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April 29, 2009

San Jose Elections Commission
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113

RECEIVED
San Jose City Clerk
2009 APR 29 P 4:30

Re: Complaint filed December 8, 2008 / Hanson Bridgett Memorandum

Dear Commissioners,

On behalf of my clients, Tom McEnery, John P. McEnery IV and Urban Markets, LLC, we would like to take this opportunity to submit a brief written response to the memorandum of Hanson Bridgett regarding the complaint filed against my client on December 8, 2008.

To begin with, we are pleased that this matter is finally coming to a conclusion. I am sure the Commission can appreciate the fact that my clients have had to expend a great deal of time and energy as well as money in defending the many serious allegations brought in this complaint, which the Commission now is able to see were unfounded and without merit.

It was clear from the outset at the filing of this complaint on December 8, 2008, that the complaint was never filed to expose corruption or to encourage full disclosure and openness in government. It was essentially filed for two purposes: One, to halt and/or obstruct a project my clients were presenting to the City of San Jose, specifically the San Pedro Square Urban Market and secondly to embarrass and/or otherwise disparage the name and reputation of Tom McEnery, who was the specific target of the complaint. It was a political vendetta and unfortunately, neither the public nor the Elections Commission were ever made aware of the true person or persons behind the filing of this complaint.

If the name of this anonymous party was in fact known, the Commission and the public would be able to draw its own conclusion as to the true purpose of this filing. Instead, the anonymous complainant chose to present its case through the McManis Law Firm, and hide

behind an alleged “fear of retaliation” based solely upon a newspaper article written more than eighteen years ago. This was the only cited basis for establishing the “good cause” required for the anonymous filing.

As to the findings of the independent evaluator, it is now clear that as to all the significant allegations of misconduct, failure to register as a lobbyist, filing of false disclosure reports, failure to report contingent compensation, etc., the evaluator determined that there was no evidence to sustain that any of such violations occurred and that the allegations lacked merit. As noted in the memorandum of Hanson Bridgett, the evidence did not support the allegation that the respondents failed to timely register as lobbyists in accordance with the requirements of the Municipal Code. The evidence failed to sustain the allegation that respondents filed false disclosure reports. There was no evidence to support the allegation that respondents failed to report contingent compensation and there was an affirmative finding that the disclosure reports filed by respondents satisfied the administrative requirements of the Municipal Code.

The only allegations that were not completely dismissed by the evaluator were the failure to report some of the contacts with city officials. The respondents freely acknowledged that certain interactions were erroneously excluded from the disclosure reports by inadvertence. Other contacts were disputed as to whether or not they were “reportable” or “non-reportable”, a legal interpretation that we will not delve into in this response. However, it should be noted that with all incidences in which there was a failure to report the evaluator stated “there is no evidence that respondent intended to conceal these items”, and his conclusion was that the violations were a result of “oversight” or as a result of different “interpretations of the Municipal Code requirements.”

There is one area which we would like to address regarding a conclusion reached in Article 4, B.2 on page 9, with regards to the disclosure and distribution of the complaint. As noted in the report, on or about the time that the complaint was filed, it was distributed anonymously by mail to several recipients, including residential neighbors of the McEnery family, business leaders and city officials as well as the San Jose Mercury News. Mr. Moye notes that Resolution 72547 provides in paragraph F.9 that complaints or any information contained therein are not to be disclosed except under certain circumstances and then only to a limited group of interested parties. The evaluator then concludes “there is no evidence that the complaint was disclosed by any City employee.” He also states that the Resolution is only applicable to City employees and it does not restrict the actions of private citizens. We take issue with both of those conclusions.

As to the statement that “there is no evidence that the complaint was disclosed by any city employee”, we call to the attention of the Commission the memorandum distributed by Councilmember Nora Campos on December 9, 2008, a copy of which is attached. This memo, delivered less than twenty-four hours after the complaint was filed, clearly refers to the allegations in the complaint and is a direct and undeniable violation of Resolution 72547 which was passed by the City Council of which Nora Campos is a member. This memorandum is not only evidence that the complaint was disclosed by a city employee, but a smoking gun with Ms. Campos’ name engraved upon the barrel. We believe that the action of Ms. Campos, coupled

with the mass mailing to various members of the community, are a clear indication and proof of the intent behind the filing of this lawsuit as previously described.

We believe it is incumbent upon this Board to delve further into the disclosure and distribution of this complaint and how the complainant attempted to use the Commission and the process itself in an effort to damage Mr. McEnery and destroy the Urban Market project. We think it is important for this Board to determine whether this complainant was a powerful special interest group or individual, with a political agenda and the money to pay for a law firm to present not only the original complaint but three amendments, or simply some individual with the desire to maintain a clean and open government. There seems to be no question that this complainant is not the latter.

