges than to the core of political expression.”

Recommendation 4: Require elected officials to disclose any meeting with a lobbyist and the project that was discussed during that meeting on their calendars and from the dais before a council meeting when the project is scheduled for a vote.

Response: There are no legal concerns with this recommendation.

Recommendation 5: Prohibit contingent fees for lobbyists. Fees for lobbyist services should not be tied to a specific outcome. If the City cannot regulate the fees then the lobbyist must disclose to any councilmember or staff what their “success fees” would be at the time of the meeting.

Response: California and several other states have enacted legislation to prohibit contingency fees for lobbyists, and there is helpful language in the cases interpreting these statutes to support such a prohibition against contingency fees.

Recommendation 6: Reduce the number of hours to qualify as a lobbyist to 3 hours a year. Currently an individual must register as a lobbyist if they spend more than 20 hours in a three month period meeting with Councilmembers or their staff, members of the planning commission, Redevelopment Agency Board, Appeals Hearing Board, Civil Service Commission, the City Manager or Executive Director of the Agency and their deputies, or any City representative to any joint powers authority to which the City is a party.

Response: There are no legal concerns with this recommendation

Recommendation 7: All City employees must report being lobbied and should also be restricted from lobbying for four years.

Response: Under the San Jose Municipal Code, “lobbying” means influencing or attempting to influence a City official or City official-elect. “City official” includes the Mayor and members of the City Council, any appointee of the City Council, Mayoral or Council staff member, Redevelopment Agency Board member, members of the Planning Commission, Appeals Hearing Board, Civil Service Commission, any City representative to any joint powers authority to which the City is a party, the City Manager and his or her Assistant City Manager and Deputy City Managers and the Executive Director of the Agency and his or her Assistant and Deputies and City and Agency Department Heads. Thus, city employees who are not “City officials” cannot be lobbied under the current definitions in Municipal Code.

The reason for limiting the definition to City officials is twofold. First, it provides specificity to the ordinance for enforcement purposes. Second it is targeted to the decision makers in the organization, which is the purpose of the regulation. If the definition were revised to apply to all City employees, then a definition of lobbying activity would need to be drafted that would clearly delineate lobbying activity from any other contact. Further, a requirement that all City employees must report being lobbied may trigger meet and confer requirements under the

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Meyers-Milius-Brown Act for represented employees, since employees who fail to report may be subject to discipline.

As to the extension of the revolving door restrictions to all City employees, this may not pass the rational basis test as discussed above in Section B.

Campaign Finance Reform

The Elections Commission has received a memorandum from the City Attorney, dated February 2, 2007, informing the Commission of all of the issues related to Campaign Finance Reform that have been referred to it, including those referred by the Rules and Open Government Committee on January 24, 2007 (See Attachment A).

Global View

Recommendation 1: Projects that would require a change of the General Plan should all be reviewed at the same time and only once a year.

Response: The Community & Economic Development City Service Area (CED CSA) supports reducing the frequency of General Plan amendments, which has impacted the ability of staff to conduct thoughtful review of amendment proposals. The CED CSA has begun discussing the proposal to limit General Plan hearings to once annually. However, there is some concern that reducing the number of General Plan Hearings where such amendments are considered from four times a year to once, may stifle the business development process. Staff would like to explore whether a specific set of criteria/conditions should be developed to allow additional General Plan Hearings for projects that meet a certain criteria of public benefit/City objectives.

Recommendation 2: Require 1:1 mitigation – in lieu fee

Response: A team comprised of the Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency, City Attorney's Office, and a consultant has met regularly to develop a policy to regulate proposals to convert industrial lands to other uses.

Policy proposals under consideration include possibly requiring an industrial capacity replacement policy similar to 'endangered species' or agricultural lands, or through a mitigation fee with the funds dedicated to supporting economic development. Outstanding questions that remain include: ensuring compliance with AB 1600 requirements and clarifying the nexus that will serve as the basis of the fee structure. Following City agreement, the above referenced team will develop an outreach strategy and solicit feedback from the development community prior to advancing the policy to the City Council for consideration. As proposed, a 1:1 mitigation would effectively result in a moratorium of industrial conversions, as the cost of non-industrial zoned lands would make such a swap cost prohibitive.

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Recommendation 3: Inventory the conversion of industrial land to housing for the past 24 years.

Response: The CED CSA strongly agrees with the Transition Committee that the long-term financial sustainability of the City depends on the availability of sufficient employment lands for future job creation and industrial/retail development. Nearly 20% of industrial lands have been converted to other uses in the past 15 years, which reduces the ability of the City to create the jobs and tax base required to support the population projections. Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency, City Attorney's Office are partnering to update the Industrial Land Conversion analysis as a prelude to Council adoption of specific plans for Evergreen and Coyote Valley and this year's General Plan Update.

A document listing conversions and General Plan changes since 1991 currently exists (16 years). A team consisting of the Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency is working together to update the Industrial Lands Analysis.

Recommendation 4: Accelerate annexations of county land beginning with commercial and industrial property.

Response: Per Council direction, the Department of Planning, Building and Code Enforcement has increased the rate of annexation of County pockets and will continue to do so as resources allow. This year, the pace of the annexations has exceeded the funding for services provided by other City departments and may result in a lull until additional non-personal funding becomes available. Staff is looking for commercial and industrial areas not already annexed by the program to put in the next phase.

Recommendation 5: The goal of city planning should be a balance of industrial, commercial, and housing to achieve our city goals including our fiscal health and that best serve the needs of the city.

Response: The existing *San Jose 2020 General Plan* contains strategies, goals and policies to achieve fiscal health, balanced community, quality of life and other outcomes. This Plan guides Council decision-making for land use actions, capital improvement investments, and service delivery. The City Council will consider the formal initiation of a comprehensive, community-based General Plan update during the budget process for FY 07/08 and through which the Council and community will discuss the proper balance of these objectives.

Additional Reforms

Recommendation 1: All projects, activities, and events seeking public funding must include a measurable social or economic benefit to the City. AND Recommendation 2: A cost benefit analysis must be submitted for all projects, activities, and events seeking public

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funding. An after action report/analysis must be performed to determine whether or not the City's interests were met. When a public subsidy is sought, Councilmembers must provide a list of those lobbyists and political donors/supporters that they spoke with relative to the project/program.

Response: The CED CSA has developed a proposal for implementing this recommendation, based upon the following definitions:

Proposed Definition

Cost-benefit analysis is the process of weighing the total expected costs against the total expected benefits. In order to analyze the City of San Jose's return on investment, cost-benefit analysis should include analysis of quantitative, as well as qualitative, indicators of fiscal, economic, and other impacts (e.g., community, environmental, media, etc).

