



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle, City Attorney
Lee Price, MMC, City Clerk

SUBJECT: PROPOSED REVISIONS TO
TITLES 2 AND 12 OF THE
SAN JOSE MUNICIPAL CODE
RELATED TO THE CITY'S
CAMPAIGN FINANCE
REGULATIONS AND THE
ELECTIONS COMMISSION

DATE: July 30, 2009

RECOMMENDATION

As recommended by the Elections Commission, approve an ordinance amending parts of Title 2 and Title 12 of the San José Municipal Code related to the Campaign Finance Regulations and the Elections Commission.

BACKGROUND

On October 10, 2006, the City Council referred to the City Attorney and the Elections Commission consideration of various actions related to independent committees, including recommendations to review provisions of Title 12 of the Municipal Code. On January 24, 2007, the Rules and Open Government Committee referred to the Elections Commission a recommendation from the Mayor's Transition Committee to re-initiate the contribution limits on independent expenditures.

The Elections Commission deferred work on the two referrals until the Ninth Circuit Court of Appeals issued a ruling on the *COMPAC v. City of San José* appeal. Since the October 14, 2008 ruling directing the trial court to dismiss the case, the Elections Commission considered amendments to the City's campaign finance regulations, among other provisions. On July 8, 2009, the Elections Commission approved a draft ordinance posted with this memo and directed staff to present the recommendations to the City Council.

SUPPLEMENTAL ANALYSIS

Proposed Revisions to Campaign Finance Regulations

A. The Proposed Ordinance Includes Definitions Consistent with the California Political Reform Act

The proposed ordinance expands the definition of "committee" and is consistent with how the Political Reform Act ("PRA") defines "committee". (See Section 12.06.040.) The current definition only regulates committees "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." Because committees formed to influence the action of the voters on ballot measures in San Jose are required under the PRA to file campaign disclosure statements with the City Clerk anyway, the definition of committee should include ballot measure committees as well as committees involved in candidate elections.

Because the definition of "committee" is proposed to be expanded, the proposed ordinance also clarifies the definition of "contribution" to make clear that only an expenditure benefitting a candidate or committee made at the behest of a candidate or committee controlled by a candidate is considered a contribution. (See Section 12.06.050.)

The proposed ordinance also expands the definition of "election"; the current definition states that recall elections are not considered elections. (See Section 12.06.080.) Because committees formed to influence a recall – which is considered a ballot measure under the PRA – are required to file campaign disclosure statements with the City Clerk anyway, the definition of election should not omit recall elections.

Because the definition of "committee" is proposed to be expanded, the proposed ordinance clarifies the definition of "independent expenditure" to make clear that an expenditure is independent only if it is not made at the behest of a candidate or committee controlled by a candidate. (See Section 12.06.130.) The proposed ordinance also eliminates redundancy in the current definition of "independent expenditure".

The proposed ordinance also clarifies the definition of "Political Reform Act" and specifically refers to the PRA for questions of construction unless the San Jose Municipal Code provides a different definition. (See Section 12.06.170.)

Finally, because the definition of "committee" is proposed to be expanded, the proposed ordinance also clarifies that only contributions from cardrooms to candidates or committees controlled by candidates are prohibited. (See Section 12.06.260.)

B. The Proposed Ordinance Suspends Enforcement of Contribution Limits for Independent Committees

The proposed ordinance suspends the provisions that limit contributions to independent committees until the United States Court of Appeals for the Ninth Circuit issues a decision in *Long Beach Area Chamber of Commerce v. City of Long Beach* or December 31, 2010, whichever is later. (See Sections 12.06.310 - 12.06.330.) The stakeholders who receive contributions and make expenditures for elections in San Jose disagree about the constitutionality of limits on contributions to independent committees and reasonable legal arguments can be made for either position. However, it is possible that the Ninth Circuit will provide guidance by the end of this year, since one of the issues on appeal before the Ninth Circuit is whether the City of Long Beach can limit contributions to political action committees.

C. The Proposed Ordinance Clarifies Campaign Disclosure Requirements

The proposed ordinance makes clear that candidates, committees controlled by candidates and independent committees receiving contributions or making expenditures in an election in San Jose must file campaign disclosure statements with the City Clerk, which is consistent with the PRA. (See Section 12.06.910(A).)

