



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nora Frimann
City Attorney

SUBJECT: SEE BELOW

DATE: November 5, 2021

SUBJECT

OPTIONS FOR CAMPAIGN FINANCE REGULATIONS RELATED TO PUBLIC FINANCING, FOREIGN INFLUENCE IN ELECTIONS, AND OTHER LIMITS ON CORPORATIONS AND OTHER ENTITIES.

RECOMMENDATION

- (a) Accept this memorandum discussing options for regulations related to public campaign financing, prohibitions on campaign contributions from foreign-influenced business entities, and other limits on corporations and entities with conflicts of interest donating to candidates for office.
- (b) Provide direction to staff to further develop or implement the options discussed in this memorandum.

OUTCOME

Approval of this action will provide direction to staff regarding the options for campaign finance regulations discussed in this memorandum.

BACKGROUND

On April 20, 2021, Council directed Staff to return with options for new regulations, taking action as allowed under current state and federal law, to bring greater equity to campaign financing, make campaign financing more representative of the voters of the City of San José, and limit corruption, or the appearance of corruption, from corporate and special interest spending on municipal elections, including:

- (a) Developing a pilot program for public financing of elections, including analysis of recent laws and proposals in Seattle, San Francisco, and Oakland.
- (b) Implementing prohibitions on foreign-influenced committees or donors from making independent expenditures or contributing to campaigns or independent expenditure committees. This would bar committees and donors which meet a

threshold of foreign ownership or contributions from being able to influence local elections, modeled after legislation recently passed in Seattle.

- (c) Limit corporations and entities with conflicts of interest from donating to candidates, specifically exploring contribution limits:
- i. Proposed in the Fair Elections Initiative of 2020 to prohibit donations from donors, including their lobbyists, seeking large City contracts or discretionary approval of planning and land use decisions on large developments, as well as donors who are regulated under the City's tenant protection ordinances; and
 - ii. A policy based on California Government Code Section 84308 that governs members to the VTA and other regional boards, requiring recusal where a matter involves a person or entity that has made a contribution in the prior 12 months, and prohibiting such contributions for three months following a decision on that matter.

The first part of this memorandum discusses the First Amendment to the United States Constitution and how it affects campaign finance regulation. The second part discusses public financing of campaigns. The third part discusses prohibiting campaign contributions from foreign-influenced business entities. And the fourth part discusses other limits on corporations and entities with proscribed conflicts of interest donating to candidates for office.

ANALYSIS

1. The First Amendment and Campaign Finance Regulation.

The United States Supreme Court has held that limits on expenditures by political campaigns and contributions to campaigns interferes with the speech and associational rights under the First Amendment.¹ The Court does not permit limits on political expenditures unless tied to the acceptance of public funds or applied to foreign nationals or foreign business entities.²

However, limits on contributions to candidates can survive judicial scrutiny if closely drawn to prevent *quid pro quo* corruption or the appearance of *quid pro quo* corruption.³ According to the Supreme Court, *quid pro quo* corruption, or the appearance of it, is one

¹ *Buckley v. Valeo* (1976) 424 U.S. 1.

² *Id.*, see also *Citizens United v. FEC* (2010) 558 U.S. 310, *Bluman v. Federal Election Com'n* (2011) 800 F.Supp.2d 281.

³ *McCutcheon v. Federal Election Com'n* (2014) 572 U.S. 185, 192. "Quid pro quo" corruption is defined as "a direct exchange of an official act for money" or "dollars for political favors" and the "appearance" of quid pro quo corruption as "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions to particular candidates."

interest that can justify limits on campaign contributions to candidates. The other limit is the promotion of self-governance when applied to contribution limits from foreign nationals.⁴ Other objectives, such as equalizing the financial resources of candidates or “getting money out of politics,” are not permissible considerations for limiting campaign contributions.⁵

The risk of actual or perceived *quid pro quo* corruption must also be more than “mere conjecture” and supported by some factual basis—like a recent scandal or history of corruption—to justify the need for limits on campaign contributions.⁶

2. Public Financing.

Charter cities in California are permitted to publicly finance political campaigns for local office under the “home rule” provision of the California Constitution.⁷ Under this authority, San Francisco, Oakland, and Los Angeles have implemented such programs, which are discussed below.⁸ We also analyze the “democracy voucher” program in Seattle, Washington, and discuss a pilot program for public campaign financing in San José as requested by Council.