Components of Cost-Benefit Analysis

Fiscal Analysis: The base component of a municipal cost-benefit analysis is a fiscal impact study, which would compare the projected total cost to the City to the total projected increase in City revenues/cost-avoidance. Fiscal calculations require a comparison of the long-term value of City investment, through a time value of money calculation, and the projected revenues, such as property tax, sales tax, utility tax, and one-time fees. A clearly defined standard would be required to ensure that all analysis conform to an objective system of measurement, which could regularly be checked with after-action analysis).

Economic Impact: In addition to a fiscal analysis, an economic impact study forecasts the changes in direct and indirect spending, employment, earnings, etc. Economic impacts of programs and projects would require consensus on the appropriate methodology to capture the ripple effects of City action, such as the increased sales for adjacent businesses from employees of a new business that received City funds. Recent work by the Office of Economic Development to develop an 'Economic and Fiscal Impact Tool' could serve as a basis for analyzing the economic impact of events, although additional analysis would be required to capture the economic impacts of other types of projects, such as the construction of physical buildings.

Additional Impacts: The most difficult cost-benefit calculations are accounting for the social impacts (e.g., community, environmental, media) of various projects/events. For example, the City supports events for their economic impact, but, as a public entity, the City also supports events because of their social benefits, such as community building/celebration, strategic positioning, and media exposure. However, social benefits would need to be weighed against social costs, including environmental degradation, opportunity costs, traffic congestion, and other quality of life impacts.

The process of quantifying social benefits is often a costly and controversial process, with little agreement among stakeholders about the appropriate weights that should be attached to various factors. Rather than attempting to quantify these abstract costs, staff proposes listing other impacts in Council memos to allow the City Council to judge the weight that should be attached. For example, a project where the fiscal and economic cost-benefit analysis is slightly positive,

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but negative environmental impacts are anticipated, would require the City Council to make a value judgment of how heavily to weigh the social costs of the project.

Proposed Pilot Program

The complexity and expense of thorough cost-benefit analysis limits the feasibility of requiring a cost-benefit analysis for all City projects as proposed within the Government Reforms & Ethics Subcommittee Report. Further, current City staff does not have the expertise or the capacity to undertake the workload associated with true cost-benefit analyses, which requires a highly specialized and labor intensive process to develop objective measures of the costs and benefits of proposed Council actions.

As such, staff proposes conducting modified cost-benefit analyses in-house, which focus heavily upon the fiscal impact of policy proposals and would be similar to a private sector 'return on investment' calculation. This in-house analysis would compare the value of City investment over time and the anticipated revenues, such as increased property tax, sales tax, utility tax, and one-time fees. In addition, staff will attempt to enumerate non-fiscal costs and benefits of the project. Attempts to quantify economic or other impacts further would likely require the services of an expert consultant to help staff develop methodology for analyzing major types of expenditures anticipated such as physical building projects and development subsidies. However, such investment would allow staff to apply the developed methodology to future analyses in a fashion similar to the anticipated use of the recently completed 'Analysis of the Economic and Fiscal Impact of Cultural and Sporting Events in San Jose.'

Staff proposes that many projects do not warrant the expense associated with a thorough cost-benefit analysis. The projects recommended for exclusion from the Proposed Pilot Program would include items/projects:

- Requiring less than \$1 million in City funds,
- Received prior approval through the budget process,
- Related to private lending deals, and
- Implement an adopted City policy, such as affordable housing projects.

Staff proposes initiating a pilot program that would provide cost-benefit analysis of 3-5 projects in FY 2007-2008 that are 'special allocations' and/or projects for which the Council specifically requests analyses. In addition to existing events that are already evaluated (e.g., Grand Prix), additional proposed projects for evaluation may include Hayes Mansion, public golf course usage, and energy efficiency initiatives.

In addition to the modified cost-benefit analysis, projects included in the pilot program would require an after-action report, which would be submitted following the completion of the project/event. The after-action report would be presented in a format that compares the results to the projected benefit in an effort to benchmark performance and improve the accuracy of the cost-benefit analysis process. The constant improvement of cost-benefit standards will also assist the Council in evaluating studies by various developers and entities requesting City assistance.

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Recommendation 3: A permanent committee on ethics should be established and report to the Mayor and Council three times a year regarding the progress of ethics reforms.

Response: If the City Council approves this recommendation, staff suggests that one of the three required reports to the City Council be combined with the proposed annual study sessions recommended as part of Reed Reform #26, *Hold regular public hearings on ethical issues around the state so we can learn from our mistakes and the mistakes of others*, to leverage the opportunity to hear all matters regarding ethics at once.

The Reed Reforms

The Reed Reforms were considered by the City Council on February 6, 2007 and Council unanimously approved the status report and list of exceptions to Reed Reform #5, 10-day report distribution requirement. This report followed a lengthy discussion at the January 31, 2007 Rules & Open Government Committee where the Committee provided clarification on four Reed Reforms and amended the list of exceptions related to Reed Reform #5. Staff will continue to report to the Rules & Open Government Committee on the status of implementing the Reforms.

PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**

- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**

- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

No public outreach was done to complete this report.

COORDINATION

This memorandum was coordinated with the various departments noted in this report.

HONORABLE MAYOR & CITY COUNCIL

Subject: Mayor's Transition Government Reforms & Ethics Subcommittee Report

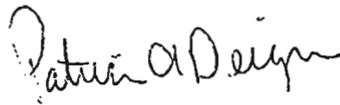
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CEQA

Not a Project.


Leah White
City Manager


for Richard Doyle
City Attorney

For more information on this report, contact Patty Deignan, Chief Deputy General Counsel, at 535-1201 and Deanna J. Santana, Deputy City Manager, at 535-8280.

Memorandum

TO: San Jose Elections Commission **FROM:** Richard Doyle
City Attorney

SUBJECT: City Council Referrals to the **DATE:** February 2, 2007
Elections Commission

At the Elections Commission's January 25, 2007 meeting, questions were raised by Commissioners regarding the City Council referrals to the Commission. This memorandum will provide our understanding of the referrals to the Commission.

