

## Suggested Revisions to the San José Municipal Code Title 12 and Resolution 79187

#	TOPIC	ISSUE	FROM	POSSIBLE SOLUTION	TYPE	BOARD RECOMMENDATIONS
1	Remove lobbyist exemption for non-profits	Per the action of the Board at its 1/10/18 meeting, strike the non-profit exemption so that the same rules apply whether former designated employees go to work for non-profit or for-profit organizations.	Board	Revise SJMC 12.12 to strike the non-profit exemption so that the same rules apply whether former designated employees go to work for non-profit or for-profit organizations.	ORD	Revise SJMC 12.12 to strike the non-profit exemption so that the same rules apply whether former designated employees go to work for non-profit or for-profit organizations.
2	Late fines for weekly Lobbyist reporting	SJMC 12.12.440 (D) requires the City Clerk to assess a late filing fine to lobbyist who fails to file a weekly report on time. This would require the Clerk's Office to cross-reference dozens of calendars with reports that can be amended at any time through the City's lobbyist portal. This is not feasible without adding another full-time staff person.	City Clerk	Revise the requirement of the late fine in SJMC 12.12.440.	ORD	Direct the City Attorney to draft language to revise the requirement for the City Clerk to assess late filing fees, and instead allow the City Clerk discretion.
3	Rejecting complaints outside of Board jurisdiction or does not specify allegations	The Board receives complaints that does not specifically allege violations within the Boards purview. It is costly to have the independent evaluator review and advise the Board that the complaint is outside their purview.	City Attorney	Revise SJMC 12.04.080 and City Council Resolution 79187 to further clarify the City Clerk/Board's authority to reject complaints, without prejudice, that are outside the jurisdiction of the Board or does not specifically allege a violation.	ORD & RESO	Approve City Attorney's draft language for the SJMC 12.04.080 revision and accept listed potential solution, in consultation with the City Clerk's office.
4	Nepotism Rules & Campaign Mailers	Clarify the BFCPP's jurisdiction regarding Nepotism Rules and Campaign Mailers.	City Attorney	Revise Resolution to clarify that the BFCPP does not have jurisdiction over the Nepotism Rules	RESO	Approve City Attorney's draft language to clarify the lack of the Board's jurisdiction regarding nepotism complaints.

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5	Special Municipal Election Dates	Due to recent amendments to the Elections Code, the Council no longer has the discretion to submit an initiative that qualifies for a Special Municipal Election to a Regular Municipal Election if certain criteria are met	City Attorney	Amend SJMC Chapter 12.05 to authorize the City Council to submit an initiative that qualifies for a Special Municipal Election to a Regular Municipal Election if certain criteria are met.	ORD	Defer to the City Attorney's Office to address as an ad hoc item outside of the Biennial Review.
6	PRA Appeals	Clarify the Board's process for reviewing Public Records Act Appeals	Board			Request that the City Council remove sections 12.21.430.C and 12.21.430.D from the Municipal Code.
7	Defining "Officeholder"	The category of "officeholder" is not clearly defined in the SJMC	Ad Hoc Subcommittee	Defining a category of "officeholder" in the SJMC would allow the SJMC to explicitly state what restrictions apply to officeholders and clarify where officeholders are unrestricted.		Direct the City Attorney to analyze items 7-11 and consolidate them with Councilmember Esparza's memorandum, dated November 30, 2022.
8	Clarifying Officeholder Accounts	Clarify definitions of "officeholder accounts" and "officeholder funds" within the SJMC	Ad Hoc Subcommittee	Futher define the term "officeholder funds" in SJMC 12.06.810; import or better reference the PRA definition of "officeholder account." Add language expressly allowing officeholders to fundraise controlled committees for independent expenditures (for other candidates or for ballot measures). Require that donations to a charity not be used for an independent expenditure committee acting in City elections, limit the		Direct the City Attorney to analyze items 7-11 and consolidate them with Councilmember Esparza's memorandum, dated November 30, 2022.

