

## MEMORANDUM

**TO:** San Jose Elections Commission

**FROM:** Hanson Bridgett LLP

**DATE:** April 24, 2009

**RE: Citizen Complaint**

Complainant: **Anonymous**

Respondents: **Tom McEnergy, John McEnergy IV, Urban Markets, LLC**

Alleged Violations: **Violation of the Lobbying Ordinance: Failure to Timely Register, Failure to Disclose Contacts, Improper Reporting, Failure to Disclose Contingent Compensation**

Complaint Filed: **December 8, 2009**

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### I. INTRODUCTION

Pursuant to a complaint filed initially on December 8, 2008 (“Complaint”)<sup>1</sup> and supplemented three times, once on January 16, 2009 (“Supplement I”) and twice on April 7, 2009 (“Supplement II” and “Supplement III”<sup>2</sup>), we have conducted an investigation to determine whether John McEnergy IV, Tom McEnergy, Urban Markets, LLC (collectively “Respondents”) violated Title 12 of the San Jose City Municipal Code (“Municipal Code”).<sup>3</sup> The Complaint and Supplements I and II allege Respondents, developers of a public market project at San Pedro Square (“the Project”), failed to register as lobbyists for the Project according to the timelines set forth in the Municipal Code, failed to disclose contacts with City Officials as required by the Municipal Code, and failed to report contingent compensation. In Supplement III, Respondents are alleged to have failed to disclose a gift to a City Official as required by the Municipal Code.

As explained in more detail below, we conclude as to most of the allegations that the evidence fails to sustain the alleged misconduct.<sup>4</sup> However, we are recommending the

<sup>1</sup> The Complaint and the three Supplements to the Complaint are attached hereto as **Exhibits A, B, C and D** respectively.

<sup>2</sup> Supplement III also sets forth facts indicating a potential violation of the section of the Municipal Code regulating receipt of gifts by City Officials. As that issue involves a different Respondent, we will address that issue in a separate report.

<sup>3</sup> The investigation was conducted pursuant to Municipal Code §12.04.080 and City Council Resolution No. 72547.

<sup>4</sup> The table attached as **Attachment A**, summarizes the disposition of each of the alleged violations.

Commission find violations as to certain of the matters. The evidence indicates these violations occurred as the result of oversight or that Respondents relied upon a different, albeit incorrect, interpretation of the Municipal Code requirements. The evidence shows that Respondents generally sought to comply with the Municipal Code.

## II. EXECUTIVE SUMMARY

### A. The Evidence Does Not Support the Allegation that Respondents Failed to Register as Lobbyists in Accordance with the Requirements of the Municipal Code (Attachment A, Items 1, 2, 3, 4, 5 and 9).

#### 1. Respondents registered as lobbyists as required by the Municipal Code.

Respondents registered as “in-house lobbyists” on May 29, 2008.<sup>5</sup> A person identified as an in-house lobbyist is not required to register at the point he/she begins to engage in lobbying activity. Rather, under the relevant section of the Municipal Code, a lobbyist is required to register once it engages in more than ten (10) hours of lobbying activity within a twelve-month period.<sup>6</sup> Although there is evidence that Respondents engaged in lobbying activity related to the Project before May 29, 2008, the evidence shows that Respondents’ lobbying activity did not exceed ten (10) hours prior to May 29, 2008. Accordingly, we find that Respondents’ lobbyist registration form was filed in accordance with the Municipal Code.

Central to our conclusion is the fact that certain contacts between Respondents and City Officials did not constitute “lobbying activity” under the Municipal Code (see Section II.B.). In particular, it is undisputed that Tom McEnery engaged in a series of meetings with Mayor Chuck Reed and/or his Chief of Staff Pete Furman, some of which occurred prior to May 29, 2008. The evidence shows that in these meetings, McEnery and the Mayor, or his Chief of Staff, discussed a variety of topics, but there is no evidence that the parties discussed the Project. Consequently, we have concluded that these meetings do not constitute “lobbying activity” and, therefore, do not contribute to the ten hours of lobbying activity required to trigger Respondents’ registration obligation.

#### 2. As Respondents registered properly in 2008, the evidence fails to sustain the allegations of violations by Respondents in 2007.<sup>7</sup>

The Complaint alleges that Respondents also failed to pay the lobbyist fee for 2007, to file disclosure reports for 2007 and the first quarter of 2008, and to renew as lobbyists for 2008.

<sup>5</sup> Many documents relevant to or referenced in this report, including copies of Respondents’ Lobbyist Reports, Respondents’ Lobbyist registration and related documents, were filed with the Complaint and the Supplements. To avoid confusion and duplication, we refer to those documents as part of the Complaint or Supplement. Thus, Respondents’ registration statement is at **Exhibit A, Tab 6 (“A.6”)**.

<sup>6</sup> As we explain in a subsequent section of this Report, we calculate the time spent “lobbying” as one period without regard to the number of lobbyists or City Officials involved in the interaction. We decline to adopt the “aggregation rule” set forth in the Complaint that contends that a one-hour meeting between one lobbyist and three City Officials should constitute three hours, as opposed to one hour, of “lobbying activity.”

<sup>7</sup> Six of the 12 violations alleged by Complainant are premised on the claim that Respondents should have registered as lobbyists before May 29, 2008. We find no merit to these allegations.

The Complaint further alleges that because Respondents should have registered in 2007, any lobbying activity prior to registering was prohibited and in violation of the Municipal Code.

These allegations flow from the first allegation discussed above. Because we have determined that Respondents registered timely, we conclude that the evidence fails to sustain these allegations.

**B. The Allegations that Respondents Failed to Disclose Contacts with City Officials Are Sustained in Part (Attachment A, Items 6, 7, and 8).**

The Complaint in this matter is the first to allege violation of the Lobbyist Registration and Reporting requirements that became effective August 1, 2007. In accordance with these requirements, Respondents filed the following Lobbyist Disclosure Reports (collectively "Disclosure Reports") detailing reportable "contacts" with City Officials:

- On July 15, 2008 ("Disclosure I") covering the period April 1, 2008 through June 30, 2008;
- On July 23, 2008 ("Disclosure IA") an amendment to the report filed July 15, 2008;
- On October 14, 2008 ("Disclosure II") covering the period July 1, 2008 through September 30, 2008; and
- On January 15, 2009 ("Disclosure III") covering the period October 1, 2008 through December 30, 31, 2008.<sup>8</sup>

Respondents acknowledge, or do not dispute, approximately certain interactions with City Officials that occurred, and that constitute reportable contacts under the Ordinance, but that were not reported on the Disclosure Reports. The evidence shows that these contacts were not reported as the result of oversight. (See **Attachment C**<sup>9</sup>)

On the other hand, with respect to several additional alleged contacts that went unreported, Respondents contend that they were not required to report the contact. In some instances we agree with Respondents (subsection 1 below), but in other instances we do not (subsection 2 below). The Municipal Code defines "lobbying activity" and "contacts" with City Officials that must be reported with some precision and sets forth certain exemptions from those requirements (see, Section VI.A.3 and VI.A.4 below). Generally, the question of what constitutes lobbying activity or a contact is obvious from the circumstances and not reasonably disputed. However, there are situations in which the facts are less clear cut. For example:

<sup>8</sup> Disclosure I is at **A.21**; Disclosure IA is at **A.22**; Disclosure II is at **A.26**; and Disclosure III is at **C.1**.

<sup>9</sup> **Attachments B and C** relate to the allegations that Respondents failed to disclose contacts with City Officials. The Complaint and Supplements are voluminous and detail a lengthy series of meetings/contacts extending from June of 2007 to the present. To assist in following our evaluation and analysis of these issues, we have prepared **Attachment B**, which shows each of the "contacts" alleged by the Complainant, disclosed by Respondents or uncovered in the course of our investigation (and a reference to any exhibit in the Report). In addition, the Attachment shows whether the "contact" was disclosed and if not, summarizes the dispute, if any, as to the disclosure obligation. **Attachment C** summarizes the contacts that we conclude should have been disclosed by Respondents, but were not.

- Does "lobbying activity" include a meeting or communication with a City Official where there is no discussion of the lobbyist's project or pending matters?
- Lobbyist A is invited to make a presentation on a project or pending matter to a group. Some of the members of the group are City Officials but they are not involved in the invitation to the lobbyist. Is Lobbyist A required to report a contact if City Officials attend the presentation?
- Is there an obligation to report meetings with City Officials undertaken to negotiate an agreement pursuant to direction of the City Council? Is there a distinction to be drawn, based on the nature of the agreement being negotiated?
- ABC, Inc. has a matter pending before the RDA. City Official requests ABC to provide a proposal for loan terms and one of ABC's principals meets with the City Official to discuss a proposal. Another of ABC's principals has met with several Councilmembers to encourage support for ABC's project. Is ABC required to report the meeting with City Official?

Our investigation uncovered situations where, as outlined above, the facts were somewhat ambiguous or not specifically addressed by the Municipal Code. In many instances we determined that Respondents' decision to report or not to report the interaction was supported by the evidence and consistent with the requirements of the Municipal Code. However, we have concluded that in other instances the evidence supported a different conclusion (from Complainant's and/or Respondents') as to whether an interaction constituted a reportable contact (see **Attachment C**).

1. There is no obligation to report a meeting or communication with a City Official if the interaction does not include a purpose related to the legislative or administrative action supported by the lobbyist.

"Lobbying activity" is defined under the Municipal Code as "influencing or attempting to influence" a City Official "with regard to a legislative or administrative action" and the Code describes the types of acts that demonstrate such influence. The Municipal Code also requires lobbyists to report contacts with City Officials where the contact is "to promote, support, modify, oppose, cause the delay or abandonment of conduct, or otherwise affect an official action." Although these provisions are broad, the Municipal Code does not require a lobbyist to report any contact with a City Official, only those during which "lobbying activity" occurs.

We have concluded that Respondents were not obligated to report certain of the meetings/communications identified by the Complainant in the Complaint and Supplements. The following meetings do not meet the definition of "lobbying activity" because there is no evidence that the meetings were related to the Project:

- Several meetings between Tom McEnery and Mayor Reed/Pete Furman. Although there is no dispute that these meetings occurred, the evidence fails to establish

that the discussion in these meetings related to the Project or constituted influence related to the Project.<sup>10</sup> See, Section VII.C.1.

- Certain meetings between Tom McEnery and/or John McEnery with Councilmembers, City staff or Redevelopment Agency (“RDA”) staff. Although there is generally no dispute that these meetings occurred, the evidence fails to establish that the discussion related to the Project.<sup>11</sup>
  - A presentation to First Act. Although the presentation was intended to promote the Project and at least one City Official is on the committee sponsoring the presentation and attended, the City Official was not “contacted” as that term is used in the Municipal Code.
2. Although a business owner may be exempted from the disclosure requirement in order to complete business authorized by the City Council, a disclosure of such contacts is required if the business owner engages in other lobbying activity.