The Elections Commission has been referred the following:

1. **Public financing of municipal campaigns**, referred by Council on or about March, 2006;
2. **Limits on contributions to independent expenditure committees**, referred by Council on October 10, 2006;
3. Reed Reform # 19 - referred by Council on January 9, 2007 (as recommended by Mayor Reed in his memo dated December 22, 2006): **Plug loopholes in the campaign financing ordinance that make it possible to contribute unlimited amounts of money in the form of paid campaign workers;**
4. Reed Transition Committee/Government Reform and Ethics Subcommittee: Campaign Finance Reform Recommendations (a - i) dated January 8, 2007 - referred by Rules and Open Government Committee on January 24, 2007 (as recommended by Mayor Reed in his memo dated January 17, 2007, asking the Elections Commission for review and comment in order to help define the scale and scope of the election audit they will be conducting:
 - a. **If money is spent in San Jose the committee making the expenditure must file their report in San Jose with the City Clerk's office within 24 hours of making the expenditure.**
 - b. **Re-initiate the contribution limits on independent expenditures (the City Attorney's office is currently appealing the court case that threw out the contribution limits).** [Note: this is somewhat duplicative of the referral from Council to the Elections Commission on October 10, 2006.]
 - c. **Increase penalties for violations dramatically, possibly as much as the expenditure.**

d. **Increase the budget and staff of the Elections Committee and allow the Elections Committee to use the District Attorney's office to investigate election complaints.**

e. **Penalize the consultant as well as the committee for failure to follow Independent Expenditure Laws.**

f. **Disallow the coordination of candidate committees and party organizations in non-partisan races.**

g. **Require Independent Expenditure committees to disclose on written material a disclaimer that says "this piece was paid for by an independent committee with funds that were raised in amounts greater than the limits imposed on campaign committees." The same disclaimer would have to be read on all radio and television commercials.**

h. **Prohibit consultants from working for a candidate committee and an Independent Expenditure Committee supporting the same candidate.**

i. **The Transition Committee also recommends the city staff looks into the Instant Run Off System to see if this method could save money.**

PLEASE NOTE: We believe that Reed Reform # 20 - **Plug loopholes in the lobbyist ordinance that allow many lobbyists to avoid public disclosure of what they are doing** - was **NOT** referred to the Elections Commission since Mayor Reed recommended deferring this topic to later discussion. However, the Sunshine Reform Task Force and Staff have proposed referring Reed Reform # 20 to the Elections Commission.

Please feel free to contact the City Attorney's Office if you have any questions.

Richard Doyle
City Attorney

By

Norm Sato
Chief Deputy City Attorney

Cc: Lee Price
Lisa Herrick
Alex Stuart

Attachment B



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: RICHARD DOYLE
City Attorney

SUBJECT: SEE BELOW

DATE: March 9, 2007

Supplemental Memo

SUBJECT: RESPONSE TO THE REPORT BY THE GOVERNMENT REFORMS AND ETHICS SUBCOMMITTEE OF THE MAYOR'S TRANSITION COMMITTEE

BACKGROUND

On January 24, 2007, the Rules and Open Government Committee considered several proposals by Mayor Reed in response to the Report by the Government Reforms & Ethics Subcommittee of the Mayor's Transition Committee ("Report"). One proposal was to amend, for Council consideration, amendment of the Municipal Code to require lobbyists to disclose success fees to City officials when meeting to discuss projects, and on the lobbyist's quarterly reports.

The Committee also directed the City Manager and City Attorney to consider all remaining final recommendations from the Report, and report back to the Committee by February 28, 2007. On February 23, 2007, the City Manager and the City Attorney issued a memorandum that discussed the remaining recommendations.

On February 27, 2007, the City Council discussed the recommendation to require disclosure of lobbyist contingency fees and requested that the City Attorney address the contingency fee issue in more detail when the issue of prohibiting contingency fees comes before the Committee.

On February 28, 2007, and March 7, 2007, the Rules and Open Government Committee deferred action on the lobbyist recommendations in the Report, but received testimony from the public. As a result of the public testimony, the Committee requested that the City Attorney address additional issues with regard to the imposition of the City's lobbyist regulations on non-profit organizations.

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ANALYSIS

A. Constitutional Constraints On Regulating Lobbyists

The regulation of lobbying activity may implicate certain rights guaranteed by the First Amendment including the rights to free speech and association, and the right to petition one's government. If a regulation impacts a fundamental constitutional right, the government action can only be justified when the government shows that it has a "compelling interest" in the regulation, and the regulation is narrowly drawn to address that compelling interest. This standard of review is more commonly referred to as "strict scrutiny." The courts have consistently held that ridding the political system of both apparent and actual corruption and improper influence is a compelling governmental interest. Members of the Government Reform and Ethics Subcommittee have stated that one of the rationales underlying all lobbyist reform recommendations in the Report is to disconnect lobbying activities from campaign fundraising in an effort to decrease the real or perceived influence lobbyists can acquire over elected public officials.

The California Supreme Court and the U.S. Supreme Court have found that when a regulation only incidentally impacts a fundamental right, there only needs to be a rational relationship between the regulation and the government interest. This standard of review is more commonly referred to as "rational basis" and is a lower level of review than strict scrutiny. Examples of regulations that meet this level of review include lobbyist registration requirements, quarterly disclosure of receipts, expenditures and lobbying activities, and limitations on gifts. On the other hand, a requirement that lobbyists disclose private financial transactions that were unrelated to the lobbying activity was found to be a direct and undue burden on the right to petition the government and was held unconstitutional because the regulation did not pass strict scrutiny.

In addition to constraints under the First Amendment, lobbyist regulations that treat categories of persons or entities differently implicate the right to equal protection. These kinds of regulation do not violate the right to equal protection as long as there is a rational basis for the regulation, and the categories are not based on a protected class (e.g. race or gender) or arbitrary and capricious.

B. Regulating Contingency or "Success" Fees (Subcommittee Recommendation 5)

Thirty-eight states, including California, and many large cities in other states, prohibit contingent lobbyist contracts.

Under a contingency lobbying contract, as opposed to a flat fee or hourly compensation arrangement, the lobbyist is paid only if the governmental decision he or she is attempting to influence is resolved in favor of the client. The U.S. Supreme Court, in several older opinions, has found that such arrangements are against public policy

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based on the concern that a lobbyist will be tempted to resort to any means necessary to achieve his goals when his compensation is at stake. The concern is not based on the amount of compensation, but on the fact that the lobbyist will not be paid unless he is successful. There is the additional concern, when the contingent fee is based on a percentage of the funding received from the government entity, that the lobbyist may seek to obtain more funding than is actually needed, at the expense and to the detriment of the taxpayer.

