RULES COMTE.: 2/28/07
ITEM:

CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: RULES & OPEN GOVERNMENT COMMITTEE

FROM: Les White
Rick Doyle

SUBJECT: SEE BELOW

DATE: February 23, 2007

SUBJECT: RESPONSE TO THE REPORT OF THE GOVERNMENT REFORMS & ETHICS SUBCOMMITTEE OF THE MAYOR'S TRANSITION COMMITTEE

RECOMMENDATION

(a) Accept the response to the Report of the Government Reforms & Ethics Subcommittee of the Mayor's Transition Committee; and,
(b) Provide direction on the recommended methodology to implement a pilot program for cost benefit analyses for projects, activities, and events seeking public funding.

OUTCOME

On January 24, 2007, the Rules & Open Government Committee considered several actions proposed by Mayor Reed regarding the Government Reforms & Ethics Subcommittee Report. This report responds to the specific directives referred to the City Attorney and City Manager.

BACKGROUND

The Mayor's Government Reforms & Ethics Subcommittee Report directed:

(1) The City Attorney to take the Campaign Finance Reform section of the Report to the Elections Committee for review and comment in order to help define the scale and scope of the election audit it will be conducting.
(2) The City Attorney and City Manager to consider all other final recommendations from the Report and report to the Rules & Open Government Committee by February 28, 2007.

This report responds to the above directives and provides a recommended methodology for Council consideration for implementing a program that results in the completion of a cost benefit analysis for projects, activities, and events seeking public funding.

ANALYSIS

On January 8, 2007, the Government Reform & Ethics Subcommittee of the Mayor's Transition Committee issued its Final Recommendations to Mayor Chuck Reed. On January 24, 2007, the Rules & Open Government Committee considered several actions proposed by Mayor Reed regarding the Government Reforms & Ethics Subcommittee Report. This report provides the City Attorney and City Manager's response to the recommendations/comments made in the Subcommittee's report and is structured consistent with the Government Reform & Ethics Subcommittee Report.

Lobbyist Reforms

Recommendation 1: A change to the definition of a "Lobbyist" closer to the definition used by the State of California which is "a person paid for the purpose of affecting legislation." This definition is not complete but is far easier to understand than the current definition used by the City today.

Response: The definition of "Lobbyist" under the State Political Reform Act (Gov. Code Section 82039) is as follows:

> "(a) "Lobbyist means any individual who receives $2000.00 or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. An individual is not a lobbyist by reason of activities described in Section 86300.
>
> (b) (Exception for certain PUC hearings)"

The City's lobbying ordinance could be revised to mirror the above definition as appropriate. The definition in the ordinance must be precise enough to enforce.

Recommendation 2: **Increase the revolving door standard from 1 year to 4 years.**

Response: Courts have found revolving door ordinances to be socio-economic regulations that do not impact any fundamental rights and, consequently, are properly reviewed using the "rational basis" test established by the United States Supreme Court. To meet the rational basis test, the regulation must be rationally related to the problem that the City is trying to address. The problems that revolving door restrictions generally are intended to address are: (1) to assure independence, impartiality and integrity in the City's actions and decisions; (2) to prevent former employees and officials from profiting from their prior City service; and (3) to prevent a private business from obtaining a perceived unfair advantage in dealing with the City by hiring a former employee.

Durational limits ("cooling off limits") prohibit a former public official or employee from having certain contact with a former agency for a specific period of time. A review of such restrictions nationwide shows that the prohibition is substantively often broad, but effective for only a limited period. Permanent bans on the subsequent activities of former employees have been upheld where the ban applies to matters in which an individual was personally involved as a government employee. The current San Jose ordinance places a one year ban on both: (1) matters in which the individual was personally involved; and (2) representation before the City on any matter.

With regard to the broad-based, general type of restriction, research has not revealed any existing revolving door limits of more than two years, and, thus no challenges that would provide judicial insight on the viability of longer limits. Therefore, the safest route would be to extend the general prohibition to two years and, if needed, impose a longer prohibition to narrow, specific situations where the risk of undue influence is unacceptably high or the existence of a conflict is unavoidable. For example, the ordinance could be tailored to address the relative risk of lobbying of different classes of employees.

