



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nora Frimann
City Attorney

SUBJECT: SEE BELOW

DATE: May 17, 2023

SUBJECT: APPROVE THE PROPOSED ORDINANCE TO REVISE SECTION 12.06.030 OF TITLE 12 OF THE SAN JOSE MUNICIPAL CODE

REASON FOR REPLACEMENT

This Replacement Memorandum removes from the original memorandum the discussion of a proposed revision to the San José Revolving Door Policy under Title 12 of the San Jose Municipal Code which would prohibit former City Officials or designated employees from serving as an officer in an independent expenditure committee for one year following the end of their term or termination of employment with the City. Additionally, the proposed ordinance which accompanies this memorandum has been updated to remove the proposed revision to Section 12.10.030 of Title 12 of the Municipal Code. The proposed revision to Section 12.06.030 discussed in the original memorandum remains unchanged and is contained herein.

RECOMMENDATION

Approve an ordinance amending Section 12.06.030 of Title 12 of the San Jose Municipal Code entitled Municipal Campaign and Officeholder Account to amend the definition of a candidate to conform with State Law.

BACKGROUND

On November 30, 2022, the Rules Committee approved direction to the City Attorney's Office ("CAO") to return to City Council with an ordinance that would address the following issues:

1. Align the SJMC's definition of a "candidate" and "candidate-controlled committee" with the California Political Reform Act Sections 82007 and 82016 as well as California Code of Regulations § 18404.1 and 18404;
2. Clarify that the Municipal Code's established campaign contribution limits and the campaign fundraising period also apply to all "candidate-controlled committees", including those that elect to make independent expenditures,

in accordance with recent California Fair Political Campaigns Commission findings; and

3. Clarify “candidate-controlled committee” to include both direct and indirect control by a “candidate”, such as an independent expenditure committee run by a staff member who reports to a current City Official now defined as a “candidate”.
4. Amend the Municipal Code’s Revolving Door Policy to prohibit former City officers and staff from serving as officers within an independent expenditure committee for one year following termination of office or employment.

A. The California Political Reform Act and the San Jose Municipal Code

The impetus for the direction from the Rules Committee arises from distinctions between campaign law regulations imposed by the State and those imposed by the City. The Political Reform Act (“PRA”) sets out statewide regulations which apply to the campaign activities and the personal financial affairs of state and local officials. The PRA also permits the City to enact a campaign ordinance that provides for additional or different campaign requirements for candidates and committees acting exclusively in the City if the provisions are stricter than those imposed by the PRA. Under this authority, the City enacted a campaign ordinance which is codified in Title 12 of the San Jose Municipal Code (“SJMC”). Candidates for elected office in the City must comply with the PRA and the stricter provisions of the City’s campaign ordinance. Both the PRA and the SJMC impose restrictions on the types of accounts a candidate may have. However, the SJMC and the PRA define “candidate” differently, and as a result, the regulatory scope of the restrictions imposed by the SJMC and the PRA differs. Due to this incompatibility, an elected official could control a committee that makes independent expenditures, without violating either the SJMC or the PRA.

B. Common Good Silicon Valley

In the lead up to the 2022 election cycle, former Mayor Sam Liccardo and a committee, Common Good Silicon Valley, solicited contributions to the committee’s bank account and subsequently made “independent expenditures” in support of other candidates. These “independent expenditures” as defined by both the PRA and the SJMC, comprise expenditures for a communication which expressly advocates the election or defeat of a clearly identified candidate, but which are not made to, or at the behest of, that affected candidate.

Prior to the formation of Common Good Silicon Valley, former Mayor Liccardo sought clarity from the California Fair Political Practices Commission (“FPPC”), on whether he was permitted under state law to form a committee for the purposes of collecting contributions to make independent expenditures in support of other candidates. The

FPPC advised that such committees are permitted so long as the contributions are made to the sole account maintained by a candidate, as defined under state law to include an elected officer. The FPPC did not opine on whether such activity would be permissible under the City's ordinance.

On May 26, 2022, a citizen filed a complaint with the City Clerk alleging the activity of Mayor Liccardo and Common Good Silicon Valley violated Title 12. Specifically, the complaint alleged that Mayor Liccardo and Common Good Silicon Valley violated:

- the SJMC's campaign contribution collection period restrictions by collecting, accepting, and depositing contributions after the end of the campaign and post-election collection periods codified under Title 12;
- the SJMC's contribution limits by accepting contributions in excess of the legal limits and failing to return or donate those excess funds within 30 days; and
- an SJMC prohibition on the creation of an "officeholder account."

Following receipt of the complaint, the City Clerk forwarded the complaint to the BFCPP's independent evaluator, Steven Miller of Hanson Bridgett, LLP. Mr. Miller authored a report on the alleged violations dated August 29, 2022. Mr. Miller's report was focused only on alleged violations of Title 12 and not on potential violations to the PRA, which is outside the purview of the BFCPP. The report included an analysis of the alleged violations and a recommendation that the BFCPP find that no violations of Title 12 occurred.

In reaching this recommendation, the report concluded that contributions to Common Good Silicon Valley were not made to a "candidate" as regulated by the City's campaign ordinance. Mr. Miller opined that Mayor Liccardo was not considered a "candidate" under the current definition in the SJMC. He also opined that the SJMC's campaign contributions restrictions were not constructed to impose limitations on contributions received by an officeholder which are utilized to fund independent expenditures in support of other candidates. Under the SJMC's current structure, these contributions are neither to a "candidate" or to a specific "campaign." Finally, Mr. Miller's report concluded that Good Silicon Valley's bank account did not constitute a prohibited "officeholder account" under the SJMC as the contributions were not utilized as officeholder funds expended on official or related business activities.

This report was presented to the BFCPP and a hearing was conducted on September 8, 2022. Following the hearing, the BFCPP accepted the recommendation of the independent evaluator by unanimous vote and concluded that no violations of Title 12 had occurred. Following the finding of the BFCPP, the November 30, 2022, Rules Committee directed the City Attorney's Office to modify the SJMC to impose regulations on independent expenditure committees created by elected officials, and to regulate former city officials and employees from working for such committees immediately after leaving city office or employment. The proposed ordinance amendment would

implement one of these recommendations. The proposed ordinance excludes revisions to the Revolving Door Policy to exclude a former City officer and staff from serving as officers within an independent expenditure committee because such a limitation could be challenged as an unconstitutional infringement on the First Amendment right to free speech.

ANALYSIS

The proposed ordinance would amend the definition of a “candidate” under the SJMC to mirror the same definition contained within the PRA. Under the PRA, a “candidate” includes “an elected officer” and mandates that candidates retain their status as a candidate throughout the time that they are in office and until their filing obligations are terminated. (Government Code Sections 82007(a)(3) and Section 82007(b)) The current SJMC definition of a “candidate” does not include “elected officers.” If the proposed ordinance is approved:

- An elected officer of the City would be considered a “candidate” under the SJMC for the entirety of the time they are in office; and
- With the exception of ballot measure committees, any committee which is controlled directly or indirectly by a candidate or which acts jointly with a candidate, would constitute a “controlled committee” and be subject to the campaign contribution limits and “collection periods” of Chapter 12.06 of the SJMC.

CONCLUSION

The proposed ordinance to revise Section 12.06.030 should address the direction from the City Council for the reasons stated above.

NORA FRIMANN
City Attorney

By /s/ Matthew Tolnay
MATTHEW TOLNAY
Deputy City Attorney

For questions, please contact Matthew Tolnay, Deputy City Attorney, at (408) 535-1900.

cc: Jennifer Maguire