Improper influences could take many forms ranging from the use of personal influence to bribery. Even if no illegal tactics are employed, the financial pressures caused by the contingent arrangement could lead to more subtle activities such as embellishing or hiding pertinent facts in an attempt to influence a decision maker. As stated above, avoiding the appearance of corruption, as well as actual corruption, is deemed a governmental interest sufficiently compelling to uphold lobbyist regulations.

As mentioned above, there are several early Supreme Court cases which held that contingent fee lobbyist contracts were void as against public policy. However, none of these cases were brought under a First Amendment challenge. There is an argument that prohibiting lobbyists from working on a contingent fee basis denies access to the government process to individuals and groups that may not otherwise be able to afford it. A few cases have entertained that argument with mixed results. The Kentucky Supreme Court, found that a ban on contingent arrangements was narrowly drawn to protect the state's "compelling interest in insuring the proper operation of a democratic government and deterring corruption as well as the appearance of corruption." The 11th Circuit Court of Appeal acknowledged the argument that if the current Supreme Court analyzed the issue under modern First Amendment principals, the outcome may be different, but nevertheless felt bound to the precedent of the Supreme Court cases.

In 1981, The Montana Supreme Court held that a prohibition against contingent compensation for lobbyists was unconstitutional. This Court did not distinguish the prior US Supreme Court cases nor did it follow the premise of those cases that contingent fee arrangements were an improper lobbying activity in and of itself. The Court found that the blanket prohibition prohibited "properly motivated" lobbying arrangements as well as "improperly motivated" arrangements and therefore infringed on the rights of those who, without improper motives, desired to pay a lobbyist on a contingent fee basis. It should be noted that the Montana law under review provided for criminal sanctions which the court acknowledged influenced its analysis. Given the age of this case and the fact that no other courts have followed suit, it is unclear how much merit should be given to this holding.

If the City were to prohibit contingency fees, the ordinance would have to be drafted in a manner that does not impact attorney's legal fees or real estate broker commissions. These are fees that are commonly paid on a contingent basis, but are regulated by state law, and therefore the City is preempted from regulating those areas. In addition, there could be enforcement issues that may prove problematic. We are researching how other jurisdictions enforce these regulations.

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Alternatively, as the Subcommittee recommended, the City could require that lobbyists disclose contingency fees.

C. In-House Lobbyist Registration Issues (Recommendation 6)

The Subcommittee recommended that the number of hours an individual spends in lobbying activities to qualify as an In-House lobbyist under the ordinance be reduced from twenty hours per quarter, to three hours per year. This recommendation raised questions and concerns from some non-profit groups as well as some members of the Rules Committee.

a. Current Definition of Lobbying

"Lobbying", under our current ordinance, means influencing or attempting to influence a City official with regard to a legislative or administrative action or decision of the City or Redevelopment Agency outside of a public meeting.

There are two types of In-House Lobbyists. One type is an individual who works as an officer or employee for an organization or association which represents businesses or organizations, such as a trade or industry association. This individual is compensated by the organization or association to advance its goals or mission. Under the current ordinance, if this individual engages in lobbying City officials on behalf of the organization or association in an aggregate amount of twenty hours or more within any three month period, then he or she is a lobbyist and required to register with the City Clerk.

The second type of In-House Lobbyist is an owner of a business or an employee of a business or non profit organization who is compensated more than \$1,000 in a month for engaging specifically in lobbying. Under the current ordinance, if this individual engages in lobbying City officials on behalf of the business or organization in an aggregate amount of twenty hours or more within any three month period, then he or she is a lobbyist.

The twenty hour per quarter threshold was recommended by the Blue Ribbon Task Force on Ethics in 2004 as a means of capturing only those persons in a business or organization whose employment duties include lobbying on a regular basis, such as a government affairs director. The Task Force was concerned about regulating limited activities such as a small business owner who is working through a specific permitting issue, or a CEO of a large corporation who visits San Jose periodically and meets with City officials to discuss general matters.

Uncompensated members of the board of directors of nonprofit organizations and members of neighborhood associations, Neighborhood Advisory Committees or Project Area Committees are specifically exempt from the ordinance.

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In addition, certain activities are exempt from the requirements of the lobbying ordinance and do not count toward the twenty hour threshold, including:

- The publication or broadcasting of news, editorials or commentary;
- Giving testimony at a public hearing, including the preparation of documents for use at a public hearing;
- Providing information or assistance to the City if requested by the City or Agency staff;
- Representing the position of an employer or organization such as a trade association when that employer or organization already has a representative registered as a lobbyist under the Ordinance;
- Bidding on, submitting a proposal for, or negotiating the terms of an authorized City or Agency agreement;
- Lodging whistleblower complaints;
- Meeting with the City Attorney or City Clerk regarding a claim, litigation or negotiation of agreements;
- Discussions with City officials solely related to City collective bargaining agreements;
- Appearances before the Civil Service Commission; and
- Communications solely in connection with the administration of an existing contract with the City or Agency.

b. IRS Issues

The Committee requested an explanation of the different types of tax exempt non profit entities and the restrictions placed on them by the Internal Revenue Code.

501(c)(3)

These are charitable organizations including churches and private foundations, and educational organizations. 501(c)(3) organizations may engage in lobbying in furtherance of their exempt purposes. The lobbying, however, may not be a substantial part of the organization's activities.

The measure of whether the lobbying is a substantial part of their activities can fall under one of two tests.

One test is the "expenditure test" which allows 501(c)(3) organizations that are not churches or private foundations to elect to measure their lobbying activity based on a ceiling amount established by the IRS. If the organization exceeds this ceiling amount over a four year period they may lose their exempt status and pay a tax. The ceiling amount varies based on the organization's total expenditure and may not exceed \$1,000,000.

The second test is the "substantial part test." The rule is whether an organization's attempts to influence legislation constitute a substantial part of its

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overall activities. This determination is based on the pertinent facts and circumstances of each case. The factors to consider are: (1) the time devoted to lobbying activity (by both compensated and volunteer workers), (2) the expenditure devoted by the organization to the activity, and (3) the amount of publicity the organization assigns to the activity. According to IRS opinions, lobbying activity may be "substantial" if the organization's expenditure on lobbying is 16% to 20%. If an organization does meet this test it may lose its tax-exempt status and all of its income is subject to tax. In addition, a tax of 5% of the lobbying expenditures for the year may be imposed against organization managers, jointly and severally, who agree to the making of such expenditures knowing that the expenditures would likely result in the loss of tax-exempt status.

