



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Proposed Lobbyist and Revolving
Door Ordinance Amendments

DATE: June 8, 2007

RECOMMENDATION

Consideration of an ordinance amending Chapters 12.10 (Revolving Door) and 12.12 (Lobbyist) of the San Jose Municipal Code to implement changes requested by the City Council to (1) increase the revolving door prohibition from one (1) to two (2) years; (2) broaden the definition of a lobbyist by decreasing the hourly threshold to qualify as a lobbyist and aggregating the hours of individuals lobbying on behalf of the same entity; (3) create an exception for nonprofit organizations with Section 501(c)(3) tax exempt status and certain business owners; (4) require disclosure of and/or prohibit compensation contingent on the result of a proposed governmental action; (5) require more specific disclosures in the lobbyist quarterly report; (6) impose interest on the quarterly report late filing fee; (7) require members of the Council and Agency to disclose contacts with lobbyists; and (8) make other technical and clarifying changes.

OUTCOME

If adopted, the proposed ordinance would amend Title 12 of the San Jose Municipal Code to amend Chapters 12.10 and 12.12 as stated above.

BACKGROUND

On February 6, 2007, the City Council approved an increase in the late filing fee for lobbyist quarterly reports from \$10 per day to \$50 per day. The City Attorney's Office was directed to return with a proposed ordinance that would allow for interest to be charged on the late filing fee.

On February 27, 2007, the Council approved the Mayor's recommendation to amend the Municipal Code to require elected officials to disclose all meetings with lobbyists on issues before the Council.

On April 3, 2007, the Council directed our Office to return with certain amendments to the Revolving Door and Lobbyist Ordinances in order to make the lobbying process more transparent. Specifically, Council asked that the proposed ordinance:

- Extend the revolving door prohibition from one (1) year to two (2) years.

- Ban success fees, and in those cases where the City cannot ban success fees, require disclosure to the City Clerk for posting on the Internet.
- Require more specific disclosures on the lobbyist reporting form as to income categories and success fees.
- Reduce the threshold number of hours required for a lobbyist to register from twenty (20) hours within any three (3) month period to ten (10) hours within a twelve (12) month period and aggregate the number of hours spent by individuals for the same organization in determining whether the ten (10) hour threshold is met.
- Require developers that would otherwise meet the ten (10) hour threshold to register, even if the developer hired a contract lobbyist.
- Exempt from the requirements of the lobbyist ordinance nonprofit organizations with tax exempt status under Internal Revenue Code Section 501(c) (3).
- Exempt from the requirements of the lobbyist ordinance small business owners representing themselves if they have not made or solicited contributions, donations, or expenditures in an amount over one thousand dollars (\$1,000) in a City election within the last year for or at the behest of the Mayor, a Councilmember, or independent expenditure committee.

A summary of the proposed ordinance is provided below in this memorandum. Our Office also reviewed the lobbyist regulations for the cities of Los Angeles, San Diego, Sacramento, Oakland and San Francisco. Distinguishing points are noted throughout this memo.

On June 4, 2007, we met with approximately fifteen registered lobbyists to discuss the proposed changes. Lobbyists requested clarification on various issues including, but not limited to the types of conduct that should be considered "lobbying activity", registration and reporting requirements, whether the ban on success fees would also ban compensation for services which include both lobbying and non-lobbying services. Many of these issues are addressed in the discussion below and the attached proposed ordinance.

The attached proposed ordinance would add, delete, or modify certain sections of the revolving door and lobbyist activity regulations. The section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and deletions are indicated by ~~strike-through type~~. Those portions of the regulations not shown in underscore or ~~strike-through~~ type have not changed.

If Council adopts these changes, we must review and conform all forms associated with these regulations.

ANALYSIS

The proposed ordinance would amend the revolving door and lobbyist regulations as follows:

Revolving Door Prohibition

The changes to the revolving door prohibition are intended to restrict officials and designated employees from unfairly profiting from or otherwise trading upon the contacts, associations and special knowledge they acquired during their tenure. The proposed ordinance would prohibit, for two years, officials, employees, commissioners, or consultants who have terminated their service with the City or Agency from (1) working on any matter which they worked on in the twelve months preceding their termination of service with the City or Agency and (2) representing anyone on any issue before the City or Agency officials or staff. The two year prohibition would apply to officials and designated employees who leave the City or Agency after the effective date of the proposed ordinance.

Lobbyist Regulation – Contingent Compensation

The purpose of this regulation is to make more transparent the financial motivations for lobbying activity by prohibiting contingent compensation for services when the compensation is directly tied to the governmental action and requiring disclosure where the compensation is only in part tied to the governmental action.

