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SAN JOSE ELECTIONS COMMISSION

RESPONSE OF JOHN DOE TO

2009 APR 29 P 4: 58

**APRIL 24, 2009 MEMORANDUM OF HANSON BRIDGETT LLP
REGARDING COMPLAINT AGAINST MCENERY/URBAN MARKETS**

I. INTRODUCTION

This Commission has a duty to “[m]onitor compliance with all campaign and ethics ordinances” in Title 12 of the San Jose Municipal Code. (SJMC §12.04.070(A).) In doing so, it is charged with the responsibility to “[r]eview and investigate allegations of violations of [Title 12] and take enforcement action where appropriate.” (SJMC § 12.04.070(B).)

Complainant filed a Complaint and several supplements identifying multiple occasions where respondents failed to register as lobbyists, failed to identify numerous contacts, failed to disclose contingent compensation, and failed to disclose an activity expense, in the course of seeking \$6 million from the City of San Jose (“the City”), to fund their San Pedro Square Urban Market project. Complainant submitted detailed evidence of numerous emails, calendar entries and other documents in support of the allegations made.

The Complaint and its supplements was submitted to Hanson Bridgett LLP for an investigation (“the Evaluator”). The Evaluator conducted an investigation, primarily in what appear to be informal, unsworn interviews of Respondent and various City Officials, including the Mayor and City Council members and heads of the Redevelopment Agency. The Evaluator, however, was denied pertinent documents in the form of email communications by the City, and refused an interview with councilmember Pierluigi Oliverio.

Based on this limited investigation, the Evaluator has now submitted a report to the Commission making “findings” of approximately 20 violations of the Municipal Code, in the form of failures to report numerous contacts and an activity expense. The Evaluator further “finds”, based entirely on unsworn, and unrecorded, statements by Respondents and City Officials, that the remainder of the Complainant’s allegations have “no merit.”

It is important to note that there is no basis in the City’s Codes for the Evaluator to make “findings.” The evaluator can only investigate a Complaint and make **recommendations** to the commission. (SJMC § 12.04.080(D).) (Emphasis added.) It is the duty of the Commission to then consider the Evaluator’s “Report and Recommendation” **and** “any other evidence presented at the Hearing” in making its decision. (See City of San Jose Resolution. No. 72547 (“Res. No. 72547”) (G)(4).) The Commission then holds a hearing over the matter and has the power to subpoena witnesses to testify at the hearing and compel the production of documents to be produced therein. (Res. 72547 (G)(11).)

The Commission may conclude that further investigation is necessary and direct the evaluator to conduct further investigation, and “[u]pon conclusion of the final Hearing, **the Commission shall issue its findings** by Resolution.” (Res. 72547 (J)(1)&(2).) (Emphasis added.) Moreover, any member of the Commission may “issue a dissenting Report either individually or jointly.” (Res. 72547(G)(17).) Finally, “[a] determination that a violation has occurred shall be based on a preponderance of the evidence from the entire record of the proceedings.” (Res. 72547(J)(5).)

In other words, although the Evaluator is charged with conducting an investigation and making recommendations to the Commission, the Commission has the ultimate responsibility to review and investigate violations of the City's ethics codes, through its subpoena powers, and make its own findings as to such allegations.

As noted by the Evaluator, this matter presents a case of first impression since the Lobbyist Ordinance was amended in August, 2007. This Commission should therefore proceed with caution when reviewing Complainant's allegations as it will be setting precedent for other lobbyists and determining the viability of the revisions made to ensure open government.

This Commission should only adopt the Evaluator's findings as to the 20 violations found against Respondents. As to the remaining allegations made by Complainant, as will be set forth in further detail below, this Commission should find uphold the allegations made by Complainant of failure to register prior to May, 2008, failure to report multiple contacts, improperly block reporting other contacts, and failure to disclose contingent compensation.

Complainant presented the Commission with ample evidence of the claims made attached to the Complaint and supplements. The only evidence relied on by the Evaluator in reaching his conclusions are the unsworn, unrecorded and informal statements of self-interested witnesses – namely Respondents who are subject to these claims, and City Officials who were freely meeting with an unregistered lobbyist over an existing matter pending before the City Council. Based on their denial of certain contacts, the Evaluator immediately determines that there were no contacts to report.

These conclusions are not only inconsistent with a simple weighing of the evidence, but also with the spirit of the ethics codes. The spirit of the City's ethics laws is to favor disclosure. The purpose of Title 12, Chapter 12 is "open and transparent government." (SJMC § 12.12.010(B)2.) This section specifically sets forth the purpose of these provisions are to "guarantee to the residents of the City that the City of San Jose (City) continues the highest ethical work environment for the residents of the City and the City's elected officials and employees....In the spirit of open and transparent government." This necessitates that Respondents should have registered in 2007, and disclosed the majority of contacts set forth by the Complainant. The evaluator himself acknowledges that the timing and circumstances of the many meetings between Respondents and Mayor Chuck Reed "give rise to the inference that there must have been some discussion of the Project or "lobbying activity" in the course of these meetings." (Evaluator's Report, pg. 17.) Yet, rather than promote the letter and spirit of the City's laws, the Evaluator tries to find every reason possible to avoid disclosure, primarily based on the testimony of Respondents and City Officials.

For these reasons, and as set forth below, the Commission should overturn the remainder of the Evaluator's recommendations and find that Respondents failed to comply with the Municipal Code as set forth in the Complaint and Supplements.

Alternatively, the Commission should direct the Evaluator to complete his investigation, namely to obtain documents withheld by the City and interview Councilmember Oliverio, and return with recommendations based on a complete investigation.

Finally, given that the Evaluator's recommendations are based on unsworn, informal and unreported statements made by interested persons, much of which is directly contradicted by the written evidence submitted by the Complainant, the Commission should hold a full evidentiary hearing, and subpoena these witnesses, including Mr. Oliverio, and require the production of all withheld documents, in order to assess the truth of these statements.