501(c)(4)

This is a tax exempt organization that is operated exclusively to promote social welfare, i.e. the common good and general welfare of the people of the community. A 501(c)(4) organization can seek legislation germane to the organization's programs and lobbying can be a primary activity without jeopardizing its exempt status.

501(c)(5)

This is a labor, agricultural or horticultural organization. There are no IRS prohibitions on lobbying for these organizations.

501(c)(6)

This is a business league (trade and professional associations), chamber of commerce, real estate boards, and boards of trade. A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. To be tax exempt, a business league's activities must be devoted to improving business conditions of one or more lines of business as distinguished from performing particular services for individual persons. These organizations may engage in unlimited lobbying in furtherance of their tax exempt purpose.

Whether a 501(c)(3) organization will lose its exempt status depends on whether it is in fact engaged in "lobbying" as defined by the Internal Revenue Code and not the local ordinance. These organizations have an obligation under federal law to not make lobbying a "substantial" part of their activities. The provisions of local or state lobbying regulations have no impact on that analysis.

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c. First Amendment Issues

If the threshold for an In-House lobbyist were lowered from twenty hours per quarter to three hours per year, an argument could be made that the registration and disclosure requirements of the ordinance place an undue burden on the First Amendment rights of free speech and to petition one's government, which would trigger a strict scrutiny analysis. Since the courts have found repeatedly that regulating lobbying activities in an effort to avoid corruption and the appearance of corruption is a compelling government interest, the remaining question under a strict scrutiny analysis would be whether the regulations are narrowly drawn to accomplish that goal. By reducing the number of hours an In-House lobbyist spends on lobbying activities to three hours per year, our definition of lobbyist would be substantially broadened to include people who do not engage in lobbying activities as a regular part of their profession. As such, broadening the definition of who is a lobbyist could weaken the argument that the lobbyist regulations are narrowly tailored.

However, lobbyist registration and disclosure regulations have been upheld under both the strict scrutiny test and the rational basis test. We have found only one case in which a registration requirement was held unconstitutional. That was a case in 1958 that invalidated a Virginia law requiring the registration of any organization that engaged in "promoting or opposing the passage of legislation ...on behalf of any race or color, or in the advocacy of racial integration or segregation, or whose activities tend to cause racial conflicts or violence..." The court held that this registration requirement was different than the one upheld by the Supreme Court because it was not limited to persons who: 1) were paid to influence legislation; and 2) who intended to directly communicate with members of the legislature in order to effect such influence. Therefore it was not narrowly tailored to apply only to actual lobbying activities.

The threshold requirements and definition of lobbying activity under the San Jose ordinance assure that it applies only to paid lobbyists who actually contact individual public officials.

d. Equal Protection Issues

The Rules and Open Government Committee asked whether nonprofits could be exempt from the lobbying ordinance.

If the City were to treat nonprofit organizations differently than businesses under the ordinance, a court would most likely analyze the distinction under the rational basis test, since the distinction is not based on gender or race or any other protected class. There are many reasons that nonprofit organizations can be exempt from regulation, including the fact that the IRS Code regulates tax exempt organizations' ability to engage in political activity, which diminishes the concern that these organizations will use their ability to contribute to a campaign to increase their influence while lobbying.

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The City could also waive the registration fees for nonprofits as long as other lobbyists do not incur the cost to offset a waiver for nonprofit organizations.

D. Prohibition on Bundling (Subcommittee Recommendation 3)

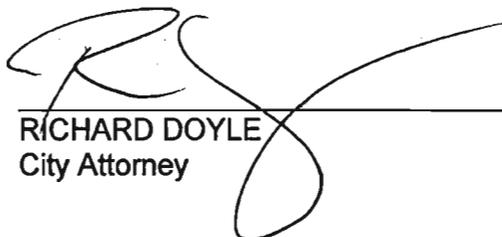
Bundling is the practice of using an agent or intermediary to solicit and deliver campaign contributions. Bundling by lobbyists has been identified as a particular area to regulate because a lobbyist who is successful in delivering campaign contributions is perceived to have more influence with the elected officials who they have helped get elected. However, we are aware of only two jurisdictions which currently regulate this practice.

The California Supreme Court rejected a provision in the original Political Reform Act that made it unlawful for lobbyists "to make contributions, or to act as an agent or intermediary in the making of a contribution, or to arrange for the making of any contribution by himself or by any other person." However, the Court's analysis was limited to the prohibition on making campaign contributions and found that, "while either apparent or actual political corruption might warrant some restriction of lobbyist associational freedom, it does not warrant total prohibition of all contributions by all lobbyists to all candidates." The Court did not discuss the prohibition on acting as an intermediary.

Since prohibiting this practice would arguably be a direct infringement on the First Amendment right to freedom of association, strict scrutiny may apply. The ordinance would have to be narrowly tailored to address only the intended governmental interest.

CONCLUSION

Regulation of lobbying activity necessarily impacts fundamental First Amendment rights of freedom of speech, association and the right to petition one's government. However, the courts have long held that the interest of government in protecting the democratic process from corruption, or the appearance of corruption, is compelling enough that if regulations are narrowly tailored lobbying activities can be limited.



RICHARD DOYLE
City Attorney



Memorandum

TO: RULES & OPEN GOVERNMENT
COMMITTEE

FROM: Les White
Rick Doyle

SUBJECT: SEE BELOW

DATE: February 23, 2007

**SUBJECT: RESPONSE TO THE REPORT OF THE GOVERNMENT REFORMS &
ETHICS SUBCOMMITTEE OF THE MAYOR'S TRANSITION
COMMITTEE**

RECOMMENDATION

- (a) Accept the response to the Report of the Government Reforms & Ethics Subcommittee of the Mayor's Transition Committee; and,
- (b) Provide direction on the recommended methodology to implement a pilot program for cost benefit analyses for projects, activities, and events seeking public funding.

OUTCOME

On January 24, 2007, the Rules & Open Government Committee considered several actions proposed by Mayor Reed regarding the Government Reforms & Ethics Subcommittee Report. This report responds to the specific directives referred to the City Attorney and City Manager.

BACKGROUND

The Mayor's Government Reforms & Ethics Subcommittee Report directed:

- (1) The City Attorney to take the Campaign Finance Reform section of the Report to the Elections Committee for review and comment in order to help define the scale and scope of the election audit it will be conducting.
- (2) The City Attorney and City Manager to consider all other final recommendations from the Report and report to the Rules & Open Government Committee by February 28, 2007.

This report responds to the above directives and provides a recommended methodology for Council consideration for implementing a program that results in the completion of a cost benefit analysis for projects, activities, and events seeking public funding.