The proposed ordinance would ban compensation for lobbying activity when the compensation is directly dependent on the result of legislative or administrative actions that are the subject of the lobbying activity. A majority of states have adopted these bans because of a compelling public policy concern that the financial pressure on lobbyists in these situations may result in methods of influence that are unethical or illegal, or could be perceived by the public as improper.

In the outreach meeting with lobbyists, several lobbyists raised concerns regarding how the ban would be applied to individuals or companies that provide a full array of services including both lobbying and non-lobbying (e.g. real estate brokerage, engineering, development, or legal services).

In situations where the lobbyist is not specifically compensated to engage in lobbying activity but lobbying for a certain legislative or administrative result is crucial to realizing

compensation for other services rendered or potential future income, the lobbyist is required to disclose the compensation arrangement.

Specifically, the disclosure would require the person engaged in lobbying activity to identify the name and address of the source of the compensation, and include a brief description of the legislative or administrative action the person is seeking to influence. In many instances, the precise compensation may be difficult to determine because it may be based on the final sale price of a development, specific legislative or administrative actions, and/or future conditions (e.g. financing or acquisition). As such, disclosure would require either (1) a range of the known compensation up to and over \$400,000, or (2) a brief description of how compensation will be calculated and other conditions that would need to be met before the lobbyist is entitled to payment.

The disclosure must be made to the City Clerk one business day before the lobbying activity occurs. Once the disclosure is filed, the lobbyist need only reference the disclosure in its registration and quarterly reports. If a person engaged in lobbying activity has not yet met the threshold to require registration as a lobbyist, the disclosure may be filed concurrent with the registration report within ten days after qualifying as a lobbyist.

The proposed ordinance also provides that a person engaged in lobbying activity may have separate written agreements for lobbying activity and other services related to the same project or issue. This provision is in response to the request of lobbyists and is not intended to regulate how lobbyists who provide a range of services set up their compensation.

The ban and disclosure requirements do not apply to contingent compensation to a lobbyist for non-lobbying activity such as the practice of law¹ or compensation completely independent of the governmental action.

Lobbyist Regulation – More Specific Disclosures on Registration and Quarterly Report

A lobbyist would be required to disclose in its quarterly reports more specific reporting of income up to and over \$400,000 and identify when the original disclosure of contingent compensation was filed with the City Clerk. These detailed disclosures make more transparent the true voice of those who are attempting to influence a particular decision and the degree of financial interest at stake.

¹ An attorney whose sole activity is to engage in the practice of law such as representing a party or potential party in a pending or actual litigation or administrative enforcement proceeding by or against the City would not be engaged in lobbying activity. An attorney who attends a meeting to argue for or against the adoption of a particular legislation would be engaged in lobbying activity. San Francisco and San Diego have similar exceptions for attorneys handling a claim or litigation.

In the outreach meeting with lobbyists, several lobbyists requested clarification regarding registration and quarterly report requirements for lobbyists who meet one or more categories (i.e. Contract Lobbyist, In-House Lobbyist, or Expenditure Lobbyist). A lobbyist who meets the thresholds for one or more categories need only file one registration and quarterly reports but should provide information for all applicable categories.

Lobbyist Regulation – Lobbyist Definition and Exemption Added

Currently, individuals who engage in significant lobbying activity on behalf of their own organization may evade registration by engaging in lobbying activity that is less than twenty (20) hours in any consecutive three (3) months, even if several individuals are working on behalf of the same organization. The twenty (20) hour threshold under the current law was intended to capture only those persons in a business or organization whose employment duties include lobbying on a regular basis, such as a government affairs director. In effect and as intended, this higher threshold would have excluded small business owners on the premise that small businesses would not spend as much time engaging in lobbying activity.

Council requested that the threshold be lowered to ten (10) hours in any twelve (12) months. It is likely that more small businesses will be required to register as lobbyists. However, Council has asked that an exception be created for small businesses that do not make or solicit campaign contributions, donations, or expenditures to a City election in the last year of more than \$1,000 for or at the behest of an elected official or independent expenditure committee. The rationale is that businesses that do contribute a certain amount may seek to use their recent political contributions as leverage in subsequent lobbying activities and elected officials may be unduly influenced by the past support.

In balancing these two interests, we suggest the proposed definition of "In House Lobbyist" include "organizations, businesses, or associations with an owner, officers, or employees that in the aggregate engage in lobbying activity for ten (10) or more hours in any consecutive twelve (12) month period."

We also recommend an exemption from the lobbyist registration requirements for the owner of a business whose attempts to influence are on behalf of the business and (1) the owner or business has not made or solicited contributions for the elected official contacted, or a candidate or independent expenditure committee at the behest of the elected official contacted, in an amount over one thousand dollars (\$1,000) within the last twelve months in a City election; (2) the owner or business has not retained a person to engage in lobbying activity on behalf of the owner or business; or (3) officers or employees of the business have not engaged in lobbying activity on behalf of the owner or business.