The lobbyist requirements of Title 12 were not intended to interfere with a business owner’s right to advocate for his/her business with City Officials. The Municipal Code provides an exemption for a business owner whose “attempts to influence governmental action are on behalf of the business.” The exemption is limited to the “owner” (sole owner or more than 50% owner) and does not apply if other employees of the owner also engage in lobbying activity. Likewise, the Municipal Code exempts from the lobbyist requirements a person “whose sole activity includes . . . [negotiating] the terms of an agreement with the City or Agency Official authorized to negotiate such an agreement.”

Respondents acknowledge that ownership of Urban Markets, LLC is divided equally among three individuals and, as a result, the “business owner” exemption is not applicable. However, Respondents do believe that the fact the City Council authorized the RDA to work with them to develop business terms for the Project takes certain of their actions outside of the disclosure requirement because the interaction was initiated by the City Official or was undertaken as part of negotiations directed by the City Council.

We disagree with Respondents on this point for two reasons. First, at the same time Respondents were working with the RDA staff on an agreement on business terms, the evidence demonstrates other interactions between Respondents and City Officials (other than RDA staff) that constituted “lobbying activity.” Thus, Respondents do not meet the “sole activity” requirement of the exemption. Second, we do not find that the fact an interaction originates with a City Official by itself disposes of the disclosure obligation. If no “lobbying activity” occurs

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<sup>10</sup> Our discussion and analysis of this issue in a later section of the report does not ignore the fact that the opportunity to meet with a City Official may be indirectly beneficial to the lobbyist even in the absence of specific discussion of a pending matter. However, in analyzing the issues we sought to strike a balance between the specific requirements of the Municipal Code and the practical difficulty of a broader disclosure obligation.

<sup>11</sup> There are also several instances where the Complainant alleges a “contact” but there is no City Official identified and/or our investigation has failed to substantiate the fact that a City Official was involved.

pursuant to the City Official's invitation, then there is nothing to report. Conversely, if pursuant to that initial contact "lobbying activity" occurs, the interaction should be disclosed.<sup>12</sup>

**C. The Evidence Fails to Sustain the Allegation that Respondents Filed False Disclosure Reports (Attachment A, Item 10).**

The Complaint asserts that because Respondents did not disclose interactions with City Officials alleged by Complainant to be "contacts," the Disclosure Reports filed by Respondents were "false" reports. There is no evidence to support this allegation.

The Disclosure Reports filed by Respondents reflect the interactions that they believed constituted contacts that they were required to report. The evidence also shows that Respondents had a good faith belief that they were not required to report contacts that related to negotiations with the City pursuant to direction of the City Council. The evidence indicates that any failure to report reportable contacts was inadvertent and not deliberate. Consequently, while we conclude that the Reports that they filed may have been incomplete in certain respects, the evidence does not support the conclusion that the Reports were false.

**D. There is No Evidence to Support the Allegation that Respondents Failed to Report Contingent Compensation (Attachment A, Item 11).**

The evidence does not sustain this allegation. Compensation for "lobbying activity" dependent on the outcome of a legislative or administrative act is prohibited and compensation for services other than lobbying activity that "directly depends on the result of legislative or administrative action(s)" must be disclosed. However, the anticipated Owner Participation Agreement ("OPA"), the "action" at issue here, did not provide for payment for "lobbying activity" or compensation for services. The Complaint refers to a "developer fee" in the proposed terms for the OPA, but the evidence does not support the contention that this "fee" is compensation for services that is prohibited or that must be disclosed. The evidence shows that under the terms of the OPA neither the City nor the RDA will pay a "fee" to Respondents.

**E. The Evidence Shows that Respondents Did Not Report an "Activity Expense" as Required by the Municipal Code (Attachment A, Item 12).**

Councilmember Sam Liccardo disclosed in a Statement of Economic Interest (FPPC Form 700) that he received a gift, "1 ticket - Sharks game," from Tom McEnery on April 1, 2008. The Municipal Code requires every registered lobbyist to disclose at the time of registering as a lobbyist and, thereafter on a quarterly basis, "payments that directly benefit any City Official, City Official-Elect or member of his or her immediate family or domestic partner made during the preceding calendar quarter." A gift is included in this requirement.

The gift is not disclosed in the Registration that Respondents filed on May 29, 2008. Although there is evidence to suggest that Respondent was not aware that he provided the Councilmember with entrance to the game at the time, the evidence shows that Councilmember entered the Arena without a ticket as part of a group hosted by Respondent. Neither Disclosure I nor the amendment (Disclosure IA), which both cover the period including April 1, 2008, report

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<sup>12</sup> In a later section of the Report we also discuss the potential applicability of Municipal Code exemptions from the Lobbying Ordinance and our conclusion that those exemptions are not applicable.

the gift to the Councilmember. Although the gift was made before Respondents registered, the Municipal Code is clear that specified matters relevant to the report are to be disclosed.

Consequently the evidence shows that Respondents did not report the gift as required by the Municipal Code.<sup>13</sup>

**F. The Disclosure Reports Filed by Respondents Satisfied the Administrative Requirements of the Municipal Code (Attachment A, Item 13).**

The Complainant asserts that Respondents' Disclosure Reports violate the Municipal Code in that Respondents do not provide adequate detail of contacts with City Officials. We disagree. The Disclosure Reports filed by Respondent contain the information required by the Municipal Code. Respondents' Disclosure Reports are substantially similar in form and content to disclosures filed by other lobbyists.

**III. COMPLAINT/ALLEGATIONS**

A copy of the Complaint and the Supplements to the Complaint are attached as **Exhibits A, B, C and D**. The Complaint and the supplements allege violations of the lobbying ordinance, in particular:

- Respondents failed to register as lobbyists in accordance with the times set forth in the Municipal Code (**Exhibit A, pp. 9-11; Exhibit B, pp. 3-4**);
- Respondents engaged in lobbying in 2007 in violation of the Municipal Code and failed to renew their registration in 2008 (**Exhibit A, pp. 11-12**);
- Respondents failed, on numerous occasions in 2008, to disclose and to report "contacts" with City Officials as required by the Municipal Code (**Exhibit A, pp. 12-15; Exhibit B, pp. 4-5; Exhibit C, pp. 1-3**);
- Respondents failed to report contingent compensation (**Exhibit A, pp. 16-17**);
- Respondents failed to submit adequate disclosure reports (**Exhibit C, pp. 3-6**);  
and
- Respondents failed to disclose a gift to a City Official as required by the Municipal Code (**Exhibit D, pp. 1-4**).

**IV. JURISDICTION OVER THE COMPLAINT AND DETERMINATION AS TO CAUSE FOR INVESTIGATION**

**A. Substantive Evaluation.**

Respondents were notified of the allegations and presented with a complete copy of the Complaint on December 10, 2008, Supplement I on March 18, 2009 and Supplements II and III on April 7, 2009. (**Exhibit E**)

<sup>13</sup> The Complainant alleges Respondents provided two gifts. We find the evidence establishes only that one gift was provided to the Councilmember by Respondents.

Pursuant to a review of the Complaint and the relevant statutory provisions, the Evaluator determined that the Complaint and the Supplements alleged violations of the Municipal Code. Specifically, the objective evidence indicated that during the time Respondents' project was pending some form of approval from the City Council, Respondents participated in meetings or communicated with City Officials. If, as alleged in the Complaint, these interactions constituted "lobbying activity," the failure to register as a lobbyist or report the contacts constituted a potential violation of §§12.12.180, 12.12.400, 12.12.410, 12.12.420 or 12.12.500 of the Municipal Code. In addition, the Complaint and Supplements detailed several instances where Respondents interacted with City Officials after registering as lobbyists, but did not report a "contact with the City Official and in one instance that Respondents provided a gift to a City Official that was not reported. These allegations constituted a potential violation of §§12.12.310, 12.12.410, or 12.12.420 of the Municipal Code.

**B. Procedural Evaluation.**

1. Anonymous Filing.

The Complaint states that the Complainant is "Anonymous."<sup>14</sup> We determined that the anonymous filing would not interfere with conducting a fair and impartial investigation. Accordingly, we proceeded with our investigation. (See **Exhibit F**)

2. Disclosure of the Complaint.

Evidence shows that at about the time the Complaint was filed, it was distributed anonymously by mail to several recipients including residential neighbors of one or more of the Respondents, business leaders and City Officials. The Complaint was also provided to the San Jose Mercury News and a copy of the Complaint was published on the newspaper's website.

The Complaint was filed on the morning of December 8, 2008. In the afternoon on December 8, several envelopes were left at the City Clerk's office for mailing. The envelopes (manila-colored) were addressed to City executives, including the City Manager, the RDA Director, City department heads and deputy directors, but did not show a return address. The City Clerk contacted Marwa Elzankaly at McManis & Faulkner, believing the envelopes were copies of the Complaint that had been left for mailing. The City Clerk informed Ms. Elzankaly that the Clerk's office could not distribute the Complaint and asked Ms. Elzankaly whether she planned to retrieve the envelopes or if the Clerk's office should dispose of them. The City Clerk secured the envelopes and later disposed of them.

Ms. Elzankaly stated that she received the call from the City Clerk but did not have any knowledge of the envelopes left at the Clerk's office or any efforts to distribute the Complaint. Mr. McManis confirmed Ms. Elzankaly's statement.

A few days later, the City Clerk received a piece of mail that had been returned to the Clerk's office as undeliverable. It was an envelope similar to the envelopes that had been left at the Clerk's office on December 8, 2008, but the return address (handwritten) showed "City of

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<sup>14</sup> Although the name of the Complainant was not given, the law firm of McManis Faulkner and its address was listed in the "Address" section of the Complaint form. James McManis, a principal in the law firm, confirmed that his firm was representing the Complainant.

San Jose.” The envelope appeared to have been mailed on December 8, 2008. The envelope contained a copy of the Complaint. (**Exhibit G**)

Respondents also reported that business associates and residential neighbors received copies of the anonymous mailings. Respondents provided an envelope similar to the envelope returned to the Clerk’s office that was addressed to “Neighbor of Tom McEnery,” and hand-stamped like the envelope returned to the Clerk. The envelope provided by Respondents did not have a return address and appeared to have been mailed on December 8, 2008. (**Exhibit H<sup>15</sup>**) Another individual also confirmed receiving an envelope similar to Exhibits G and H containing a copy of the Complaint in the week of December 8, 2008.

Resolution No. 72547 provides at paragraph F.9 that Complaints are not to be disclosed except under certain circumstances and then only to a limited group of interested parties. There is no evidence that the Complaint was disclosed by any City employee. As the Resolution is applicable only to City employees and does not restrict the actions of private citizens, we find no evidence of a violation of the Resolution. Although it is not clear who distributed the Complaint, we have determined that the distribution of the Complaint does not affect or interfere with consideration of the merits of the Complaint.

3. Conduct of the Investigation.

Our investigation encompassed interviews (most in person) of the Respondents, the Mayor and his Chief of Staff, the Councilmembers<sup>16</sup> including two former councilmembers, the RDA Executive Staff and the City Manager. We conducted approximately 25 witness interviews and reviewed documents provided by those witnesses.<sup>17</sup> The Commission’s Investigator researched and reviewed the Form 700s for each City Official and reviewed Lobbyist Reports on file with the City Clerk’s office.