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ANALYSIS

On January 8, 2007, the Government Reform & Ethics Subcommittee of the Mayor's Transition Committee issued its Final Recommendations to Mayor Chuck Reed. On January 24, 2007, the Rules & Open Government Committee considered several actions proposed by Mayor Reed regarding the Government Reforms & Ethics Subcommittee Report. This report provides the City Attorney and City Manager's response to the recommendations/comments made in the Subcommittee's report and is structured consistent with the Government Reform & Ethics Subcommittee Report.

Lobbyist Reforms

Recommendation 1: A change to the definition of a "Lobbyist" closer to the definition used by the State of California which is "a person paid for the purpose of affecting legislation." This definition is not complete but is far easier to understand than the current definition used by the City today.

Response: The definition of "Lobbyist" under the State Political Reform Act (Gov. Code Section 82039) is as follows:

"(a) "Lobbyist means any individual who receives \$2000.00 or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. An individual is not a lobbyist by reason of activities described in Section 86300.

(b) (Exception for certain PUC hearings)"

The City's lobbying ordinance could be revised to mirror the above definition as appropriate. The definition in the ordinance must be precise enough to enforce.

Recommendation 2: Increase the revolving door standard from 1 year to 4 years.

Response: Courts have found revolving door ordinances to be socio-economic regulations that do not impact any fundamental rights and, consequently, are properly reviewed using the "rational basis" test established by the United States Supreme Court. To meet the rational basis test, the regulation must be rationally related to the problem that the City is trying to address. The problems that revolving door restrictions generally are intended to address are: (1) to assure independence, impartiality and integrity in the City's actions and decisions; (2) to prevent former employees and officials from profiting from their prior City service; and (3) to prevent a private business from obtaining a perceived unfair advantage in dealing with the City by hiring a former employee.

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Durational limits ("cooling off limits") prohibit a former public official or employee from having certain contact with a former agency for a specific period of time. A review of such restrictions nationwide shows that the prohibition is substantively often broad, but effective for only a limited period. Permanent bans on the subsequent activities of former employees have been upheld where the ban applies to matters in which an individual was personally involved as a government employee. The current San Jose ordinance places a one year ban on both: (1) matters in which the individual was personally involved; and (2) representation before the City on any matter.

With regard to the broad-based, general type of restriction, research has not revealed any existing revolving door limits of more than two years, and, thus no challenges that would provide judicial insight on the viability of longer limits. Therefore, the safest route would be to extend the general prohibition to two years and, if needed, impose a longer prohibition to narrow, specific situations where the risk of undue influence is unacceptably high or the existence of a conflict is unavoidable. For example, the ordinance could be tailored to address the relative risk of lobbying of different classes of employees.

The Subcommittee Report also noted that the majority of its member felt that all City employees should be restricted from lobbying for four years. Extending the existing prohibition to all employees may be too broad to be rationally related to the goal of reducing undue influence in local government.

Finally, although the meet and confer requirements of the Meyers-Milias-Brown Act and Section 16600 of the Business and Professions Code (prohibiting contracts that restrain individuals from engaging in a lawful profession) could be considered in this analysis, it is our opinion that neither of those laws apply to increasing the restrictions of the revolving door ordinance.

Recommendation 3: Prohibit Lobbyists from donating to campaigns or from bundling contributions from their clients to candidates.

Response: The Council could consider prohibitions on campaign contributions to City officials and candidates. Under State law, State lobbyists are restricted from making contributions to an elected State officer or candidate if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected State officer.

As to a prohibition on "bundling", given the legitimate government interest in restoring public confidence in government and reducing undue influence that underlies extensive campaign finance legislation, it is difficult to imagine what countervailing public interest served by bundling might motivate a court to find a prohibition against bundling unconstitutional. While freedom of political speech and association are implicated with regard to campaign contributions, as the Supreme Court recently noted, restrictions on political contributions are considered "marginal" speech restrictions "subject to relatively complaisant review under the

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First Amendment, because contributions lie closer to the edges than to the core of political expression.”

Recommendation 4: Require elected officials to disclose any meeting with a lobbyist and the project that was discussed during that meeting on their calendars and from the dais before a council meeting when the project is scheduled for a vote.

Response: There are no legal concerns with this recommendation.

Recommendation 5: Prohibit contingent fees for lobbyists. Fees for lobbyist services should not be tied to a specific outcome. If the City cannot regulate the fees then the lobbyist must disclose to any councilmember or staff what their “success fees” would be at the time of the meeting.

Response: California and several other states have enacted legislation to prohibit contingency fees for lobbyists, and there is helpful language in the cases interpreting these statutes to support such a prohibition against contingency fees.

Recommendation 6: Reduce the number of hours to qualify as a lobbyist to 3 hours a year. Currently an individual must register as a lobbyist if they spend more than 20 hours in a three month period meeting with Councilmembers or their staff, members of the planning commission, Redevelopment Agency Board, Appeals Hearing Board, Civil Service Commission, the City Manager or Executive Director of the Agency and their deputies, or any City representative to any joint powers authority to which the City is a party.

Response: There are no legal concerns with this recommendation

Recommendation 7: All City employees must report being lobbied and should also be restricted from lobbying for four years.

Response: Under the San Jose Municipal Code, “lobbying” means influencing or attempting to influence a City official or City official-elect. “City official” includes the Mayor and members of the City Council, any appointee of the City Council, Mayoral or Council staff member, Redevelopment Agency Board member, members of the Planning Commission, Appeals Hearing Board, Civil Service Commission, any City representative to any joint powers authority to which the City is a party, the City Manager and his or her Assistant City Manager and Deputy City Managers and the Executive Director of the Agency and his or her Assistant and Deputies and City and Agency Department Heads. Thus, city employees who are not “City officials” cannot be lobbied under the current definitions in Municipal Code.

The reason for limiting the definition to City officials is twofold. First, it provides specificity to the ordinance for enforcement purposes. Second it is targeted to the decision makers in the organization, which is the purpose of the regulation. If the definition were revised to apply to all City employees, then a definition of lobbying activity would need to be drafted that would clearly delineate lobbying activity from any other contact. Further, a requirement that all City employees must report being lobbied may trigger meet and confer requirements under the

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Meyers-Milias-Brown Act for represented employees, since employees who fail to report may be subject to discipline.

As to the extension of the revolving door restrictions to all City employees, this may not pass the rational basis test as discussed above in Section B.