The Subcommittee Report also noted that the majority of its member felt that all City employees should be restricted from lobbying for four years. Extending the existing prohibition to all employees may be too broad to be rationally related to the goal of reducing undue influence in local government.

Finally, although the meet and confer requirements of the Meyers-Milias- Brown Act and Section 16600 of the Business and Professions Code (prohibiting contracts that restrain individuals from engaging in a lawful profession) could be considered in this analysis, it is our opinion that neither of those laws apply to increasing the restrictions of the revolving door ordinance.

Recommendation 3: Prohibit Lobbyists from donating to campaigns or from bundling contributions from their clients to candidates.

Response: The Council could consider prohibitions on campaign contributions to City officials and candidates. Under State law, State lobbyists are restricted from making contributions to an elected State officer or candidate if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected State officer.

As to a prohibition on "bundling", given the legitimate government interest in restoring public confidence in government and reducing undue influence that underlies extensive campaign finance legislation, it is difficult to imagine what countervailing public interest served by bundling might motivate a court to find a prohibition against bundling unconstitutional. While freedom of political speech and association are implicated with regard to campaign contributions, as the Supreme Court recently noted, restrictions on political contributions are considered "marginal" speech restrictions "subject to relatively complaisant review under the

First Amendment, because contributions lie closer to the edges than to the core of political expression."

Recommendation 4: Require elected officials to disclose any meeting with a lobbyist and the project that was discussed during that meeting on their calendars and from the dais before a council meeting when the project is scheduled for a vote.

Response: There are no legal concerns with this recommendation.

Recommendation 5: Prohibit contingent fees for lobbyists. Fees for lobbyist services should not be tied to a specific outcome. If the City cannot regulate the fees then the lobbyist must disclose to any councilmember or staff what their "success fees" would be at the time of the meeting.

Response: California and several other states have enacted legislation to prohibit contingency fees for lobbyists, and there is helpful language in the cases interpreting these statutes to support such a prohibition against contingency fees.

Recommendation 6: Reduce the number of hours to qualify as a lobbyist to 3 hours a year. Currently an individual must register as a lobbyist if they spend more than 20 hours in a three month period meeting with Councilmembers or their staff, members of the planning commission, Redevelopment Agency Board, Appeals Hearing Board, Civil Service Commission, the City Manager or Executive Director of the Agency and their deputies, or any City representative to any joint powers authority to which the City is a party.

Response: There are no legal concerns with this recommendation

Recommendation 7: All City employees must report being lobbied and should also be restricted from lobbying for four years.

Response: Under the San Jose Municipal Code, "lobbying" means influencing or attempting to influence a City official or City official-elect. "City official" includes the Mayor and members of the City Council, any appointee of the City Council, Mayoral or Council staff member, Redevelopment Agency Board member, members of the Planning Commission, Appeals Hearing Board, Civil Service Commission, any City representative to any joint powers authority to which the City is a party, the City Manager and his or her Assistant City Manager and Deputy City Managers and the Executive Director of the Agency and his or her Assistant and Deputies and City and Agency Department Heads. Thus, city employees who are not "City officials" cannot be lobbied under the current definitions in Municipal Code.

The reason for limiting the definition to City officials is twofold. First, it provides specificity to the ordinance for enforcement purposes. Second it is targeted to the decision makers in the organization, which is the purpose of the regulation. If the definition were revised to apply to all City employees, then a definition of lobbying activity would need to be drafted that would clearly delineate lobbying activity from any other contact. Further, a requirement that all City employees must report being lobbied may trigger meet and confer requirements under the

Meyers-Milias-Brown Act for represented employees, since employees who fail to report may be subject to discipline.

As to the extension of the revolving door restrictions to all City employees, this may not pass the rational basis test as discussed above in Section B.

Campaign Finance Reform

The Elections Commission has received a memorandum from the City Attorney, dated February 2, 2007, informing the Commission of all of the issues related to Campaign Finance Reform that have been referred to it, including those referred by the Rules and Open Government Committee on January 24, 2007 (See Attachment A).

Global View

Recommendation 1: Projects that would require a change of the General Plan should all be reviewed at the same time and only once a year.