V. SUMMARY OF RELEVANT FACTS

A. The RDA Received a Suggestion from Oxbow for Siting an “Urban Market” in Downtown San Jose, and Referred Oxbow to Respondents as a Potential Developer for the Project.

In about June 2007, Harry Mavrogenes, Executive Director of the Redevelopment Agency met with representatives of Oxbow Management, LLC, general partner of the Oxbow Public Market in Napa, California. The meeting was to discuss the concept of a “public market” in San Jose premised on the Napa public market and similar designs/concepts in California such as the San Francisco Ferry Plaza and public markets in Los Angeles and Oakland. Based on his discussions with Oxbow, Mavrogenes suggested that they discuss the public market idea

<sup>15</sup> We have redacted the address that appears on the address label for privacy reasons.

<sup>16</sup> Councilmember Oliverio refused our request for an interview. As a result, we were not able to corroborate the circumstance of one meeting between him and Respondents. Due to illness, we were not able to interview Councilmember Chirco.

<sup>17</sup> We reviewed email communications, provided to us by Respondents and other interviewees, between Respondents and City Officials. We have requested but have not reviewed additional email communications, but our investigation thus far indicates further review of such email communications will not lead to the discovery of significant evidence or evidence of violations of the Municipal Code.

with the McEnerys because of their property holding in San Pedro Square and the likelihood that the public market concept would be compatible with that area and the steps the McEnery's had already taken to develop the San Pedro Square commercial district.

San Pedro Square is commercial district in the "core" Downtown area of San Jose and Respondents had developed significant parts of the district and were substantial property owners. Respondents Tom McEnery and John McEnery IV were principals in entities that had developed and managed property in the district, including San Pedro Square Properties and Farmers Union Partnership. Respondents were active in the San Pedro Square Association and envisioned continued commercial development of the area including aesthetic developments, development as an event venue, and further development of entertainment (dining, art, etc.) and retail enterprises.

The Oxbow representatives met with the McEnery's along with other RDA staff and Respondents were supportive of the idea of establishing a public market in the San Pedro Square area. By September 2007, Respondents and Oxbow had had a detailed discussion of the concept of a public market in San Pedro Square and how it might be accomplished. In November 2007, Respondents and the RDA held a "kick-off" meeting to proceed towards development of the public market. Respondents had one meeting with a Councilmember in the fall of 2007 during which the idea for the public market was discussed and in the beginning of 2008 began working with the RDA towards an agreement that anticipated a partnership with the RDA on the project. Respondents met several times with RDA executive staff, including Leslie Parks, who was initially assigned responsibility for the project and later, Pete Larko, who took over responsibility from Leslie. Respondents and the RDA anticipated presenting the matter to the City Council and Redevelopment Agency Board for approval of an Exclusive Negotiating Agreement for the Council's last June meeting in 2008.

**B. In Anticipation of Securing an Exclusive Negotiating Agreement to Develop a Proposal for the Urban Market, Respondents Registered as Lobbyists and Created Urban Markets, LLC.**

The McEnerys operated two other entities related to their property holdings in San Pedro Square - San Pedro Square Properties and Farmers Union Partnership. Along with Martin Menne they created a business entity for development of the public market in San Pedro Square.<sup>18</sup> The McEnerys and Menne created Urban Markets, LLC and took equal ownership in the entity. At about the same time Respondents were working towards formalizing the establishment of Urban Markets, they registered as lobbyists with the City.

The company identified each of the owners as well as two other individuals who would be working on the public market project, Barry Swenson and Sarah Brouillette, as "in-house" lobbyists for Urban Markets. Respondents registered as lobbyists on May 29, 2008.<sup>19</sup> The

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<sup>18</sup> In the course of discussions leading up to the ENA, Respondents were advised by the Agency that they would need to have a business entity for the ENA, the City would not enter into such an agreement with them on an individual basis.

<sup>19</sup> Under the City's Lobbying Ordinance, Title 12, Section of the Municipal Code, Respondents were obligated to register at the time they had engaged in more than ten hours of "lobbying activity" in a twelve-month period. Respondents registered anticipating the likelihood that they would engage in some lobbying efforts as the project developed.

activities undertaken by Respondents in pursuit of the public market project that involved interaction with City and RDA officials are detailed in **Attachment B**.

Prior to registering as lobbyists, Respondents had one meeting with an elected official, Councilmember Liccardo, in November 2007, wherein the public market project was discussed. Respondent Tom McEnery also had a brief telephone call with the Mayor at the time Respondents began working formally with the RDA to advise that they were undertaking the project.<sup>20</sup>

**C. The City Council Granted Respondents an Exclusive Negotiating Agreement to Develop the Urban Market Project and Respondents Worked with RDA to Develop a Further Agreement for the Project.**

On June 24, 2008, the City Council and RDA Board approved an ENA for Respondents to negotiate an agreement for "a planned urban market development in the San Pedro Square District." Respondents and the RDA anticipated returning to the Council in the fall with a proposal for business terms for an agreement, at that time thought to be a Development and Disposition Agreement ("DDA"), for approval by the Council. Through the summer and into the fall, Respondents worked with RDA executive staff, architects and consultants on the project including design of the market and financing for the project. The ENA had forecasted an investment of \$6M in the project by the RDA, including a loan for approximately \$2.5M and an additional \$3.5M for streetscape and other public area improvements.

Respondents interactions on the project are summarized in Attachment B.

**D. In Addition to Interactions with the RDA, Respondents Met with Certain Councilmembers In Anticipation of a December 9, 2008 Meeting in which the City Council Was to Consider Business Terms for the Urban Market Project.**

The Project was scheduled to go before the Council on December 9, 2008 for approval of business terms for an Owner Participation Agreement ("OPA"). By this time, a variety of factors had caused the originally forecasted business terms to change. The proposal before the Council called for a grant and loan to Respondents for building improvements in the are of the planned public market, and a smaller amount for streetscape improvements.

Respondents met with several of the Councilmember in anticipation of this proposal before the Council, most of the meetings occurring in the early part of December. Respondents had also participated in a meeting with the Mayor and key City executives that reviewed (consisting of a briefing by the RDA) a number of projects for the Downtown area.

The Complaint in this matter was filed on December 8, 2009.

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<sup>20</sup> The Mayor had been informed of the project by his staff, prior to the call from Respondent.

## VI. LEGAL AUTHORITY

Relevant legal authority related to this investigation is found in the Municipal Code, the Resolution implementing Title 12 of the Municipal Code and guidance provided by the City Clerk.<sup>21</sup>

### A. Municipal Code.

The Municipal Code contains the following provisions relevant to this investigation:

#### 1. 12.12.010 Title, Purpose, and Application.

##### B. The purposes of this Chapter are:

1. To guarantee to the residents of the City that the City of San José (City) continues the highest ethical work environment for the residents of the City and the City's elected officials and employees.

2. In the spirit of open and transparent government, to allow the public to know and better understand the relationship between its elected officials, lobbyists, and lobbyist's clients.

3. To enhance public confidence and trust with respect to lobbyist activities and City practices.

4. To ensure that the requirements of this Chapter and their implementation are responsive to the goal of making it easy to do business with the City.

5. To bring about clarity and certainty about applicable provisions among stakeholders.

6. To establish a policy that sets clear standards of conduct.

7. To maintain the citizen's constitutional right to petition government for redress of grievances and not to limit the public's access to their elected officials.

#### 2. 12.12.020 Exemptions.

The following persons are exempt from the requirements of this Chapter unless otherwise specified:

C. A person hired by the City or Agency for work performed on behalf of the City or Agency, or a person who prepares documents for approval by the City under the California Environmental Quality Act of 1970, as amended and Title 21 of the San Jose Municipal Code, or a person who has been specifically invited by the City Council or Redevelopment Agency Board or any committee thereof, or by any board or commission, or any committee of a board or commission, or by any officer or employee of the City or the Redevelopment Agency charged by law with the duty of conducting a hearing or making a decision, for the purpose of giving testimony in aid of the body or person extending the invitation or invited to attend a meeting such as a City or Agency task force or department committee meeting to provide information or assistance requested by City or Agency staff.

<sup>21</sup> The City Clerk's guidance is published on the City of San Jose website.

D. The owner of a business whose attempts to influence governmental action are on behalf of the business and:

1. The owner or business has not made or solicited contributions for the elected official contacted, or a candidate or independent expenditure committee at the behest of the elected official contacted, in an amount over one thousand dollars (\$1,000.00) within the last twelve (12) months in a City election;
2. The owner or business has not retained a person to engage in lobbying activity on behalf of the owner or business; or
3. Officers or employees of the business have not engaged in lobbying activity on behalf of the owner or business.

For the purpose of this Section, an "owner" is any individual with greater than a fifty percent (50%) interest in the business. This exemption applies only to the threshold for becoming an In-House Lobbyist as defined under Section 12.12.180.B. An owner of a business who meets this exemption is subject to the requirements of this Chapter if he or she meets the definition of Contract Lobbyist or Expenditure Lobbyist as defined under Sections 12.12.180.A and 12.12.180.C, respectively.

E. A person whose attempts to influence governmental action are limited to:

1. Publicly appearing at a public meeting, public hearing, or other official proceeding open to the public; and/or
2. Preparing, processing or submitting documents or writings in connection with the governmental action for use at a public meeting, public hearing, or other official proceeding open to the public.

F. Any person whose sole activity includes one or more of the following:

1. to submit a bid on a competitively bid contract;
2. to submit a written response to a request for proposals or qualifications;
3. to participate in an oral interview for a request for proposals or qualifications;

or

4. to negotiate the terms of an agreement with the City or Agency Official authorized to negotiate such an agreement.

G. A person who meets with City Officials solely to lodge "whistleblower" complaints relating to improper governmental activity such as gross mismanagement, waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

H. A person who meets with the City Attorney or City Clerk regarding any claim or litigation matter, negotiation of any agreements where the City is a party or the requirements or interpretation of this Chapter.

I. Uncompensated members or uncompensated members of the board of directors of non-profit organizations.

J. Members of neighborhood associations, Neighborhood Advisory Committees or Project Area Committees.

K. Persons whose communications are solely related to:

1. The establishment, amendment, administration, implementation or interpretation of a collective bargaining agreement or a memorandum of agreement between the City and a recognized employee organization.
2. Management decisions as to the working conditions of represented employees that clearly relate to the terms of a collective bargaining agreement or memorandum of agreement between the City and a recognized employee organization.
3. Proceedings before the City of San José Civil Service Commission.

L. A person whose communications with City Officials are solely in connection with the administration of an existing contract or agreement between the person and the City or Redevelopment Agency.

3. **12.12.150 Contact or Contacting.**

"Contact or contacting" means attendance at a meeting with a City Official or City Official-Elect, or any direct communication with a City Official or City Official-Elect, whether oral, electronic or in writing, including, but not limited to communication through an agent, associate or employee, for the purpose of engaging in lobbying activity.