The analysis here is general and does not cover every requirement for each program. Our intention is to provide the Council with a sense of the different requirements that could be implemented in a public financing program. Some of the figures referenced in this memorandum may not reflect current expenditure limits or budgetary appropriations for future elections in these cities.

2.1. City and County of San Francisco Public Financing Program.

In 2000, San Francisco voters created a voluntary system of limited public financing for candidates to the Board of Supervisors.⁹ In 2006, this program was extended to Mayoral candidates. Through this program, which is administered by the San Francisco Ethics Commission, partial public financing is provided to candidates who are opposed by another candidate who has qualified for public financing or has received contributions and/or made expenditures of \$10,000 or more.

To receive public funds, candidates must raise a certain amount from San Francisco residents, which varies by the office sought and whether the candidate is an incumbent.

⁴ *Bluman, supra*, 800 F. Supp.2d at 288-289.

⁵ *McCutcheon, supra*, 572 U.S. at 192.

⁶ *Lair v. Motl* (2017) 873 F.3d 1170, 1178, see also *Schickel v. Dilger* (2019) 925 F.3d 858, 870.

⁷ *Johnson v. Bradley* (1992) 4 Cal.4h 389.

⁸ Sacramento also has a public campaign finance program but has not funded the program since Fiscal Year 2010/2011: <https://www.cityofsacramento.org/Clerk/Elections/9-Campaign-Finance>.

⁹ San Francisco Ethics Commission Website, Public Financing Program: <https://sfethics.org/disclosures/campaign-finance-disclosure/campaign-finance-disclosure-public-financing>.

Criteria for eligibility is extensive and includes: agreeing to a spending limit of \$350,000 for Board of Supervisors and \$1,700,000 for Mayor (subject to adjustment by the San Francisco Ethics Commission), agreeing not to accept any loans except from yourself, and not loaning or donating more than \$5,000 of your own money to your campaign. There are also additional filing requirements and mandatory audits.

Board of Supervisor candidates who qualify receive an initial grant of \$60,000 and mayoral candidates receive \$300,000.¹⁰ Candidates may be eligible to receive additional funds based on the private contributions they raise through the submission of a matching request payable at a 6 to 1 rate up to \$150 per private contribution by a City resident.¹¹ This means if a San Francisco resident contributed \$150 to a local candidate participating in the program, the City would match the contribution with \$900 in public funds, raising the total value of the contribution to \$1,050.

For the 2020 election, candidates eligible to receive public financing could receive a total of: \$1,200,000 (Non-Incumbent Mayoral Candidates), \$1,185,500 (Incumbent Mayoral Candidates), \$255,000 (Non-Incumbent Supervisorial Candidates) or \$252,000 (Incumbent Supervisorial Candidates). In 2020, over three million dollars in public funds was disbursed to eligible candidates.¹²

San Francisco funds its program through an Election Campaign Fund established in its Campaign Finance Reform Ordinance.¹³ The ordinance requires an annual allocation based on a formula of \$2.75 per resident with additional allocations required in the case of a vacancy in office, but the total amount that can be allocated is capped at \$7 million and no more than 15 percent of the total in the Fund for any given election may be used for administering the program.

2.2. City of Oakland Limited Public Financing Program.

In 1999, the Oakland City Council passed the Limited Public Financing Act to offset certain campaign expenses for any candidate for the office of Councilmember. Candidates for Citywide offices are not eligible for public financing in Oakland.¹⁴

To qualify, a candidate must be opposed on the ballot and received contributions from Oakland residents totaling at least 5% of the voluntary spending limit and must have made campaign expenditures totaling at least 5% of the voluntary spending limit. The

¹⁰ San Francisco Municipal Code §1.144.

¹¹ *Id.*

¹² *Report on San Francisco's Public Campaign Finance Program, November 2, 2020 Election.* <https://sfethics.org/wp-content/uploads/2021/05/2021.05.14-Agenda-Item-5-2020-Public-Financing-Report-FINAL.pdf>

¹³ San Francisco Municipal Code §1.138.

