



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Limits on Campaign  
Contributions to Independent  
Committees

**DATE:** September 28, 2006

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## **RECOMMENDATION**

Adoption of an urgency ordinance and approval of a regular ordinance amending Section Chapter 12.06 of Title 12 of the San José Municipal Code to add Sections 12.06.090 and 12.06.340 to reinstate limits on campaign contributions to independent committees and suspending enforcement of Section 12.06.310.

## **OUTCOME**

The adoption of the urgency ordinance and approval of the regular ordinance will reinstate limits on campaign contributions to independent committees, increase the amount of that limit with a provision to account for inflation, and clarify the kind of election-related activities which an independent committee must be engaged in for the contribution limit to apply. Adoption and approval of the ordinances will also suspend enforcement of San José Municipal Code Section 12.06.310 until there is a final determination in the case of *San José Silicon Valley Chamber of Commerce Political Action Committee, et al. v. City of San José, et al.*, USDC No. C 06-04252 JW, that Section 12.06.310 is valid and enforceable.

## **BACKGROUND**

For more than twenty years, the City of San José ("City") has had in effect a limitation on contributions to independent committees that make contributions or expenditures in aid of or in opposition to the election or nomination of a candidate for city council or mayor. This contribution limit was codified in Section 12.06.310 as part of the Municipal Campaign and Officeholders Contributions Ordinance in Chapter 12.06 of Title 12 of the San José Municipal Code.

Under the Municipal Code, a committee means any person who receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters in a municipal election for or against the nomination or election of

one or more candidates, and that receives contributions of \$1,000 or more in a calendar year, makes independent expenditures of \$1,000 or more in a calendar year, or makes contributions of \$10,000 or more to or at the behest of candidates and committees in a calendar year. Independent committees are defined as any committee other than a controlled committee, which is a committee controlled by a candidate for Mayor or City Council.

The applicable contribution limit in effect was \$250 per donor for each election, with the primary and general elections considered separate elections. However, Section 12.06.310 expressly allowed individuals to make and independent committees to receive contributions in excess of the \$250 limit but required that the amount in excess of the limit be segregated from the funds collected for activity in aid of or in opposition to a City Council or Mayoral candidate. Only contributions collected in compliance with the contribution limit could be used in aid of or in opposition to the election or nomination of a candidate for municipal office in San José.

In May 2006, three weeks before the Mayoral primary election, two political action committees associated with the San José Silicon Valley Chamber of Commerce funded a mass mailing and telephone campaign that prominently featured and singled out for criticism one Councilmember who was a candidate for Mayor. The Chamber of Commerce acknowledged that the campaign was funded by contributions in excess of the \$250 limit. In response to a citizen complaint, the San José Elections Commission initiated an investigation conducted by its appointed evaluator, held a public hearing, and determined that the Chamber of Commerce had violated the contribution regulation in San José Municipal Code Section 12.06.310.

After the Elections Commission determined that it would issue a public reprimand and impose a fine against the Chamber of Commerce, the Chamber's political action committees filed a federal lawsuit challenging Section 12.06.310 as unconstitutionally vague and overbroad under the Due Process Clause and as violating free expression under the First Amendment. On September 20, 2006, the federal district court declared Section 12.06.310 unconstitutional on these grounds and prohibited the City from enforcing this Section.

## **ANALYSIS**

As a result of the recent federal court order declaring Section 12.06.310 unconstitutional, the City currently lacks the ability to enforce campaign contribution limits to independent committees. This provision has long been part of the comprehensive Municipal Campaign and Officeholder Contributions Ordinance enacted to prevent corruption and the appearance of corruption in local government and maintain the integrity of the electoral process. The contribution limit applicable to independent committees prevents the circumvention of contribution limits to candidates for City Council and Mayor and their controlled committees by large individual

contributions directed to independent committees engaged in activity to influence City Council and Mayoral elections.

The proposed ordinances would reinstate a limitation on contributions to independent committees in a manner that attempts to address the constitutional concerns raised by the federal district court.