4. **12.12.170 Lobbying Activity.**

"Lobbying Activity" means influencing or attempting to influence a City Official or City Official-Elect with regard to a legislative or administrative action of the City or Redevelopment Agency.

A. "Influencing" means contacting, either directly or indirectly, for the purpose of promoting, supporting, modifying, opposing, causing the delay or abandonment of conduct, or otherwise intentionally affecting the official actions of the City Official or City Official-Elect, by any means, including, but not limited to providing, preparing, processing, or submitting information, incentives, statistics, studies or analyses.

B. "Legislative action" means the drafting, introduction, consideration, modification, enactment or defeat of any resolution, ordinance, amendment thereto, report, nomination or other action of the Mayor, City Council, Redevelopment Agency of the City, or City board or commission, or task force or any joint powers authority of which the City is a party.

C. "Administrative action" means the proposal, drafting, development, consideration, advocacy, recommendation, adoption, amendment or approval of any rule, regulation, agreement, contract, permit, license or hiring action.

5. **12.12.300 Contingent Compensation.**

A. A person may not accept compensation for lobbying activity when the compensation is directly dependent on the result of legislative or administrative action(s) that are the subject of the lobbying activity.

B. A person may not accept compensation for engaging in lobbying activity when the compensation depends on both:

1. The result of legislative or administrative action(s) that are the subject of the lobbying activity; and

2. Additional condition(s) or event(s) that are not the subject of the lobbying activity.

C. A person engaged in lobbying activity may accept compensation for services, other than lobbying activity, when the compensation directly depends on the result of legislative or administrative action(s) that are the subject of the lobbying activity.

D. A person engaged in lobbying activity may accept compensation for services, other than lobbying activity, when the compensation depends on both:

1. The result of legislative or administrative actions that are the subject of the lobbying activity; and

2. Additional condition(s) or event(s) that are not the subject of the lobbying activity.

6. **12.12.420 Additional Required Information and Disclosures.**

The lobbyist registration report must also contain the following information:

G. Contacts made with City Officials or City Officials-Elect during the preceding calendar quarter for the purpose of influencing or attempting to influence legislative or administrative action. Contact information must include a brief description of the item(s) of legislative or administrative action the lobbyist is seeking to influence and the number of contacts in the following ranges: (1), (2--5), (6--10) or (11 or more).

H. Activity expenses such as payments that directly benefit any City Official, City Official-Elect or member of his or her immediate family or domestic partner made during the preceding calendar quarter. Activity expenses include gifts as defined by Chapter 12.08, honoraria, consulting fees, salaries and other forms of compensation, but do not include campaign contributions.

B. **Resolution No. 72547.**

1. **E. COMPLAINTS OF ALLEGED VIOLATIONS**

1. Any person may file a complaint alleging possible violations of the City Campaign and ordinances set forth in Title 12 of the San Jose Municipal Code.

6. The complaint may be filed anonymously, but in this situation, the complainant must state good cause for anonymity. The Evaluator and the Commission may consider the anonymous nature of the complaint, and the reasons given for anonymity in their considerations of such complaint.

2. **F. REVIEW OF COMPLAINTS BY THE EVALUATOR**

9. No complaint, investigative file or information contained therein, shall be disclosed to any person other than a Respondent or Respondent's representative, the City Attorney, District Attorney, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation, prior to the presentation of the Report and Recommendations to the Commission. The Evaluator, however, may communicate with the Chair of the Commission on procedural matters relating to a pending complaint during the course of the investigation. After the Report is presented, complaints, related documents, and investigative files shall not be disclosed except as required by the California Public Records Act (Government Code §§ 6250 et seq. ).

C. **City Clerk's Instructions and Guidance for Lobbyists.**

1. Frequently Asked Questions:

- **WHEN IS A PERSON ENGAGED IN LOBBYING ACTIVITY?**

The time spent by any individual to submit a completed application is not generally considered "lobbying activity." For example, submitting plans or reports for a permit as part of the application, meeting with City staff that are not City Officials, or submitting other information in response to a request by City staff is not "lobbying activity." Similarly, time interacting with a Department Head at a public hearing, such as a Director's Hearing, would not be considered "lobbying activity." On the other hand, if the individual initiates contact with a Department Head outside of a public hearing, for the purpose of influencing his or her decision, that contact time, unless otherwise exempt under San José Municipal Code Section 12.12.020, is "lobbying activity."

- **WHAT IS THE CONTINGENT COMPENSATION PROHIBITION AND DISCLOSURE REQUIREMENT?**

**Prohibition**

Accepting payment for lobbying services dependent on governmental result is prohibited. The prohibition applies to any arrangements on or after August 1, 2007. Amendments to preexisting agreements after August 1, 2007 would be prohibited to the extent it substantively changes a contingent compensation arrangement or provides for contingent compensation.

**Disclosure**

Disclosure is required of any payment for non-lobbying services dependent on governmental result. The disclosure applies to any arrangement whether it is made before or after August 1, 2007 if it is the subject of ongoing lobbying activity. A lobbyist must file Form D at least one business day before contacting a City Official on a matter for which he or she is receiving contingent compensation. If the person is not yet required to register as a lobbyist, the disclosure can be made at the time he or she is required to register.

2. **Lobbyist Workshop Questions and Answers**<sup>22</sup>.

- **4. If a Lobbyist is hosting a 2 hour picnic for Members of the City Council and there is no specific discussion regarding an official action by the City but the Lobbyist engages in a 15 minute conversation about a governmental action he is trying to influence, what time should be**

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<sup>22</sup> The City Clerk presented a workshop on August 20, 2007 and printed on the website are questions and answers from the workshop.

**considered “engaging in lobbying activity?” What if the 15 minute conversation was regarding each other’s families?**

Although one of the purposes of the picnic may be to build a better relationship with Members of the City Council in order to lobby more effectively in the future, the Lobbyist is only required to account for the 15 minute conversation discussing the governmental action as “lobbying activity.” The cost of the picnic which directly benefits each Member of the City Council and his or her immediate family including spouse or domestic partner, must be reported as an activity expense under San Jose Municipal Code Section 12.12.420.H.

**VII. FACTUAL FINDINGS AND ANALYSIS OF ISSUES**

The facts in this matter are generally straightforward. There is virtually no dispute that the meetings and communications alleged in the Complaint and the Supplements occurred. Determining whether there has been a violation of the Municipal Code as to any of the allegations devolves primarily upon two legal questions: Did the interactions constitute “lobbying activity?” If the activity constituted “lobbying activity,” were Respondents required to disclose that activity?

**A. Does the evidence sustain the allegation that the meetings between Tom McEnery and Mayor Chuck Reed (or with the Mayor’s Chief of Staff) constituted “lobbying activity” that Respondents were required to disclose?**

No.

The evidence demonstrates that the Mayor and his Chief of Staff had scheduled periodic meetings with Tom McEnery beginning with the transition and continuing after Mayor Reed took office. There was generally no agenda for the meetings - they were intended to be informal and usually occurred over coffee. The purpose of these meetings was to discuss politics and current events and the meetings offered an opportunity for advice from McEnery given his former tenure as mayor. Respondents and the City Officials state that neither the Project nor any of the other matters pending before City agencies in which McEnery was involved were discussed at the meetings.

The 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. Likewise, the contention implicit in the allegation is the occurrence of the meetings enhanced Respondents’ ability to promote or to develop support for the Project. The direct evidence contradicts the circumstantial inference of lobbying activity and without more we do not find that there is sufficient evidence to sustain the allegation.

The definition of “lobbying activity” and “contact” under the Municipal Code clearly require a focus and interaction on a pending legislative or administrative action. The mere fact of meeting with a City Official is insufficient basis to find that “lobbying activity” has occurred. Furthermore, the guidance provided to lobbyists by the City Clerk makes clear that although a purpose of interaction with a City Official may be to enhance a relationship in aid of future lobbying, a “Lobbyist is only required to account for [time] discussing [a] governmental action as “lobbying activity.” (See, Section VI.C.2 above)

To find otherwise would require a lobbyist to report any contact with a City Official, no matter the purpose. The Municipal Code clearly does not set forth that stringent a requirement. The careful wording of the conduct that constitutes "lobbying activity" and "contacts" suggests an intent to distinguish mere interaction with a City Official from lobbying activity. Accordingly, we are recommending that the Commission find that in the absence of credible evidence that the meetings/discussions between Respondent and the Mayor/Chief of Staff included discussion of the Project, they do not constitute "lobbying activity" or a "contact."<sup>23</sup>

**B. Does the evidence sustain the allegation that Respondents failed to register as lobbyists in accordance with the requirements of the Municipal Code?**

No.

Registration is required at the point that an individual engages in more than ten hours of lobbying in a 12-month period. Respondents filed their registration on May 29, 2008, and provided they had not engaged in more than ten hours of lobbying activity in any 12-month period before that date, their filing was timely.<sup>24</sup>

The following interactions occurred during this period:

- 1) 1/26/07 Meeting (TM) with Mayor Reed
- 2) 1/30/07 Meeting (TM) with Mayor Reed
- 3) 2/14/07 Meeting (TM) with Mayor Reed
- 4) 2/26/07 Meeting (TM) with Mayor Reed
- 5) 3/8/07 Meeting (JM and SB) with Councilmember Liccardo
- 6) 3/13/07 Meeting (TM) with Mayor Reed
- 7) 3/16/07 Meeting (TM) with Mayor Reed
- 8) 4/24/07 Meeting (TM) with Mayor Reed
- 9) 6/6/07 Meeting (TM and JM) with HM
- 10) 6/13/07 Meeting (TM and JM) with HM and other RDA staff
- 11) 6/25/07 Meeting (TM) with Mayor Reed
- 12) 6/26/07 Meeting (TM) with HM
- 13) 6/27/07 TM and JM walk-through with Oliverio<sup>25</sup>
- 14) 8/27/07 Meeting (TM) with Furman
- 15) 9/4/07 Meeting (TM) with Furman
- 16) 9/18/07 Meeting (TM) with Furman
- 17) 9/24/07 Meeting (JM) with Councilmember Liccardo
- 18) 10/2/07 Meeting (TM) with Furman

<sup>23</sup> The Mayor disclosed telephone conversations with Respondents, separate from these meetings, in which the Project was discussed to some extent. On one occasion, Respondents called to advise the Mayor that the Project was being submitted to the RDA and in another, the Mayor contacted Respondents to discuss procedures for presenting the Project in the December Council meeting. (See, **Exhibit B**)

<sup>24</sup> Respondents did not file their registration based on a detailed analysis of the time that they may have engaged in lobbying activity. Rather, in anticipation of the proposal for an Exclusive Negotiating Agreement going before the City Council, Respondents established the Urban Markets entity and registered it as an in-house lobbyist organization.

<sup>25</sup> Councilmember Oliverio declined to participate in the investigation of this matter.

