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City Attorney

MEMORANDUM

TO: All Elected Officials
All Board and Commission Members
All Department Heads

FROM: Dennis J. Herrera
City Attorney

DATE: August 25, 2003

RE: Political Activities By City Officers and Employees

As the November election approaches, the City Attorney's Office would like to take the opportunity to remind City officers and employees of the laws that restrict their use of City resources for political activities. To this end, I am forwarding to you materials outlining the basic rules and principles, which you may share with your employees. The materials are intended as a general guide and are not a substitute for legal advice. Please contact the City Attorney's Office with any questions related to these materials or participation in political activities.

PROHIBITION ON POLITICAL ACTIVITY BY CITY OFFICERS AND EMPLOYEES

Misuse of City Resources and Personnel

State law prohibits government employees from using City resources to support or oppose a ballot measure or the election or defeat of a candidate at the federal, state, or local level. Local law also prohibits City officers and employees from engaging in political activity during working hours or on City premises.

- **What is a misuse of City resources?**

Any use of City resources or personnel for political activity is prohibited. There is no de minimis exception. This ban prohibits any use for political purposes of telephones, copiers, fax machines, computers, office supplies or any other City resources. City personnel's time and attention may not be diverted from their City duties. Addressing envelopes, circulating petitions, making telephone calls, or engaging in similar types of campaign activity on City time is prohibited.

- **May a Board or Commission take a position on a ballot measure?**

The prohibition on use of City resources for political activity also means that City officers and employees may not use their official positions to influence elections. Thus, boards or commissions may not vote to endorse a measure or a candidate. Nor may City officials distribute campaign literature at City events or include campaign literature in official mailings to employees or members of the public.

- **May City officers and employees analyze a ballot measure's effects?**

City officers and employees may lawfully use City resources (where budgeted for such a purpose) to investigate and evaluate objectively the potential impact of a ballot measure on City operations. The analysis may be made available to the public.

- **May City officers and employees respond to inquiries about a measure?**

City officers and employees may respond to public requests for information, including requests to participate in public discussions about ballot measures, if the officer's or employee's statements are limited to an *accurate, fair, and impartial* presentation of relevant facts to aid the voters in reaching an informed judgment regarding the measure.

- **What is an objective and impartial presentation?**

Courts will evaluate materials prepared or distributed by a public entity in terms of whether they make a balanced presentation of facts designed to enhance the ability of the voters intelligently to exercise their right to vote, or whether the communications promote a particular position for or against a ballot measure. City officers and employees who are considering providing the public with an informational presentation regarding a ballot measure should consult in advance with the City Attorney's office.

- **What are the penalties for violating the law?**

Courts may impose considerable penalties for violation of these laws. Under State law, misappropriating public funds is a felony punishable by imprisonment and a ban on holding public office in the State. Under local law, use of City funds for political

or election activities also may be deemed official misconduct that justifies removal of a public officer, or cause to fire a public employee. The conduct of City officers and employees also may risk liability for the City. For example, the Fair Political Practices Commission (“FPPC”) fined the County of Sacramento \$10,000 for failing to report the use of public funds to prepare and distribute pamphlets on pending ballot measures.

Off-Duty Political Activities By City Officers and Employees

City officers and employees have a First Amendment right to engage in political activities while off duty. As a general rule, officers and employees may take a public position, as private citizens, on an electoral race or a ballot measure. Federal law imposes some restrictions on the political activities of local employees whose principal employment is in connection with federally funded activity. San Francisco also restricts the political activities of certain officers and employees, including the Ethics and Election Commissions and their employees, and the City Attorney.

Both State and local laws prohibit City officers and employees from engaging in the following political activities at any time:

- **Soliciting of campaign contributions from City employees**

City officers and employees may not directly or indirectly solicit funds from other City officers or employees or from persons on City employment lists. This prohibition does not preclude a City officer or employee from requesting political contributions from other City officers or employees if the request is part of a solicitation made to a significant segment of the public that may include officers or employees of the City.

- **Engaging in political activities while in uniform or on City premises**

City officers and employees may not participate in political activities of any kind while in uniform.