First, the ordinances would clarify the type of election-related activity by independent committees that would be regulated by the contribution limit. Section 12.06.310 stated that the contribution limit applied to independent committees "expending funds or making contributions in aid of and/or opposition to the nomination or election of a candidate for city council or mayor." If passed, the proposed ordinances would apply the contribution limit to an independent committee only when it funds specific types of communications, termed "electioneering communications," or makes contributions to candidates for City office or candidate controlled committees.

In defining electioneering communications, the proposed ordinances follow the language of the Bipartisan Campaign Reform Act ("BCRA"), the federal campaign finance statute that was upheld as constitutional by the United States Supreme Court. Specifically, the proposed ordinances provide that the covered communications are those conveyed by broadcast, cable or satellite communication, newspapers, magazines, outdoor advertising facilities, mass mailing, or telephone bank, or any other form of general public political advertising. The communications must also refer to a clearly identified candidate for City Council or Mayor, be made within close proximity to an election (60 days before a general, special or runoff election, or 30 days before a primary election), and be targeted to the electorate that will be voting in the election. This definition of "electioneering communications" in BCRA applied to expenditure limits which are subject to a higher level of constitutional scrutiny than contribution limits. Although the proposed ordinances would only establish contribution limits, the more stringent definition is suggested given the federal court's application of strict scrutiny in holding Section 12.06.310 unconstitutional.

Second, the proposed ordinances would also increase the amount of the contribution limit from \$250 per election to \$500 per election. This increase would make the contribution limit to independent committees consistent with the contribution limit applicable to candidates for Mayor. The proposed ordinances would also include a provision to increase the contribution limit annually to adjust for inflation as necessary. Both the increase and the annual adjustment address a concern raised in passing by the federal district court that the previous limit of \$250, without adjustment for inflation, was low and therefore might be too restrictive on expressive and associational interests.

Finally, although the federal district court held Section 12.06.310 unconstitutional, this Section remains part of the Municipal Code. The proposed ordinances would suspend

enforcement of Section 12.06.310 until the judgment in the *San José Silicon Valley Chamber of Commerce Political Action Committee* case becomes final.

Pursuant to Section 605 of the City Charter, the proposed urgency ordinance, if adopted by eight members of the City Council, will become effective immediately upon its adoption. Under Section 605, the City Council may adopt an urgency ordinance if the City Council finds that it is necessary to do so for the immediate preservation of the public peace, health or safety.

Based on the circumstances surrounding the adoption of the proposed ordinance the City Council could make the required finding. As noted above, as of September 20, 2006, Section 12.06.310 is unenforceable. The general election for Mayor and District 3 City Council seat and the primary election for the District 6 City Council seat will be held November 7, 2006, and the campaign contribution collection period for independent committees for the general election began June 7, 2006 and ends October 21, 2006. The intent of the contribution limit to independent committees is and has been to place realistic and enforceable limits on the amount individuals may contribute to political campaigns in municipal office elections for the purpose of preventing the perception by the public that campaign contributors exercise undue or improper influence over elected officials. Unless the ordinance is adopted, the City of San José and the San José Elections Commission will not be able to enforce limits on contributions to independent committees for the impending Mayoral and City Council elections.

Both the proposed urgency ordinance and the regular ordinance are attached to this memorandum.

### **POLICY ALTERNATIVES**

The City Council could choose to not adopt the proposed urgency ordinance or regular ordinance and leave unregulated contributions to independent committees. The City Council could also include a requirement for independent committees to disclose or to maintain records of contributions used for electioneering communications and contributions to candidates and their controlled committees.

### **PUBLIC OUTREACH/INTEREST**

The contemplated action does not appear to qualify as an item of significant interest based on the established criteria. This memo and the proposed ordinances are posted on the City's website for the October 3, 2006 Council Agenda. Notice of the approval of the proposed regular ordinance will be published in the newspaper as required by law.

### **COORDINATION**

Not applicable.

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**BUDGET REFERENCE**

Not applicable.

**CEQA**

Not a Project.