Campaign Finance Reform

The Elections Commission has received a memorandum from the City Attorney, dated February 2, 2007, informing the Commission of all of the issues related to Campaign Finance Reform that have been referred to it, including those referred by the Rules and Open Government Committee on January 24, 2007 (See Attachment A).

Global View

Recommendation 1: Projects that would require a change of the General Plan should all be reviewed at the same time and only once a year.

Response: The Community & Economic Development City Service Area (CED CSA) supports reducing the frequency of General Plan amendments, which has impacted the ability of staff to conduct thoughtful review of amendment proposals. The CED CSA has begun discussing the proposal to limit General Plan hearings to once annually. However, there is some concern that reducing the number of General Plan Hearings where such amendments are considered from four times a year to once, may stifle the business development process. Staff would like to explore whether a specific set of criteria/conditions should be developed to allow additional General Plan Hearings for projects that meet a certain criteria of public benefit/City objectives.

Recommendation 2: Require 1:1 mitigation – in lieu fee

Response: A team comprised of the Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency, City Attorney's Office, and a consultant has met regularly to develop a policy to regulate proposals to convert industrial lands to other uses.

Policy proposals under consideration include possibly requiring an industrial capacity replacement policy similar to 'endangered species' or agricultural lands, or through a mitigation fee with the funds dedicated to supporting economic development. Outstanding questions that remain include: ensuring compliance with AB 1600 requirements and clarifying the nexus that will serve as the basis of the fee structure. Following City agreement, the above referenced team will develop an outreach strategy and solicit feedback from the development community prior to advancing the policy to the City Council for consideration. As proposed, a 1:1 mitigation would effectively result in a moratorium of industrial conversions, as the cost of non-industrial zoned lands would make such a swap cost prohibitive.

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Recommendation 3: Inventory the conversion of industrial land to housing for the past 24 years.

Response: The CED CSA strongly agrees with the Transition Committee that the long-term financial sustainability of the City depends on the availability of sufficient employment lands for future job creation and industrial/retail development. Nearly 20% of industrial lands have been converted to other uses in the past 15 years, which reduces the ability of the City to create the jobs and tax base required to support the population projections. Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency, City Attorney's Office are partnering to update the Industrial Land Conversion analysis as a prelude to Council adoption of specific plans for Evergreen and Coyote Valley and this year's General Plan Update.

A document listing conversions and General Plan changes since 1991 currently exists (16 years). A team consisting of the Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency is working together to update the Industrial Lands Analysis.

Recommendation 4: Accelerate annexations of county land beginning with commercial and industrial property.

Response: Per Council direction, the Department of Planning, Building and Code Enforcement has increased the rate of annexation of County pockets and will continue to do so as resources allow. This year, the pace of the annexations has exceeded the funding for services provided by other City departments and may result in a lull until additional non-personal funding becomes available. Staff is looking for commercial and industrial areas not already annexed by the program to put in the next phase.

Recommendation 5: The goal of city planning should be a balance of industrial, commercial, and housing to achieve our city goals including our fiscal health and that best serve the needs of the city.

Response: The existing *San Jose 2020 General Plan* contains strategies, goals and policies to achieve fiscal health, balanced community, quality of life and other outcomes. This Plan guides Council decision-making for land use actions, capital improvement investments, and service delivery. The City Council will consider the formal initiation of a comprehensive, community-based General Plan update during the budget process for FY 07/08 and through which the Council and community will discuss the proper balance of these objectives.

Additional Reforms

Recommendation 1: All projects, activities, and events seeking public funding must include a measurable social or economic benefit to the City. AND Recommendation 2: A cost benefit analysis must be submitted for all projects, activities, and events seeking public

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funding. An after action report/analysis must be performed to determine whether or not the City's interests were met. When a public subsidy is sought, Councilmembers must provide a list of those lobbyists and political donors/supporters that they spoke with relative to the project/program.

Response: The CED CSA has developed a proposal for implementing this recommendation, based upon the following definitions:

Proposed Definition

Cost-benefit analysis is the process of weighing the total expected costs against the total expected benefits. In order to analyze the City of San Jose's return on investment, cost-benefit analysis should include analysis of quantitative, as well as qualitative, indicators of fiscal, economic, and other impacts (e.g., community, environmental, media, etc).

Components of Cost-Benefit Analysis

Fiscal Analysis: The base component of a municipal cost-benefit analysis is a fiscal impact study, which would compare the projected total cost to the City to the total projected increase in City revenues/cost-avoidance. Fiscal calculations require a comparison of the long-term value of City investment, through a time value of money calculation, and the projected revenues, such as property tax, sales tax, utility tax, and one-time fees. A clearly defined standard would be required to ensure that all analysis conform to an objective system of measurement, which could regularly be checked with after-action analysis).

Economic Impact: In addition to a fiscal analysis, an economic impact study forecasts the changes in direct and indirect spending, employment, earnings, etc. Economic impacts of programs and projects would require consensus on the appropriate methodology to capture the ripple effects of City action, such as the increased sales for adjacent businesses from employees of a new business that received City funds. Recent work by the Office of Economic Development to develop an 'Economic and Fiscal Impact Tool' could serve as a basis for analyzing the economic impact of events, although additional analysis would be required to capture the economic impacts of other types of projects, such as the construction of physical buildings.

Additional Impacts: The most difficult cost-benefit calculations are accounting for the social impacts (e.g., community, environmental, media) of various projects/events. For example, the City supports events for their economic impact, but, as a public entity, the City also supports events because of their social benefits, such as community building/celebration, strategic positioning, and media exposure. However, social benefits would need to be weighed against social costs, including environmental degradation, opportunity costs, traffic congestion, and other quality of life impacts.

The process of quantifying social benefits is often a costly and controversial process, with little agreement among stakeholders about the appropriate weights that should be attached to various factors. Rather than attempting to quantify these abstract costs, staff proposes listing other impacts in Council memos to allow the City Council to judge the weight that should be attached. For example, a project where the fiscal and economic cost-benefit analysis is slightly positive,

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but negative environmental impacts are anticipated, would require the City Council to make a value judgment of how heavily to weigh the social costs of the project.

Proposed Pilot Program

The complexity and expense of thorough cost-benefit analysis limits the feasibility of requiring a cost-benefit analysis for all City projects as proposed within the Government Reforms & Ethics Subcommittee Report. Further, current City staff does not have the expertise or the capacity to undertake the workload associated with true cost-benefit analyses, which requires a highly specialized and labor intensive process to develop objective measures of the costs and benefits of proposed Council actions.