II. THE ELECTIONS COMMISSION SHOULD ADOPT THE EVALUATOR'S FINDINGS AS TO THE FAILURE TO DISCLOSE CONTACTS SET FORTH IN ATTACHMENT C TO ITS REPORT

The Evaluator's report and recommendations sets forth approximately 19 occasions where Respondents failed to report contacts with City Officials and recommends that the Commission find that these are violations of the Municipal Code. (Evaluator's Report, pg. 22, Attachment C.) Complainant agrees with this and requests that the Commission adopt the Evaluator's recommendation as to these violations.

III. THE ELECTIONS COMMISSION SHOULD ADOPT THE EVALUATOR'S FINDINGS AS TO RESPONDENTS' FAILURE TO DISCLOSE A GIFT TO A CITY OFFICIAL AS SET FORTH IN ATTACHMENT A, ITEM 12 OF ITS REPORT

The Evaluator's report provides that Respondents failed to report an "activity expense" based on a gift, in the form of entry into a San Jose Sharks game, reported by Councilmember Liccardo. Complainant agrees with this and requests that the Commission adopt the Evaluator's recommendation as to these violations.

IV. THE ELECTIONS COMMISSION SHOULD OVERTURN THE REMAINDER OF THE EVALUATOR'S FINDINGS AND FIND THAT RESPONDENTS FAILED TO COMPLY WITH THE LOBBYIST ORDINANCE AS SET FORTH IN JOHN DOE'S COMPLAINT AND SUPPLEMENTS.

A. Urban Markets LLC Should Have Registered As A Lobbyist in 2007.

Tom McEnery convinced the Evaluator that the City approved an ENA for Urban Markets on June 24, 2008, just one month after Urban Markets registered as a lobbyist, and that prior to May 29, 2008, Urban Markets' officers including Tom McEnery, John McEnery, Martin Menne, Sarah Brouillette, and Barry Swenson all had less than 10 hours of contact with City Officials prior to May 2008. This is an incredible assumption.

In order to reach this conclusion, the Evaluator ignored the following evidence:

I. The meetings with Mayor Reed were reportable contacts.

The circumstantial evidence dictates that the meetings between Tom McEnery and Mayor Reed and/or his Chief of Staff, should have been reported. According to the Evaluator's report, the "direct evidence contradicts the circumstantial inference of lobbying activity," but the report neglects to set forth what constitutes the direct evidence that these meetings were about anything other than the pending project that Tom McEnery had before the City. (Evaluator's Report, p. 17.)

As the Evaluator explains, the circumstantial evidence infers that lobbying was occurring during these numerous meetings. Pursuant to the California Jury Instructions:

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

(BAJI No. 2.00 (Spring 2009 ed.), *see also* CACI No. 202 (2008 ed.).)

Even the Evaluator admits that the purpose of the meetings between Tom McEnery and Mayor Reed was to discuss “politics and current events.” Given the timing of many of these meetings, it is inconceivable Tom McEnery’s project would not have come up during these 16 meetings with Mayor Reed and/or Pete Furman. Even the Evaluator acknowledges that “[t]he timing and circumstances of the meeting give rise to the inference that there must have been some discussion of the Project or “lobbying activity” in the course of these meetings.” (Evaluator’s Report, p. 17.)

Even if these meetings for coffee only lasted 20 minutes, that would give Tom McEnery over 320 minutes, well over 5 hours, to discuss “politics and current events,” which according to the circumstantial evidence, likely included the Urban Markets Project. Even if only a portion of these meetings included discussion of the Project, it would put Urban Markets over the 10 hour minimum, requiring them to have registered as lobbyists well before May 29, 2008.

The Commission should find that the evidence demonstrates that Respondents’ failure to register before May, 2008, is a violation of the Lobbyist Ordinance. Respondents and the Mayor’s self-interested denials are insufficient to contradict the obvious conclusion.

Additionally, the Commission should exercise its power to subpoena witnesses to require Mayor Reed and Respondents to answer questions about these regular meetings. There is no explanation by the Evaluator as to what the evidence shows was discussed during these meetings, or what exactly does t “politics and current events” mean. While the Evaluator makes a passing reference to some direct evidence, he offers none to the Commission for its consideration.

The Commission should find that Respondents failed to timely register before May, 2008. Even so, the Commission has a duty to conduct a full evidentiary hearing on this issue and the others addressed below before making any other finding.

2. The “walk through” with Pierluigi Oliverio was a reportable contact.

Councilmember Oliverio’s paper calendar reflects a 75 minute meeting on June 27, 2007, marked “San Pedro Square Walk Thru Meeting with Tom & John McEnery.” This is the only direct evidence regarding this meeting. Presuming Mr. Oliverio’s calendar is accurate, Respondents would be over the 10 hour requirement and should have registered as lobbyists in 2007.

Mr. Oliverio, a City Official, refused to be interviewed by the Evaluator. Respondent claims to have no record of this meeting. Yet somehow the Evaluator determined that the Urban Markets Project was not discussed, without any explanation or supporting evidence. On the contrary, the existing evidence, a walk through with a City Council Member of the very area for which Respondents are seeking redevelopment funds, draws only the conclusion that the Urban Markets Project must have been discussed.

Moreover, Councilmember Oliverio’s refusal to cooperate with this investigation is out of line and inappropriate. Pursuant to San Jose Municipal Code section 12.12.800, Councilmembers are required to disclose all communications with registered lobbyists.

