



## Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle,  
City Attorney

**SUBJECT:** PROPOSED REVISIONS TO  
CHAPTERS 12.04 AND 12.06 OF  
THE SAN JOSE MUNICIPAL  
CODE REGARDING MUNICIPAL  
CAMPAIGNS

**DATE:** October 6, 2011

### RECOMMENDATION

As recommended by the City Attorney, approve an ordinance amending parts of Chapters 12.04 and 12.06 of the San José Municipal Code regarding Municipal Campaigns.

### BACKGROUND AND ANALYSIS

#### A. CHAPTER 12.04

Section 12.04.160 of the Municipal Code currently provides that enforcement of Title 12 shall not be governed by Section 1.08.020 of the Municipal Code unless such violation constitutes a separate violation of another section or provision of the Municipal Code or of another applicable provision of law. Since Section 1.08.020 lists the Municipal Code sections that may be enforced as infractions, the result of Section 12.04.160 is the implication that violations of Title 12 may be enforced as misdemeanors under Section 1.08.010.

However, the Blue Ribbon Panel in 1997 recommended that criminal penalties be deleted from Title 12. In fact, the 1998 version of Section 12.04.160 referred to Section 1.08.010 rather than 1.08.020. The proposed ordinance, therefore, corrects the typographical error and refers back to Section 1.08.010. (See Section 12.04.160.)

#### B. CHAPTER 12.06

##### 1. Ted Smith v. City of San Jose Lawsuit

Plaintiff, Ted Smith, filed his complaint on July 3, 2007, as a taxpayer of the City of San José, against the City and the San José Elections Commission, alleging facial challenges to certain provisions of the San José Municipal Code that regulate lobbying and campaign finance in the City.

Based primarily on First Amendment and vagueness grounds, Plaintiff challenged: (1) the definition of and requirements for "In-House Lobbyists"; (2) the definition of and requirements for "Expenditure Lobbyists"; (3) the prohibitions against campaign contributions within (a) 17 days of a regular City election and (b) 7 days of a special City election; (4) the ban against deceiving a City Official regarding pending matters; (5) the prohibition against anonymous campaign contributions; and (6) the use of the language "aids" or "opposes" in certain contribution provisions.

The parties filed cross-motions for summary judgment in 2010. On March 4, 2011, the Honorable James P. Kleinberg ruled in the City's favor with regard to the "In-House Lobbyists" requirements, "Expenditure Lobbyists" requirements and "anti-deceit" regulations, thus rejecting the challenge to those provisions as a matter of law.

Judge Kleinberg also ruled that Plaintiff's challenges to the anonymous contribution ban and the "aids" or "opposes" language in the contribution provisions were moot in light of the revisions that the Council made to the challenged provisions in 2009.

Finally, Judge Kleinberg refused to rule on Plaintiff's challenges to the 17-day and 7-day contribution blackout periods, but did rule that the constitutionality of those regulations was a "question of fact" that would require further evidence on why the 17-day and 7-day blackout periods were justified to serve an important City interest. These issues were set for a court trial on June 13, 2011.

On August 16, 2011, after the court trial, Judge Kleinberg issued a Statement of Decision, finding that the City failed to carry its burden of proving that Sections 12.06.290 and 12.06.610 are constitutional. Specifically, the court found that the City's blackout provisions do not satisfy even intermediate scrutiny because:

- The City failed to demonstrate that the blackout provisions advance the interest of full disclosure of contributions since technology allows campaign disclosure reports to be filed nearly instantaneously on the Internet.
- The City failed to demonstrate that the blackout provisions advance the interest of preventing corruption and the appearance of corruption since a late contribution – unlike a large contribution – is not necessarily susceptible to quid pro quo corruption.
- The blackout provisions are under-inclusive because they do not apply to independent committees, which creates inequity in political campaigning.
- Even volunteer personal services would be prohibited during the blackout periods.

In addition, while not specifically raised by the Plaintiff in his complaint, the Court also found unconstitutional the City's provision prohibiting candidates from contributing personal funds 7 days before an election.

We recommend the following revisions in light of the Court's Statement of Decision:

- a. The Proposed Ordinance Eliminates the Blackout Provisions and the Third Pre-Election Statement Required in Special Elections

The proposed ordinance eliminates the blackout periods by ending the contribution collection period at midnight on the day before the election. (See Sections 12.06.290(B)(2) and (C)(2) and 12.06.610(A)(2).) The draft ordinance also deletes the third pre-election statement that was required to be filed no later than the fifth day before Special Elections. (See Section 12.06.610(B).) Since candidates and committees may accept contributions until midnight on the day before the election, the pre-election statement, which would only capture contributions received up to the fifth day before the election, is not particularly useful. Instead, as explained below, candidates and committees will be required to report "late contributions", as defined, within 24 hours of hours of receipt.