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				transfer to only 501(c)(3) charities.		
9	Revise Controlled Committees	The SJMC currently defines candidate-controlled committees and categorizes all other committees as independent	Ad Hoc Subcommittee	Define both candidate-controlled and officeholder-controlled committees similarly, in order to align better with the State PRA definitions. All other committees would then be independent.		Direct the City Attorney to analyze items 7-11 and consolidate them with Councilmember Esparza's memorandum, dated November 30, 2022.
10	Add Explicit Statements Allowing Contributions	Lack of clarity where the SJMC imposes no restrictions (SJMC 12.06.210)	Ad Hoc Subcommittee	Clarify that the SJMC (12.06.210) imposes no restrictions on the following: <ul style="list-style-type: none"> <li>• spending by anyone on ballot measures</li> <li>• independent expenditures by officeholders for/against (active) candidates</li> <li>• independent expenditures by non-controlled committees</li> <li>• [Note that coordination with a candidate by either officeholder-controlled or independent committees would be a violation]</li> </ul>		Direct the City Attorney to analyze items 7-11 and consolidate them with Councilmember Esparza's memorandum, dated November 30, 2022.
11	Revise Introductory Rationale	Lack of description on why contribution restrictions are not applied to officeholders and independent expenditures	Ad Hoc Subcommittee	Revise SJMC 12.06.200 to describe why contribution restrictions are not applied to officeholders and independent expenditures		Direct the City Attorney to analyze items 7-11 and consolidate them with Councilmember Esparza's memorandum, dated November 30, 2022.

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12	Disclaimers for Editorials and Commentaries	Lack of disclaimers on commentaries and editorials that the opinions of candidates are their own	Board	Incorporation of a requirement that candidates include a disclaimer at the end of editorials and commentaries describing that the opinions are their own		Direct the City Attorney to draft language addressing disclosure of unpaid campaign publications.
13	Exit Clause for Complaints	Lack of an exit clause in Resolution 79187 for a complainant to revoke their complaint	Board	Incorporation of an exit clause in Resolution 79187 to allow for complainants to revoke their complaint		Direct the City Attorney to draft language to permit a complainant to revoke their complaint.
14	Campaign Committee Loans	Reviewing limitations of candidates to make loans to their campaign committee	City Attorney	Strike SJMC 12.06.295.D		Accept the City Attorney's recommendation to strike section 12.06.295.D from the Municipal Code.

## Ideas for SJMC Revisions

### Motivation

After considering the recent complaint against Common Good Silicon Valley, several areas became apparent for improved clarity in the San Jose Municipal Code section (SJMC 12.06) regarding campaign finance restrictions. These areas largely centered around three main themes, which are interrelated to some degree.

The first idea is that it would be clearer if the SJMC explicitly listed what types of contributions are permitted (i.e. unrestricted), rather than implicitly permitting anything not explicitly prohibited. When the code is silent on a specific area, it leaves open the possibility that State restrictions may apply or may interact with other SJMC provisions. If the code explicitly said that classes of contributions are permitted (with no limits), then any ambiguity would be avoided. For example, expressly stating that officeholders may make independent expenditures supporting or opposing other candidates would likely have preempted the recent complaint.

The second idea is that it would be useful to align the SJMC and State notions of *candidate* better. One simple way to do this is to have the SJMC define a category of *officeholder* and then explicitly state what restrictions apply to officeholders. This is because the state definition of *candidate* subsumes both the “active candidate” notion as defined in the SJMC and the category of officeholders. The state Political Reform Act (PRA) defines *candidates* as including officeholders until they leave office and no longer have to file financial disclosures. Hence, any State provisions that apply to the State notion of *candidates* would apply to the combination of SJMC categories for *candidates* and *officeholders*.

Finally, the third idea is to consider the structure that Common Good Silicon Valley evolved into by the time of its third amended filing. Namely, this is an independent expenditure committee (PAC) that is sponsored by a 501(c)(4) nonprofit organization, which is much more opaque than the original PAC structure (a committee controlled by an officeholder) and is essentially the classic structure of “dark money” political contributions. Although it would be unconstitutional to prohibit such structures entirely, they still pose dangers to campaign finance integrity of the form addressed in SJMC 12.06. Hence, it might be worth considering whether additional disclosure requirements on independent committees would serve the public interest.

### Proposed Changes

#### (1) Defining Officeholder

As described above, if the SJMC defined a category of *officeholder*, then the state’s definition of candidate would map onto the combination of SJMC (active) *candidates* plus *officeholders*. This would then allow the SJMC to explicitly state what restrictions apply to officeholders and clarify where officeholders are unrestricted.

Defining an officeholder is not likely to be difficult. The period would start when being sworn into office and would run through the last reporting period after leaving office. There might perhaps be some overlap between the two (e.g. where the existing candidate rules allow for a 180-day post-campaign period), but most likely that wouldn't cause any legal ambiguity.

## (2) Clarifying Officeholder Accounts

The State defines officeholder accounts in [85316\(b\)](#). This is an account for fundraising for “governmental expenses” (see [89512\(a\)](#)) incurred while holding office (e.g. publishing newsletters, giving speeches, travel). As previously discussed, the City provides a budget for these sorts of expenses and therefore prohibits officeholder accounts in [SJMC 12.06.810](#). However, this surface level of analysis misses some important elements of context.

