



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: SEE BELOW

DATE: October 11, 2017

SUBJECT

CONSIDERATION OF AN ORDINANCE TO AMEND THE CITY'S GIFT ORDINANCE, UNDER SAN JOSE MUNICIPAL CODE CHAPTER 12.08, AS DIRECTED BY COUNCIL AT ITS AUGUST 15, 2017 MEETING.

RECOMMENDATION

Approve an ordinance amending the Gift Ordinance to strike the City's exceptions for allowable gifts and incorporate the exceptions for allowable gifts under the Political Reform Act while maintaining a \$50.00 gift limit.

Please note: Approval of this item requires 8 or more affirmative votes (2/3).

OUTCOME

Approval of the amendments to the Gift Ordinance will strike the City's exceptions for allowable gifts and incorporate the State exceptions for allowable gifts while maintaining a \$50.00 limit. In general, this would relax the ethical standard for accepting gifts, but, as discussed further, there are circumstances where the ethical standard for accepting gifts may become stricter.

BACKGROUND

In the *Mayor's 2015 Biennial Ethics Review and Recommendations*, the Board of Fair Campaign and Political Practices ("BFCPP"), then Ethics Commission, was directed "to recommend revisions to the Gift Ordinance [SJMC Chapter 12.08] to better align with the State gift rules and simplify the compliance with conflicting rules" because "the City's current Gift Ordinance does not align with State-level rules and can be confusing to interpret."

Following this direction, the BFCPP, in March 2017, recommended changes to the Gift Ordinance for Council consideration. The draft ordinance was presented to Council on June 20, 2017. Before the Council meeting, Mayor Liccardo and Councilmember Diep each submitted memoranda proposing a change to BFCPP's recommendations. Mayor

Liccardo proposed adopting the BFCPP's recommendations, but rejecting any increase to the gift dollar limit. Councilmember Diep proposed repealing the Gift Ordinance and following only State law related to gifts.

At the June 20, 2017 meeting, the Council adopted Councilmember Diep's proposal and passed for publication an ordinance to repeal the Gift Ordinance. However, when the repeal ordinance came before the Council for final adoption on June 27, 2017, the Council deferred the item to August 15, 2017 for further discussion.

At the August 15, 2017 meeting, the Council directed the City Attorney to draft an ordinance amending Title 12 of the San José Municipal Code to align the Gift Ordinance with the gift regulations under the Political Reform Act, but maintain the \$50 gift limit.

As a reminder, the BFCPP recommended the following changes to the Gift Ordinance:

- Revise the definition of "gift" to be consistent with the definition in the Political Reform Act.
- Strike Exceptions (SJMC 12.08.030.B-J, L, and M and 12.08.040.A) as redundant or inconsistent with the Political Reform Act.
- Refer to a "person subject to the decision-making or recommending authority," in SJMC 12.08.010, as a "Restricted Source."
- Increase the gift exception limit to allow the acceptance of gifts with a value of \$250.00 or less, and beginning January 1, 2019 biennially adjust the gift limit to reflect any changes in the Consumer Price Index for all Urban Consumers in the San Francisco-Oakland-San José area as published by the U.S. Department of Labor, Bureau of Statistics.
- Modify SJMC 12.08.030.K to allow for "commemorative gifts."
- Make technical changes and reorganize Chapter 12.08.

For more background and analysis, please refer to the memoranda submitted to Council on August 15, 2017 and June 6, 2017.

ANALYSIS

The analysis will discuss the requirements of the City's Gift Ordinance, the requirements of the gift regulations in the Political Reform Act, the proposed revisions to the City's Gift Ordinance, and other considerations if the revisions were adopted.

1. City's Gift Ordinance Requirements

The City has had its own gift regulations since the 1980's. The current Gift Ordinance was adopted in 1993 (Ord. 24499) as part of a comprehensive ethics ordinance establishing Title 12. In 2004, the Gift Ordinance was amended (Ord. 27258) to clarify that the reporting and disqualification requirements of the Political Reform Act applied; and to increase the gift limit exception from \$15.00 to \$50.00 and to make clarifying and technical changes. No revisions have been made since 2004.