¹⁴ *Limited Public Financing Program Guide for City Council District Candidates:* <https://cao-94612.s3.amazonaws.com/documents/Limited-Public-Financing-Program-Guide-2020-FINAL-5-4-20-with-cover-pages.pdf>

voluntary spending limit is \$1.50 per resident in the electoral district in which the candidate is running for office as determined by the latest decennial Census with the amount adjusted by CPI each year. In 2020, the expenditure ceiling ranged from \$148,000 to \$153,000 per district.¹⁵

The amount available to qualifying candidates depends on how much money was budgeted by the Oakland City Council and the number of candidates. Candidates seeking public funds must request reimbursement with appropriate invoices and proof of payment. Reimbursement will only be provided for candidate filing and ballot fees; printed campaign literature and production costs; postage; print advertisements; radio airtime and production costs; television or cable airtime and production costs; and website design and maintenance costs.¹⁶ In 2020, approximately \$153,000 in total was made available to be distributed among eligible candidates, and in past years the amount distributed per candidate ranged from \$8,000 to \$25,000.¹⁷ However, no candidate may receive more than 30% of Oakland's voluntary spending limit for the office being sought.

Candidates who accept public funds must agree to an expenditure limit, but in exchange for accepting the limit, candidates may receive contributions in a higher amount than they would if they had not accepted public funds. For example, in 2020, candidates who did not agree to the expenditure limit were limited to \$200 in contributions per person, whereas a candidate who agreed to the expenditure limit could accept \$900 per person. Following the election, the candidate must return to the City a portion of excess public funds remaining in their campaign account.

The program is administered by the Oakland Public Ethics Commission and is funded through an Election Campaign Fund.¹⁸ The City Council is required to allocate funds based on consideration of anticipated campaign activity and administrative costs. However, the amount of funds to be allocated may not exceed \$500,000.00 for any two-year budget cycle. Up to seven and one-half (7 ½) percent of the amount allocated may be utilized to cover the anticipated cost of administering Oakland's financing program.

2.3. City of Los Angeles Matching Funds Program.

In 1993, Los Angeles voters enacted a matching funds program to provide limited public funding to qualified City candidates. Currently, Los Angeles provides 6 to 1 matching

¹⁵ Oakland Campaign Contribution and Voluntary Campaign Spending Limits for 2020: <https://www.oaklandca.gov/news/2020/city-of-oakland-campaign-contribution-and-voluntary-campaign-spending-limits-per-the-oakland-campaign-reform-act-2020>.

¹⁶ Oakland Municipal Code §3.13.110.C.

¹⁷ *Limited Public Financing Program Guide for City Council District Candidates*, page 4.

¹⁸ Oakland Municipal Code §3.13.150.

funds to candidates who are certified to appear on the ballot and are opposed by a candidate.¹⁹

To qualify, candidates in the upcoming 2022 election must receive qualifying contributions of \$5 or more each from 100 individuals living in the Council district and raise up to \$11,400 (\$64,200 for Mayor) from individuals residing in the City.²⁰ Once a candidate agrees to participate in the program, the candidate must abide by an expenditure ceiling, regardless of whether the candidate requests or actually receives public funds. For 2022, the expenditure ceilings for council candidates will be \$571,000 in the primary election and \$476,000 in the general election, and \$3,329,000 in the primary election and \$2,662,000 in the general election for mayoral candidates.

Los Angeles matches up to \$114 per qualifying contributor for Council candidates, for a total of \$684, and up to \$214 per contributor for the Mayor, for a total of \$1,284. The maximum amount that may be disbursed to one candidate is \$161,000 in the primary election and \$201,000 in the general election for council candidates, and \$1,071,000 in the primary election and \$1,284,000 in the general election for mayoral candidates.

To fund this program, Los Angeles established the Matching Campaign Funds Trust Fund, and the Los Angeles City Council is required by ordinance to appropriate a minimum amount each fiscal year.²¹ However, the Council may by a two-thirds vote reduce or eliminate the required appropriation if certain criteria are met, like a fiscal emergency. The Council appropriation to the Trust Fund was \$3,431,848 in Fiscal Year 2020.²² The estimated fund balance as of July 1, 2020 was \$21,531,848.²³ The program is administered by the Los Angeles Ethics Commission.

