



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Ordinance – Increase in Election
Commission Penalties &
Campaign Mailing Disclosures,
and Other Minor Changes to the
Campaign Regulations

DATE: December 7, 2007

RECOMMENDATION

Approval of an ordinance amending Chapter 12.04 of the San Jose Municipal Code to increase the total amount of penalties which may be imposed by the San Jose Elections Commission; amending Chapter 12.06 by adding a new Part 10 to set out requirements for campaign communications and mass mailing disclosures and disclaimers; and making other minor technical corrections and clarifications to the campaign regulations.

OUTCOME

Approval of this ordinance will codify the rules for increased penalties that may be imposed by the Elections Commission and require additional disclosure for campaign communications and mass mailings.

BACKGROUND

At its September 2007 meeting, the San Jose Elections Commission developed a work program to address a number of pending City Council referrals. One of the referrals related to the issue of increasing penalties for violations of the City's Ethics Ordinances in Title 12. Additionally, the Commission considered recommending that the Campaign Contribution Ordinance be amended to require disclosure and disclaimer requirements on campaign communications which are paid for by independent expenditure committees. The Commission requested that the City Attorney analyze these issues and survey requirements imposed by other jurisdictions with regard to penalties and disclosure requirements.

On November 14, 2007, the Commission reviewed draft ordinances and recommended that the ordinances be forwarded to the City Council for review and approval. A draft ordinance which incorporates the recommendations of the Elections Commission on the proposed amendments to the Municipal Code will follow as a supplemental.

Finally, the City Clerk is recommending a technical correction and a minor amendment to the campaign regulations that will clarify for candidates: (1) that the City Clerk is the filing officer for the form 501, "Statement of Intention" to become a candidate; and (2) amend the time of the end of the campaign contribution collection period to be consistent with State Law.

ANALYSIS

I. PENALTIES IMPOSED BY SAN JOSE ELECTIONS COMMISSION

A. Civil Penalties – Current Ordinance

SJMC Section 12.04.110 provides that the Elections Commission may impose penalties of up to \$5,000 for each violation under Title 12. For violations of Chapter 12.06 relating to campaign contribution violations, the amount of penalties may be up to \$5,000 and/or the value of any contribution(s) received. In determining whether penalties should be imposed and the amount of penalties, Section 12.04.120 sets out the criteria that the Commission may consider in determining if penalties should be imposed and the amount of the penalty.

B. Due Process Considerations

Generally, there are no specific monetary limits on the amount of a civil statutory fine that may be assessed. However, a civil fine must satisfy the requirements of due process by being reasonably related to a proper legislative goal and imposed in a manner that is procedurally fair. While civil penalties may have a punitive or deterrent effect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. City and County of San Francisco v. Sainez (2000) 77 Cal.App.4th 1302.

While the courts afford some discretion in the establishment of penalties, it is still necessary for penalties to be proportional to the misconduct and imposed to achieve the penalty's deterrent purposes. A review of penalties in other jurisdictions discloses that the major cities in the State and the Fair Political Practices Commission (FPPC) impose penalties of either \$5,000 or a higher amount which is based on the amount that a respondent failed to report, unlawfully contributed, expended, gave or received. For example, Los Angeles and San Francisco penalize up to \$5,000 or 3 times the amount of the unlawful action, whichever is greater. None of the larger jurisdictions has an amount which exceeds the \$5,000 limit which is not based on the particular amount of the unlawful action.

C. Proposed Ordinance - Summary

The proposed ordinance maintains the \$5,000 monetary limit for each violation and also permits the Commission to impose a penalty which is three times the amount that a person or respondent failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater. With regards to violations of the Campaign Contribution Ordinance (Chapter 12.06), the Commission exercises discretion in evaluating whether to impose a penalty and the amount of a penalty. These factors include consideration of the severity of the violation, whether the violation was deliberate, negligent or inadvertent, the degree the respondent cooperated with the investigation or whether there was the presence or absence of any intention to conceal, deceive or mislead. SJMC Section 12.04.120 A.

II. DISCLOSURE REQUIREMENTS – CAMPAIGN COMMUNICATIONS

A. First Amendment Issues

Generally, the courts in reviewing First Amendment challenges to campaign communication disclosure requirements have found requiring disclosure of certain information on campaign communications funded by independent expenditures to be constitutional. For example, a requirement that campaign communications that support or oppose a candidate be accompanied by a statement indicating who financed the communication has been upheld. Additionally, a provision requiring a statement that the literature or advertisement was not authorized, paid for, or approved by the candidate was similarly approved by the court. Alaska Right to Life Committee v. Miles 441 F.3d 773 (9th Cir. 2006).

The court in Alaska Right to Life Committee relied on the U.S. Supreme Court's decision in McConnell v. Federal Election Commission, 540 U.S. 93, 124 S.Ct. 619 (2003), which concluded that there is a compelling state interest in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions" McConnell, 540 U.S. at 196. Thus, a disclosure informing the voters where campaign funds come from and the total amounts spent for or against a candidate has been determined to be justified because there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way.

B. Proposed Ordinance - Summary

The proposed ordinance establishes disclosure requirements for candidate mass mailings. Any candidate or committee that pays for a mass mailing must print, display or incorporate words which identify the person who pays for the mailing.

Any person who makes independent expenditures for a mass mailing which support or oppose any candidate for City office must state on the mailing that it is not authorized or approved by any candidate for City office. Furthermore, the identity, address of the person paying for the mailing and the total cost of the mailing is required to be stated on the mailing.