Response: The Community & Economic Development City Service Area (CED CSA) supports reducing the frequency of General Plan amendments, which has impacted the ability of staff to conduct thoughtful review of amendment proposals. The CED CSA has begun discussing the proposal to limit General Plan hearings to once annually. However, there is some concern that reducing the number of General Plan Hearings where such amendments are considered from four times a year to once, may stifle the business development process. Staff would like to explore whether a specific set of criteria/conditions should be developed to allow additional General Plan Hearings for projects that meet a certain criteria of public benefit/City objectives.

Recommendation 2: Require 1:1 mitigation – in lieu fee

Response: A team comprised of the Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency, City Attorney's Office, and a consultant has met regularly to develop a policy to regulate proposals to convert industrial lands to other uses.

Policy proposals under consideration include possibly requiring an industrial capacity replacement policy similar to 'endangered species' or agricultural lands, or through a mitigation fee with the funds dedicated to supporting economic development. Outstanding questions that remain include: ensuring compliance with AB 1600 requirements and clarifying the nexus that will serve as the basis of the fee structure. Following City agreement, the above referenced team will develop an outreach strategy and solicit feedback from the development community prior to advancing the policy to the City Council for consideration. As proposed, a 1:1 mitigation would effectively result in a moratorium of industrial conversions, as the cost of non-industrial zoned lands would make such a swap cost prohibitive.

Recommendation 3: Inventory the conversion of industrial land to housing for the past 24 years.

Response: The CED CSA strongly agrees with the Transition Committee that the long-term financial sustainability of the City depends on the availability of sufficient employment lands for future job creation and industrial/retail development. Nearly 20% of industrial lands have been converted to other uses in the past 15 years, which reduces the ability of the City to create the jobs and tax base required to support the population projections. Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency, City Attorney's Office are partnering to update the Industrial Land Conversion analysis as a prelude to Council adoption of specific plans for Evergreen and Coyote Valley and this year's General Plan Update.

A document listing conversions and General Plan changes since 1991 currently exists (16 years). A team consisting of the Office of Economic Development, Department of Planning, Building and Code Enforcement, Housing Department, Redevelopment Agency is working together to update the Industrial Lands Analysis.

Recommendation 4: Accelerate annexations of county land beginning with commercial and industrial property.

Response: Per Council direction, the Department of Planning, Building and Code Enforcement has increased the rate of annexation of County pockets and will continue to do so as resources allow. This year, the pace of the annexations has exceeded the funding for services provided by other City departments and may result in a lull until additional non-personal funding becomes available. Staff is looking for commercial and industrial areas not already annexed by the program to put in the next phase.

Recommendation 5: The goal of city planning should be a balance of industrial, commercial, and housing to achieve our city goals including our fiscal health and that best serve the needs of the city.

Response: The existing *San Jose 2020 General Plan* contains strategies, goals and policies to achieve fiscal health, balanced community, quality of life and other outcomes. This Plan guides Council decision-making for land use actions, capital improvement investments, and service delivery. The City Council will consider the formal initiation of a comprehensive, community-based General Plan update during the budget process for FY 07/08 and through which the Council and community will discuss the proper balance of these objectives.

Additional Reforms

Recommendation 1: All projects, activities, and events seeking public funding must include a measurable social or economic benefit to the City. ***AND*** ***Recommendation 2: A cost benefit analysis must be submitted for all projects, activities, and events seeking public***

funding. An after action report/analysis must be performed to determine whether or not the City's interests were met. When a public subsidy is sought, Councilmembers must provide a list of those lobbyists and political donors/supporters that they spoke with relative to the project/program.

Response: The CED CSA has developed a proposal for implementing this recommendation, based upon the following definitions:

Proposed Definition

Cost-benefit analysis is the process of weighing the total expected costs against the total expected benefits. In order to analyze the City of San Jose's return on investment, cost-benefit analysis should include analysis of quantitative, as well as qualitative, indicators of fiscal, economic, and other impacts (e.g., community, environmental, media, etc).

Components of Cost-Benefit Analysis

Fiscal Analysis: The base component of a municipal cost-benefit analysis is a fiscal impact study, which would compare the projected total cost to the City to the total projected increase in City revenues/cost-avoidance. Fiscal calculations require a comparison of the long-term value of City investment, through a time value of money calculation, and the projected revenues, such as property tax, sales tax, utility tax, and one-time fees. A clearly defined standard would be required to ensure that all analysis conform to an objective system of measurement, which could regularly be checked with after-action analysis).