- 19) 10/2/07 Meeting (TM) with John Weiss
- 20) 10/22/07 Meeting (TM) with Figone
- 21) 10/23/07 Meeting (TM) with Furman
- 22) 11/14/07 Meeting (TM, JM and, SB) with 4 City Officials
- 23) 11/17/07 Meeting (TM) with Councilmember Liccardo
- 24) 12/04/07 ON TM Spreadsheet as "SPS Historic pub. mkt"
- 25) 2/23/08 Meeting (TM) with Mayor Reed and Furman
- 26) 2/28/08 TM, JM, SB with HM and other RDA staff
- 27) 3/4/08 Meeting (TM) with Furman
- 28) 3/12/08 Meeting (JM) with Leslie Parks
- 29) 4/1/08
  - a. Hockey game (TM) with Councilmember Liccardo in attendance
  - b. Meeting (TM) with Mayor Reed
- 30) 4/2/08 Presentation (TM and JM) to First Act
- 31) 4/24/08 Meeting (TM and JM) with HM and other RDA staff
- 32) 5/12/08 Email message from Respondent to Larko
- 33) 5/14/08 Meeting (JM and MM) with Larko, Ishibashi
- 34) 5/19/08 Meeting (TM) with Mayor Reed

1. Interactions where the Project was not discussed are to be excluded.

The evidence shows that in the meetings that occurred between Respondent Tom McEnergy and the Mayor and his Chief of Staff (Furman) (Items 1, 2, 3, 4, 6, 7, 8, 11, 14, 15, 16, 18, 21, 25, 27, and 34 from the list above) there was no discussion of the Project. (See preceding section) Similarly, we found that there was no discussion in the following items:

- Item 5: Meeting (JM and SB) with Councilmember Liccardo: This meeting pre-dated the initial idea for the Project.
- Item 13: TM and JM walk-through with Oliverio: Respondent walked through the area with the councilmember, but the Urban Market Project was not discussed.
- Item 20: Meeting (TM) with Figone: Respondent met with the new City Manager as a "meet and greet"; there was no discussion of the Project.
- Item 24: Meeting (TM) with Councilmember Chu: Respondent met with the new Councilmember as a "meet and greet"; there was no discussion of the Project.
- Item 29a: Hockey game (TM) with Councilmember Liccardo in attendance: The Councilmember was present with a group hosted by Respondent but there was no discussion of the Project.<sup>26</sup>

2. The time spent interacting with City Officials that included "lobbying activity" related to the Project did not exceed ten hours before May 29, 2008.

<sup>26</sup> Respondents do not have a record of the time associated with Item 13. The meeting in Item 20 lasted approximately one hour. The meeting in Item 24 lasted approximately 30 minutes. In Item 29a, the Councilmember arrived at the end of a pre-game dinner, walked with the group to the Arena and spent approximately 15 minutes at the game.

a. The total time is less than ten hours.

There is some variance in the records maintained by Respondents and the information developed in the investigation from City records.<sup>27</sup> However, despite these differences, the interactions with City Officials prior to May 29, 2008 totaled less than ten hours:

			<u>Resp.</u>	<u>City</u>
Item 9:	6/6/07	Meeting (TM and JM) with HM	.25	.25
Item 10:	6/13/07	Meeting (TM and JM) with HM and RDA staff	1.00	1.00 <sup>28</sup>
Item 12:	6/26/07	Meeting (TM) with HM	1.00	1.50
Item 19:	10/2/07	Meeting (TM) with John Weiss	.75	.75 <sup>29</sup>
Item 22:	11/14/07	Meeting (TM, JM, AND SB) with 4 City Officials	1.50	1.00
Item 23:	11/17/07	Meeting (TM) with Councilmember Liccardo	.25	.25
Item 26:	2/28/08	TM, JM, SB with HM and other RDA staff	1.00	1.00
Item 28:	3/12/08	Meeting (JM) with Leslie Parks	.50	.50
Item 31:	4/24/08	Meeting (TM and JM) with HM and other RDA staff	1.00	.50
Item 32:	5/12/08	Email message from Respondent to Larko	.25	.25
Item 33:	5/14/08	Meeting (JM and MM) with Larko, Ishibashi	.75	1.00 <sup>30</sup>
TOTAL			8.25	7.75 <sup>31</sup>

b. The Municipal Code does not require aggregation of time within individual meetings.

The Municipal Code states that the time spent by multiple individuals from the same organization engaging in lobbying activity is to be aggregated when determining the registration requirement. This "aggregation" rule provides that an entity and its employees will be treated as one and addresses a concern raised by the Mayor in pursuing the ordinance provision that lobbyists may use different individuals from the same firm to avoid the rules. Complainant contends further that the "time should also be aggregated when a lobbyist organizes a meeting with several City Officials simultaneously." Complainant contends that because the definition of a "contact" refers to a singular City Official, if multiple City Officials meet with one lobbyist, the

<sup>27</sup> Respondents also contend that any time before August 1, 2007, when the ordinance was enacted should not count towards the ten-hour requirement. We disagree. Prior to this version of the ordinance, a similar registration requirement existed, so Respondents were on notice as to the conduct that could qualify them as lobbyists. There is no attempt to hold them responsible for any reporting or disclosure requirements prior to August 1, 2007.

<sup>28</sup> An email message was sent by Respondents as a follow-up to this meeting (Exhibit A.15). Under the rules, only the time spent preparing correspondence would be counted as "lobbying activity" and it does not appear that significant time was required for this correspondence. A similar message was sent by Respondents on June 27, 2007 (Exhibit A.17).

<sup>29</sup> The City's records regarding this meeting are incomplete, but it appears that the time stated by Respondents is accurate.

<sup>30</sup> The City Official noted that the meeting was calendared for one hour, but does not dispute that it may have lasted only 45 minutes.

<sup>31</sup> The Complaint alleges interactions with Councilmember Liccardo (September 24, 2007) and Councilmember Chu (January 16, 2008). We found no evidence that the Project was discussed in these meetings.

time attributable to the "lobbying activity" is multiplied by the number of City Officials. We find several concerns with this approach and decline to adopt it with respect to this Complaint.<sup>32</sup>

First, the Municipal Code does not specify the aggregation principle advanced by Complainant. Likewise, there is no similar authority under other statutory schemes calling for the aggregation of time in this fashion. Furthermore, the guidance from the City Clerk, both as to "lobbying activity" and reporting contacts, does not address this issue or identify the standard urged by Complainant. Consequently, we do not find that there is a regulatory basis for Complainant's approach or adequate notice to Respondents of that standard.<sup>33</sup>

Second, the approach urged by Complainant is based on facts that may not be applicable in all situations. Complainant suggests the "aggregation" rule on the grounds that Respondents "had the influence to gather multiple City Officials in one room at one time." While this may be the case in some instances, as often as not, and as the evidence demonstrates in this case, the putative lobbyist may have no role in initiating a "contact" (i.e., the City Official may initiate the interaction or schedule the meeting) and/or may have no control over which City Officials participate in a meeting (i.e., the agency/department will usually determine who from the organization will participate in meetings). Practically speaking, efficiency often requires that multiple officials be involved in a meeting (particularly where the officials are staff as opposed to elected officials) such that it is the effort to be efficient as opposed to an attempt to "skirt" the rules that will lead to meetings with multiple lobbyists and City Officials.

Finally, the practical implications of implementing an "aggregation" rule as suggested by the Complaint are significant. The Municipal Code currently provides that only that part of a contact that is devoted to the lobbying purpose need be counted for determining the registration obligation. Adding to the analysis a further calculation based on the time actually spent by multiple parties, could prove burdensome. For example, Lobbying Firm sends lobbyists A and B to meet with City Officials D, E and F to discuss a project. The meeting lasts one hour and three-quarters of the meeting is devoted to discussion of the Project. Under a straightforward calculation, the Lobbying Firm would report .75 hours no matter how long each of the lobbyists or City Officials participated in the meeting. However, if one or more of the City Officials or one of the lobbyists did not participate in the entire meeting, the calculation becomes much more complicated. If D, E, or F came to the meeting late or stayed for only a part of the meeting, which may often occur in these settings, Lobbying Firm would have to track each individual's time.

Based on the foregoing, we recommend that the Commission find that "aggregation" is not appropriate and that the time spent in reportable meetings is to be calculated without regard to the number of participants.

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<sup>32</sup> Complainant addresses the situation where one lobbyist meets with multiple City Officials, but does not address specifically multiple lobbyists meeting with one or more City Officials. We presume from the Complaint that Complainant would propose that this situation be treated in the same fashion.

<sup>33</sup> In contrast, in the area of determining when campaign contributions from an entity should be "aggregated" for purposes of determining a potential violation of applicable limits, there is a well-settled rule and guidance under the Political Reform Act that have been adopted by the Municipal Code, placing individuals on notice as to the applicable standard. (See, Municipal Code §12.06.010; Cal. Gov't. Code §85311; FPPC Regulations §18215.1)

**C. Did Respondents Report All of the Contacts with City Officials that they Were Required to Report?**

No. Respondents disclosed a substantial number of contacts with City Officials, but in some instances overlooked items that should have been reported and believed that they were not obligated to disclose others.

1. Respondents had no obligation to disclose a number of the “contacts” alleged in the Complaint as there is no evidence that the interaction constituted lobbying activity.

For several of the items alleged to be contacts, there is no evidence that Respondents and the City Official discussed the project or that Respondents’ activity constituted “lobbying activity.” (See, **Attachment B**; see also. Sec. VII.A)

2. Respondents acknowledge that certain interactions were erroneously excluded from their Disclosure Reports.

Respondents do not dispute that certain of their meetings with City Officials that concerned discussion of the Project should have been disclosed. Specifically, Respondents note that they overlooked disclosing a July 14, 2008 meeting with Councilmember Liccardo and a September 16, 2008 meeting with the City Manager. (See, **Attachment C**; see also, **Exhibits A.24 and A.31**) There is no evidence that Respondents intended to conceal these items.

3. The evidence indicates certain of the interactions identified in the Complaint did not involve a City Official and as a result, Respondents had no disclosure obligation.

A “contact” is defined as lobbying activity involving a City Official. City Officials are identified in the Municipal Code and listed on the City Clerk’s website. We found no evidence that the following items involved contact between Respondents and a City Official:

- Exhibit A.19: Internal RDA email correspondence detailing a meeting between Respondents and third parties.
- Exhibit A.20: Internal RDA email correspondence detailing a meeting between Respondents and RDA staff who are not City Officials. Moreover there is no evidence that the discussion concerned the Project.
- Exhibit A.28: Internal RDA email correspondence detailing a meeting between Respondents and RDA staff who are not City Officials. Moreover there is no evidence that the discussion concerned the Project.
- Exhibit A.32: Internal RDA email correspondence detailing a meeting between Respondents and third parties.

4. We have determined that Respondents' claim of exemption as to certain interactions is not supported by the evidence.

**Attachment C** sets forth interactions that were not reported where the facts indicate that they should have been. Except for the interactions where Respondents missed reporting the event (section VII.C.2 above), Respondents assert that there was no obligation to report certain events because they were not required to under one of the Municipal Code exemptions. We address Respondents' claims of exemption in Sections VII.F, VII.G and VII.H, below.