- b. The Proposed Ordinance Clarifies that Volunteer Personal Services are Not Contributions

The proposed ordinance makes clear that volunteer personal services – and any other service, payment or thing of value not specifically defined as a contribution – are not contributions. (See Sections 12.06.050(B) and (D).)

- c. The Proposed Ordinance Eliminates the Provision Prohibiting Candidates from Contributing Personal Funds

The proposed ordinance eliminates the provision that prohibited candidates from contributing personal funds 7 days before an election. Instead, candidates may contribute personal funds until midnight on the day before the election. (See Section 12.06.295(C).)

- d. The Proposed Ordinance Adds a Definition for Late Contributions

Since candidates and committees may accept contributions until midnight on the day before the election, under the provisions of the Political Reform Act they will be required to report "late contributions" within 24 hours of hours of receipt. The Political Reform Act defines late contributions as \$1,000 or more, or multiple contributions aggregating \$1,000 or more, from a single source during the 16 days before the election. The proposed ordinance defines "late contribution" more narrowly – contributions of \$500 or more, or multiple contributions aggregating \$500 or more, from a single source during the 16 days before the election. (See Section 12.06.140.) This definition will require candidates and committees to report more contributions made after the second pre-election report is filed; in particular, since contributions to candidates for a Council district can never exceed \$500 under the City's contribution limits, the narrower

definition of "late contribution" will require Council candidates to report late contributions as well.

- e. The Proposed Ordinance Revises the Requirements of the Report Published by the City Clerk

Since candidates and committees may accept contributions until midnight on the day before the election, the report published by the City Clerk cannot report all of the contributions received and expenditures made. The proposed ordinance is revised to require that the report contain information as of 7 days before the election. (See Section 12.06.920.)

## 2. Voluntary Expenditure Limits

In October 2009, the City Council adopted revisions to Chapter 12.06 of the San Jose Municipal Code, which, among other things, increased campaign contribution limits to candidates effective January 1, 2011 and included a cost of living adjustment. In addition, the Council asked the Elections Commission to review the formula used to calculate the Voluntary Expenditure Limits (VEL) and make a recommendation to the City Council.<sup>1</sup>

The Elections Commission discussed the referral and observed that the population of the City (and each District) had increased and, as a result, the expenditure limits had increased proportionally as well. Consequently, the Commission questioned whether a change in the formula used to calculate the VEL was necessary and made no recommendation about an increase to the Rules and Open Government Committee.

At the Rules and Open Government Committee meeting on July 28, 2010, one member noted that expenses to communicate with voters (such as postage) had increased and that more research was needed on the "purchasing power" of the expenditure limits. Another member noted that due to inflation, the limits could be outdated and that an inflation index might be considered. The Rules and Open Government Committee referred the item to the City Attorney for further analysis.

In order to respond to the referral from the Rules and Open Government Committee, we (1) reviewed the voluntary expenditure limits provisions of California's largest cities to compare them to San Jose's provisions; (2) sought stakeholder input; and (3) reviewed recent opinions about expenditure limits.

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<sup>1</sup> The Voluntary Expenditure Limits were adopted by the City Council in 1997 and have not been adjusted since. The current limits are \$.75 per City resident for Mayoral candidates and \$1.00 per District resident for City Council candidates per election (both primary and run-off). For Mayoral candidates, \$.75 is multiplied by the number of residents of the entire City to arrive at the VEL for each election; for City Council candidates, \$1.00 is multiplied by the number of residents in each District to yield the VEL per candidate. Since population varies by Council District, the VEL per district is different.

We determined that we cannot accurately compare San Jose's VEL with the jurisdictions selected since some cities have matching funds or public financing provisions; in any case, attached as Attachment 1 is a matrix that summarizes the voluntary expenditure and contribution limits for the largest cities in California.

Although staff from the Offices of the City Clerk and City Attorney solicited stakeholder input through an on-line survey, an open meeting and written comments, we did not find the results to be conclusive.

As we reviewed recent opinions on expenditure limits, we found that two United States Supreme Court decisions raise legal issues about two of the City's VEL provisions: the provision that establishes different contribution limits if a candidate has accepted the VEL and the provision that triples expenditure limits based on the receipts or expenditures of a non-VEL candidate or the expenditures of an independent committee.

In *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), the Supreme Court found unconstitutional a provision in the Bipartisan Campaign Reform Act that raised contribution limits for non-self-financing candidates when a self-financing candidate's expenditure of personal funds caused the "opposition personal funds amount" to be exceeded. Specifically, once a self-financing candidate spent a certain amount of his or her own money, the non-self-financing candidate was able to receive contributions at three times the normal limit. The Supreme Court held that this provision impermissibly burdened the self-financing candidate's First Amendment right to spend his own money for campaign speech.