RICHARD DOYLE  
City Attorney

By   
Lisa Herrick  
Sr. Deputy City Attorney

cc: Les White

For questions please contact Lisa Herrick, Senior Deputy City Attorney, at 535-1900.

**DRAFT**

ORDINANCE NO. \_\_\_\_\_

**AN URGENCY ORDINANCE OF THE CITY OF SAN JOSE  
AMENDING CHAPTER 12.06 OF TITLE 12 OF THE SAN  
JOSE MUNICIPAL CODE TO ADD NEW SECTIONS  
12.06.090 AND 12.06.340 TO REINSTATE CAMPAIGN  
CONTRIBUTION LIMITS TO INDEPENDENT  
COMMITTEES AND SUSPENDING ENFORCEMENT OF  
SECTION 12.06.310 OF CHAPTER 12.06 OF TITLE 12  
AND SETTING FORTH THE FACTS CONSTITUTING  
SUCH URGENCY**

**WHEREAS**, since the 1980s, the City of San José has imposed limitations on campaign contributions to independent committees; and

**WHEREAS**, the intent of the City Council is and has been to prevent the circumvention of contribution limits to candidates for City Council and Mayor and their controlled committees by large individual contributions to independent committees engaged in activity to influence City Council and Mayoral elections; and

**WHEREAS**, the City Council believes that the City's longstanding contribution limit has been effective in preventing corruption and the appearance of corruption and in maintaining the integrity of the electoral process; and

**WHEREAS**, Section 12.06.310 of Chapter 12.06 of Title 12, which regulated contributions to independent committees, was determined to violate the First and Fourteenth Amendments of the United States Constitution by Judgment in the case of *San José Silicon Valley Chamber of Commerce Political Action Committee, et al. v. The City of San José, et al.*, United States District Court No. C 06-04252 JW, dated September 20, 2006; and

**WHEREAS**, by adoption of this Ordinance, the City reaffirms that it will continue to limit contributions to independent committees in furtherance of its and its residents' significant interests in preventing circumvention of the contribution limits applicable to candidates and their controlled committees and maintaining the integrity of the electoral process; and

**WHEREAS**, while litigation concerning the enforceability of Section 12.06.310 is pending, the City Council wishes to suspend the enforcement of Section 12.06.310; and

**WHEREAS**, the City Council believes that it is in the public interest to ensure that donors do not make large contributions and independent committees do not receive or solicit unlimited campaign contributions to be used to influence the election of the offices of Mayor and City Council while the enforceability of Section 12.06.310 is being examined by the courts and, for this purpose, wishes to enact a narrow contribution limit using language already approved by the United States Supreme Court in the case of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), and to have its campaign contribution limit construed and enforced in a manner consistent with court decisions; and

**WHEREAS**, the City Council wishes by this Ordinance to limit only contributions to independent committees and not expenditures by independent committees;

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:**

**SECTION 1.** Enforcement of Section 12.06.310 of Chapter 12.06 of Title 12 of the San José Municipal Code is hereby suspended and will remain suspended pending final judgment in the case of *San José Silicon Valley Chamber of Commerce Political Action Committee, et al. v. The City of San José, et al.*, United States District Court No. C 06-04252 JW.

**SECTION 2.** Part 1 of Chapter 12.06 of Title 12 of the San José Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read as follows:

**12.06.090 Electioneering Communications**

“Electioneering communications” means communications by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising that:

- A. Refers to a clearly identified candidate for City Council or Mayor;
- B. Is made 60 days before a general, special or runoff election for the office sought by the candidate or 30 days before a primary election; and
- C. Is targeted to the electorate that will be voting in the election for the office sought by the candidate.

**SECTION 3.** Part 1 of Chapter 12.06 of Title 12 of the San José Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read as follows:

**12.06.340 Contribution Limitations to Independent Committees**

- A. No person shall make and no independent committee shall accept any contribution to an independent committee that funds electioneering communications or makes contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council which will

cause the total amount contributed by that person to the independent committee to exceed \$500 per election.