Under the State PRA, prior campaign funds can be rolled into these officeholder accounts and [85316\(b\)\(3\)](#) allows the officeholder accounts to be rolled into future campaign accounts. As detailed in the FPPC [2012 Quintana](#) and [2018 Kaufman](#) letters, the [85316](#) contribution limits to officeholder accounts apply only to state officials and it is up to local municipal jurisdictions to set the corresponding limits for local officeholders (if any). Those letters also describe examples of legitimate officeholder expenses in some detail. However, should an officeholder not seek reelection or campaign for another office, the PRA considers any balance in the officeholder account as surplus funds and prohibits transfer to another state candidate. Section [89519\(b\)\(5\)](#) allows only:

Contributions to support or oppose a candidate for federal office, a candidate for elective office in a state other than California, or a ballot measure.

Hence, the officeholder accounts (and any officeholder-controlled committees) serve as a parking ground for campaign funds in between active election periods, and the public has an interest in regulating that these accounts do not become general “slush-funds” used for any sort of political purpose.

The SJMC sidesteps this problem by banning officeholder accounts and expressly prohibiting the rollover of campaign funds into any other account. Outside of the post-election legal defense funds outlined in [SJMC 12.06.1100](#), all campaign funds are considered surplus funds 90 days after the post-election reporting period. [SJMC 12.06.720](#) allows for surplus campaign funds to be transferred to a political party, a ballot-measure committee, or a bona fide charity, but it does not allow for the funds to go to another City candidate or to an independent expenditure committee. In light of the 501(c)(4) sponsored committees discussed below, the donation of surplus funds to charities could potentially present a loophole allowing for transfer to a PAC. This could potentially be addressed with language similar to the existing limitations on donations to political parties (i.e. those funds must not be used to support or oppose candidates for elective office). Specifically, we could require donations to a charity not be used for an independent expenditure committee acting in City elections, or else we could limit the transfer to only 501(c)(3) charities.

The existing language in [SJMC 12.06.810](#) seems mostly effective in prohibiting fund-raising for governmental expenses (the primary role of officeholder accounts in the PRA). The term *officeholder funds* in the current text probably needs further definition and perhaps the PRA definition of

*officeholder account* could just be imported or better referenced. In addition, we should add language expressly allowing officeholders to fundraise controlled committees for independent expenditures (for other candidates or for ballot measures). A potential sketch of such rewording is outlined here:

### **12.06.810 - Officeholder account prohibited.**

~~No city officeholder, or any person or committee on behalf of a city officeholder may establish an officeholder account or an account established under the Political Reform Act, California Government Code Section 81000 et seq. as amended, for the solicitation or expenditure of officeholder funds unless otherwise provided in San José Municipal Code Section 12.06.1100 et seq. Nothing in this section shall prohibit an officeholder from spending personal funds on official or related business activities.~~

An officeholder account is defined as a political-spending account or an officeholder-controlled committee, whose purpose is to spend funds on governmental expenses for official or related business activity. This definition is the same as the officeholder accounts defined in 85316(b) of the Political Reform Act and California Government Code Section 81000 et seq. as amended.

No city officeholder, or any person or committee on behalf of a city officeholder may establish an officeholder account or solicit or raise funds for governmental expenses incurred by the officeholder while holding office. Nothing in this section shall prohibit an officeholder from spending personal funds on official or related business activities. Furthermore, nothing in this section shall prohibit officeholders from soliciting funds for the City general fund or for specific city projects.

This prohibition does not apply to officeholder-controlled committees or accounts created for the purpose of independent expenditures supporting or opposing other candidates or ballot measures.

### (3) Revise Controlled Committees

Currently, the SJMC defines candidate-controlled committees and categorizes all other committees as *independent*. The proposal would be to define both candidate-controlled and officeholder-controlled committees similarly (i.e. that the candidate or officeholder has significant influence on spending decisions) in order to align better with the State PRA definitions. All other committees would then be *independent*.

The State defines controlled committees in [82016](#), with essentially the same definition as SJMC but with the State's broader category of candidates. In particular, this section states:

A candidate or state measure proponent controls a committee if the candidate or state measure proponent, the candidate or state measure proponent's agent, or any other committee the candidate or state measure proponent controls has a significant influence on the actions or decisions of the committee.

