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June 1, 2004

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Blue Ribbon Task Force  
San Jose City Council  
801 North First Street  
San Jose, CA 95110

Dear Chairperson Yeager and Task Force Members:

I am sorry that I am unable to attend the Task Force meeting on June 2, 2004. I hope that, nonetheless, you will give my comments serious consideration.

I strongly believe that for regulation of ethical conduct to be effective, three things are essential:

1. The regulation must address the actual concern;
2. It must be clear and unambiguous; and
3. It must not be overly burdensome.

The draft ordinance before you dramatically fails on all three accounts. I urge you to direct the City Attorney to meet with interested stakeholders representing the various effected communities so that the draft can be revised in a way that provides a meaningful, readily understandable, and practical legislative program.

The proposed ordinance needs to be analyzed from the perspective of the very distinct and unrelated groups that it includes within its coverage. This letter is intended to highlight some of my major concerns.

### 1. The Business Community

In this era, when it is so critical for our economic development that San Jose be perceived as business friendly, the ordinance creates a "pay to play" environment that will inhibit the participation and communication to the Council from businesses. When you apply the definition in the draft, a person engages in lobbying and must pay a fee and register, whenever, on behalf of his or her

employer, the person provides "purposeful communication, either directly or through agents, for the purpose of promoting, supporting, modifying, opposing, causing the delay or abandonment of conduct, or otherwise intentionally affecting the behavior of a City official or City official-elect, by any means, including, but not limited to, providing or using persuasion, information, incentives, statistics, studies or analyses." Keep in mind, this requirement applies not only to legislative acts, but to administrative actions as well. The over breadth is obvious. Almost any contact with City staff or Council will fall into this category.

Moreover, if a business wanted to engage a public relations firm to distribute flyers and ads urging customers to oppose or support some City action under the current language, if the business has spent \$5,000 or more during a calendar year in connection with carrying out public relations, advertising or similar activities with the intent of influencing legislative or administrative action, it must register even if the business never contacts the City. Surely, there has been no problem with such public relations activity.

The same regulatory program that applies to the political advocacy consultant does not need to apply to all contacts with the City by businesses.

## 2. The Developer Community

The ordinance is unduly burdensome for developers. Any project will have a myriad of consultants (all of whom will have to register and will back charge the registration fees to the developer). The developer on a typical project will have countless meetings with staff as well as letters, phone calls and emails. Ordinarily the developer on a controversial project will have direct contact with each Council office and perhaps with a number of Commissioners. The regulatory program, which I discuss in more detail below, requires documentation of all of these contacts.

It seems to me that with regard to the developer, the rational concern relates to contributions and expenditures. To be meaningful, these expenditures should be known before, not three months after, the Council acts. The simple solution is to have the developer list his consultants as part of the application. The developer and his consultants can file an expenditure report a few days before the Council meeting. It can be on the City Web Site with other project information. Only those consultants that have contact with Council offices or Commission members should have to be separately registered.

### 3. The Legal Community

It seems unnecessary and burdensome to make both the attorney and his or her firm register. The individual registration identifies the firm. This concern applies to the engineering and other professional communities as well.

The interaction with the City Attorney's Office needs to be more carefully thought through. An attorney should not have to register to accompany a client to a meeting where staff is represented by the City Attorney's Office. It raises ethical concerns for the City Attorney's Office to meet with a represented party in the absence of the other attorney or his or her consent. Moreover, an attorney should not need to register to negotiate the terms of a lease or sale of property or contract. Certainly, an attorney should not have to register to call the City Attorney's Office to threaten a lawsuit if some action is not corrected or to negotiate a tolling agreement. Nor should it be necessary to register to seek interpretations from the City Attorney even if the intent of the request is to persuade the City to take a different course of action.

Moreover, an attorney should not have to identify a client who is asserting his or her Fifth Amendment rights. As I indicated in my previous letter, occasionally a client may have a code or an ordinance violation and the attorney maybe able to negotiate a solution to the problem. Please take note that the Brown Act precludes the Council from forcing persons attending or testifying at a public meeting from identifying themselves because it is recognized that there are circumstances when anonymity is appropriate. Similarly, there should be an exception for an attorney representing a whistleblower.

### 4. The Non-Profit and Trade Association Communities

I cannot see the rationale for registration. The issue with regard such organizations is not identifying the representatives or whether these employees make campaign or other contributions. Why should the Executive Directors (it is not clear if additional staff members have to register too) register to list their single client. The concern is not with any contact by non-profits with City staff, with, perhaps, the limited exception of organizations seeking funding. The concern is the perception that certain organizations have undue influence with the Council. It makes no sense to distinguish between the organization with paid employees and the totally volunteer organization. It is not important how many contacts the organization has made to a particular Council member or what date on a calendar a meeting occurred. If there could be some indication by

Councilmembers that on a particular agenda item, they or their offices had been contacted by certain concerned organizations, it would be meaningful. Alternatively, perhaps organizations could simply file a Notice of Position with the City Clerk, indicating the issue that they will lobby on and the position that the organization takes on that issue.