As such, staff proposes conducting modified cost-benefit analyses in-house, which focus heavily upon the fiscal impact of policy proposals and would be similar to a private sector 'return on investment' calculation. This in-house analysis would compare the value of City investment over time and the anticipated revenues, such as increased property tax, sales tax, utility tax, and one-time fees. In addition, staff will attempt to enumerate non-fiscal costs and benefits of the project. Attempts to quantify economic or other impacts further would likely require the services of an expert consultant to help staff develop methodology for analyzing major types of expenditures anticipated such as physical building projects and development subsidies. However, such investment would allow staff to apply the developed methodology to future analyses in a fashion similar to the anticipated use of the recently completed 'Analysis of the Economic and Fiscal Impact of Cultural and Sporting Events in San Jose.'

Staff proposes that many projects do not warrant the expense associated with a thorough cost-benefit analysis. The projects recommended for exclusion from the Proposed Pilot Program would include items/projects:

- Requiring less than \$1 million in City funds,
- Received prior approval through the budget process,
- Related to private lending deals, and
- Implement an adopted City policy, such as affordable housing projects.

Staff proposes initiating a pilot program that would provide cost-benefit analysis of 3-5 projects in FY 2007-2008 that are 'special allocations' and/or projects for which the Council specifically requests analyses. In addition to existing events that are already evaluated (e.g., Grand Prix), additional proposed projects for evaluation may include Hayes Mansion, public golf course usage, and energy efficiency initiatives.

In addition to the modified cost-benefit analysis, projects included in the pilot program would require an after-action report, which would be submitted following the completion of the project/event. The after-action report would be presented in a format that compares the results to the projected benefit in an effort to benchmark performance and improve the accuracy of the cost-benefit analysis process. The constant improvement of cost-benefit standards will also assist the Council in evaluating studies by various developers and entities requesting City assistance.

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Recommendation 3: A permanent committee on ethics should be established and report to the Mayor and Council three times a year regarding the progress of ethics reforms.

Response: If the City Council approves this recommendation, staff suggests that one of the three required reports to the City Council be combined with the proposed annual study sessions recommended as part of Reed Reform #26, *Hold regular public hearings on ethical issues around the state so we can learn from our mistakes and the mistakes of others*, to leverage the opportunity to hear all matters regarding ethics at once.

The Reed Reforms

The Reed Reforms were considered by the City Council on February 6, 2007 and Council unanimously approved the status report and list of exceptions to Reed Reform #5, 10-day report distribution requirement. This report followed a lengthy discussion at the January 31, 2007 Rules & Open Government Committee where the Committee provided clarification on four Reed Reforms and amended the list of exceptions related to Reed Reform #5. Staff will continue to report to the Rules & Open Government Committee on the status of implementing the Reforms.

PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. (Required: Website Posting)
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. (Required: E-mail and Website Posting)
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. (Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)

No public outreach was done to complete this report.

COORDINATION

This memorandum was coordinated with the various departments noted in this report.

HONORABLE MAYOR & CITY COUNCIL

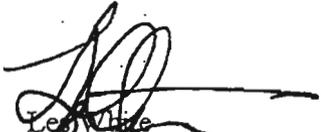
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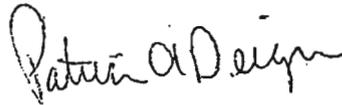
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CEQA

Not a Project.


Leah White
City Manager


for Richard Doyle
City Attorney

For more information on this report, contact Patty Deignan, Chief Deputy General Counsel, at 535-1201 and Deanna J. Santana, Deputy City Manager, at 535-8280.



Memorandum

TO: San Jose Elections Commission **FROM:** Richard Doyle
City Attorney

SUBJECT: City Council Referrals to the Elections Commission **DATE:** February 2, 2007

At the Elections Commission's January 25, 2007 meeting, questions were raised by Commissioners regarding the City Council referrals to the Commission. This memorandum will provide our understanding of the referrals to the Commission.

The Elections Commission has been referred the following:

1. **Public financing of municipal campaigns**, referred by Council on or about March, 2006;
2. **Limits on contributions to independent expenditure committees**, referred by Council on October 10, 2006;
3. Reed Reform # 19 - referred by Council on January 9, 2007 (as recommended by Mayor Reed in his memo dated December 22, 2006): **Plug loopholes in the campaign financing ordinance that make it possible to contribute unlimited amounts of money in the form of paid campaign workers;**
4. Reed Transition Committee/Government Reform and Ethics Subcommittee: Campaign Finance Reform Recommendations (a - i) dated January 8, 2007 - referred by Rules and Open Government Committee on January 24, 2007 (as recommended by Mayor Reed in his memo dated January 17, 2007, asking the Elections Commission for review and comment in order to help define the scale and scope of the election audit they will be conducting:
 - a. **If money is spent in San Jose the committee making the expenditure must file their report in San Jose with the City Clerk's office within 24 hours of making the expenditure.**
 - b. **Re-initiate the contribution limits on independent expenditures (the City Attorney's office is currently appealing the court case that threw out the contribution limits).** [Note: this is somewhat duplicative of the referral from Council to the Elections Commission on October 10, 2006.]
 - c. **Increase penalties for violations dramatically, possibly as much as the expenditure.**

d. Increase the budget and staff of the Elections Committee and allow the Elections Committee to use the District Attorney's office to investigate election complaints.

e. Penalize the consultant as well as the committee for failure to follow Independent Expenditure Laws.

f. Disallow the coordination of candidate committees and party organizations in non-partisan races.

g. Require Independent Expenditure committees to disclose on written material a disclaimer that says "this piece was paid for by an independent committee with funds that were raised in amounts greater than the limits imposed on campaign committees." The same disclaimer would have to be read on all radio and television commercials.

h. Prohibit consultants from working for a candidate committee and an Independent Expenditure Committee supporting the same candidate.

i. The Transition Committee also recommends the city staff looks into the Instant Run Off System to see if this method could save money.

PLEASE NOTE: We believe that Reed Reform # 20 - **Plug loopholes in the lobbyist ordinance that allow many lobbyists to avoid public disclosure of what they are doing** - was **NOT** referred to the Elections Commission since Mayor Reed recommended deferring this topic to later discussion. However, the Sunshine Reform Task Force and Staff have proposed referring Reed Reform # 20 to the Elections Commission.

Please feel free to contact the City Attorney's Office if you have any questions.

Richard Doyle
City Attorney

By

Norm Sato
Chief Deputy City Attorney

Cc: Lee Price
Lisa Herrick
Alex Stuart