The existing Form 410 has a field for the controlling candidate or officeholder. Presumably, this field would be required to be filled in if an officeholder is actually exerting significant influence on the committee's spending. Note that the Form 460 has a selection box for General Purpose Committee or Officeholder/Candidate Controlled Committee. Presumably a mismatch between the committee type on these forms would be flagged as deserving investigation (but it's unclear if any mechanism for such

flagging exists). In the case of Common Good Silicon Valley, this mismatch was not raised as part of the complaint to our board (although presumably this would be a matter for the jurisdiction of the State FPPC in any event).

#### (4) Add Explicit Statements Allowing Contributions

We should spell out that the SJMC imposes no restrictions on the following (perhaps appending this to [SJMC 12.06.210](#)):

- spending by anyone on ballot measures
- independent expenditures by officeholders for/against (active) candidates
- independent expenditures by non-controlled committees
- [Note that coordination with a candidate by either officeholder-controlled or independent committees would be a violation]

#### (5) Revise Introductory Rationale

There is some discussion (in [SJMC 12.06.200](#)) of the rationale for enacting tighter restrictions on contributions to City candidates, but this falls silent on why restrictions are not applied to officeholders and independent expenditures. It goes on to clarify that no restrictions apply to ballot measures, but never justifies why contributions in support of a ballot measure might not also create the appearance of “undue or improper influence” that contributions to candidates do. Perhaps there should be some further discussion of the aim of reducing the potential for quid pro quo corruption, of the tradeoffs of campaigning limits vs free speech, or some justification of why the lines are drawn where they are.

Here is a possible revision of that section:

#### **12.06.200 - Intent and purpose.**

It is the intent of the city council of the City of San José in enacting this chapter to place realistic and enforceable limits on the amount individuals and independent committees may contribute to political campaigns in municipal office elections for the purpose of preventing the perception by the public that campaign contributors exercise undue or improper influence over elected officials.

~~At the same time, it would violate the free-speech rights of candidates, officeholders, or members of the public to restrict spending on ballot measures or other broader issues confronting the city. Hence, the contribution limits of this chapter apply only to contributions to candidates and do not apply to individuals and committees whose sole objective is the passage or defeat of ballot measures.~~

~~In order to achieve this purpose it is not necessary to, nor is it the city council's intent to, impose limitations on individuals and committees whose sole objective is the passage or defeat of ballot measures.~~

Similarly, contributions to officeholder-controlled committees for the purpose of independent expenditures supporting or opposing other candidates risk the appearance of undue influence, but



are difficult to restrict without limiting free-speech rights. Therefore, such contributions are not limited but are required to be disclosed.

#### (6) Disclosure for Independent Committees

As described above, it would be unconstitutional to limit contributions to independent committees, but it seems feasible to require additional disclosure. Currently, the Form 410 filings require listing the *treasurer*, *assistant-treasurer*, and *principal officers* of the committee. It is unclear, however, if this set of officers would include all persons with a “significant influence over spending decisions” of the committee. If feasible, extending a disclosure requirement to list all persons or organizations with significant influence in spending would certainly help to improve the anonymity problem around “dark money” contributions. Presumably, this would only apply to independent PACs supporting/opposing City elected officials. (Maybe it could later be extended to supporting/opposing City ballot measures?)

There is a question about whether the “significant influence” standard is sufficiently clear-cut to use here. It seems the most likely standard, since there must already be case-law precedent around it for defining independent committees. However, it may be worth exploring whether a tighter standard could be used. For example, perhaps any communications with candidates, officeholders, or lobbyists could be required to be reported. It could potentially also be useful to look for any disclosure precedents used successfully in other municipal jurisdictions. For example, the City of Santa Clara has lowered the threshold for reporting of independent expenditure committees from \$50,000 to \$100 in order to cover more of these PACs.

In any event, what set of measures are most effective and practical needs further legal research before we can recommend specific changes to address this issue. However, the recent example suggests this type of PAC will become more prominent in City campaigns and it would be best to address additional disclosure requirements before future complaints come to us about such PACs.

## Supporting Statement

### Disclaimers for Editorials and Commentaries

This topic arose from discussion around the Barco complaint in Dec 2022. The Municipal Code (SJMC) requires a well-defined set of disclosures on any advertising for campaigns, but there are no current specifications for unpaid publications by campaigns. In a traditional newspaper, an unpaid op-ed written by a candidate or other campaign spokesperson would contain an attribution letting the public know the column came from an active campaign. However, similar publications on the Internet do not always follow the same norms and this could produce some potential confusion. In particular, there seems to be a public interest in distinguishing official campaign statements from ones that could be seen as impartial third-party endorsements. Hence, the Board recommends studying the feasibility of an addition to the SJMC that would require disclosure/attribution of publications like op-eds, blogs, or social media posts if they come from a candidate or another representative from the candidate's campaign organization.