It is possible to impose the Code of Conduct on all persons contacting the City without requiring registration.

#### 5. The Political Advocate Consultants

The Ordinance should primarily be aimed at the consultant doing political advocacy. Such persons, including so-called lobbyists and professionals acting in a political advocacy role, should register and give the information on a client by client basis. My concerns about the proposed procedures in the draft ordinance apply to all groups required to register.

First of all, the draft requirement that all contacts made with City officials during the preceding calendar quarter for the purpose of influencing or attempting to influence legislative or administrative action be disclosed. Imagine working on a project and regularly communicating with staff and having to record every phone call and email. Often in the effort of the City to act with one voice, a meeting will include many staff members. Each person attending would have to be listed. Why not merely, at the time a client is listed, list the City Departments generically and name the Commissioners and Councilmembers that the Registrant anticipates contacting. Alternatively, a similar list could be filed at the time an action goes to the City Council.

The notion of an annual registration or termination of registration is an unnecessary complication. A consultant has the client until the action is taken. He or she does not necessarily have multiple clients at the same time so there may be gaps. Once registered, registration should continue as long as an annual fee is paid. (The fee needs to be no more than cost recovery and should not be so high that it discourages communication.) Reports ought to be filed in connection with a Council hearing. After the fact reporting on a quarterly basis does not seem to be the way to engender public confidence.

The disclosure requirements need to be more carefully thought through. For example, disclosing contributions "At the behest" of an elective City Official is defined as being "at the suggestion of" any elective City official. Thus, if a

councilmember goes on radio and urges support of a charity and a "lobbyist" hears it and donates – it is at the behest of the Councilmember under this definition, even if the Councilmember has no knowledge of the contribution.

With today's technology, campaign and officeholder contribution disclosure can be handled more meaningfully. Each Registrant and each Developer should be given a number which should be required to be included with other donation information. Then various linkages can be developed so that contributions are identified in real time and not three months after an action.

### General Comments

The Clerk's Office should be directed to enable registration through the City Website or by email. The draft provision currently makes this service permissive. Another important provision would be to require the City Attorney to issue and publish written opinions on the City Web site so that they would serve as a bright line. Compliance with the opinion should be a bar to penalties.

Another concern is that the local political advocates will know about this ordinance and the regulations but those who are new to the community will not. The way that those persons required to register are put on notice of the regulations needs to be thought through.

While I am very much a supporter of a Code of Conduct, many of the listed Prohibitions are ambiguous or seem unnecessary. For example, Item RR states "Cause or influence the introduction of any legislative or administrative action for the purpose of thereafter being employed as a lobbyist to secure the granting, denial, confirmation, rejection, passage or defeat of the legislative or administrative action." What concern is being addressed here?

Or item UU. "Perform services for a client on any matter including any legislative action or administrative action which the lobbyist had performed services for the City of San Jose or Redevelopment Agency." How does this relate to the Revolving Door Ordinance? What is the time limit? If someone worked in the Planning Department on the drafting of the General Plan, does it mean that he or she can never be a consultant for a General Plan amendment?

The training workshop requirement assumes that all "lobbyists" under this broad definition are local. Some from out of town will appear once or twice. Again, this does not just apply to political advocacy consultants who tend to be

Ken Yeager  
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June 1, 2004  
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local and interact with the City on behalf of numerous clients on a continuous basis but to every business person, developer, engineer, attorney etc. who has any contact with the City under the broad definitions provided in the draft ordinance.

### Conclusion

I have not identified each and every problem and ambiguity that I found in the draft. I will be happy to provide such comments to the City Attorney. However, I hope that there can be some major restructuring of the program and a much improved ordinance developed.

It is not necessary that the ordinance be "one size fits all." The application to the different communities should focus on the purpose of the ordinance and the practicalities. The focus on the different types of City actions should lead to limiting its application so that it does not include most administrative actions. It is also not necessary to use the term "lobbyist" which for some is seen as having a pejorative connotation and more importantly is not a term that puts most of the persons subject to this ordinance on notice that it includes them.

I want to make it clear that the opinions in this letter are my own and I am not representing any client nor am I writing as the representative of any of the organizations with which I am associated.

Thank you for your consideration.

Sincerely,

HOPKINS & CARLEY  
A Law Corporation

  
Joan R. Gallo

JRG/nw

cc: Mayor Gonzales  
Rick Doyle  
City Clerk