Under the Gift Ordinance, City officials and designated employees ("Form 700 filers") cannot "accept any gift, directly or indirectly, from any person who is subject to the decision-making or recommending authority of such officer or employee, except as specifically provided in [the Gift Ordinance]." Exceptions to the Gift Ordinance include, among others, gifts valued at less than \$50.00, informational materials, and wedding gifts.

As of June 2017, approximately 1681 officials, employees, and consultants are Form 700 filers subject to the Gift Ordinance. In addition, the City Employee Gift Policy, under section 1.2.2, extends the limits on gift acceptance in the Gift Ordinance to all employees.

2. Political Reform Act Gift Regulations

In contrast to the City's Gift Ordinance, the Political Reform Act does not impose a ban on accepting gifts. Instead, it prohibits Form 700 filers from accepting gifts from a single source with a value totaling more than \$470.00 in a calendar year. If the gift or gifts have a value of \$470.00 or less, it can be accepted. And all gifts accepted with a value totaling \$50.00 or more must be disclosed in an annual Form 700 report.

Although there have been no revisions to the Gift Ordinance since 2004, the Political Reform Act has been revised in that time; specifically, to increase the dollar limit with inflation and to expand the exceptions for what is not considered a "gift." These exceptions apply to a range of activities, including:

- gifts exchanged between dating partners,
- gifts from long-time personal friends when the gift is unrelated to the official's duties, and
- free admission to a ticketed event for the official and one guest where the official performs a ceremonial role.

Generally, when an exception applies the gift does not need to be reported and does not count against the \$470.00 gift limit. However, there are circumstances where a public official may have to recuse himself or herself from any decision involving the donor if the gift or gifts have a value of \$470.00 or more. Despite the City's own Gift

Ordinance, Form 700 filers must also comply with the gift regulations in the Political Reform Act.

3. Other Considerations

a. When Can Form 700 Filers Accept a Gift?

While the proposed amendments to the Gift Ordinance generally relax the ethical standard for accepting gifts in San José, there are circumstances where the ethical standard will be stricter. One area would be the acceptance of tickets to events.

To understand why the proposed ordinance would lead to a stricter ethical standard for accepting tickets, it is important to discuss when Form 700 Filers can legally accept a gift. Before accepting any gift, a Form 700 Filer must ask whether the Gift Ordinance applies. If the Gift Ordinance applies, a Form 700 Filer must then ask whether there is an exception that would allow the gift to be accepted. If there is no exception, a Form 700 Filer cannot accept the gift.

But even when an exception applies under the Gift Ordinance, that does not necessarily mean Form 700 Filers can accept the gift. Form 700 Filers must also review State law requirements before accepting a gift. Under State law, the value of the gift is critical to whether it can be accepted. The Form 700 filer must look to whether the gift is worth more than \$470 or whether the Form 700 has already accepted a gift from the same donor during the calendar year. As previously mentioned, if the gift or cumulative value of all gifts received from one donor in a calendar year exceed \$470.00, Form 700 Filers usually cannot accept the gift, even though it would be allowed under the Gift Ordinance.

Finally, State law has its own gift exceptions. If a State law exception applies, the gift may not need to be reported, may not count against the \$470.00 limit (meaning the Form 700 Filer can accept a gift worth more than \$470.00), or both.

b. Current Rules Under the Gift Ordinance for Accepting Tickets to Events.

The Gift Ordinance allows Form 700 Filers to accept any gift with a value of less than \$50.00 if the total value of all such gifts received from one donor does not exceed \$50.00 in a calendar year. Under this exception, a Form 700 Filer may accept any tickets valued at less than \$50.

In addition, the Gift Ordinance currently allows Form 700 Filers to accept **one** free ticket to a ceremonial, political, civic, and cultural or community function for their personal use if given by the sponsor of the event. "For example, cultural events include theatrical

productions and art exhibits; political events include political fundraisers.” (SJMC § 12.08.030.F.)

However, there are limits to this exception. First, this exception does not apply to “regularly scheduled athletic events,” like tickets to professional sporting events. (SJMC § 12.08.030.F.1.) This means if a local sports team were to give a free ticket valued at \$50 or more to a game, a Form 700 Filer cannot accept it.