- B. Independent committees that accept contributions for purposes other than electioneering communications or contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council must segregate contributions to be used for electioneering communications and contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council from other contributions. Where an independent committee has segregated contributions received for electioneering communications or contributions to candidates for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council from other contributions, contributors to that committee may contribute more than \$500 per election so long as no portion of the contribution in excess of \$500 per election is used for electioneering communications or contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council.
- C. This section is not intended to prohibit or regulate contributions to independent committees for any activity other than electioneering communications or contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council.
- D. Beginning January 1, 2008, the City Clerk shall once annually, on a calendar year basis, increase the contribution limitation amounts upon a finding that the cost of living in the immediate San Francisco Bay Area, as shown on the Consumer Price Index (CPI) for all items in the San Francisco Bay Area as published by the U.S. Department of Labor, Bureau of Statistics, has increased. The increase of the contribution limitation amounts shall not exceed the CPI increase, using 2006 as the index year. The adjustment shall be rounded to the

nearest one hundred (100). The City Clerk shall publish the contribution limitation amounts no later than February 1st of each year, beginning on February 1, 2008.

- E. This section will expire upon a final determination in the case of *San Jose Silicon Valley Chamber of Commerce Political Action Committee, et al. v. The City of San José, et al.*, United States District Court No. C 06-04252 JW that Section 12.06.310 is valid and enforceable.

**SECTION 4.** This Ordinance is declared by the City Council to be an urgency measure necessary for the immediate preservation of the public peace, health or safety. The facts constituting such urgency are: (1) the purpose of contribution limits to independent committees is to prevent the circumvention of contribution limits to candidates for City Council and Mayor and their controlled committees by large individual contributions to independent committees engaged in activity to influence City Council and Mayoral elections; (2) for over twenty years, the City of San José has imposed limitations on campaign contributions to independent committees; (3) the intent of the City Council is to place realistic and enforceable limits on the amount independent committees may contribute to political campaigns in municipal office elections for the purpose of preventing the perception by the public that campaign contributors exercise undue or improper influence over elected officials; (4) as of September 20, 2006, Section 12.06.310 of the San José Municipal Code is unenforceable; (5) the general election for Mayor and the District 3 City Council seat and the primary election for the District 6 City Council seat will be held November 7, 2006, and a runoff election for the District 6 City Council seat may be held shortly after November 7, 2006, according to the City Charter; (6) the campaign contribution collection period for independent committees for the general election for Mayor and the District 3 City Council seat began on June 7, 2006 and ends on October 21, 2006; (7) the City Council believes that this Ordinance is in the public interest and will preserve the public peace in that it will ensure that independent committees do not receive or solicit unregulated campaign contributions for electioneering communications while the enforceability of Section 12.06.310 is being examined by the courts; (8) this Ordinance enacts a narrow contribution limit using the

phrase "electioneering communications" which has already been approved by the United States Supreme Court in the case of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); (9) the Ordinance regulates only contributions to independent committees and not expenditures by independent committees; and (10) unless this Ordinance is adopted neither the City nor the Elections Commission of the City of San José will be able to enforce limits on contributions to independent committees during the impending Mayoral and City Council elections.

SECTION 5. This Ordinance will become effective immediately upon its adoption pursuant to Section 605 of the Charter of the City of San José and will remain effective until the effective date of the superseding ordinance.

ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2006, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

\_\_\_\_\_  
RON GONZALES  
Mayor

ATTEST:

\_\_\_\_\_  
LEE PRICE, MMC  
City Clerk

ORDINANCE NO. \_\_\_\_\_

**DRAFT**

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTER 12.06 OF TITLE 12 OF THE SAN JOSE MUNICIPAL CODE TO ADD NEW SECTIONS 12.06.090 AND 12.06.340 TO REINSTATE CAMPAIGN CONTRIBUTION LIMITS TO INDEPENDENT COMMITTEES AND SUSPENDING ENFORCEMENT OF SECTION 12.06.310 OF CHAPTER 12.06 OF TITLE 12**

**WHEREAS**, since the 1980s, the City of San José has imposed limitations on campaign contributions to independent committees; and