Before taking any legislative or administrative action, the Mayor, each Member of the City Council, the Chair and each member of the San Jose Redevelopment Agency Board of Directors, and each Member of the Planning Commission, Civil Service Commission, or Appeals Hearing Board must disclose all scheduled meetings and telephone conversations with a registered lobbyist about the action. The disclosure may be made orally at the meeting before discussion of the

action on the meeting agenda. *The oral disclosure must identify the registered lobbyists, the date(s) of the scheduled meetings and telephone conversations, and the substance of the communication.* This section does not limit any disclosure obligations that may be required by this Code or City policy. (SJMC §12.12.800.) (Emphasis added.)

Under this provision, Mr. Oliverio must disclose the substance of the communications he had with Tom and John McEnery on June 27, 2007, or any other dates. His refusal has hindered this investigation, and the Commission must use its subpoena power to require Mr. Oliverio to appear before it and be questioned about this contact and other contacts with Respondents. If Mr. Oliverio refused to comply with a subpoena issued by the Commission, appropriate penalties must be sought.

It should be noted further that despite numerous California Public Records Requests, the Complainant has not been able to obtain Mr. Oliverio's complete calendars from the City and instead had to search online for them. Mr. Oliverio's June 27, 2007, walk-through with Respondents, should be counted as a lobbying activity. Moreover, Mr. Oliverio's conduct has inhibited the investigation of this matter and he should be subpoenaed to come before the Commission and answer questions about this and any other contacts with Respondents, under oath.

3. The March 8, 2007, meeting between Sam Liccardo and John McEnery and Sarah Broillette was a reportable contact.

On March 8, 2007, Councilmember Sam Liccardo had lunch with two identified lobbyists. His calendar reflects a one hour meeting as "Lunch w/John McEnery (lobbyist) and Sarah Broillette (lobbyist)." (Evaluator's Report, Exh. A.4.) Mr. Liccardo knew he needed to disclose this meeting in accordance with the City's lobbyist

ordinances, and in fact, noted that he was meeting with “lobbyists,” but neither lobbyist reported this “contact.”

The Evaluator concluded that this meeting pre-dated the initial idea for the Urban Markets Project, but the direct evidence does not support this conclusion. Based on our comprehensive review of the registered lobbyists in San Jose, John McEnery and Sarah Broillette are only registered as “lobbyists” for Urban Markets, and not for any other entities or projects. Based on this direct evidence, the Commission should find that these are reportable contacts.

At a minimum, the Commission should use its subpoena power to require Sam Liccardo to come before the Commission and answer questions about this lunch with the identified lobbyists. The Evaluator’s report provides no explanation for this meeting, and no evidence to counter the obvious conclusion that John McEnery and Sarah Broillette had commenced their lobbying efforts on behalf of Urban Markets during this meeting with Mr. Liccardo.

4. The September 24, 2007, meeting between Sam Liccardo and John McEnery was a reportable contact.

The Evaluator failed to include Councilmember Sam Liccardo’s September 24, 2007, dinner with Tom McEnery, in his calculation of time under section VII.B.2.a of his report. This meeting is listed as item 17 in the 34 contacts identified by the Evaluator in section B of the report. However, it is not listed as one of the items to be “excluded” from reporting requirements, based on the Evaluator’s recommendations in section VII.B.1 of his report. Based on Mr. Liccardo’s calendar, he had dinner that night with “Tom McEnery (lobbyist).” The calendar entry reflects that 2 hours were set aside for this meeting. (Evaluator’s Report, Exh. A.5.)

Again, even though Mr. Liccardo dutifully recorded his 2 hour dinner with a known lobbyist, the Evaluator did not include the time spent at this dinner when calculating the time Urban Markets and its representatives spent lobbying City Officials prior to registering as lobbyists.

If the Evaluator had properly accounted for each of the above contacts, he would have had to include at least an additional 4.3 hours, which would have totaled 9.02 hours without counting the numerous meetings with the Mayor. If you include the 13 meetings for “coffee” between Mayor Reed, or Pete Furman, and Tom McEnery, in 2007, at approximately 20 minutes each (for a total of 260 minutes or 4.3 hours), the total time Urban Markets spent lobbying in 2007 alone is well over 13.35 hours.

The spirit of the lobbyist reforms was for open and transparent government, and to allow us all to see what type of influence known lobbyists were exerting on our City’s Officials. The documents submitted with the Complaint reflect meetings with “lobbyists,” yet the Evaluator chose not to include them in his own calculations of lobbying activity. If accepted without further investigation, this approach clouds the view of our City’s government, and flies in the face of the intent of the revisions to the lobbyist ordinances.

B. Urban Markets LLC Should Have Registered As A Lobbyist in the First Quarter of 2008

1. The total time spent lobbying prior to March 31, 2008, exceeds 10 hours.

As clearly set forth above, the Evaluator did not include several contacts reported by City Councilmembers as lobbying in his calculation of time. Inclusion of items 5, 13 and 17, on page 18 of his report, brings the total time spent lobbying by Urban Markets to

at least 10.5 by Respondent's calculations and 10.3 by the City's calculations. Either way, Urban Markets should have registered as a lobbyist by the first quarter of 2008.

2. The aggregation rule applies.

The Evaluator concludes that the aggregation rule only applies to lobbyists, so that when multiple individuals from a lobbyist group meet with one City Official, the time is multiplied by the number of lobbyists present.

Logic requires that the aggregation rule would also apply when there are multiple City Officials present. When trying to decipher a statute, the courts often return to the notes reflecting the Legislature's intent when drafting the statute. *Lewis v. Ryan* (1976) 64 Cal.App.3d 330, 333. Similarly, when interpreting the revised San Jose Municipal Code relating to lobbying activity, the Commission must return to the documents reflecting the intent of the drafters. As Mayor Reed stated in this March 29, 2007, memorandum on the Reed Reforms, "this approach of aggregating the number of hours will reduce the chance of an organization circumventing the City's lobbying ordinance and not disclosing their activities." A.1. The same reasoning applies to a lobbyist meeting with multiple Councilmembers simultaneously. The purpose of keeping the public informed of all lobbying activities is only met by an accurate reporting and calculation of time.