The proposed ordinance also requires that candidates and their committees file a declaration stating that contributions have not been accepted or solicited in violation of any of the requirements of Chapter 12.06. (See Section 12.06.910(A).) This revision expands what a candidate or committee is required to attest; the current version of the Municipal Code requires only that candidates and their committees declare that contributions have not been accepted or solicited in excess of the contribution limits.

The proposed ordinance also makes clear that candidates and their controlled committees – but not independent committees – must itemize all contributions received. This requirement is not new but differs from the PRA; the PRA only requires itemization of contributions \$100 and over. (See Section 12.06.910(B).)

The proposed ordinance also clarifies that an independent committee whose primary filing official is not the City Clerk must file campaign disclosure statements with the City Clerk once the committee has received a contribution or made an expenditure in an election in the City of San Jose; this requirement is consistent with the PRA. (See Section 12.06.910(C).)

The proposed ordinance also adds two new requirements for independent committees:

1. Once an independent committee whose primary filing official is not the City Clerk has received a contribution or made an expenditure in an election in San Jose, the

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committee must also file with the City Clerk, within 2 business days, copies of campaign disclosure statements filed by the committee with its regular filing official for the previous twelve months. (See Section 12.06.910(D).) This disclosure will enable San Jose voters to review the contributions received and expenditures made by the committee for the twelve months before the committee became involved in an election in San Jose.

2. Once an independent committee whose primary filing official is not the City Clerk has received a contribution or made an expenditure in an election in San Jose, from that date forward, the committee must also file with the City Clerk the campaign disclosure statements required to be filed pursuant to the PRA until the committee terminates or has not received contributions or made expenditures in an election in San Jose for four years. (See Section 12.06.910(E).) Again, this disclosure will enable San Jose voters to review the contributions received and expenditures made by the committee once it becomes involved in an election in San Jose.

The proposed ordinance clarifies the penalties for filing late campaign disclosure statements; these penalties are consistent with the penalties set forth in the PRA. (See Section 12.06.910(F).)

The proposed ordinance clarifies the information that the City Clerk must publish in the San Jose Mercury News. (See Section 12.06.920.)

D. The Proposed Ordinance Adds a Section Requiring Disclosure of "Electioneering Communications"

The current version of the Municipal Code requires that candidates, controlled committees and independent committees making "mass mailings" that advocate for or against one or more candidates in an election in San Jose incorporate a "paid for by" statement which includes the name and address of the candidate or committee. "Mass mailing is defined in the PRA as "over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry." Thus, if a mass mailing "expressly advocates" for or against a candidate in an election in San Jose, the "paid for by" statement must be included.

The current version of the Municipal Code also requires that other campaign advertisements – including recorded telephone messages – that "expressly advocate" for or against a candidate in an election in San Jose, must include a "paid for by" statement.

The proposed ordinance replaces the current version of the campaign communication provisions with new, broader provisions governing "electioneering communications." An "electioneering communication" is "any form of communication, for which payment is made, that refers to a clearly identified candidate for Mayor or City Council of the City of San José and is disseminated, broadcast, or otherwise published within ninety calendar days of an election for which the candidate is on the ballot." (See Section 12.06.1000(A).)

The definition of "electioneering communication", therefore, is not limited to mass mailings or campaign advertisements that expressly advocate for or against a candidate in an election in San Jose.¹ However, the following types of communications are explicitly excluded from the definition of electioneering communication:

- News stories, commentaries or editorials disseminated, broadcast or otherwise published by newspaper, radio station, television station, internet site or any other recognized news medium unless the news medium is owned or controlled by any political party, political committee or candidate.
- Member communications, except those made by a political party.
- Communications made in the form of a slate mailer.
- Communications paid for by a governmental entity.
- Communications that occur during a candidate debate or forum.
- Communications made solely to promote a candidate debate or forum made by or on behalf of the person sponsoring the debate or forum, provided that such communications do not otherwise discuss the positions or experience of a candidate.
- Communications in which a candidate's name is required by law to appear and the candidate is not singled out in the manner of display.
- Spoken communications between two or more individuals in direct conversation unless at least one of the individuals is compensated for the purposes of making the communication.
- Communications that appear on bumper stickers, pins, stickers, badges, ribbons and other similar memorabilia.

(See Section 12.06.1010(G).)

¹ In the event a court were to find the proposed definition of "electioneering communication" constitutionally insufficient, then the term "electioneering communication" would mean any form of communication, for which payment is made, which promotes or supports a candidate for Mayor or City Council of the City of San José, or attacks or opposes a candidate for Mayor or City Council of the City of San José (regardless of whether the communication expressly advocates a vote for or against a candidate), and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. (See Section 12.06.1000(B).)