The City's provision is distinguishable from the provision in the *Davis* case; candidates voluntarily accept expenditure limits in exchange for higher contribution limits at the beginning of the contribution collection period. The different contribution limits are not triggered by a self-financing candidate's expenditure of personal funds. However, we believe that the most cautious approach is to adopt a revised ordinance that sets out only one set of contribution limits.

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. \_\_; 131 S. Ct. 2806, June 27, 2011, the Supreme Court found Arizona's matching funds scheme to be unconstitutional; once a privately financed candidate has raised or spent more than the initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. The matching funds provision therefore forces the privately financed candidate to "shoulder a special and potentially significant burden when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."<sup>2</sup>

The provision that triples expenditure limits in San Jose differs from Arizona's matching funds provision in at least two ways: San Jose candidates do not receive public funds

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<sup>2</sup> *Arizona Free Enterprise*, *supra*, at 2818.

and the trebling of expenditure limits is not triggered by the expenditure of personal funds. In any case, there is a concern that the City's provision that triples expenditure limits based on the receipts or expenditures of a non-VEL candidate or the expenditures of an independent committee may burden the political speech of a non-VEL candidate or independent committee. A non-VEL candidate or independent committee may be burdened in choosing to spend money that could trigger triple the expenditure limits of the VEL candidate. Here, too, the most cautious approach is to delete the provision that triples expenditure limits.

On September 14, 2011, the Rules and Open Government Committee considered staff's response to the referral. Based on the direction from the Committee, we recommend the following revisions:

- a. The Proposed Ordinance Increases the Expenditure Limits for City Council Candidates and Adds a Method for Adjusting Expenditure Limits in the Future

As evidenced in Attachment 1, San Jose's current limits are somewhat lower than other California cities for City Council candidates but a bit higher than other California cities for Mayoral candidates. Thus, the proposed ordinance increases the VEL for City Council candidates to \$1.25 per resident, per election. (See Section 12.06.530(A)(2).)

The proposed ordinance also adds a method to adjust VEL for the 2012 elections as well as in the future. For the 2012 elections, the City Clerk will determine the cost for the candidate's statement of qualifications in the last election as established by the County Registrar of Voters and add that amount to the applicable VEL. (See Section 12.06.530(C)(1) and (C)(3).) The City Clerk will also determine the bulk mailing rate, multiply the rate by the numbers of residents in the City and each Council district, multiply the resulting amounts by .4 and add those amounts to the applicable VEL as well. (See Section 12.06.530(C)(2) and (C)(3).) The bulk mailing calculation is multiplied by .4 since data shows that, on average, approximately 40% of total residents in any jurisdiction are registered voters. Adding the bulk mailing rate calculation to the VEL will ensure that at least the cost of one bulk mailing will be based on the current rate.

For future elections, the City Clerk will consider any cost of living increase, adjust the amount accordingly and multiply that amount by the appropriate number of residents. (See Section 12.06.530(D)(1) and (D)(4).) The City Clerk will also determine the cost for the candidate's statement of qualifications in the last election as established by the County Registrar of Voters and add that amount to the applicable VEL. (See Section 12.06.530(D)(2) and (D)(4).) Finally, the City Clerk will determine the bulk mailing rate, multiply the rate by the numbers of residents in the City and each Council district, multiply the resulting amounts by .4 and also add those amounts to the applicable VEL. (See Section 12.06.530(D)(3) and (D)(4).)

b. The Proposed Ordinance Eliminates Alternative Contribution Limits

In order to avoid any claim that San Jose's campaign finance provisions impermissibly burden a self-financing candidate's First Amendment right to spend money for campaign speech, the proposed ordinance sets out only one set of contribution limits. (See Sections 12.06.210(A), (C) and (F) and the repeal of Section 12.06.540.)

c. The Proposed Ordinance Deletes the Provision that Increases Expenditure Limits During an Election

In order to avoid a claim that a non-VEL candidate or independent committee may be burdened in choosing to spend money that could trigger the increase of expenditure limits of the VEL candidate, the proposed ordinance deletes the provision that triples expenditure limits during an election. (See repeal of Section 12.06.560.)

**CONCLUSION**

The proposed ordinance:

- Conforms the enforcement provisions with the recommendations of the Blue Ribbon Panel in 1997;
- Considers Judge Kleinberg's Statement of Decision in the *Ted Smith v. City of San Jose* lawsuit; and
- Revises the method of calculating VEL and eliminates provisions that could be argued impinge First Amendment rights of free speech.