2.4. City of Seattle Democracy Voucher Program.

The Council also requested an analysis of the financing program in Seattle, Washington, known as the “democracy voucher” program. Under this program, eligible Seattle residents²⁴ automatically receive four \$25 vouchers which can be assigned to one or more candidates.²⁵ Candidates then submit the voucher to the Seattle Ethics and

¹⁹ Matching Funds FAQs: 2020 Regular City Elections: <https://ethics.lacity.org/wp-content/uploads/Matching-Funds-FAQs.pdf>.

²⁰ 2022 Matching Funds FAQ: <https://ethics.lacity.org/wp-content/uploads/Matching-Funds-FAQ-2022-Candidates.pdf>.

²¹ Los Angeles Municipal Code §471.

²² City of Los Angeles FY 2020-21 Budget: <https://lacontroller.org/wp-content/uploads/2020/09/Budget-2020-21-Electronic.pdf>.

²³ Proposed Budget for FY 2020-21: <https://cao.lacity.org/budget20-21/BlueBook2/files/basic-html/page405.html>.

²⁴ The democracy voucher program is not limited to registered voters. Non-registered voters who are Seattle residents, at least 18 years of age, and a citizen, national, or lawful permanent resident may also apply for democracy vouchers.

²⁵ Democracy Voucher Program: <http://www.seattle.gov/democracvoucher/i-am-a-seattle-resident>. See also Seattle Municipal Code §2.04.620 *et seq.*

Elections Commission, the administrator of the Democracy Voucher Program, and once verified receive public financing.

A candidate may qualify for a democracy voucher if they received a certain number of qualifying contributions of at least \$10 and a certain number of qualifying signatures. Candidates in the program are subject to a contribution limit of \$300 (not including \$100 in Democracy Vouchers) for City Council and \$550 (including \$100 in Democracy Vouchers).²⁶ Candidates not participating in the Democracy Voucher Program have a contribution limit of \$550 from individual donors.

Candidates in the program are also subject to a spending limit. The limits for the 2021 election are:

Campaign Limits for Participating Candidates	City Council At-large	City Council District	Mayor
Campaign Spending Limits (Primary Election Only)	\$187,500	\$93,750	\$400,000
Combined Campaign Spending Limits for Primary and General Election	\$375,000	\$187,500	\$800,000

Candidates must follow stricter reporting guidelines and may not use Democracy Vouchers for certain expenditures such as making cash payments, reimbursing contributors for their contributions, supporting the candidate in a campaign for a different office, or making contributions to other candidates or political committees.

To fund this program, Seattle voters in 2015 approved a property tax of \$3 million per year for 10 years. Properties taxed to fund this program include commercial, businesses, and residential properties and costs the average Seattle homeowner about \$8.00 per year.²⁷ For the 2021 Seattle election, \$6.8 million will be available for candidates to fund their campaigns.

In 2019, more than 476,000 Seattle residents received vouchers.²⁸ The average cost to produce and mail each voucher packet was 56 cents. In total, 147,128 vouchers were processed from 38,092 residents. During the 2019 election cycle, the Seattle Ethics and Elections Commission generated 273 checks, distributing \$2,454,475. Program

²⁶ Democracy Voucher Program, Candidate FAQs: <https://www.seattle.gov/democracymv/i-am-a-candidate/candidate-faqs>.

²⁷ Democracy Voucher Program, About the Program: <https://www.seattle.gov/democracymv/about-the-program>.

²⁸ Democracy Voucher Program, Biennial Report: [https://www.seattle.gov/Documents/Departments/EthicsElections/DemocracyVoucher/2019_Biennial_Report\(0\).pdf](https://www.seattle.gov/Documents/Departments/EthicsElections/DemocracyVoucher/2019_Biennial_Report(0).pdf).

administration costs were \$1,159,397 and \$459,497 was spent on technology for a total of \$1,615,894. There were also additional start-up costs when the program was first implemented.

2.5. Pilot Program.

The public financing programs discussed above differ in implementation. Los Angeles provides matching funds as does San Francisco, which also provides an initial grant of public funds to eligible candidates. Instead of matching funds, Oakland reimburses eligible expenses up to a certain amount. And Seattle gives its residents the choice in determining which candidates should receive public financing.

But there are common features. Each program has eligibility requirements to identify viable candidates, additional filing requirements if accepting public funds, requirements to participate in debates and town halls, expenditure limits, and requirements that any public funds remaining after the election are returned to the City.

