



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

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

DATE: October 10, 2006

RECOMMENDATION

Adoption of an urgency 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 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 of the ordinance 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.

SUPPLEMENTAL INFORMATION

At the City Council meeting on October 3, 2006, the Council voted to defer this item so that staff could (1) review and respond to the memos submitted by Lance Olson and Jim Sutton; and (2) obtain advice from local and national experts.

Staff has consulted with elections law experts and received the following opinions:

1. Paul S. Ryan is the Federal Election Commission Director and Associate Legal Counsel at the Campaign Legal Center located in Washington D.C. Mr. Ryan has specialized in campaign finance, ethics and election law for more than seven years; he is one of the nation's leading experts on local government campaign finance law and public campaign financing and has published extensively on these topics. Mr. Ryan has

also testified as an expert on election law before numerous legislative bodies and government ethics agencies, including the Federal Election Commission, the California State Legislature, the California Fair Political Practices Commission, the New York City Council, the New York City Campaign Finance Board, the Los Angeles City Council and the Los Angeles City Ethics Commission.

Mr. Ryan and the Campaign Legal Center filed a friend of the court brief in support of a North Carolina law that limits contributions to political committees. In its brief the Campaign Legal Center argues:

If supposedly independent political committees are allowed to receive unlimited contributions, donors will use those contributions to buy access to and influence with those candidates aided by the committee. Such unlimited contributions, even if given to supposedly independent committees, create the potential for the same kind of corruption that was at the heart of the Supreme Court's analysis in *McConnell* [*v. Federal Election Commission*, 540 U.S. 93 (2003)] upholding restrictions on donations to party committees. This danger of real or potential corruption arising from unlimited donations to political committees is sufficient to justify the contribution limits imposed on such gifts.

The District Court has not yet ruled on the motions before it.

Mr. Ryan has told the City Attorney's Office that the Campaign Legal Center will file a friend of the court brief in support of San Jose's contribution limit ordinance if the Council chooses to appeal Judge James Ware's order.

2. Daniel R. Ortiz is a Professor at the University of Virginia School of Law where he teaches, among other things, constitutional law and electoral law. Professor Ortiz also serves as legal advisor for the Reform Institute, a not-for-profit educational organization that formulates and advocates reform in areas of public policy including campaign finance and election reform. In his capacity as legal advisor, Professor Ortiz assists the Institute with legal challenges and publications that involve reform and the First Amendment. On behalf of the Reform Institute, Professor Ortiz has written several friend of the court briefs, including the Arizona open primary case, the Arizona clean elections case and the Pennsylvania redistricting case. Professor Ortiz was a project director for the Institute's 2004 publication *Enhancing Values: Practical Campaign Reforms for States*, as well as *Beyond Party Lines: Principles for Redistricting Reform*. Professor Ortiz also coordinated a task force for the National Commission on Federal Election Reform, overseen by former Presidents Gerald Ford and Jimmy Carter, on constitutional and federal election law issues.

Professor Ortiz believes that San Jose can constitutionally limit contributions to independent organizations in local candidate elections. Although the constitutional law in this area is somewhat uncertain, the Supreme Court's decision in *McConnell v.*

Federal Election Commission, 540 U.S. 93 (2003), which upheld the major provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), indicates that a properly tailored ordinance would likely withstand constitutional scrutiny. Professor Ortiz believes that such an ordinance would have to (i) set contribution limits at a reasonable level so as to avoid impinging unnecessarily on associational and expressive freedom, (ii) avoid any significant impact on campaign spending outside of San Jose, and (iii) rest on some evidence or reasonable prediction that unlimited spending by independent committees poses the danger of corruption or the appearance of corruption to the political process.

3. Joan L. Cassman is a partner at the law firm of Hanson Bridgett Marcus Vlahos Rudy LLP and serves as chair of the Public Agency Section of the firm. Ms. Cassman provides legal services to a number of municipalities and public agencies. In addition to the general issues facing all public agencies, Ms. Cassman specializes in, among other things, election law and ethics issues.