Economic Impact: In addition to a fiscal analysis, an economic impact study forecasts the changes in direct and indirect spending, employment, earnings, etc. Economic impacts of programs and projects would require consensus on the appropriate methodology to capture the ripple effects of City action, such as the increased sales for adjacent businesses from employees of a new business that received City funds. Recent work by the Office of Economic Development to develop an 'Economic and Fiscal Impact Tool' could serve as a basis for analyzing the economic impact of events, although additional analysis would be required to capture the economic impacts of other types of projects, such as the construction of physical buildings.

Additional Impacts: The most difficult cost-benefit calculations are accounting for the social impacts (e.g., community, environmental, media) of various projects/events. For example, the City supports events for their economic impact, but, as a public entity, the City also supports events because of their social benefits, such as community building/celebration, strategic positioning, and media exposure. However, social benefits would need to be weighed against social costs, including environmental degradation, opportunity costs, traffic congestion, and other quality of life impacts.

The process of quantifying social benefits is often a costly and controversial process, with little agreement among stakeholders about the appropriate weights that should be attached to various factors. Rather than attempting to quantify these abstract costs, staff proposes listing other impacts in Council memos to allow the City Council to judge the weight that should be attached. For example, a project where the fiscal and economic cost-benefit analysis is slightly positive,

but negative environmental impacts are anticipated, would require the City Council to make a value judgment of how heavily to weigh the social costs of the project.

Proposed Pilot Program

The complexity and expense of thorough cost-benefit analysis limits the feasibility of requiring a cost-benefit analysis for all City projects as proposed within the Government Reforms & Ethics Subcommittee Report. Further, current City staff does not have the expertise or the capacity to undertake the workload associated with true cost-benefit analyses, which requires a highly specialized and labor intensive process to develop objective measures of the costs and benefits of proposed Council actions.

As such, staff proposes conducting modified cost-benefit analyses in-house, which focus heavily upon the fiscal impact of policy proposals and would be similar to a private sector 'return on investment' calculation. This in-house analysis would compare the value of City investment over time and the anticipated revenues, such as increased property tax, sales tax, utility tax, and one-time fees. In addition, staff will attempt to enumerate non-fiscal costs and benefits of the project. Attempts to quantify economic or other impacts further would likely require the services of an expert consultant to help staff develop methodology for analyzing major types of expenditures anticipated such as physical building projects and development subsidies. However, such investment would allow staff to apply the developed methodology to future analyses in a fashion similar to the anticipated use of the recently completed 'Analysis of the Economic and Fiscal Impact of Cultural and Sporting Events in San Jose.'

Staff proposes that many projects do not warrant the expense associated with a thorough cost-benefit analysis. The projects recommended for exclusion from the Proposed Pilot Program would include items/projects:

- Requiring less than $1 million in City funds,
- Received prior approval through the budget process,
- Related to private lending deals, and
- Implement an adopted City policy, such as affordable housing projects.

Staff proposes initiating a pilot program that would provide cost-benefit analysis of 3-5 projects in FY 2007-2008 that are 'special allocations' and/or projects for which the Council specifically requests analyses. In addition to existing events that are already evaluated (e.g., Grand Prix), additional proposed projects for evaluation may include Hayes Mansion, public golf course usage, and energy efficiency initiatives.

In addition to the modified cost-benefit analysis, projects included in the pilot program would require an after-action report, which would be submitted following the completion of the project/event. The after-action report would be presented in a format that compares the results to the projected benefit in an effort to benchmark performance and improve the accuracy of the cost-benefit analysis process. The constant improvement of cost-benefit standards will also assist the Council in evaluating studies by various developers and entities requesting City assistance.

Recommendation 3: A permanent committee on ethics should be established and report to the Mayor and Council three times a year regarding the progress of ethics reforms.

Response: If the City Council approves this recommendation, staff suggests that one of the three required reports to the City Council be combined with the proposed annual study sessions recommended as part of Reed Reform #26, *Hold regular public hearings on ethical issues around the state so we can learn from our mistakes and the mistakes of others,* to leverage the opportunity to hear all matters regarding ethics at once.