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## COMPARISON OF VOLUNTARY EXPENDITURE AND CONTRIBUTION LIMITS

	<b>San Jose</b>	<b>Los Angeles</b>	<b>San Diego</b>	<b>San Francisco</b>
<b>Voluntary Expenditure Limits</b>	City Council: \$1.00 per resident, per election  Mayor: \$.75 per resident, per election	City Council: \$1.24 per resident for the primary election and \$1.03 per resident for the general election to be eligible for matching funds <sup>1</sup>  Mayor: \$.56 per resident for the primary election and \$.45 per resident for the general election to be eligible for matching funds <sup>2</sup>  (CPI adjustment)	N/A	To receive public financing in the amount of \$2.75 per resident, candidates in regular elections for Board of Supervisors must not spend more than \$1.95 per resident <sup>3</sup>  To receive public financing in the amount of \$2.75 per resident, candidates in regular elections for Mayor must not spend more than \$1.83 per resident <sup>4</sup>
<b>Contribution Limits to Candidates</b>	City Council: \$500 per election if accept VEL; \$200 per election if not  Mayor: \$1000 per election if accept VEL; \$500 per election if not  (CPI adjustment)	City Council: \$500 per election  Mayor: \$1000 per election  (CPI adjustment)	\$500 per election  (CPI adjustment)	\$500 per election

<sup>1</sup> Calculated based on Los Angeles Department of City Planning Demographic Research Unit, Population & Housing Data by City Council District – average of all 15 Districts of 266,900 and ceilings of \$330,000 for the primary election and \$275,000 for the general election.

<sup>2</sup> Calculated based on Los Angeles Department of City Planning Demographic Research Unit, Population & Housing Data by all City Council Districts of 4,003,500 and ceilings of \$2,251,000 for the primary election and \$1,800,000 for the general election.

<sup>3</sup> Calculated based on U.S. Census 2010 population – average of all 11 districts of 73,203 and Individual Expenditure Ceiling of \$143,000.

<sup>4</sup> Calculated based on U.S. Census 2010 population of 805,235 and Individual Expenditure Ceiling of \$1,475,000.

## COMPARISON OF VOLUNTARY EXPENDITURE AND CONTRIBUTION LIMITS

	<b>Fresno</b>	<b>Long Beach</b>	<b>Sacramento</b>	<b>Oakland</b>
<b>Voluntary Expenditure Limits</b>	N/A	<p>City Council: \$.79 for the primary election and \$.39 for the runoff election<sup>5</sup> to be eligible for matching funds</p> <p>Mayor: \$.43 for the primary election and \$.22 for the runoff election<sup>6</sup> to be eligible for matching funds</p> <p>(CPI adjustment)</p>	<p>City Council: \$1.51 each election if accept financing from Campaign Reform Fund<sup>7</sup></p> <p>Mayor: \$1.25 each election if accept financing from Campaign Reform Fund<sup>8</sup></p>	<p>Mayor: \$.70 per resident per election</p> <p>City Council: \$1.50 per resident per election</p> <p>(CPI adjustment)</p>
<b>Contribution Limits to Candidates</b>	<p>From Persons: \$3,200 per election</p> <p>From Small Contributor Committees: \$6,400</p> <p>(CPI adjustment)</p>	<p>City Council in primary and general elections: \$250.00 per election</p> <p>Mayor in primary and general elections: \$500.00 per election</p> <p>In special elections: \$1,000.00 total</p> <p>(CPI adjustment)</p>	<p>City Council candidates - From Persons: \$1,500 From Large Political Committees: \$5,050</p> <p>Mayoral candidates - From Persons: \$3,050 From Large Political Committees: \$10,100</p> <p>(CPI adjustment)</p>	<p>From Persons: \$700 per election if accept VEL; \$100 if not</p> <p>From Broad-Based Political Committees: \$1,300 per election if accept VEL; \$300 if not</p> <p>(CPI adjustment)</p>

<sup>5</sup> Calculated based on City of Long Beach, California Council District Map, Department of Technology Services, GIS - Central Management Unit—average population of all 9 Districts of 51,362 and ceilings of \$40,000 for the primary election and \$20,000 for the runoff election.

<sup>6</sup> Calculated based on City of Long Beach, California Council District Map, Department of Technology Services, GIS - Central Management Unit—citywide population of 462,257 and ceilings of \$200,000 for the primary election and \$100,000 for the runoff election.

<sup>7</sup> Calculated based on 2010 U.S. Census Block population counts – average population of all 8 Districts of 58,311 and ceiling of \$88,000.

<sup>8</sup> Calculated based on 2010 U.S. Census Block population count of 466,488 and ceiling of \$585,000.