Further, as fully explained in the December 8, 2008 complaint, when defining a "contact" in the San Jose Municipal Code, section 12.12.150, the term City Official is singular. The inference is that a lobbyist is to report one contact for each City Official contacted; a one for one ratio. To find otherwise, leaves open the possibility of lobbyists "skirting" the spirit of the Reed Reforms, and underreporting lobbying activity.

As set forth in the Complaint and its supplements, when properly calculated, Urban Markets and its representatives spent well over 10 hours lobbying multiple City Officials in 2007, and before finally registering in May 2008.

C. Urban Markets Did Not Report All Contacts With City Officials

While the Evaluator acknowledges that Urban Markets committed at least 19 violations of the City's ordinance, he attempts to justify several other failures to report as "oversights."

The Evaluator claims to have found no evidence that the contacts identified in Exhibits 19, 20, 28, and 32 to the Complaint, involved contacts between Respondent and a City Official. (Evaluator's Report, pg. 19.) The Evaluator is simply wrong in this conclusion.

Exhibit 19 to the Complaint is a copy of the calendar of the Mayor's Chief of Staff, Pete Furman. (Evaluator's Report, Exh. A.19.) This calendar shows multiple contacts between Tom McEnery and Mayor Reed. This Exhibit confirms at least 7 meetings between Respondent and the Mayor – at least one of which occurred at Tom McEnery's San Pedro Square office. While the Evaluator appears convinced that none of these contacts included a discussion of the Urban Markets Project, there is no evidence whatsoever to support this conclusion.

Exhibit 20 to the Complaint is an email sent by Ruth Shikada to Harry Mavrogenes discussing a meeting between Respondent and Dolores Mellon. (Evaluator's Report, Exh. A.20.) While this contact may not have been reportable, the email also says that "Tom mentioned that you [Harry Mavrogenes] would be meeting

with him within the next day or two.” This email is direct evidence that the Respondent was meeting with Mr. Mavrogenes, contacts that should have been reported.

Exhibit 28 to the Complaint is an email chain started by John McEnery with comments by Tom McEnery. (Evaluator’s Report, Exh. A.28.) The email was sent to Mr. Mavrogenes, a reportable contact. Under the definition of “contacts,” emails must be reported. (SJMC § 12.12.150.) The email is clearly discussing the Urban Markets Project, and references the “public market piece of the development.” This contact should have been reported.

Exhibit 32 to the Complaint is an email sent by Walter Rask to Peter Larko and Janet Kern advising that “John McEnery may be up to something.” (Evaluator’s Report, Exh. A.32.) The Evaluator claims there is no evidence here of a contact that should have been reported. Complainant, however, did not contend that this was a contact that should have been reported. Instead, this email was included as evidence that even City staff thought that the McEnerys were “up to something.”

D. Urban Markets Filed False Lobbyist Reports.

The Evaluator defines a false statement as one that is “untruthful,” and goes on to state that “falsity can be based on intent, **accident, or mistake.**” (Evaluator’s Report, pg. 24, fn. 36.) Based on his own definition, the fact that Respondents’ lobbyist reports are not accurate, whether it is because of some malicious intent or mere oversight, is irrelevant. Either way the reports are false and in violation of the City’s ordinances.

E. Respondents Did Not Report Their Contingent Compensation.

San Jose Municipal Code section 12.12.300(D) provides that a lobbyist may accept compensation for services when the compensation depends on the result of the

legislative or administrative actions subject to the lobbying activity and additional conditions or events not subject to the lobbying activity. Such compensation, however, must be disclosed. (SJMC §12.12.310(B).) The \$6 million in compensation Urban Markets is to receive from the City in loans and grants was contingent on the success of its lobbying. The only purpose of Respondents' lobbying was to obtain this compensation, funding from the City for Respondents' personal project. The goal of obtaining this compensation should have been identified for the public in Urban Markets' lobbyist reports.

F. Urban Markets Failed to Comply with the Administrative Requirements.

1. Block reporting is not permitted under the ordinance.

The Evaluator misconstrues the Municipal Code and based his recommendations on the improper assumption that the Code does not require that the manner of contacts be disclosed, that there be separate entries for each City Official, or a specific number of contacts reported.

As explained in the Second Supplemental Complaint, the lobbyist form requires that each City Official contacted be listed separately, and that for each Official, the dates of contact also be listed. According to the City's online instructions, the lobbyist is to:

- Fill in the name of each City Official or City Official-Elect contacted.
- Fill in the name of the individual who made the contact.
- Fill in the date(s) of contact.
- Check the box for the number of contacts made by the individual with that City Official or City Official-Elect. (Evaluator's Report, Exh. 13.)

Under these instructions, block reporting is not permitted. Each contact must identify both the lobbyist who made the contact and the individual City Official contacted. The dates must be set forth.

San Jose City Clerk, Lee Price, is charged with reviewing the lobbyist reports filed in her office. During a recent deposition, Ms. Price clarified how the lobbyist quarterly reports are to be completed:

Q: Okay. And on the second section of that page do you see where it says the legislative or administrative action the in-house lobbyist seeks to influence

A: Yes.

Q: What kind of information would be put in this section?

MS. HERRICK: Objection, the form speaks for itself. You can answer the question

THE WITNESS: The activities are detailed how it is the in-house lobbyist seeks to influence a decision is supposed to be put there. So it needs some detail that would give the public information about what legislative or what administrative action the lobbyist was attempting to influence the outcome of.

Q: Okay. And when it says describe in detail, how much detail is the City looking for?

A: Something that tells the public what it is they're doing as opposed to something in general.

Q: Okay. Under that section do you see where it says Contact Information?

A: Yes.

Q: Can you describe for me what's required to be included in that section?

MS. HERRICK: Objection, the form speaks for itself. You can answer the question.