5. Conclusion.

Based on the foregoing, we recommend that the Commission find a violation of the disclosure obligation as reflected in the items noted on **Attachment C**.

**D. Did Respondents violate the Municipal Code by "block reporting" contacts in their lobbyist disclosure reports?**

No.

The Complainant contends that Respondents were required to provide separate information for each City Official contacted, the dates of those contacts and the number of those contacts. The Municipal Code does not set forth a specific standard with respect to the actual reporting of contacts with City Officials. The Municipal Code requires "a brief description of the item(s) of legislative or administrative action the lobbyist is seeking to influence and the number of contacts in the following ranges . . ." (§12.12.420) The Municipal Code does not require that the manner of contact (i.e., email, telephone, in-person), dates of contact(s), or the specific number of contacts be disclosed.

With the exception of a line for identifying dates, the actual disclosure form is generally consistent with the spare requirements of the ordinance. The City Clerk's instructions for the form state:

- Fill in the name of each City Official or City Official-Elect contacted.
- Fill in the name of the individual who made the contact.
- Identify the action the individual was trying to influence.
- 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.

Based on the foregoing, we are not persuaded that a violation has occurred. The Municipal Code does not require the specific information identified by Complainant - the Code makes no mention of dates or number of contacts. Likewise, the City Clerk's guidance, although more detailed than the Municipal Code, does not require separate entries for each City Official or a specific number of contacts.<sup>34</sup> In addition, we have reviewed the reports filed by

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<sup>34</sup> The City Clerk's website also has a sample "Form with Errors" to illustrate requirements for completing the form. This sample does not require the information or form of presentation sought by Complainant nor does it highlight the practice followed by Respondent as an error. (**Exhibit I, p. 5**)

other in-house lobbyists (reports filed for the periods covered by the allegations of the Complaint/Supplements) and find them to reflect a variety of practices:

- Some record the manner, date and specific number of contacts with each City Official;
- Most do not indicate the manner of contact.
- Some, but not all, identify the date of the contact.
- Some identify dates of contacts, but not all of the dates. For example, one report indicated "more than 11" contacts but listed dates for only 4 contacts.
- Where there are multiple contacts, few give the specific number of contacts (unless separate dates of contact are included).

From the foregoing, it is clear that the report filed by Respondent is typical of reports filed by others.<sup>35</sup> Complainant states that the report "conceal[s] just how much lobbying it has engaged in and when it occurred." As to the latter issue, as noted above, the Municipal Code requires no more than a lobbyist report if a contact occurred within the quarter - not the specific date. As to whether the reports "conceal" lobbying activity, it is clear from the reports that Respondents have had substantial interactions with RDA staff and every City Official that Respondents met with to discuss the Project is identified on the form. Consequently, we recommend that the Commission find that the Report satisfies the requirements of the Municipal Code.

**E. To the Extent That Respondents Failed to Report a Contact with a City Official, Were Any of Their Disclosure Reports "False Reports"?**

No.

This allegation requires evidence that Respondents' Disclosure Reports were untruthful or that Respondents filed the reports knowing that they contained incorrect information.<sup>36</sup>

The person filing the report must certify that "to the best of [his/her] knowledge the information contained [in the form] is true and complete." As noted in the preceding discussion and reflected on Attachments B and C, in most instances, Respondents complied with their obligations under the Municipal Code. In those instances where they did not, the failure is supported by evidence of Respondents' good faith belief that no obligation existed. The manner in which Respondents sought to comply with their obligations coupled with the reasonableness of their interpretation of the Municipal Code exemptions is sufficient evidence for the Commission to find that they acted in good faith.

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<sup>35</sup> This comparison is significant as the Complaint refers to a "McEnery exemption" suggesting that Respondents have adopted a different set of standards. Clearly, the disclosure reports filed by Respondents are not substantially different, and in some cases are more informative, than those of other lobbyists.

<sup>36</sup> A "false" statement or report is one that is untruthful. (*Black's Law Dictionary*, 8th Ed.) Falsity can be based on intent, accident, or mistake.

Thus, the evidence fails to demonstrate, or even suggest, concealment or untruthfulness. The Disclosure Reports filed by Respondents may have proved to be incomplete based on an erroneous understanding of the Ordinance, but they were not untruthful and there is no evidence that they were filed with an intent to mislead.

We recommend, therefore, that the Commission find that there is no merit to this allegation.

**F. Are the Respondents “exempt” business owners under the Municipal Code?**

No.

In adopting reforms that led to revision of the Lobbying Ordinance, the Council sought to protect the right of a business owner to petition an elected official or City staff on behalf of his/her own business. Consequently, Municipal Code §12.12.020(D) exempts the “owner of a business whose attempts to influence governmental action are on behalf of the business.” However, that section/exemption is limited to the sole proprietor of a business or the majority (more than 50%) owner if the business has more than one owner. The exemption is also not available if employees of the business have engaged in lobbying.

Respondents acknowledge that ownership of Urban Markets, LLC is divided equally between Tom McEnery, John McEnery IV and Martin Menne. With this arrangement, there is no majority owner and Urban Markets is not entitled to exemption.

Furthermore, the evidence is undisputed that at least one employee of Urban Markets participated in “lobbying activity” on behalf of the business. This activity is a disqualification under §12.12.020(D)(3). We recommend, therefore, that the Commission find that Urban Markets was not entitled to the business owner exemption from the Lobbying Ordinance.

**G. Are the Respondents “exempt” from the lobbyist requirements on the grounds that they were negotiating an agreement with the City?**

No.

Respondents assert that they were not obligated to report certain of their activities as they related to negotiation of agreements with the RDA at the direction of the City Council. Municipal Code §12.12.020(G)(4) exempts from the Lobbying Ordinance any person “whose sole activity includes . . . to negotiate the terms of an agreement with the City or Agency Official authorized to negotiate such an agreement.” At first blush, there is merit to Respondents’ contention. Insofar as the Council directed the RDA staff to work with them on an agreement, it seems the purpose of the interaction was not only a matter of public record, but for a purpose not subject to the regulation intended by the Lobbying Ordinance. The exemption for this type of activity would appear to recognize that same principle.

What distinguishes Respondents’ situation from the situation intended under the exemption, however, is the evidence that Respondents’ activity was not limited to working with RDA staff, it also included interactions with elected officials and other City staff for the purpose

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of promoting the Project. For example, there were meetings with Councilmembers, the City Manager, and the City's Development Director (See **Attachment B**). Thus, Urban Markets' negotiation with the RDA was not the *sole activity* undertaken by the business.

Respondents have asserted that because the Project had already received approval of the Council with the extension of the ENA and approval of the business terms, Urban Markets' interaction with the RDA was not subject to scrutiny under the Lobbying Ordinance. Again, there is some logic to this contention. To the extent the Lobbying Ordinance seeks "to allow the public to know and better understand the relationship between" City Officials and lobbyists, the fact of the Council having voted twice to permit negotiation and development work between the RDA and Urban Markets is significant. Nonetheless, as noted above, the Municipal Code exemption is limited to specific circumstances and seeks to avoid the potential for other "activity," not so public as the negotiations with staff, from occurring without disclosure. Moreover, the fact that the Council will eventually be a decisionmaker on an OPA or DDA after approval of an ENA or business terms, means that the public is entitled to know whether those decisionmakers have been subjected to any type of influence. The Municipal Code does not shield such interaction simply because negotiations are required. For example:

The City Council authorized an exclusive negotiating agreement with DevCo. and DevCo. is negotiating an agreement with a City agency that will require approval by the City Council. DevCo. is working with applicable staff to finalize terms of the agreement. Staff is recommending one set of terms, but DevCo. would prefer others. DevCo.'s VP of Operations schedules a meeting with Councilmember A, hoping to explain DevCo.'s position on the agreement and secure Councilmember A's support if the matter comes to a vote.

On the one hand, there is no benefit to the public in requiring DevCo. to disclose its negotiations if that is its sole activity as the early Council action authorizing the ENA occurred in public. On the other hand, the Municipal Code provides that the public is entitled to know that Councilmember A's subsequent support for or opposition to the proposed agreement may have been influenced by the visit from DevCo.'s VP. Accordingly, DevCo. is not exempt from the Ordinance.

Respondents appear to contend that certain "contacts" were exempt under §12.12.020(G)(4). But this section is not a mechanism to carve out specific contacts from otherwise reportable interactions. Rather, it is a blanket exemption that removes a person from application of the entire set of rules under all circumstances. By registering as a lobbyist and reporting some contacts - in particular, contacts that did not relate specifically to development of an agreement with staff- Respondents have waived the "sole activity" exemption.

Based on the foregoing, we recommend that the Commission find that Respondents' interactions with City Officials were not exempt under Municipal Code §12.12.020(F)(4). We recommend further that the Commission find that the items set forth in Attachment C are reportable contacts subject to disclosure.

**H. Are the Respondents “exempt” from the Lobbying Ordinance under the Municipal Code §12.12.020(M)?**

No.

We have also considered whether Respondents’ interactions with City Officials are exempt on the grounds that they are “in connection with the administration of an existing contract or agreement between the person and the City or Redevelopment Agency.” We have concluded that this exemption is not applicable to Respondents. Technically, the ENA is an “existing contract or agreement” with the City, but this section of the Municipal Code appears intended to exempt City/RDA contractors or those performing business for the City under the contract. Again, the rationale is that the purpose of the resulting interaction with City Officials is for the business need and not to lobby. Conversely, an ENA is no more than an agreement to come to an agreement and as explained above the fact that another decision will follow the ENA - and as a result the possibility of “lobbying activity” - calls for the disclosure intended by the Lobbying Ordinance.

We recommend that the Commission find that the exemption under Municipal Code §12.12.020(M) is not applicable to Urban Markets’ activities and that the items set forth in Attachment C are reportable contacts subject to disclosure.

**I. Is there any evidence that Respondents failed to disclose contingent compensation?**

No.

The Lobbying Ordinance requires disclosure of “contingent compensation,” and prohibits “compensation dependent on the result of the legislative or administrative action(s) that are the subject of the lobbying activity.” Specifically, the Municipal Code precludes a lobbyist being paid on the basis of success, i.e., a “success fee,” in attaining the legislative or administrative goal. (See, Municipal Code §12.12.300) On the other hand, the Municipal Code excludes from its prohibition compensation that a person might earn for its services/work for the City, even though it has engaged in lobbying activity. The Code provisions take into account and distinguish the following:

- Case A: BigCo. hires Lobbyist to lobby on its behalf to secure an agreement with the City. Lobbyist will earn \$XX,XXX if the contract is awarded to BigCo. and nothing if BigCo. is not awarded the contract. This arrangement is prohibited under the Municipal Code.
- Case B: BigCo. hires Lobbyist to lobby on its behalf to secure an agreement with the City. Lobbyist will earn an hourly fee of \$XX/hour for its lobbying work. This arrangement is not prohibited under the Municipal Code.
- Case C: BigCo. is seeking a contract with the City and deploys its development officer and government relations officers to meet with City Officials. If BigCo. is awarded the contract, it will earn a management fee. The management fee is not prohibited by the Municipal Code.