In addition to the money needed to distribute to eligible candidates, these programs carry administrative costs. Each program has a separate fund established with budgeting requirements written into law to ensure sufficient funds are allocated to eligible candidates and to pay for program administration. Each program is also administered by a public ethics commission with dedicated staff and funding.

The amount of money and resources dedicated to a public campaign finance program will determine the type of program that could be implemented in San José. Programs that provide greater matching funds may increase the pool of candidates willing to run for office and make the system more participatory, but the more generous the program, the more money, oversight, and administration needed. Whomever is charged with administering the program, whether the Board of Fair Campaign and Political Practices or the Clerk's Office, will need adequate resources budgeted to it to administer the program and fund qualifying candidates.

For the purposes of a pilot program, Oakland's campaign finance reimbursement program appears to be the most straightforward to implement with the lowest cost. In exchange for the receipt of public funds, candidates could be subject to an expenditure limit but could take advantage of a higher per person contribution limit if participating in the program.

While Oakland's program could provide a model, some of the requirements specific to the program may not work for the City, namely criteria for eligibility, appropriate spending and contribution limits, and program administration. Creating a campaign finance program requires developing technical regulations that provide appropriate incentives for candidates to accept public funds with an expenditure limit that still permits a candidate to compete with competitors who do not accept public funds.

3. Foreign Influence in Elections.

In addition to public financing, Council asked staff to analyze implementing prohibitions on foreign-influenced committees or donors making independent expenditures or contributions to campaigns or independent expenditures committees.

Both federal and California law prohibit foreign individuals (other than green card holders), governments, and entities from making contributions or independent expenditures favoring candidates.²⁹ Corporations and other entities organized or having a principal place of business in a foreign country are covered by the foreign contribution and spending ban under State and federal law. However, domestic subsidiaries of foreign corporations may spend or contribute funds generated by the operations of the subsidiary so long as all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts.³⁰

Beyond the State and federal ban on foreign contributions, some jurisdictions have implemented or proposed additional measures to address foreign influence in elections.³¹ At the local level, Seattle and St. Petersburg, Florida have passed such ordinances, and each is discussed below.

3.1. *Seattle's Ordinance.*

Seattle's ordinance prohibits a foreign-influenced corporation from:

- contributing directly to a candidate for elected office;³²
- making independent expenditures for or against candidates for elected office;³³ or
- contributing to an independent expenditure committee that has conveyed that its contributions may be used for or against candidates for elected office.

Seattle defines a "foreign-influenced corporation"³⁴ as a corporation with:

- 1% or more stake directly or indirectly owned by a single foreign entity;
- 5% or more directly or indirectly owned by multiple foreign entities; or

²⁹ 52 U.S.C. § 30201; 11 C.F.R. §110.20; Cal. Gov't Code §85320.

³⁰ Cal. Gov. Code §85320(b)(4); FEC Advisory Opinion 2006-15 (TransCanada), <https://saos.fec.gov/aodocs/2006-15.pdf>.

³¹ *Recent State and Local Legislation Bans Foreign-Influenced Corporate Spending in U.S. Elections*, April 30, 2020: <https://www.skadden.com/insights/publications/2020/04/recent-state-and-local-legislation-bans>.

³² Seattle Municipal Code §2.04.370

³³ §2.04.400.

³⁴ §2.04.010.

- where a foreign owner participates directly or indirectly in the U.S. political activity decision-making of the company.

Seattle's ordinance further requires corporations making contributions or expenditures in its elections to certify under penalty of perjury that they are not foreign-influenced.³⁵

3.2. *St. Petersburg's Ordinance.*

St. Petersburg has enacted a similar ordinance but differs from Seattle in a few ways. First, St. Petersburg's ordinance applies to all business entities, not just corporations.³⁶

Second, St. Petersburg defines "foreign-influence" more narrowly than Seattle by requiring a higher threshold to qualify. St. Petersburg defines "foreign-influence" as a business entity³⁷ with:

- 5% or more stake directly or indirectly owned by a single foreign entity;
- 20% or more directly or indirectly owned by multiple foreign entities; or
- where a foreign owner directly or indirectly participates in the U.S. political activity decision-making of the company.

Finally, St. Petersburg only prohibits independent expenditures and contributions to outside spending groups by a "foreign-influenced" business entity.³⁸

3.3. *Additional Direction.*

If the Council desires to implement limits on foreign influence in City elections, the ordinances passed by Seattle and St. Petersburg could serve models. However, there are a few matters to consider before such an ordinance could be adopted.