THE WITNESS: The lobbyist is required to identify the name of the city official who they contacted, who made the contact, what the action was; was it a meeting, a telephone call, a letter, an email. The date of that contact or contacts, and to range - - to check a box - - pardon me - - of ranges; is it one contact, was it two to five, six to ten, or more than 11. (See pertinent portions of Price deposition, 211:7-212:14, attached as Exhibit A.)

Ms. Price makes it clear that the form *requires* that the lobbyist identify the City Official contacted, who made the contact, the type of contact made (e.g. a telephone call, letter, etc...), and the date of the contact.

Mary Cornwell, Analyst for the City Clerk's Office, also clarified in an email explanation to a lobbyist that the lobbyist reports must reflect the dates of contact. Ms. Cornell explained that this was so important that the first forms published after the revised ordinance went into effect in August 2007, were corrected to include a list for the dates of contact. When pressed for further clarification, Ms. Cornwell further stated that each type of contact, be it a phone call, an email, letter or meeting, needs to be dated in the lobbyist report. (See Cornwell July 22, 2008, email chain, attached as Exhibit B.)

There is no room for ambiguity. The purpose of these requirements is to tell the public what the lobbyist is doing. As stated, the purpose of the revisions to the lobbyist ordinances, and the City's forms, was to create a transparent government, to keep everything out in the open. If there is any question about whether something should be reported or not, the Commission must err on the side of disclosure - - the public has a right to know. The City has been requiring that lobbyists provide the above-referenced detail. Respondents should be held to the same standard.

As stated by the Evaluator in his report, “the fact that the Council will eventually be a decision maker on an OPA or DDA after approval of an ENA or business terms, means that the public is entitled to know whether those decision makers have been subjected to any type of influence.” (Evaluator’s Report, p. 26.) Respondents violated the Municipal Code by failing to properly report these contacts in their lobbyist disclosure reports.

V. ALTERNATIVELY, THE ELECTIONS COMMISSION SHOULD REQUIRE THE EVALUATOR TO COMPLETE ITS INVESTIGATION BEFORE DISMISSING ANY OF JOHN DOE’S CLAIMS.

This Commission should direct the evaluator to conduct further investigation and provide a follow up report, before dismissing any of John Doe’s claims. Resolution No. 72547 provides that “[i]f the Commission concludes that further investigation is necessary, it shall direct the Evaluator...to conduct further investigation and to report back to the Commission.” (Res No. 72547 J(1).) The Evaluator’s report makes clear that the Evaluator did not complete its investigation, primarily because the City has apparently refused to cooperate with the investigation and provide certain information sought by the Evaluator.

For example, based on a number of footnotes tucked away in the Evaluator’s report, it appears that the Evaluator has requested email communications that have not been provided by the City or reviewed by the Evaluator. (Evaluator’s Report, Pg. 9, fn. 17.) Moreover, the Evaluator’s Report further notes that “Councilmember Oliverio refused (its) request for an interview.” (Evaluator’s Report, pg. 9, fn. 16.)

Without any explanation, the evaluator concludes that “review of such email communications will not lead to the discovery of significant evidence or evidence of violations of the Municipal Code.” (Evaluator’s Report, Pg. 9, fn. 17.) This assertion, however, has no explanation or basis. Email communications are crucial to the determination of whether the many meetings held between Respondents and various City Officials were, in fact, meetings to discuss the San Pedro Square Project. If, for example, there exist internal emails or emails between Respondents and the City, that acknowledge such meetings occurred, or confirm the discussions during those meetings, the Evaluator, and not to mention the general public, must have access to those emails to conduct a complete investigation. Such emails are especially important if they contradict statements made during interviews conducted by the Evaluator, and which the Evaluator seems to solely rely upon.

It is further important to note that counsel for John Doe, McManis Faulkner, sought pertinent email communications from the City and received very few emails dating between the period of May, 2007 and the present, without any satisfactory explanation from the City. (See Exhibit C, attached.) One must wonder if those email communications withheld by the City are the same email communications withheld from McManis Faulkner in response to its requests to the City for public records.

Moreover, the Evaluator has given the Commission no explanation as to why those emails have not been produced or reviewed. The Commission should be asking for information such as what time period of emails have been withheld; the City’s stated reason for not producing those emails; whether the City actually conducted a search for those emails; and the Evaluator’s reason for not pursuing production of those emails.

Additionally, it should not be acceptable to this Commission that Councilmember Pierluigi Oliverio, entrusted with the duty of upholding the laws of the City of San Jose, has refused to cooperate with this Commission's investigation into multiple violations of the City's own laws. The Evaluator acknowledges that Tom McEnery and John McEnery did a "walk-through with Oliverio" of the San Pedro Square area, but claims that "the Urban Market Project was not discussed." It is unclear how the evaluator concluded that Respondents walked through the very area for which they were seeking \$6 million from the City, with one of the very people in a position to vote on that request, without ever discussing their project, especially given that Mr. Oliverio refused the Evaluator's request for an interview. Again, the Evaluator also gives no reason for Councilmember Oliverio's refusal to cooperate with the investigation.

For those reasons, this Commission should direct the Evaluator to complete its investigation by obtaining any records withheld by the City and return a revised report and recommendations thereafter.

VI. THE ELECTIONS COMMISSION SHOULD SUBPOENA ALL WITNESSES WHOSE TESTIMONY WAS RELIED ON BY THE EVALUATOR AND ALL DOCUMENTS AND TESTIMONY WITHHELD BY THE CITY FOR A FULL EVIDENTIARY HEARING ON THE REMAINDER OF JOHN DOE'S CLAIMS.

Regardless of whether the Evaluator is directed to complete its investigation, this Commission should conduct a full evidentiary hearing on this matter and exercise its power to subpoena witnesses – specifically all City Officials who met with Respondents, including Councilmember Oliverio - and compel the production of records – especially those email communications which the City has refused to produce.