In addition, the current version of the Municipal Code applies to mailers, posters, yard and street signs, billboards, television, cable, satellite and radio broadcasts and newspaper and magazine advertisements. The proposed ordinance would apply to all forms of communication, including, for example, email and Internet communications.

The proposed ordinance requires that candidates, controlled committees and independent committees making "electioneering communications" incorporate a "paid for by" statement which includes the name and address of the candidate or committee. (See Section 12.06.1010(A), (B) and (C).)

The proposed ordinance also requires that if an independent committee makes a payment or payments or a promise of a payment or payments that cumulatively total \$1,000 or more for an electioneering communication must file with the City Clerk – within 24 hours of making the payment or the promise of payment – a report that discloses the committee's name, address, occupation and employer, if applicable, and the amount of the payment. The electioneering communication, or a transcript of the electioneering communication if in spoken form, also must be attached to the disclosure report. (See Section 12.06.1010(D).)

Finally, the proposed ordinance requires that if an independent committee has received a payment or promise of payment totaling \$100 or more specifically for the purpose of making an electioneering communication, the committee must also disclose on the report the name, address, occupation and employer of the person who made the payment or promise of payment as well as the amount received and the date of the payment. (See Section 12.06.1010(E).)

Proposed Revisions Which Impact the Elections Commission

A. The Proposed Ordinance Clarifies the Term and Qualifications of Commissioners

The current version of the Municipal Code permits members of certain City commissions who are appointed to position with an unexpired term to serve to the end of the former incumbent's term. In addition, if a member has been appointed to serve a term of less than one half of the full term, that member may be reappointed to serve on the commission for up to two consecutive additional terms. The proposed ordinance clarifies that members of the Elections Commission also may serve up to two consecutive additional terms where a member has been appointed to serve an unexpired term of a former incumbent. (See Section 2.08.1620.)

The proposed ordinance also clarifies that the prohibition against holding "public office" while serving on the Elections Commission means serving as an elected member of public office. (See Section 2.08.1630(C).) The proposed ordinance also adds an additional prohibition against being employed by or having a contractual relationship with a candidate for City office while serving on the Elections Commission. (See Section 2.08.1630(F).) It is

important that Elections Commissioners remain impartial and being employed by or having a contractual relationship with a City candidate would compromise that impartiality.

B. The Proposed Ordinance Changes How the Elections Commission May Find a Violation of Title 12

The current version of the Municipal Code requires that the votes of at least three members of the Commission "who concurred in the finding of the violation" are required to impose any order or penalty. However, there may be a lapse in time between finding a violation and imposition of a penalty. During that period, it is possible that one or more Commissioners who voted to find a violation will have left the Commission, because of an expired term or resignation. The proposed ordinance, therefore, permits an Elections Commissioner to impose an order or penalty for a violation of Title 12 – even if he or she did not concur in the finding of the violation – as long as the Commissioner certifies that he or she has heard or read the testimony at the hearing on the complaint and reviewed all the evidence in the record. (See Section 12.04.060(B).)

C. The Proposed Ordinance Adds a Requirement of Confidentiality

Resolution No. 72547, adopted by the City Council, sets forth the regulations and procedures for Elections Commission investigations and hearings. One of the regulations requires that a complaint, investigative file or information contained therein, must not be disclosed to any person other than a respondent or respondent's representative, the City Attorney, District Attorney, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation, before the evaluator presents the report and recommendations to the Commission. The proposed ordinance codifies this regulation in the Municipal Code, so that violation of the confidentiality provision could give rise to a separate complaint before the Elections Commission. (See Section 12.04.080(E).)

PUBLIC OUTREACH/INTEREST

The Elections Commission conducted an open and public Study Session on April 8, 2009. The purpose of the Study Session was to discuss the City's current campaign finance regulations relating to contribution limits generally, contribution limits on independent expenditure committees and segregation of contributions to independent expenditure committees. In addition, the Commission was interested in examining inflation adjustments on contribution limits and options for greater disclosure of contributions. Stakeholders (including campaign committees who have participated in San José elections and have filed campaign statements with the City Clerk, campaign lawyers and campaign consultants) were invited to participate in the discussion and/or submit written comments.

Based on the public testimony received at the Study Session, a subcommittee of the Elections Commission was formed and met to develop recommendations to the full Commission.