"Contributions" include expenditure and donations. A contribution of over \$1,000 at the behest of the elected official contacted to an independent expenditure committee would fall within the lobbyist registration requirements. However, a \$1,000 contribution to an independent expenditure committee on a person's own initiative or at the initiative of an independent expenditure committee would not fall within the lobbyist registration requirements because the connection between the contribution and the elected official contacted is less clear. The donor may or may not know how an independent expenditure committee spends the contribution. It is also possible that the donor's contribution was used to support a candidate who did not win. Absent a clearer connection between the contribution and the elected official contacted, the argument that registration as a lobbyist is necessary to minimize improper influence is not as compelling.

Since the proposed change would require an organization to register if it reaches the 10 hour threshold, the in-house owners, officers, and employees engaged in lobbying activity on behalf of the organization would no longer be required to register individually but must be listed in the organization's registration and quarterly reports.

In the outreach meeting, the lobbyists requested that individuals who are contract lobbyists but work for the same firm should register the firm and list the individuals who lobby on behalf of the firm for a client. Such a request would streamline registration and quarterly reports by having all the information in one place and allow for easier auditing by the City Clerk. Section 12.12.190.A of the proposed ordinance reflects this change by providing that a Contract Lobbyist may be either an entity or an individual.

Lobbyist Regulation – Exemption Removed

The current law does not require an individual such as a chief executive officer (CEO) or an owner of a business who is not paid specifically to lobby to register, even if they meet the threshold twenty (20) hours, if their employer or business already has a registered lobbyist. This exception has been deleted; such individuals would now be listed in the quarterly report if his or her business would otherwise be required to register. See also the discussion of lobbyist definition above.

Lobbyist Regulation – Exemption Added

Compensated employees or officers of a nonprofit organization with tax exempt status under Internal Revenue Code Section 501(c) (3) and whose attempts to influence are on behalf of the organization would not be subject to the registration requirements. According to the IRS, Section 501(c) (3) organizations may engage in lobbying in furtherance of their charitable or educational purposes as long as lobbying is not a substantial part of their activities. In order to maintain the tax exempt status, these organizations are restricted in their ability to engage in political activity.

It should be noted that an exemption from the local lobbying regulations for Section 501(c)(3) organizations does not change how the IRS determines whether these organizations are in fact engaging in lobbying activity under the IRS regulations. The goal of the proposed amendments is to regulate activities of organizations or individuals who use their political contributions to lobby more effectively. Creating an exception for Section 501(c) (3) organizations would not undermine this purpose since their lobbying activities are already restricted by other laws.

Of all the lobbyist regulations reviewed from the various jurisdictions, only the City of Los Angeles created an exception for nonprofit tax exempt Section 501(c) (3) organizations. The exception for L.A. is much narrower, the organization must provide direct service to the indigent population and direct contacts with city officials cannot be for the purpose of attempting to influence city funding for the organization.

Lobbyist Regulation – Fees

Interest would now accrue on the fee a lobbyist incurs for filing a quarterly report after its due date. The interest would be calculated on a monthly basis or a fraction thereof from the day after the quarterly report is due until the fee is fully paid. If there is more than one late filing fee due, the interest would accrue separately for each fee. If the proposed ordinance is adopted, the City may not impose the interest on the late filing fee until thirty (30) days after the second reading of the ordinance and the interest is set forth in the Schedule of Fees.

Disclosure – Contacts or Meetings with Lobbyists

An existing Council-Staff Interaction Policy requires the disclosure of communications with any party to an administrative hearing of the City Council either by memorandum in advance of the hearing or by oral disclosure at the hearing. In the Mayor's memorandum dated January 25, 2007, which was approved by the City Council on February 27, 2007, he recommended that this policy be extended to interactions with lobbyist on all actions before the Council and codified.

We need additional guidance from the Council on three issues raised by this recommendation:

First, it would be difficult for a member of the Council to determine when a person trying to influence him or her on a Council agenda item is a lobbyist as defined in Chapter 12.12. We recommend that disclosure be only of interactions with "registered lobbyists" since registration can be verified with the City Clerk. If Council directs that disclosure still be of all interactions with any person trying to influence a decision, then each member of the Council must keep accurate records of many more meetings.

Second, it should be noted that lobbying activity includes direct communication, oral or written, in informal or social settings if those communications are to influence a governmental decision. It is possible that members of the Council may not fully recollect every interaction particularly if it is not pre-arranged. As such, disclosure by members of the Council may not always be consistent with registered lobbyists' disclosures.