This Commission has the power to “subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items.” (SJMC § 12.04.085.) Resolution No. 72547 further provides that “[t]he Commission, if necessary, may compel the testimony of witnesses and may compel the production of relevant documents to the Evaluator by subpoena.” (Resolution 72547 G(11).)

Although the resolution provides that “this power may be used only as a last resort, after good faith efforts to acquire the relevant information have failed and upon a finding that the information or testimony is essential for a determination in the matter,” (Resolution 72547 G(11)), this matter sets a primary example of a situation where the Commission must exercise this power. (See also SJMC § 12.04.095(C).)

The Evaluator’s investigation consisted primarily of “interviews” of Respondents, Mayor Reed and his Chief of Staff, members of the City Council, excluding Oliverio and Chirco, the Redevelopment Agency Executive Staff and the City Manager. (Evaluator’s Report, pg. 9.) It is not clear that the Evaluator took any sworn statements from these witnesses, or administered any oath before taking their testimony, or created any formal record of these interviews. The majority of the Evaluator’s recommendations appear to be based entirely on the Evaluator’s informal, unsworn, interviews of these individuals, apparently without any review of documents or email communications that may or may not corroborate their statements.

The Commission currently has no way of verifying that the statements made during these interviews were truthful, or the amount of weight that should be placed on those statements. Moreover, as set forth above, Councilmember Oliverio refused to be

interviewed by the evaluator, and the City has refused to produce highly relevant email communications, all of which can be compelled by the Commission's power to subpoena witnesses and compel the production of documents.

Given that the Evaluator's recommendations are based purely on informal, unsworn witness interviews, and given that the Evaluator was not able to conduct at least one important interview or obtain highly relevant documents from the City, this Commission should exercise its authority and direct that a full evidentiary hearing be held over John Doe's remaining claims, subpoena all witnesses interviewed by the Evaluator and Councilmember Oliverio, and compel the City's production of all internal and external email communications relating to the San Pedro Square Project or Respondents. Without sworn testimony, and the Commission's own evaluation of the truth of these witness' statements, the Commission has no basis for dismissing any of John Doe's claims. In fact, the weight of the documentary and circumstantial evidence presented by John Doe, as set forth above, weighs heavily in favor of sustaining these claims and finding clear violations were made of the City's Lobbyist Ordinance.

VII. EVERY VIOLATION FOUND BY THE ELECTIONS COMMISSION SHOULD BE COUNTED AS A SEPARATE VIOLATION AND A FINE OF \$5,000 SHOULD BE IMPOSED FOR EACH SUCH VIOLATION.

As set forth above, the Commission should uphold the Evaluator's recommendation that at least 19 violations were made of failure to disclose contacts and one violation of failure to disclose a gift to a City Official, for a total of 20 violations by Respondents. Moreover, as set forth above, the Commission should overturn the remainder of the Evaluator's recommendations and find additional violations as set forth above.

San Jose Municipal Code section 12.04.100(C) provides that if the commission finds a violation of Title 12, it may: a) find mitigating circumstances and do nothing; b) issue a public reprimand; or c) issue a civil penalty. (See also Resolution No. 72547(K)(1).) The Code further provides that "...the commission may impose penalties of up to five thousand dollars (\$5,000.00) for each violation..." (SJMC § 12.04.110.)

Each and every single failure to report meetings, contingent compensation, or other information, and each failure to register, should be held as a separate violation.

Resolution No. 72547 also sets multiple which the Commission should consider, including:

- a) the severity of the violation; b) the presence or absence of any intention to conceal, deceive, or mislead; c) whether the violation was deliberate, negligent or inadvertent; d) whether the violation was an isolated incident or pervasive enough to indicate a pattern of disregard for this Chapter... (Res. 72547 (K)(3)(a)-(g).)

The Evaluator claims that these violations appear to be innocent mistakes but provides no basis for this conclusion. In fact, a review of these factors weighs heavily in favor of imposing the maximum \$5,000 penalty for each and every violation made.¹

First, the violations made are severe violations. These laws are intended to promote transparency and open government so that the general public is aware of who City Officials are meeting with and what influence is being exercised for projects seeking City funding through taxpayer money.

Moreover, there is no evidence that these violations were unintentional, negligent or inadvertent. Tom McEnery is the former Mayor of the City of San Jose and has lots of contacts and influence with existing City Officials. His position especially warrants that

¹ For example, if the Commission finds at least 20 failures to report information, as recommended by the Evaluator, each failure is a separate violation, for which a \$5,000 penalty should be imposed, for a total civil penalty of at least \$100,000.

he should be held to the City's standards of transparency and open government. Former mayor, Tom McEnery, sat on Mayor Chuck Reed's Transition Team, whose focus was, in part, on developing policies to promote open government. Moreover, Mr. McEnery, has participated in meetings of the San Jose Blue Ribbon Task Force on revisions to the Lobbyist Ordinance in 2004. To claim ignorance or inadvertence in failing to comply with those same laws is hardly believable.

In addition, one might also note that Mr. McEnery is represented by able counsel who could easily advise him on the requirements of the City's laws. The City itself has given the public access to the City Clerk and the City Attorney's office in order to answer any questions about the specific requirements of the City's lobbyist laws. If Respondents, in fact, were making a good faith effort to comply with the law, they could have easily taken advantage of this service to clarify any misunderstandings as to the City's requirements, as most registered lobbyists seem to do.

Finally, even based on the Evaluator's recommendation, Respondents engaged in at least 20 violations of the City's lobbyist laws by failing to report multiple contacts and at least one gift to a City Official. These are numerous, ongoing violations, not an isolated incident, and warrant the imposition of civil penalties to ensure future compliance with the City's laws.