My clients will appear at the hearing ready and willing to answer any of your questions concerning any of the allegations raised in the complaint and we are hopeful that the Commission will go further into this matter by addressing some of the other issues raised in this letter. We believe that though the evaluator recognized some technical violations of the ordinance, it was made clear in Mr. Moyer's report that respondents in this matter have made a reasonable attempt to comply with the statute and there is absolutely no evidence to indicate that anything was intentionally hidden or falsely reported. To that extent, we believe the entire complaint should be dismissed and no fines, penalties or other sanctions imposed.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth J. Machado, Jr.", written in a cursive style.

Kenneth J. Machado, Jr.
Attorney At Law

KJM/md

Encl.

CC: Clients



BOARD AGENDA: 12-09-08
ITEM: 7.1

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Councilmember Nora Campos

SUBJECT: SEE BELOW

DATE: December 9, 2008

APPROVED:

Nora Campos

DATE:

12/9/2008

**SUBJECT: INDEPENDENT INVESTIGATION INTO LOBBYING ACTIVITY
ASSOCIATED WITH THE SAN PEDRO SQUARE URBAN MARKET
PROPOSAL**

RECOMMENDATION:

1. Defer Council consideration of the San Pedro Square Urban Market proposal until the scope and magnitude of an investigation into the lobbying activity associated with the project is determined.
2. Direct the City Attorney to disclose all documents that have been made public as part of the two Public Records Act requests submitted by McManis Faulkner. The City Attorney is further directed to provide copies of the all of these documents to the Mayor and Council and make them available to the public on the City of San José's website.
3. Direct the City Attorney to bring a recommendation to the Council to disclose any documents related to this matter that were not disclosed as part of the Public Records Act requests, including internal work product, internal correspondence and documents that have been deemed attorney/client privileged.
4. Authorize the City Auditor to select and retain a qualified Independent Investigator to conduct an investigation into the lobbying activities associated with the San Pedro Square Urban Market proposal. The Auditor should obtain a list of qualified Independent Investigators from a retired judge and/or by contacting the Association of Judicial Arbitrations Mediations (JAMS) and the local Bar Association.
5. The Auditor is further directed to complete a thorough conflict analysis to ensure the independence and impartiality of the Independent Investigator.
6. The scope of the independent investigation should include but not be limited to providing answers to the following questions:

- Which City Council members and City and Agency staff members did Tom McEnery and the other lobbyists associated with the San Pedro Square Urban Market proposal meet with, and what were the topics of those meetings?
- When did Tom McEnery and the other lobbyists first meet with City Council members and City and Agency staff members to discuss their urban market proposal?
- What influence did Tom McEnery and the other lobbyists have in the dramatic alteration of the urban market proposal's financial terms?
- When did Tom McEnery and the other lobbyists trigger the requirement to register under the City's Lobbyist Ordinance?
- Have Tom McEnery and the other lobbyists committed any violations of the City's Lobbyist Ordinance?

ANALYSIS:

While it is important and necessary that elected officials and City staff members meet with project proponents, developers, and legally-registered lobbyists to further their understanding of proposals, it is extremely imperative that the public know with whom their elected officials are having contact. In the case of the San Pedro Square Urban Market, the burden of disclosing that information is not only the responsibility of the elected officials, but is also clearly the responsibility of Tom McEnery and the other lobbyists involved in this proposed project.

As the head of Mayor Reed's Transition Committee, which made comprehensive recommendations regarding lobbying reform, Tom McEnery was clearly in a position where he would have had extensive knowledge of the requirements under the Lobbyist Ordinance adopted by Council on August 1, 2007 as part of the Reed Reforms.

The complaint filed yesterday by McManis Faulkner on behalf of John Doe contained allegations of numerous unreported contacts that Tom McEnery has made in lobbying for public subsidies to develop his urban market proposal. Based upon the magnitude of the allegations, and the need to maintain the City's commitment to openness and transparency, the Council must act immediately to defer consideration of the San Pedro Square Urban Market and to authorize an independent investigation into the matter, as has been the practice of the City when confronted with past allegations of wrongdoing.

In order to determine the scope and magnitude of any omissions or failures to disclose lobbying contacts, it is crucial that the Mayor, Council, and City and Agency staff members fully disclose any meetings and communications they have had with Tom McEnery and the other lobbyists associated with the San Pedro Square Urban Market proposal.