First, should the ordinance apply only to foreign-influenced corporations, all business entities, or just some business entities, like corporations and limited liability companies? Seattle's ordinance only applies to corporations, whereas St. Petersburg applies to all business entities regardless of how they may be formed.

Second, to what extent should covered entities be prohibited. Should it prohibit contributions to candidates, independent expenditures on candidates, or both?

Lastly, how much foreign influence is necessary to qualify? A low threshold may implicate the Supreme Court's decision in *Citizens United*, which recognized that corporations have a First Amendment right to spend independently in candidate

³⁵ §§2.04.260.A.d, 2.04.270.D.

³⁶ St. Petersburg Municipal Code §10-51(m).

³⁷ *Id.*

³⁸ St. Petersburg Municipal Code §10-61.

elections. While the DC Circuit Court in *Bluman v. FEC* recognized that spending limits on foreign nationals and business entities may be permitted under the First Amendment, it did not address the level of foreign investment necessary to make a corporation “foreign-influenced.”

A relatively small percentage of foreign owners may not be “foreign” enough to impart any influence over the entity or to justify treating a business operating and headquartered in the United States differently than a United States corporation that has no foreign ownership. A low threshold may also be viewed as a way of getting around *Citizens United*, as many American, multinational corporations have some foreign investment. Accordingly, a higher threshold, like 20 percent, may be more appropriate. In a *New York Times* Opinion column,³⁹ former Chair and current Commissioner of the Federal Elections Commission, Ellen Weintraub, advocated for a threshold of 20 percent foreign ownership similar to how the Federal Communications Commission bars companies that are more than 20 percent owned by foreign nationals from owning a broadcast license.

4. Contributions Limits on Corporations and Other Entities and Conflicts of Interest.

Finally, the Council asked staff to return with options to limit corporations and entities with conflicts of interest from donating to candidates, specifically exploring contribution limits proposed in the so-called “Fair Elections Initiative” and a policy based on California Government Code Section 84308 that would require recusal where a matter involves a person or entity that has made a contribution in the prior 12 months, and prohibiting such contributions for three months following a decision on that matter. Government Code section 84308 does not apply to local government agencies whose members are directly elected by the voters.

4.1. Prior Council Proposal to Adopt Government Code 84308.

The proposal to enact a policy modeled after Government Code section 84308, also known as and referred to in this memorandum as the “Levine Act,” was part of Council discussions in July 2020 related to a ballot measure to amend the Charter to expand the powers of the Mayor and move the mayoral election to the presidential cycle. The City Attorney’s Office drafted a proposed Charter Amendment⁴⁰ and implementing ordinance,⁴¹ but this proposal was ultimately not adopted. Instead, the proposal was

³⁹ Weintraub, Ellen L., “Taking On Citizens United,” *New York Times*, March 30, 2016: <https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html>.

⁴⁰ Proposed Charter Amendment: <http://sanjose.legistar.com/gateway.aspx?M=F&ID=936d4233-714c-4c25-891c-aa065497fa16.pdf>.

⁴¹ Proposed Implementing Ordinance: <http://sanjose.legistar.com/gateway.aspx?M=F&ID=a0bb7a64-bcb9-4b4f-b89e-1f7cba43dc3f.pdf>.

referred to the Board of Fair Campaign and Political Practices for further study and a recommendation, which is currently ongoing.

If the proposal were enacted, it would have prohibited Councilmembers and the Mayor from accepting, soliciting, or directing a contribution of more than \$250.00 from any party or participant while a proceeding involving a license, permit, or other entitlement for use was pending before the City and for three months following the date a final decision is rendered. It would also have prohibited elected officials from making, participating in the making, or in any way attempting to use their official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use before the City if the member of the Council had willfully or knowingly received a contribution in an amount of more than \$250.00 within the preceding twelve months.

4.2. Fair Elections Initiative.

In 2019, a petition, titled the “Fair Elections Initiative,”⁴² was circulated to propose an initiative to amend the Charter to move the mayoral elections to the presidential cycle and to prohibit campaign contributions and from certain “Special Interests,” their lobbyists, and Related Parties.