**WHEREAS**, the intent of the City Council is and has been to prevent the circumvention of contribution limits to candidates for City Council and Mayor and their controlled committees by large individual contributions to independent committees engaged in activity to influence City Council and Mayoral elections; and

**WHEREAS**, the City Council believes that the City's longstanding contribution limit has been effective in preventing corruption and the appearance of corruption and in maintaining the integrity of the electoral process; and

**WHEREAS**, Section 12.06.310 of Chapter 12.06 of Title 12, which regulated contributions to independent committees, was determined to violate the First and Fourteenth Amendments of the United States Constitution by Judgment in the case of *San José Silicon Valley Chamber of Commerce Political Action Committee, et al. v. The City of San José, et al.*, United States District Court No. C 06-04252 JW, dated September 20, 2006; and

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candidates and their controlled committees and maintaining the integrity of the electoral process; and

**WHEREAS**, while litigation concerning the enforceability of Section 12.06.310 is pending, the City Council wishes to suspend the enforcement of Section 12.06.310; and

**WHEREAS**, the City Council believes that it is in the public interest to ensure that donors do not make large contributions and independent committees do not receive or solicit unlimited campaign contributions to be used to influence the election of the offices of Mayor and City Council while the enforceability of Section 12.06.310 is being examined by the courts and, for this purpose, wishes to enact a narrow contribution limit using language already approved by the United States Supreme Court in the case of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), and to have its campaign contribution limit construed and enforced in a manner consistent with court decisions; and

**WHEREAS**, the City Council wishes by this Ordinance to limit only contributions to independent committees and not expenditures by independent committees;

**NOW, THEREFORE**, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

**SECTION 1.** Enforcement of Section 12.06.310 of Chapter 12.06 of Title 12 of the San José Municipal Code is hereby suspended and will remain suspended pending final judgment in the case of *San José Silicon Valley Chamber of Commerce Political Action Committee, et al. v. The City of San José, et al.*, United States District Court No. C 06-04252 JW.

**SECTION 2.** Part 1 of Chapter 12.06 of Title 12 of the San José Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read as follows:

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- B. Is made 60 days before a general, special or runoff election for the office sought by the candidate or 30 days before a primary election; and
- C. Is targeted to the electorate that will be voting in the election for the office sought by the candidate.

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- B. Independent committees that accept contributions for purposes other than electioneering communications or contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council must segregate contributions to be used for electioneering communications and contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council from other contributions. Where an independent committee has segregated contributions received for electioneering communications or contributions to candidates for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council from other contributions, contributors to that committee may contribute more than \$500 per election so long as no portion of the contribution in excess of \$500 per election is used for electioneering communications or contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council.
  
- C. This section is not intended to prohibit or regulate contributions to independent committees for any activity other than electioneering communications or contributions to a candidate for Mayor or City Council or any controlled committee of a candidate for Mayor or City Council.
  
- D. Beginning January 1, 2008, the City Clerk shall once annually, on a calendar year basis, increase the contribution limitation amounts upon a finding that the cost of living in the immediate San Francisco Bay Area, as shown on the Consumer Price Index (CPI) for all items in the San Francisco Bay Area as published by the U.S. Department of Labor, Bureau of Statistics, has increased. The increase of the contribution limitation amounts shall not exceed the CPI increase, using 2006 as the index year. The adjustment shall be rounded to the nearest one hundred (100). The City Clerk shall publish the contribution limitation amounts no later than February 1st of each year, beginning on February 1, 2008.

RD:LH  
9/28/2006

E. This section will expire upon a final determination in the case of *San Jose Silicon Valley Chamber of Commerce Political Action Committee, et al. v. The City of San José, et al.*, United States District Court No. C 06-04252 JW that Section 12.06.310 is valid and enforceable.

PASSED FOR PUBLICATION of title this \_\_\_\_\_ day of \_\_\_\_\_, 2006, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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RON GONZALES  
Mayor

ATTEST:

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LEE PRICE, MMC  
City Clerk