Ms. Cassman has worked with the San Jose City Attorney's Office as Evaluator and Consultant to the San Jose Elections Commission, conducting investigations and providing advice to the Board on campaign finance complaints; she and her colleague served as Evaluators for the Elections Commission on the complaint against COMPAC.

Ms. Cassman believes that the governmental interest in preventing corruption and the appearance of corruption applies to an independent committee even though it is farther removed from a candidate than the political parties at issue in the *McConnell* case. She believes that the decision in *Lincoln Club v. City of Irvine*, 292 F.3d 934 (9th Cir. 2001) can be read as permitting such a conclusion, since, even courts highly protective of First Amendment rights will acknowledge the role that independent committees play in the election landscape and the power they can wield.

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. Some elections law experts, as discussed above, believe that the Ninth Circuit and the United States Supreme Court should determine that regulation of contributions to independent committees serves an important governmental interest.

In response to the memos submitted by Lance Olson and Jim Sutton (as well as the constitutional concerns raised by the federal district court) we have revised the proposed ordinance as follows:

1. The phrase "electioneering communications" is limited to any paid newspaper advertisement, paid Internet advertisement, mass mailings or telephone banks to the general public. Communications by means of broadcast, cable or satellite communication, magazine, outdoor advertising facility or any other form of general public political advertising are not regulated by the proposed ordinance.
2. A communication is not an electioneering communication unless it is made 30 days before a general, special, runoff or recall election for City Council or Mayor.
3. The phrase "targeted to the electorate" requires distribution of an electioneering communication to at least 500 persons who are registered to vote or eligible to register to vote in the Council or Mayoral election. The proposed ordinance provides for a rebuttable presumption that any paid newspaper advertisement, paid Internet advertisement, mass mailings or telephone banks to the general public is distributed to at least 500 persons who are registered to vote or eligible to register to vote in the Council or Mayoral election.

The revised proposed urgency ordinance is attached to this memorandum.

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.

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POLICY ALTERNATIVES

The City Council could choose to not adopt the proposed urgency ordinance and leave unregulated contributions to independent committees. The Council could also ask staff to draft an ordinance that requires 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 10, 2006 Council Agenda.

COORDINATION

Not applicable.

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, California's Political Reform Act, codified at Government Code Sections 81000 et seq., makes the following findings and declarations in Section 81001:

(a) State and local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth; (b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them; (c) Costs of conducting election campaigns have increased greatly in recent years, and candidates have been forced to finance their campaigns by seeking large contributions from lobbyists and organizations who thereby gain disproportionate influence over governmental decisions; (d) The influence of large campaign contributors is increased because existing laws for disclosure of campaign receipts and expenditures have proved to be inadequate; (e) Lobbyists often make their contributions to incumbents who cannot be effectively challenged because of election laws and abusive practices which give the incumbent an unfair advantage; (f) The wealthy individuals and organizations which make large campaign contributions frequently extend their influence by employing lobbyists and spending large amounts to influence legislative and administrative actions; . . . and (h) Previous laws regulating political practices have suffered from inadequate enforcement by state and local authorities; and

WHEREAS, California Government Code Section 81002(f) encourages governments such as the City of San José to enact adequate enforcement mechanisms so that public officials and private citizens will vigorously enforce the Political Reform Act; and

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 paid newspaper advertisement, paid Internet advertisement, mass mailing or telephone bank to the general public that:

- A. Refers to a clearly identified candidate for City Council or Mayor;
- B. Is made 30 days before a general, special, runoff or recall election for the office sought by the candidate; and
- C. Is targeted to the electorate that will be voting in the election for the office sought by the candidate. A communication is targeted to the electorate if it is distributed to 500 or more individuals who are registered to vote or eligible to register to vote in the election for the office sought by the candidate. There will be a rebuttable presumption that any paid newspaper advertisement, paid Internet advertisement, mass mailing or telephone bank to the general public is distributed to 500 or more individuals who are registered to vote or eligible to register to vote in the election for the office sought by the candidate.
- D. 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 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.

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RD:LH
10/10/2006

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