Second, the ticket must come from the sponsor of the event. (SJMC § 12.08.030.F.2.) For example, say a local music organization offered a Form 700 Filer one free ticket valued at \$50 or more to a concert. A concert is a “cultural” event, and as sponsor of the event the local music organization could give the free ticket and the Form 700 Filer can accept it. But if someone other than the local music organization gives the ticket, the Form 700 Filer would not be able to accept it under this exception since it was not given by the sponsor of the event.

c. State Gift Regulations for Accepting Tickets.

State law handles tickets differently than the Gift Ordinance. Under State law, Form 700 Filers can accept tickets to events, even sporting events, if their face value is less than \$470.00 and the tickets are reported on the Form 700 if worth \$50.00 or more. Say the local music organization in the above example offered a Form 700 Filer two free tickets each worth \$100.00. The Gift Ordinance allows the Form 700 Filer to accept only one ticket, but State law would allow the Form 700 Filer to accept both tickets since their total value is less than \$470.00. The value of each ticket would also need to be reported on the Form 700.

State law also has its own exceptions for tickets. They are:

- **Unused tickets:** Tickets that are received, but not used do not need to be reported and do not count against the \$470.00 limit.
- **Campaign or nonprofit fundraisers:** A Form 700 Filer may accept two tickets to attend a political fundraiser or a fundraiser for a 501(c)(3) given by the committee or organization hosting the fundraiser. State law considers such tickets to have no value. Tickets to political fundraisers and 501(c)(3) fundraisers do not count against the \$470.00 limit and do not need to be reported.
- **Ceremonial Role:** A Form 700 Filer may accept two tickets to an event where the official performs a ceremonial role, so long as the City complies with its Ticket Distribution Policies and the City reports the tickets on a Form 802. A “ceremonial role” is defined as an act performed at an event at the request of the host of the event where, for a period of time, the focus of the event is on

the act performed by the official. Examples include: throwing out the first pitch at a baseball game; cutting a ribbon at an opening; making a presentation of a certificate, proclamation, award, or other item, such as the key to the city. Such tickets do not count against the \$470.00 limit and do not need to be reported on the Form 700.

d. Impact of Proposed Change to Gift Ordinance on Acceptance of Tickets.

If the Council's direction were implemented, the ethical standard for accepting gifts would generally be reduced, but with respect to tickets it would be stricter than the current Gift Ordinance. That is because all gifts, including tickets, would be capped at \$50.00 unless a State law exception applied. And with respect to tickets, there are only a few State law exceptions explicitly dealing with tickets; limited to political and 501(c)(3) fundraisers and when performing a ceremonial role.

For example, once again say the local music organization offered a Form 700 Filer two free tickets to a concert each with a face value of \$100.00, but only to watch the performance and not to perform a ceremonial role. If the proposed change to the Gift Ordinance were adopted, the Form 700 Filer could not accept any tickets because none of the State law exceptions would apply and each ticket costs more than \$50.00. If the Form 700 Filer wanted to go, he or she would need to pay for the tickets.

If the Council wants to maintain the status quo with respect to tickets, the Council may want to consider keeping the City's exception allowing acceptance of one free ticket given by a sponsor of an event to ceremonial, political, civic, and cultural or community function, except sporting events. Alternatively, the Council could revisit increasing the dollar limit of gifts generally or specific to tickets to allow for greater flexibility when accepting tickets.

PUBLIC OUTREACH

The Board of Fair Campaign and Political Practices discussed the Gift Ordinance and potential revisions on June 8, 2016, January 11, 2017, and February 8, 2017. The Council discussed the Gift Ordinance on June 20, 2017, June 27, 2017, and August 15, 2017. This memorandum has been posted on the City Clerk's website as a part of the October 24, 2017 City Council Agenda.

COORDINATION

This memorandum has been coordinated with the Office of the City Clerk.

HONORABLE MAYOR AND CITY COUNCIL

October 11, 2017

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COMMISSION RECOMMENDATION

The recommendations discussed above were approved at the February 8, 2017 Board of Fair Campaign and Political Practices meeting.

CEQA

Not a Project, File No. PP10-068(b). General Procedure & Policy Making, Municipal Code or Policy.



MARK VANNI

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For questions, please contact Mark Vanni, Deputy City Attorney, at (408) 535-1997.