Although the compensation in Cases B and C is not prohibited, the facts indicate the compensation is dependent upon the outcome of the legislative/administrative action for which the lobbying has occurred. Under the Municipal Code there is a requirement to disclose the compensation in §12.12.310(A). The disclosure is to be made before commencing lobbying activity or at the time the lobbyist registers. (§§12.12.310(A) and (C))

The terms proposed for the Owner Participation Agreement (“OPA”) for the Project as presented to the Agency Board in the staff report dated November 25, 2008, provide for the RDA to provide “a grant for eligible structural improvements and historic façade work” and loans of a like amount for that same purpose. In addition the RDA set aside an amount for “streetscape improvements.” A description of the terms of the OPA as presented in the staff report references a “developer fee” of up to \$450,000 that “could be payable to the Developer.” The Complaint characterizes this referenced amount as contingent compensation. We disagree.

On its face, it appears that Urban Markets - the developer - could be paid a fee of up to \$450,000. However, the “developer fee” in this instance is not being paid by the City/RDA nor is it coming from any of the funds that the RDA is making available for the project -either as a grant or as a loan. The OPA specifically provides that “no Agency funds will be used to pay a developer fee or developer salaries.” (See, **Exhibit J**, p. 5<sup>37</sup>) Furthermore, the “result” of the action purportedly giving rise to the claimed contingent compensation is loans and grants for building improvements, rather than any compensation to Respondent or compensation for services to be provided by the developers.

Based on the foregoing, we conclude that the facts do not establish “compensation for services” that are dependent on the approval of the OPA. We recommend, therefore, that the Commission find that Respondents were not required to disclose contingent compensation.<sup>38</sup>

**J. Were Respondents required to report an “activity expense” based on the gift reported by Councilmember Liccardo?**

Yes.

Section 12.12.420(H) makes clear that a schedule detailing “activity expenses” must be filed with the Lobbyist Report as applicable. The schedule covers “activity expenses” in the period covered by the report. The facts in this instance are largely undisputed. Councilmember Liccardo gained entry to the Arena on behalf of Respondent. Although no ticket actually exchanged hands, the Councilmember received a benefit that constitutes a gift under the Municipal Code. Accordingly, Respondents were required to disclose the item on Disclosure I,

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<sup>37</sup> This memo references a January 22, 2009 Information Memo addressing a question concerning developer fees that was raised at a January 20, 2009 study session. We have reviewed that memorandum and find that it presents the same information set forth in Exhibit J.

<sup>38</sup> It is clear that §12.12.300 sought to address “success fees” and arrangements that tied compensation for lobbying to the results being lobbied for. In our view, this history suggests that the key to this section is a payment for service. Arguably any approval of a project confers some benefit to its supporters, even if there is no direct compensation; it seems that this section would have been worded to require anyone who engages in lobbying activity to file a disclosure of any anticipated benefit if that was the intent.

the report covering the period April 1, 2008-June, 30, 2008. We recommend the Commission find that Respondents violated §12.12.420(H) by not disclosing this item.

As to the other "gift" of Sharks' tickets disclosed by the Councilmember, we do not find sufficient evidence to demonstrate that Respondents provided this gift. The Complaint alleges that because one of the Respondents is a part owner of the group that owns the Sharks - from whom the Councilmember received the tickets - the gift is imputed to Respondents. There is, however, no evidence that Respondent was aware the tickets were offered to the Councilmember or that he played any role in the decision to offer or to provide the tickets. Likewise, there is no evidence to establish that his ownership interest in this group is sufficient to impute the actions of the group to him. Consequently, we find that this part of the allegation is not supported by substantial evidence and recommend that the Commission find that there has been no violation.

### **VIII. CONCLUSIONS AND RECOMMENDATIONS**

#### **A. Summary of Conclusions.**

Our conclusions as to each allegation are set forth in **Attachment A**.

#### **B. Recommendations.**

1. We recommend that the Elections Commission find:

a. Dismissals.

- That the evidence fails to sustain that part of the Complaint alleging a violation of the Municipal Code based on alleged lobbying activity in 2007 (**Attachment A**, Items 1, 2, 3, 4, 5, and 9).
- That, with the exception of the items listed in **Attachment C** to this Report, the evidence fails to sustain that part of the Complaint alleging a failure to disclose or to report contacts in violation of the Municipal Code.
- That the evidence fails to sustain that part of the Complaint alleging false reporting (**Attachment A**, Item 10).
- That the evidence fails to sustain that part of the Complaint alleging failure to report contingent compensation (**Attachment A**, Item 11).
- That the evidence fails to sustain that part of the Complaint alleging failure to file adequate disclosure reports (**Attachment A**, Item 13).

b. Violations.

- Find that Respondents failed to disclose contacts with City Officials on certain occasions as set forth in **Attachment C** (**Attachment A**, Items 6, 7, and 8).

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- Find that Respondents failed to disclose a gift to a City Official as required by the Municipal Code (**Attachment A**, Item 12).

2. We recommend that the Elections Commission conduct a hearing to:

- a. Adopt the findings and recommendations as set forth in this Report and its Attachments.
- b. What penalty, if any, should be assessed pursuant to Municipal Code Title 2, Part 2, if a violation is determined.

Respectfully submitted,



Joan L. Cassman  
M. D. Moye  
Steven Miller

**ATTACHMENTS/EXHIBITS TO REPORT OF INVESTIGATION**

**ATTACHMENTS**

- **Attachment A** - Summary of Investigative Findings
- **Attachment B** - Listing of Alleged "Contacts" with City Officials
- **Attachment C** - Summary of Undisclosed Contacts - Potential Violations

**EXHIBITS**

- **Exhibit A** - Citizen Complaint Form, dated December 8, 2008, including 36 Exhibits
- **Exhibit B** - Supplemental Complaint I, dated January 16, 2008, including 10 Exhibits
- **Exhibit C** - Supplemental Complaint II, dated April 7, 2009, including 14 Exhibits
- **Exhibit D** - Supplemental Complaint III, dated April 7, 2008, including 8 Exhibits
- **Exhibit E** - Letter from Hanson Bridgett LLP, to Urban Markets, LLC et al., dated, December 9, 2008, re: Notification to Respondent
- **Exhibit F** - (1) Letter from Hanson Bridgett LLP, to Ken Machado (attorney for Respondents), dated, January 22, 2009, re: Anonymous Complaint  
(2) Supplemental Information Report, dated April 7, 2009
- **Exhibit G** - Envelope distributing copy of the Complaint returned to City Clerk
- **Exhibit H** - Envelope distributing copy of the Complaint received by a neighbor of Respondents
- **Exhibit I** - Excerpt of Sample Lobbyist Report from City Clerk's website
- **Exhibit J** - Memorandum from Executive RDA to RDA Board, dated February 10, 2009, re: Building Rehabilitation and Loan Agreement with Urban Markets, LLC for Improvements Related to the San Pedro Square Urban Market

# **ATTACHMENT A**

## ATTACHMENT A

	<b>Allegation</b>	<b>Evaluator Findings</b>	<b>Recommendation</b>	<b>Reference</b>
1.	Failure to register in 2007	No Merit	Dismiss allegation.	Sec. IIV.A and B
2.	Failure to disclose contacts and file disclosure report in 2007	No Merit	Dismiss allegation.	Sec. IIV.A and B
3.	Failure to pay registration fee for 2007	No Merit	Dismiss allegation.	Sec. IIV.A and B
4.	Failure to renew lobbyist registration	No Merit	Dismiss allegation.	Sec. IIV.A and B
5.	Failure to report contacts and to file disclosure report (1Q/2008)	No Merit	Dismiss allegation.	Sec. IIV.A and B
6.	Failure to report contacts (2Q/2008)	Sustained in part	Conduct hearing.	Sec. IIV.A, C, F, G, & H
7.	Failure to report contacts (3Q/2008)	Sustained in part	Conduct hearing.	Sec. IIV.A, C, F, G, & H
8.	Failure to report contacts (4Q/2008)	Sustained in part	Conduct hearing.	Sec. IIV.A, C, F, G, & H
9.	Illegal lobbying prior to May 29, 2008	No Merit	Dismiss allegation.	Sec. IV.A and B
10.	False reporting	No Merit	Dismiss allegation.	Sec. VII.E
11.	Failure to disclose contingent compensation	No Merit	Dismiss allegation.	Sec. VII.I
12.	Failure to report activity expense	Sustained	Conduct hearing.	Sec. VII.J
13.	Inadequate or incomplete disclosure report	No Merit	Dismiss allegation.	Sec. VII.D

# **ATTACHMENT B**

**ATTACHMENT B**

DATE	EVENT	COMPLAINT EXHIBIT	DISCLOSED ON LOBBYIST REPORT?	REPORTABLE CONTACT?	COMMENTS
1/26/07	Meeting (TM) with Mayor Reed	B.3	NO	NO	Sec. VII.A
1/30/07	Meeting (TM) with Mayor Reed	B.3	NO	NO	Sec. VII.A
2/14/07	Meeting (TM) with Mayor Reed	B.3	NO	NO	Sec. VII.A
2/26/07	Meeting (TM) with Mayor Reed	B.3	NO	NO	Sec. VII.A
3/8/07	Meeting (JM and SB) with Councilmember Liccardo	B.4	NO	NO	Sec. VII.C.1
3/13/07	Meeting (TM) with Mayor Reed	B.3	NO	NO	Sec. VII.A
3/16/07	Meeting (TM) with Mayor Reed	B.3	NO	NO	Sec. VII.A
4/24/07	Meeting (TM) with Mayor Reed	B.3	NO	NO	Sec. VII.A
6/6/07	Meeting (TM and JM) with HM		NO	YES <sup>1</sup>	Sec. VII.C.4 and VII.G Respondent asserts not reportable
6/13/07	Meeting (TM and JM) with HM and other RDA staff	A.15	NO	YES	Sec. VII.C.4. Respondents say no City Official present--not reportable.

<sup>1</sup> For the items prior to May 29, 2008, we identify them as "reportable" for assessing Respondents' obligation to register as a lobbyist. As the obligation to register had not yet occurred, there was no obligation to disclose this contact in a Lobbyist Report. For dates after May 29, 2008, a "YES" indicates our conclusion that the item should have been disclosed on the applicable Lobbyist Report.