VIII. CONCLUSION

The Evaluator was not able to obtain all relevant evidence, and the individuals he interviewed were not under oath. One Councilmember actually refused to cooperate and the City failed to provide him with pertinent email communications. It is impossible to reach any conclusion based on the absence of evidence. The Commission is not bound

by the Evaluator's report, and based on the evidence set forth thus far the Commission has a duty to either find clear violations of the law as set forth in the Complaint and subsequent supplements. If not, the Commission has an obligation to conduct a full evidentiary hearing to assess the credibility of the witnesses upon whose testimony the evaluator relies. Moreover, by using its subpoena power, the Commission will be able to obtain both documents and testimony the Evaluator could not get in the course of his investigation.

SUBMITTED BY:

McManis Faulkner
50 W. San Fernando Street, 10th Floor
San Jose, CA 95113

On Behalf of Complainant,
John Doe

Exh A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

TED SMITH, an individual,
Plaintiff,

**CERTIFIED
COPY**

v.

No. 1-07-CV-089167

CITY OF SAN JOSE, a municipal entity;
SAN JOSE ELECTIONS COMMISSION; and
DOES 1 through 20,

Defendants.

DEPOSITION OF LEE PRICE

Volume II

Monday, February 23, 2009

10:14 a.m.

McMANIS FAULKNER
50 W. San Fernando Street, Tenth Floor
San Jose, California 95113

Carol A. Wible-Torres, CSR No. 3391

#09-175CW



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1 Q. And on page 7 of the report, is this basically
2 what you would fill out if you were an in-house lobbyist?

3 MS. HERRICK: Objection, the form speaks for
4 itself. You can answer the question.

5 THE WITNESS: Yes.

6 BY MS. ELZANKALY:

7 Q. Okay. And on the second section of that page do
8 you see where it says the legislative or administrative
9 action the in-house lobbyist seeks to influence?

10 A. Yes.

11 Q. What kind of information would be put in this
12 section?

13 MS. HERRICK: Objection, the form speaks for
14 itself. You can answer the question.

15 THE WITNESS: The activities are detailed how it
16 is the in-house lobbyist seeks to influence a decision is
17 supposed to be put there. So it needs some detail that
18 would give the public information about what legislative or
19 what administrative action the lobbyist was attempting to
20 influence the outcome of.

21 BY MS. ELZANKALY:

22 Q. Okay. And when it says describe in detail, how
23 much detail is the City looking for?

24 A. Something that tells the public what it is they're
25 doing as opposed to something in general.

1 Q. Okay. Under that section do you see where it says
2 Contact Information?

3 A. Yes.

4 Q. Can you describe for me what's required to be
5 included in that section?

6 MS. HERRICK: Objection, the form speaks for
7 itself. You can answer the question.

8 THE WITNESS: The lobbyist is required to identify
9 the name of the city official who they contacted, who made
10 the contact, what the action was; was it a meeting, a
11 telephone call, a letter, an email. The date of that
12 contact or contacts, and to range -- to check a box --
13 pardon me -- of ranges; is it one contact, was it two to
14 five, six to ten, or more than 11.

15 BY MS. ELZANKALY:

16 Q. Okay. Now, if you'll recall, under the in-house
17 lobbyist definition, the threshold was if you engaged in
18 lobbyist activity for 10 hours or more in a 12-month
19 period. Do you recall that?

20 A. Yes.

21 Q. Okay. So for purposes of calculating the amount
22 of time that you've spent, are you including contacts that
23 occurred in the form of just meetings or are you including
24 contacts that include phone calls or emails or any other
25 kinds of contact?

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I, Carol A. Wible-Torres, CSR #3391, a Certified Shorthand Reporter for the State of California, do hereby certify;

That the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me, a Certified Shorthand Reporter, in shorthand at the time and place therein named and thereafter reduced to computerized transcription;

And that the witness was given an opportunity to read and, if necessary, correct said deposition and to subscribe the same.

I further certify that I am neither counsel for nor related to any party to said action nor in any way interested in the outcome thereof.

Dated: March 1, 2009

Carol A. Wible-Torres

Carol A. Wible-Torres, CSR #3391

Exh B

Cornwell, Mary

From: Ash Pirayou
Sent: Wednesday, July 23, 2008 12:20 PM
To: Cornwell, Mary
Subject: RE: Lobbyist Report...2

Thanks that was what I was planning on doing going forward and for the amendments.

From: Cornwell, Mary
Sent: Wednesday, July 23, 2008 12:15 PM
To: ash@pirayoulaw.com
Subject: RE: Lobbyist Report...2

Ash -- use the spreadsheet as an attachment... you still need to use the cover page and signature page of the real report.

Mary

From: Ash Pirayou
Sent: Wednesday, July 23, 2008 12:08 PM
To: Cornwell, Mary
Subject: RE: Lobbyist Report

I received a copy of an excel sheet that I am told was provided by the Clerk's office. I trust I can use that to go back to amend the reports?

From: Cornwell, Mary
Sent: Tuesday, July 22, 2008 4:06 PM
To: ash@pirayoulaw.com
Cc: Tsongtaataril, Rosa; Sato, Norm; Price, Lee
Subject: RE: Lobbyist Report

Ash,

You are very welcome.

Yes, each contact, as described below, needs to be dated.

Mary

From: Ash Pirayou
Sent: Tuesday, July 22, 2008 4:00 PM
To: Cornwell, Mary
Cc: Tsongtaataril, Rosa; Sato, Norm; Price, Lee
Subject: RE: Lobbyist Report

Thank you for the reply: just to confirm, each contact -- be it a phone call, an email, delivery or a letter, or a meeting -- needs to have the date attached to it.

I will do my best to file the amendments as it appears that I used the 8/28/07 forms throughout my filings and don't recall reading the "date" information on those forms since probably the 8/28 didn't have them, as you describe.