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The Elections Commission also met on May 13, June 10, and July 8 to discuss proposed revisions to the campaign finance regulations. All meetings were open to the public and adequately noticed. In addition, the Office of the City Clerk specifically provided notice of the Elections Commission's proposed revisions to stakeholders. The stakeholders listed in Attachment 1 received notice of the Elections Commission's proposals.

In addition, if the ordinance is adopted, the City Attorney and City Clerk will provide additional outreach and education to the public (including candidates and the stakeholders' group) to ensure that the new regulations are adequately disseminated.

CONCLUSION

The proposed ordinance suggests certain significant revisions to the campaign finance regulations:

- The proposed ordinance conforms many definitions in the San Jose Municipal Code to definitions used in the California Political Reform Act. This consistency will assist candidates, their controlled committees and independent committees in complying with San Jose's regulations.
- The proposed ordinance suspends enforcement of San Jose's laws that limit contributions to independent committees until there is great clarity about the constitutionality of contribution limits. However, the proposed ordinance also clarifies and increases the campaign disclosure requirements for independent committees. For example, once an independent committee whose primary filing officer is not the City Clerk has received a contribution or made an expenditure in an election in San Jose, the committee must also file with the City Clerk, within 2 business days, copies of campaign disclosure statements filed by the committee with its regular filing official for the previous twelve months. The committee must also file with the City Clerk the campaign disclosure statements required to be filed pursuant to the PRA until the committee terminates or has not received contributions or made expenditures in an election in San Jose for four years. These disclosures will enable San Jose voters to review the contributions received and expenditures made by the committee that would not otherwise be made available to the City Clerk.
- In addition, the proposed ordinance adds a section requiring disclosure of "electioneering communications". The term "electioneering communication" encompasses "any form of communication, for which payment is made, that refers to a clearly identified candidate for Mayor or City Council of the City of San José and is disseminated, broadcast, or otherwise published within ninety calendar days of an election for which the candidate is on the ballot." Electioneering communications, therefore, are not limited to just mass mailings or campaign advertisements that expressly advocate for or against a candidate in an election in San Jose.

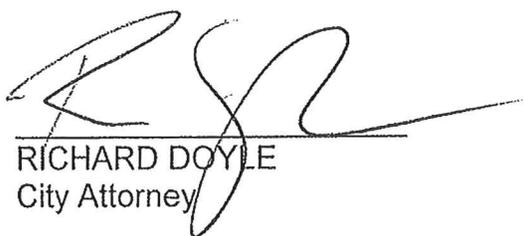
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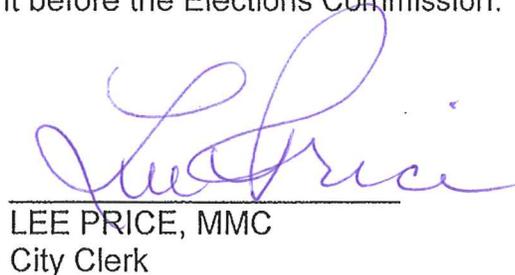
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The proposed ordinance also suggests revisions to provisions in the Municipal Code that impact the Elections Commission:

- The proposed ordinance clarifies the term and qualifications of commissioners. Specifically, members of the Elections Commission may serve up to two consecutive additional terms where a member has been appointed to serve an unexpired term of a former incumbent. And, the prohibition against holding "public office" while serving on the Elections Commission means serving as an elected member of public office. The proposed ordinance also adds an additional prohibition against being employed by or having a contractual relationship with a candidate for City office while serving on the Elections Commission to maintain the integrity of the Commission.
- Because there may be a lapse in the period of time between the finding of a violation and imposition of a penalty, the proposed ordinance permits an Elections Commissioner to impose an order or penalty for a violation of Title 12 – even if he or she did not concur in the finding of the violation – as long as the Commissioner certifies that he or she has heard or read the testimony at the hearing on the complaint and reviewed all the evidence in the record.
- The proposed ordinance codifies into the Municipal Code the regulation that requires that a complaint, investigative file or information contained therein not be disclosed to any person other than a respondent or respondent's representative, the City Attorney, District Attorney, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation before the evaluator presents the report and recommendations to the Commission. Thus, a violation of the confidentiality provision could give rise to a separate complaint before the Elections Commission.



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For questions please contact Lee Price, City Clerk, at (408) 535-1260