Campaign advertisements must disclose and identify the person who paid for the advertisement. Campaign advertisements include campaign literature, mailers and flyers, posters, yard or street signs, television, cable and radio broadcasts and newspaper and magazine advertisements.

The disclosure requirements also apply to recorded telephone messages distributed to 500 or more individuals or households. Any person paying for a recorded message is required to maintain a transcript and record of the distributed calls for each message.

The requirements do not apply to member communications distributed by an organization that is not a political party provided that the communications are not general public advertising such as broadcasting or newspaper advertisements. This is consistent with requirements in other jurisdictions. State law exempts these communications from disclosure requirements. The FPPC has determined that payments for member communications are not contributions or expenditures under Government Code Section 85312.

Complaints alleging violations of these disclosure requirements may be filed with the San Jose Elections Commission.

C. Other Jurisdictions – Required Disclosures on Communications

The following summarizes what other California jurisdictions require with respect to required disclosures on campaign communications.

Los Angeles

Candidates or committees that pay for a campaign communication are required to print, display or incorporate the following words in a communication: "Paid for by" immediately followed by the name, address and city of that candidate or committee.

Campaign communications funded by independent expenditures supporting or opposing candidates must include the phrase "not authorized by a City candidate," and must also include the name of any contributor of \$25,000 or more to a committee funding the independent expenditure.

San Diego

San Diego requires candidates or committees that pay for mass campaign literature to include the words "paid for by" followed by the named, address and city of the candidate or committee.

Every electioneering communication (any form of communication that mentions or refers to a clearly identified candidate, but does not expressly advocate the election, defeat, or recall of the candidate that is disseminated, broadcast, or published within 90 calendar days of an election not including independent expenditures or slate mailers) must include the words "paid for by" followed by the name, address and city (for written communications) of the person who paid for the communication. Disclosure reports are required for payments of \$1,000 or more.

San Francisco

Candidates who pay for mass mailings must include "paid for by" information. Like San Diego, every electioneering communication must include the words "paid for by" in the communication.

A person who makes an independent expenditure (not an electioneering communication) for a mass mailing which supports or opposes any candidate must include the following statement on the mailing:

*Notice to Voters
(Required by the City and County of San Francisco)
This mailing is not authorized or approved by
any candidate for City and County office
or by any election official. It is paid for by
(name and committee identification number)
(address, city, state)
Total cost of this mailing is (amount)*

This requirement applies to television or radio programming and communications placed in newspapers and periodicals of general circulation. Filing and disclosure is required for mass mailings and advertisement paid by independent expenditures and electioneering communications.

Oakland

Any person who makes independent expenditures for a mass mailing, slate mailing or other campaign materials which support or oppose any candidate is required to place the following statement on the mailing:

*Notice to Voters
(Required by the City of Oakland)
This mailing is not authorized or approved by any
City candidate or election official.
It is paid for by
(name)
(address, city, state)
Total cost of this mailing is: (amount)*

III. MINOR AMENDMENTS – CAMPAIGN REGULATIONS

The City Clerk is recommending two minor amendments to the campaign regulations to reflect State law and reduce confusion by candidates/committees. They are summarized, as follows:

A. Correction of Filing Officer

In the late 1990's, the Fair Political Practices Commission changed the filing officer for Statements of Intention to become a candidate from the Secretary of State to the local filing official, which in the City's case, is the City Clerk. Sections 12.06.030 and 12.05.180 have not been revised to reflect this change. Amending the sections will reduce confusion about where to file the statement.

B. Amend time of end for the end of campaign contribution collection period

The campaign contribution collection period ends on the seventeenth day prior to the election (or in the case of a special election, on the seventh day prior to the election). This is always a Saturday and most banks are not open until 5:00 p.m. Sections 12.06.290 and 12.06.610 currently specifies that the campaign collection period ends at 5:00 p.m. Government Code Section 6806 defines a day as "the period of time between any **midnight** and the **midnight** following". With the advent of the automatic teller machine (ATM), it is reasonable to extend the hour deadline to midnight. Amending the time from 5:00 p.m. to midnight is consistent with State law and more reasonable.

CONCLUSION

I. The proposed ordinance provides for penalties in the amount of up to the greater of \$5,000 or three times the amount which a person or respondent failed to report properly or unlawfully contributed, expended, gave or received. The penalty amount continues to be based on factors such as those currently in the Municipal Code which allow the Commission to exercise some discretion in evaluating the amount of a penalty.

II. The required disclosures on communications funded by campaigns and independent committees which have been upheld by the courts are those that inform the voters where campaign funds come from and the total amounts spent for or against a candidate. The requirements in the proposed ordinance are consistent with the First Amendment and with those in other California cities. Complaints alleging violations of the disclosure requirements may be filed with the San Jose Elections Commission.

III. The minor amendments to the campaign regulations will clarify for candidates:
(1) That the City Clerk is the filing officer for the form 501, "Statement of Intention" to become a candidate; and (2) Amend the time of the end of the campaign contribution collection period to be consistent with State Law.

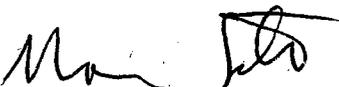
PUBLIC OUTREACH/INTEREST

This memorandum and the draft ordinance are posted on the City's website for the December 18, 2007 Council Agenda.

CEQA

Not a project.

RICHARD DOYLE
City Attorney

By  _____
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cc: Debra Figone

For questions please contact Norm Sato, Chief Deputy City Attorney at 535-1925