The Reed Reforms

The Reed Reforms were considered by the City Council on February 6, 2007 and Council unanimously approved the status report and list of exceptions to Reed Reform #5, 10-day report distribution requirement. This report followed a lengthy discussion at the January 31, 2007 Rules & Open Government Committee where the Committee provided clarification on four Reed Reforms and amended the list of exceptions related to Reed Reform #5. Staff will continue to report to the Rules & Open Government Committee on the status of implementing the Reforms.

PUBLIC OUTREACH/INTEREST

- ☐ **Criteria 1**: Requires Council action on the use of public funds equal to $1 million or greater.
  (Required: Website Posting)

- ☐ **Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**

- ☐ **Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

No public outreach was done to complete this report.

COORDINATION

This memorandum was coordinated with the various departments noted in this report.

CEQA

Not a Project.

Les White
City Manager

Richard Doyle
City Attorney

For more information on this report, contact Patty Deignan, Chief Deputy General Counsel, at 535-1201 and Deanna J. Santana, Deputy City Manager, at 535-8280.

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: San Jose Elections Commission

FROM: Richard Doyle
City Attorney

SUBJECT: **City Council Referrals to the Elections Commission**

DATE: February 2, 2007

At the Elections Commission's January 25, 2007 meeting, questions were raised by Commissioners regarding the City Council referrals to the Commission. This memorandum will provide our understanding of the referrals to the Commission.

The Elections Commission has been referred the following:

1. **Public financing of municipal campaigns**, referred by Council on or about March, 2006;

2. **Limits on contributions to independent expenditure committees**, referred by Council on October 10, 2006;

3. Reed Reform # 19 - referred by Council on January 9, 2007 (as recommended by Mayor Reed in his memo dated December 22, 2006): **Plug loopholes in the campaign financing ordinance that make it possible to contribute unlimited amounts of money in the form of paid campaign workers**;

4. Reed Transition Committee/Government Reform and Ethics Subcommittee: Campaign Finance Reform Recommendations (a - i) dated January 8, 2007 - referred by Rules and Open Government Committee on January 24, 2007 (as recommended by Mayor Reed in his memo dated January 17, 2007, asking the Elections Commission for review and comment in order to help define the scale and scope of the election audit they will be conducting:

a. **If money is spent in San Jose the committee making the expenditure must file their report in San Jose with the City Clerk's office within 24 hours of making the expenditure.**

b. **Re-initiate the contribution limits on independent expenditures (the City Attorney's office is currently appealing the court case that threw out the contribution limits).** [Note: this is somewhat duplicative of the referral from Council to the Elections Commission on October 10, 2006.]

c. **Increase penalties for violations dramatically, possibly as much as the expenditure.**

d. **Increase the budget and staff of the Elections Committee and allow the Elections Committee to use the District Attorney's office to investigate election complaints.**

e. **Penalize the consultant as well as the committee for failure to follow Independent Expenditure Laws.**

f. **Disallow the coordination of candidate committees and party organizations in non-partisan races.**

g. **Require Independent Expenditure committees to disclose on written material a disclaimer that says "this piece was paid for by an independent committee with funds that were raised in amounts greater than the limits imposed on campaign committees." The same disclaimer would have to be read on all radio and television commercials.**

h. **Prohibit consultants from working for a candidate committee and an Independent Expenditure Committee supporting the same candidate.**

i. **The Transition Committee also recommends the city staff looks into the Instant Run Off System to see if this method could save money.**

PLEASE NOTE: We believe that Reed Reform # 20 - **Plug loopholes in the lobbyist ordinance that allow many lobbyists to avoid public disclosure of what they are doing -** was **NOT** referred to the Elections Commission since Mayor Reed recommended deferring this topic to later discussion. However, the Sunshine Reform Task Force and Staff have proposed referring Reed Reform # 20 to the Elections Commission.

Please feel free to contact the City Attorney's Office if you have any questions.

Richard Doyle
City Attorney

By _____
Norm Sato
Chief Deputy City Attorney

Cc: Lee Price
Lisa Herrick
Alex Stuart