DATE	EVENT	COMPLAINT EXHIBIT	DISCLOSED ON LOBBYIST REPORT?	REPORTABLE CONTACT?	COMMENTS
6/25/07	Meeting (TM) with Mayor Reed	B.3	NO	NO	Sec. VII.A
6/26/07	Meeting (TM) with HM		NO	YES	Sec. VII.C.4 Respondents assert not reportable--pre lobbyist ordinance.
6/27/07	TM and JM walk-through with Oliverio	A.16	NO	NO	Sec. VII.C.1.
8/1/07	New Lobbyist Ordinance Takes Effect				
8/27/07	Meeting (TM) with Furman	A.19	NO	NO	Sec. VII.A
9/4/07	Meeting (TM) with Furman	A.19	NO	NO	Sec. VII.A
9/18/07	Meeting (TM) with Furman	A.19	NO	NO	Sec. VII.A
9/24/07	Meeting (JM) with Councilmember Liccardo	B.5	NO	NO	Sec. VII.C.1
10/2/07	Meeting (TM) with Furman	A.19	NO	NO	Sec. VII.A
10/2/07	Meeting (TM) with John Weiss		NO	YES	Sec. VII.C.4 Respondents assert not reportable because Weiss initiated meeting.
10/22/07	Meeting (TM) with Figone	B.6	NO	NO	Sec. VII.C.1
10/23/07	Meeting (TM) with Furman	A.19	NO	NO	Sec. VII.A
[date uncertain]	Telephone call from TM to Mayor		NO	YES	
11/14/07	Meeting (TM, JM and, SB) with 4 City Officials	A.22, 23	YES	YES	
11/17/07	Meeting (TM) with Councilmember Liccardo	A.24	NO	YES	Sec. VII.C.2
1/16/08	Meeting (TM) with Councilmember Chu	B.7	NO	NO	Sec. VII.C.1
2/23/08	Meeting (TM) with Mayor Reed and Furman	A.19, 25	NO	NO	Sec. VII.A

DATE	EVENT	COMPLAINT EXHIBIT	DISCLOSED ON LOBBYIST REPORT?	REPORTABLE CONTACT?	COMMENTS
2/28/08	Meeting (TM, JM, and SB) with HM and other RDA staff	A.21	YES	YES	
3/4/08	Meeting (TM) with Furman	A.19	NO	NO	Sec. VII.A
3/12/08	Meeting (JM) with Leslie Parks	A.21	YES	YES	
4/1/08	Hockey game (TM) with Councilmember Liccardo in attendance	A.24	NO	NO	Sec. VII.C.1
4/1/08	Meeting (TM) with Mayor Reed		NO	NO	Sec. VII.A
4/2/08	Presentation (TM and JM) to First Act		NO	NO	Sec. VII.C.1
4/24/08	Meeting (TM, JM) with HM and other RDA staff	A.21	YES	YES	
5/12/08	Email from JM to Larko		NO	YES	Sec. VII.C.4 and VII.G
5/14/08	Meeting (JM, MM) with Larko, Ishibashi	A.21	YES	YES	
5/19/08	Meeting (TM) with Mayor Reed	A.25	NO	NO	Sec. VII.A
5/29/08	REGISTERED AS LOBBYIST	A.6			
6/4/08	Review documents submitted to UM from RDA		NO	NO	Sec. VII.C.5
6/18/08	Meeting (JM) with Councilmember Chu's chief of staff Bitbidal	A.22	YES	YES	
6/25/08	Meeting (JM) with RDA		NO	YES	Sec. VII.C.4
7/1/08	Meeting (TM, JM, MM, BS) with HM, and Weiss	A.23	NO	YES	Sec. VII.C.4, VII.G Respondents assert not reportable because "post ENA."

DATE	EVENT	COMPLAINT EXHIBIT	DISCLOSED ON LOBBYIST REPORT?	REPORTABLE CONTACT?	COMMENTS
7/1/08	Meeting (TM) with Mayor Reed	A.25	NO	NO	Sec. VII.A
7/8/08	Meeting (JM) with RDA City Officials and other staff	A.27	NO	YES	Sec. VII.C.4 and VII.G Respondents assert not reportable because initiated by RDA.
7/9/08	Email (TM) to Pete Larko	A.28	NO	YES	Sec. VII.C.4 and VII.G
7/10/08	Meeting (JM) with HM	A.23	NO	YES	Sec. VII.C.4 and VII.G
7/14/08	Meeting (JM) with Liccardo	A.24	NO	YES	Respondents assert not reportable because meeting required by ENA Sec. VII.C.2
7/15/08	Meeting (JM) with Rask		NO	NO	Sec. VII.C.5
7/17/08	Meeting (JM) with John Weiss	A.29	NO	YES	Sec. VII.C.4 and VII.G
7/22/08	Letter from JM to Weiss re 7/17 meeting	A.29	NO	YES	Sec. VII.C.4 and VII.G
7/30/08	Email from JM to Larko, Kern, Weis	A.30	NO	YES	Sec. VII.C.4 and VII.G
7/31/08	Email from JM to Larko, Kern, Weis		NO	YES	Sec. VII.C.4 and VII.G
8/6/08	Meeting (JM, TM, MM) with RDA staff	A.26	YES	YES	
8/19/08	Meeting (TM) with Mayor Reed	A.25	NO	NO	Sec. VII.A
8/25/08	Meeting (TM) with Councilmember Chu	A.8	NO	NO	Sec. VII.C.1

DATE	EVENT	COMPLAINT EXHIBIT	DISCLOSED ON LOBBYIST REPORT?	REPORTABLE CONTACT?	COMMENTS
9/2/08	Meeting (JM, TM, MM) with HM	A.26	YES	YES	
9/3/08	Meeting (JM) with HM	A.23	NO	YES	Sec. VII.C.4 and VII.G
9/9/08	Meeting (JM, MM) with RDA officials	D.7	YES	YES	
9/11/08	Meeting (JM, MM) with HM and others	A.23	NO	YES	Sec. VII.C.4 and VII.G Respondents assert not reportable because "administrative only"
9/16/08	Meeting (JM, TM) with Figone	A.31	NO	YES	Sec. VII.C.2
9/24/08	Meeting (JM, TM, MM) with HM and others	A.26	YES	YES	
9/27/08	Meeting (JM and TM) with HM		NO	YES	Sec. VII.C.4 and VII.G
9/27/08	Meeting (JM, TM) with Councilmember Liccardo	A.24	YES	YES	
9/29/08	Meeting (TM, JM) with Councilmember Cortese	B.9	NO	NO	
10/2/08	Meeting (TM) with Councilmember Chirco	C.6	NO	Undetermined	
10/3/08	Meeting (JM, MM) with Larko and Kern	D.7	YES	YES	
10/27/08	Meeting (TM) with Furman and Reed	C.7	NO	NO	Sec. VII.A
10/27/08	Meeting (TM) with Oliverio, Cortese, and Constant	C.7, 9	NO	NO	Sec. VII.C.1
10/29/08	Meeting (TM) with Oliverio	C.9	NO	NO	
10/31/08	Meeting (JM, TM, MM) with HM and others	D.7	YES	YES	

DATE	EVENT	COMPLAINT EXHIBIT	DISCLOSED ON LOBBYIST REPORT?	REPORTABLE CONTACT?	COMMENTS
11/4/08	Meeting (TM, JM, MM, BS) with HM and others	C.10	NO	YES	Sec. VII.C.4 and VII.G
11/12/08	Meeting (TM, JM), with Krutko	D.7	YES	YES	
11/19/08	Fax from JM to Krutko		NO	YES	Sec. VII.C.4 and VII.G
11/21/08	Mayor and RDA officials with unspecified lobbyist from UM	D.7	YES	YES	
11/24/08	Meeting (JM, MM) with RDA staff	D.7,10	YES	YES	
11/24/08	Telephone call with Councilmember Constant		NO	YES	Sec. VII.C.4
11/26/08	Meeting (JM) with Krutko and Larko	D.7	YES	YES	
12/1/08	Meeting (JM, TM) with Councilmember Chu	D.7	YES	YES	
12/3/08	Telephone call with Councilmember Constant		NO	YES	Sec. VII.C.4
12/7/08	Telephone call from Mayor to TM		NO	YES	Sec. VII.C.4
12/8/08	Meeting (JM, TM, MM, SB) with Councilmember Nguyen	D.7	YES	YES	
12/8/08	Meeting (TM) with numerous councilmembers	D.7	YES	YES	
12/30/08	Meeting TM and Reed	C.11	NO	NO	Sec. VII.A

# **ATTACHMENT C**

## ATTACHMENT C

DATE	EVENT	COMPLAINT EXHIBIT	DISCLOSED ON LOBBYIST REPORT?	REPORTABLE CONTACT? <sup>1</sup>	COMMENTS <sup>2</sup>
5/12/08	Email from JM to Larko		NO	YES	Sec. VII.C.4 and VII.G
6/25/08	Meeting (JM) with RDA		NO	YES	Sec. VII.C.4
7/1/08	Meeting (TM, JM, MM, BS) with HM, and Weiss	A.23	NO	YES	Sec. VII.C.4, VII.G Respondents assert not reportable because "post ENA."
7/8/08	Meeting (JM) with RDA City Officials and other staff	A.27	NO	YES	Sec. VII.C.4 and VII.G Respondents assert not reportable because initiated by RDA.
7/9/08	Email (TM) to Pete Larko	A.28	NO	YES	Sec. VII.C.4 and VII.G
7/10/08	Meeting (JM) with HM	A.23	NO	YES	Sec. VII.C.4 and VII.G  Respondents assert not reportable because meeting required by ENA
7/14/08	Meeting (JM) with Councilmember Liccardo	A.24	NO	YES	Sec. VII.C.2
7/17/08	Meeting (JM) with John Weiss	A.29	NO	YES	Sec. VII.C.4 and VII.G
7/22/08	Letter from JM to Weiss re 7/17 meeting	A.29	NO	YES	Sec. VII.C.4 and VII.G
7/30/08	Email from JM to Larko, Kern, Weis	A.30	NO	YES	Sec. VII.C.4 and VII.G
7/31/08	Email from JM to Larko, Kern, Weis		NO	YES	Sec. VII.C.4 and VII.G
9/3/08	Meeting (JM) with HM	A.23	NO	YES	Sec. VII.C.4 and VII.G
9/11/08	Meeting (JM, MM) with HM and others	A.23	NO	YES	Sec. VII.C.4 and VII.G  Respondents assert not reportable because "administrative only"

<sup>1</sup> This column reflects our conclusion that the interaction was reportable.

<sup>2</sup> This column refers to the section of the report in which the issue is discussed.

DATE	EVENT	COMPLAINT EXHIBIT	DISCLOSED ON LOBBYIST REPORT?	REPORTABLE CONTACT? <sup>1</sup>	COMMENTS <sup>2</sup>
9/16/08	Meeting (JM, TM) with Figone	A.31	NO	YES	Sec. VII.C.2
9/27/08	Meeting (JM and TM) with HM		NO	YES	Sec. VII.C.4 and VII.G
11/4/08	Meeting (TM, JM, MM, BS) with HM and others	C.10	NO	YES	Sec. VII.C.4 and VII.G
11/19/08	Fax from JM to Krutko		NO	YES	Sec. VII.C.4 and VII.G
11/24/08	Telephone call with Councilmember Constant		NO	YES	Sec. VII.C.4
12/3/08	Telephone call with Councilmember Constant		NO	YES	Sec. VII.C.4