Finally, there could be a discrepancy between disclosures of "meetings" versus "contacts." A "contact" is what a lobbyist must count toward their hourly threshold and this may occur during informal or social settings for as a brief period as a five to ten minute conversation. A "meeting" suggests a more formal or scheduled gathering but could also be interpreted to include a spontaneous interaction. Depending on how each member of the Council interprets the requirement, there may be discrepancies in disclosures between each member of the Council, and the lobbyists.

Currently, the proposed ordinance adds a new Part entitled "Disclosure of Contacts with Registered Lobbyists," which requires elected officials to disclose any contacts with a registered lobbyist prior to taking a legislative or administrative action. Disclosure must be made in writing to the Council or Redevelopment Agency Board in advance of the meeting where a legislative or administrative action is pending or scheduled to be discussed, or by oral disclosure at the meeting before discussion of the item on the meeting agenda. The disclosure includes the name of registered lobbyist(s), date(s) of the contact, identification and description of the agenda item; and summary of the substance of the contact.

Lobbyist Regulation – Technical and Clarifying Changes

- Technical changes to the lobbyist regulations include replacing the term "lobbying" with "lobbying activity" throughout Chapter 12 of the Code.
- We recommend moving various sections within the Chapter to reflect a more logical progression including the sections for "exceptions to lobbying activity" and enforcement.
- The definitions of "contact or contacting" and "lobbying activity" have also been clarified to provide those engaged in lobbying activity better guidance on the type of conduct that should be counted toward the hourly threshold. For assistance in compliance, the lobbyists requested a list of "city officials." Our Office will work with the City Clerk to prepare an advisory list with the caveat that lobbyists should verify with the City Clerk or our Office if they have any questions regarding individuals who are not on the list.
- Under the current law, lobbyists are prohibited from engaging in various dishonest or unethical conduct. The use of the term "lobbyist" implies that a person

engaged in lobbying activity must first qualify as a lobbyist before such conduct is prohibited. Consistent with the City's stated purposes for regulating lobbying activity, we recommend Section 12.12.500 be changed to regulate any individual engaged in lobbying.

ADDITIONAL ISSUES REQUIRING COUNCIL DIRECTION

Council direction is needed to resolve the following issues:

Exception for Negotiating Contracts

The current ordinance exempts from the definition of lobbying activity the negotiation of contracts once the selection of the contractor has been selected by the Council, City Manager, Agency Board, Executive Director, or the voters, as the case may be. However, in many cases, negotiations of agreements with City and Agency administration officials take place prior to Council or Board approval of the selection of the consultant or developer. For example, the Agency Board selection of a developer for redevelopment project usually takes place with the approval of an Exclusive Negotiations Agreement (ENA) for the development of an Agency site. Once the ENA is approved, subsequent negotiations fall under this exception. Under the 20 hour every three months threshold for registration as an in house lobbyist, it was very rare that the negotiation of an ENA would trigger the registration requirement. The lowering of the threshold to 10 hours per year in the aggregate for an organization could easily trigger the registration requirement during the negotiation of an ENA.

If this is an unintended consequence, the exception can be narrowed to specify that it applies only to contract negotiations with City or Agency staff, as opposed to City Council or Agency Board members.

Criminal Enforcement and Subsequent Ban on Acting as a Lobbyist

A violation of the City's lobbyist ordinance may result in administrative and/or civil enforcement including an injunction and penalties of up to \$5,000 for each violation or the amount of compensation received for the lobbying activity, whichever is greater. All other jurisdictions reviewed provide for criminal prosecution for violations of the lobbyist regulation and a one (1) to four (4) year ban on acting as a lobbyist after a determination of a violation. If Council would like to make a violation of the lobbyist, revolving door, and/or other regulations in Title 12 subject to criminal enforcement as a misdemeanor or ban a lobbyist for a certain period of time after a determination of a violation, the ordinance must be amended.

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Fees

Currently, if a lobbyist fails to pay the "client fee" during registration or with the quarterly report, there is no late fee charge. Further, if a lobbyist does not pay the registration fee on time, he or she will be liable for a late fee up to a maximum of the original registration amount but there is no interest imposed for either the registration or the late registration fee. An ordinance amendment would be required to impose a late client fee, interest on the registration and late registration fee, and interest on the client fee and late client fee.

PUBLIC OUTREACH/INTEREST

Our Office coordinated with the City Clerk to notify all registered lobbyists regarding the proposed amendments. We met with approximately fifteen registered lobbyists, on June 4, 2007. On June 8, 2007, we provided a copy of the proposed ordinance to the lobbyists and will be available to answer their questions. The proposed ordinance addresses many of the concerns they expressed at the outreach meeting.

COORDINATION

This memorandum was coordinated with the City Clerk.

CEQA

Not a project.

RICHARD DOYLE
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By 
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