The petition, which did not gather enough signatures to qualify for the ballot, defined “Special Interests” as:

- Substantial Contractors, which includes any for profit business or person offering, proposing or bidding on providing goods or services to the City or who is seeking funding from the City in an amount to exceed \$250,000 from the date of the bid or proposal until two years after the award or denial.
- Substantial Developer, which includes any for profit business or person who owns the land or is the applicant of a project for which an application for any discretionary land use approval has been submitted with over 20 residential units or over 10,000 square feet of non-residential floor area until the final discretionary approval or denial.
- Substantial Landlord/Property Manager, including any for profit business or person owning or managing over 10 residential rental units in the City.

The initiative defined “Related Parties” to include any owner, officer, spouse or key management employee or in-house lobbyist of any Special Interest or Special Interest Contract Lobbyist. A key management employee is any person who has the authority to hire or fire other employees.

⁴² Notice of Intent to Circulate Petition: <https://www.sanjoseca.gov/Home/ShowDocument?id=45026>.

4.3. *City's Contributions Limits.*

The City already has contribution limits for candidates for City office.⁴³ These limits apply to all contributors and adjust with inflation subject to Council approval.⁴⁴ The City also prohibits campaign contributions from owners, officers, or key employees associated with any cardrooms in San José.⁴⁵ Finally, candidates may only begin fundraising 180 days before the primary election through the day before the primary election or run-off election, if applicable.⁴⁶

4.4. *Bans on Campaign Contributions.*

Despite constitutional constraints, federal Appellate Courts have permitted complete bans on contributions from persons or entities while they negotiate or perform government contracts.⁴⁷ The rationale for permitting such bans is they target contributions from those who are seeking to or doing business with the government where corruption has historically been present and the desire for such contracts makes those involved susceptible to coercion through campaign contributions. A total ban also eliminates any notion of influence over elected officials. But it is not clear if the Supreme Court would continue to follow lower Courts in permitting complete contribution bans on government contractors, particularly without a recent history of corruption to justify the ban.

If the Council were to move forward with a contribution ban like the one proposed in the “Fair Elections Initiative,” applying such a ban to government contractors and developers seeking permits may be defensible under the current state of the law, especially if there is a factual record developed justifying the need for a ban. These are persons or entities seeking or doing business with the City or are applying for the City’s permission to develop property, which are the types of interactions most susceptible to or associated with corruption or the appearance of corruption in government.

However, prohibiting contributions from residential landlords or property managers, would likely not be permitted. This is not a group seeking or doing business directly with the City or a group that would be historically associated with corruption absent some additional basis or finding to justify the limit. Moreover, if the Council were to move forward with implementing portions of the “Fair Elections Initiative” the prohibition should be applied to all persons and entities that can make campaign contributions to

⁴³ San José Municipal Code §12.06.210

⁴⁴ As of the date of this memorandum, the contribution limits are \$700 per election (e.g. primary and general) if the candidate is running for Council office and \$1,400 from per election if running for Mayor.

⁴⁵ San José Municipal Code §12.06.240.

⁴⁶ §12.06.290.

⁴⁷ *Yamada v. Snipes* (2015) 786 F. 3d 1182, 1206, upholding on contributions to state legislators from government contractors in the State of Hawaii. See also *Wagner v. Federal Elections Commission* (2015) 793 F.3d 1, upholding a ban under the Federal Elections Campaign Act on contributions from contractors during negotiations or performance of federal contracts.

candidates, not just for-profit entities. This would avoid claims that the contribution ban violated equal protection and the First Amendment.

Alternatively, the Council could consider modeling a contribution ban after the limit in the Levine Act. As previously discussed, the Levine Act limits contributions from a party or participant while a proceeding involving a “license, permit, or other entitlement for use” was pending before the City and for three months following the date a final decision is rendered. In the Levine Act “a license, permit, other entitlement for use” means all business, professional, trade and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises. “License, permit, or other entitlement for use” does not include decisions or proceedings where general policy decisions or rules are made, where the interests affected are many and diverse, or ministerial decisions where no discretion is exercised.

The Council could take the Levine Act one step further and ban campaign contributions from any party or participant while a proceeding involving a license, permit, or other entitlement for use was pending before the City and for three months following the date a final decision is rendered. This alternative approach, however, raises the same constitutional concerns previously discussed.