7/31/2008

SJ002398

Thanks again for all your time and help on this.

From: Cornwell, Mary [
Sent: Tuesday, July 22, 2008 3:46 PM
To: ash@pirayoulaw.com
Cc: Tsongtaatarli, Rosa; Safo, Norm; Price, Lee
Subject: RE: Lobbyist Report

Dear Ash,

Yes, the dates of contacts were added to the forms 11/1/2007. Around 70% of the lobbyists filed the correct forms and filled in the dates in Q4'07 filed January 15, 2008 and forward.

The major changes to the forms came after the ordinance became effective in August of 2007. The first cut of the new form (published 8/28/07) did not specify the date of contact. The second cut (11/1/2007) was corrected to list the dates. The current and latest quarterly report that lists the dates of contact is dated 11/19/2007 -- currently on our web site. Other modifications to the schedules continued especially to clarify the instructions explaining the intent of the new ordinance and disclosing the appropriate information.

The forms were meant to capture the dates for Q4'07 (filed 1/15/2008), Q1'08 (Filed 4/15/2008) and Q2'08 (Filed 7/15/2008). The new ordinance, forms and loss of NetFile online filing made a huge impact on the lobbyists trying to get the reports filled out and filed. It was not easy, and is still somewhat problematic.

I would encourage you to amend your reports if you have the information available to avoid any issues that may arise due to the scrutiny of public documents. However, the Clerk's Office understands that this was a time of transition, and it is understood that records may not have been kept.

I hope this helps clarify the circumstances of the transition. Please let me know if you have additional questions.

Best regards,

Mary Cornwell

From: Ash Pirayou
Sent: Tuesday, July 22, 2008 9:23 AM
To: Cornwell, Mary
Subject: Lobbyist Report

Dear Mary:

I was told today that the lobbying reports we filed had to have dates of contacts. Can you confirm that?

When did that requirement get instituted as I don't remember seeing any City action on the Council agenda or received notice of the change?

I did look at the new forms, which I didn't think I had to use, and it appears the forms were changed on 7/1/08.

Does that mean the new forms were to capture the data for the 4/1/08 to 6/30/08 report? Or for this upcoming report from 7/1/08 to 9/30/08?

Please let me know and I will do my best to file amendments for the reports we filed trying to identify each contact with a date, if needed.

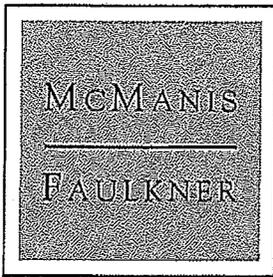
Thank you.

Ash Pirayou
Pirayou Law Offices
Pirayou Properties, LLC

7/31/2008

2398a

Exh C



January 29, 2009

VIA EMAIL AND U.S. MAIL

Lisa Herrick, Esq.
Senior City Attorney
City of San José
200 E. Santa Clara Street
San José, CA 95113

Re: Public Records Requests dated September 4, 2008 and January 9, 2009

Dear Ms. Herrick:

I am writing in response to your letters to our office, dated January 14, 2009.

First, with respect to our September 4, 2008, request for public records, we are asking for "every page of 4 years of calendars from" all City Council Members, the Mayor, the Mayor's Chief of Staff, Harry Mavrogenes, and the City Manager. This request includes those who held these offices and positions in the past. Also, although you stated the "Citywide General Records Retention Schedule" provides for a 2 year retention period for calendars, we are asking that you search for and produce any calendars that go back 4 years to the present, which are still in the City's possession, custody or control, and which have not been destroyed.

With respect to your production of responsive emails between May 2007 and the present, they appear incomplete because our office received very few emails during that time period even though there appear to have been multiple communications between Urban Markets and various City Officials. In your December 12, 2008 letter, you stated that the City's recordkeeping policy provides that "in-trays and out-trays be purged no

later than 90 days." Your response as to the City's record-keeping policies is not a verification that no such records exist. You do not state that you searched for these emails and could not find them. Please advise whether you actually searched for emails dating between May, 2007 and the present. If any such emails exist, they must be produced.

With respect to our January 9, 2009 request for public records, we will contact the City Clerk for documents responsive to categories 1, 15, 16 and 17. I will be in contact with you, however, if the City Clerk's office does not make the information available to us for review.

Also, you stated that you are working on gathering documents responsive to category numbers 2-9 and 11-13. Please let me know when those documents are available for us to review and/or copy.

With respect to request number 10, San Jose Municipal Code section 12.12.620(a) provides that "[u]pon the written request of any City Official, the City Clerk will issue an order to show cause to any unregistered person." Request number 10 seeks any such written requests made by a City Official, and any Order to Show Cause issued by the City Clerk pursuant to such request, which relate to Urban Markets LLC, including Tom and John McEnery, Sarah Brouillette, Martin Menne and Barry Swenson.

Number 14 seeks any complaints or any other documents filed against a City Official "for failure to enforce ordinances." For example, a City Official meeting with an unregistered lobbyist is a failure to enforce the registration provisions of the lobbyist ordinance. We are specifically interested in any complaints or any other documents, alleging failure by any City Official to enforce or comply with the City's lobbyist or campaign finance ordinances.

Finally, please produce to our office the City's "Citywide General Records Retention Schedule" and any other written record keeping policies that provide a 90 day retention period for emails and that provide a 2 year retention period for calendars. Please also provide any other written record keeping policies that apply to any of the documents which our office has requested in our public records requests dated September 4, 2008, November 25, 2008, January 9, 2009, and January 26, 2009.

Lisa Herrick
January 29, 2009
Page 3

Please contact me if you have any additional questions or if you would like to discuss these requests further.

Thank you.

Very truly yours,

McMANIS FAULKNER

A handwritten signature in black ink, appearing to read 'MARWA ELZANKALY', with a stylized flourish at the end.

MARWA ELZANKALY

ME:ss