4.5. *Conflict of Interest with Campaign Contributors.*

Under the Charter, all Councilmembers present at a meeting are required to vote on matters unless disqualified from doing so by law.⁴⁸ State law prohibits public officials from participating in a government decision if it will materially affect a financial interest.⁴⁹ The City also imposes its own limits in the Municipal Code, under its Appearance of Impartiality Ordinance, to require elected officials to abstain from matters that would not normally be considered a conflict of interest under State law.⁵⁰ But neither requires elected officials to recuse themselves from decisions involving campaign contributors when acting in their elected capacity, and we are aware of no other city that imposes such a limitation for elected officials. Courts have also rejected arguments that elected officials have a common law conflict of interest or appearance of bias when deciding upon matters involving campaign contributors.⁵¹

If the Council desires to create a framework where a campaign contribution creates a conflict of interest, the Levine Act’s conflict of interest provision could serve as a model. Under this framework, a Councilmember would be prohibited from making, participating

⁴⁸ City Charter §600.

⁴⁹ Cal. Gov. Code §87100, see also Cal. Gov. Code §1090.

⁵⁰ San José Municipal Code Chapter 12.22.

⁵¹ *Woodland Hills Residents Assn., Inc. v. City Council*. (1980) 26 Cal.3d 938, see also *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424.

⁵¹ *Woodland Hills, supra*, at 947.

in the making, or in any way attempting to use their official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use before the City if the member of the Council has willfully or knowingly received a campaign contribution from a party or participant in the proceeding within the preceding twelve months. The Levine Act sets the limit threshold for the conflict of interest at \$250 but the Council could consider increasing or lowering the amount to trigger a conflict.

Following the Levine Act, the conflict of interest would only apply to contributions for the Councilmember's own candidacy or controlled committee and would be applied in decisions related to all business, professional, trade and land use licenses and permits and all other entitlements for use, including entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises.⁵² Consistent with the Levine Act, there would be no conflict in proceedings where general policy decisions or rules are made, where the interests affected are many and diverse, or in ministerial decisions where no discretion is exercised.⁵³

Other provisions under the Levine Act that could be incorporated are allowing conflicted Councilmembers to participate in the proceeding if they return the contribution within 30 days from the time they knew, or should have known, about the contribution and the proceeding, methodologies for aggregating contributions among related business entities, and requirements to disclose the conflict during the proceeding.⁵⁴

The Levine Act requires both the affected party or participant and the officer of the agency to disclose whether a contribution above the limit was made or received.⁵⁵ In addition to this disclosure requirement, entities that are subject to the Levine Act require those seeking permits or bidding on contracts to complete a disclosure statement as part of the application or bidding process. If the Council were to move forward with implementing the contribution limit or conflict of interest provisions of the Levine Act, similar disclosure statements should be implemented whenever someone applies for a permit, bids on a contract, or pursues another entitlement for use.

Lastly, any conflict of interest provision should not prevent a conflicted Councilmember from participating in the decision if their participation is legally required. This would be modeled after a similar provision in the Political Reform Act and is intended to address a scenario where the Council cannot constitute a *quorum* because a majority of the Council has a conflict in a matter.

⁵² Cal. Gov. Code §84308(a)(5).

⁵³ 2 CCR §18438.2.

⁵⁴ Cal. Gov. Code §84308(c).

⁵⁵ *Id.* at (d).

4.6. Enforcement.

As with the Appearance of Impartiality Ordinance, any implementation of the Levine Act should not affect the validity of any action taken by the Council nor support an allegation of or serve as a basis for a claim of potential or actual bias or a conflict. This limitation is recommended because campaign contributions do not generally create a bias or a conflict of interest under the law and may not be recognized as a legitimate basis to reconsider or revoke a permit or license or nullify a contract.

As with other campaign and ethics violations, the Board of Fair Campaign and Political Practices should have jurisdiction to hear complaints alleging violations of any local conflict of interest provision and assess civil penalties where appropriate.

CLIMATE SMART SAN JOSE

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda website for the November 16, 2021 Council Meeting.

COORDINATION

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

CEQA

CEQA: Not a Project, File No. PP17-008, General Procedure & Policy Making resulting in no changes to the physical environment.

NORA FRIMANN
City Attorney

By /s/ _____
Mark J. Vanni
Senior Deputy City Attorney

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cc: Jennifer Maguire