OTHER ELECTION RELATED LAWS

The following laws frequently present questions during an election period:

Mass Mailings at Public Expense

In addition to the general prohibition against using public resources or personnel to engage in political activity, City officers and employees are prohibited from sending at public expense, non-political newsletters or mass mailings that feature or make reference to an elected official. A non-political newsletter or mass mailing is prohibited if all of the following four requirements are met:

- **Sent or delivered.** The item is sent or delivered by any means to the recipient at his or her residence, place of employment or business, or post office box.
- **Features an elected official.** The item sent either features an elected officer affiliated with the agency that produces or sends the mailing, or includes the name, office, photograph, or other reference to an elected officer affiliated with the agency that produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.
- **Paid for with public funds.** Any of the cost of distribution is paid for with public moneys or costs of design, production, and printing exceeding \$50 are paid

with public money, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

- **More than 200 items in a single month.** More than 200 substantially similar items are sent in a single calendar month.

Taken literally, this prohibition would preclude any large mailing at public expense, including many mailings essential to the operation of government, such as tax notices, sample ballots, and meeting agendas. To avoid this result, the FPPC has promulgated clarifying regulations that exempt certain types of mailings. For example, the prohibition does not apply to press releases and intra-office communications. Please check with the City Attorney's office if you have any questions about the mass mailing rule.

Campaign Contributions

As a general rule, the receipt of campaign contributions is not the basis for disqualification from a government decision. One exception to this general rule is Government Code § 84308, which restricts the ability of members of appointed boards and commissions to seek political contributions from participants in certain proceedings. Section 84308 includes two separate prohibitions: (1) a restriction on seeking campaign contributions from participants in proceedings before the board or commission; and (2) a restriction on making decisions affecting a source of campaign contributions in the prior 12 months.

- **Soliciting Contributions from persons in a pending proceeding**

Members of appointed boards and commissions may not solicit, accept or direct campaign contributions of more than \$250 from any party to or participant in any use entitlement proceeding pending before the board or commission, *during the proceeding or for three months after the final decision is rendered* in the proceeding. The prohibition does not apply to a body, such as the Board of Supervisors, whose entire membership is elected. But the prohibition would apply to members of the Board of Supervisors when they sit as members of an appointed body.

This rule applies whether the contributions are sought for the official or for someone else, and whether the contributions come directly from the party or participant, or are made by an agent acting on behalf of the party or participant. The prohibition applies to contributions for candidates or ballot measures in federal, state, or local elections.

An official does not violate this rule if the official makes a request for contributions in a mass mailing sent to members of the public, to a public gathering, in a newspaper, on radio or television, or in any other mass medium, provided it is not targeted to persons who appear before the board or commission. An official does not engage in a solicitation solely because his or her name is printed with other names on stationery or letterhead used to ask for contributions.

◆ What is a “use entitlement proceeding?”

A “use entitlement proceeding” is a government action granting, denying, revoking, restricting or modifying a license, permit, or other entitlement for use. Use entitlement proceedings include proceedings on all business, professional, trade and land use licenses and permits, as well as other entitlements for land use, all contracts (other than competitively bid, labor or personal employment contracts) and all franchises.

Decisions on general plans, general building or development standards, or other rules of general application are not use entitlement proceedings.

◆ **Who is a party or participant?**

A “party” is a person, including a business entity, who files an application for, or is the subject of a use entitlement proceeding. A “participant” is any person who is not a party to a proceeding but who (1) actively supports or opposes a particular decision (*i.e.*, lobbies the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence the decision of the officers of the agency), and (2) has a financial interest in the decision. An “agent” is an individual who represents a party or participant in a proceeding. If an individual agent is also acting as a member of a law, architectural, engineering or consulting firm, or a similar entity, both the entity and the individual are considered agents.

● **Disqualification from proceedings involving a contributor**

A member of an appointed board or commission may not participate in any use entitlement proceeding involving a party or participant (or their agent) from whom the official received a contribution of more than \$250 in the 12 months before the proceeding. The \$250 threshold applies to the combined total of all contributions from the party or participant and from an agent of the party or participant. Disqualification is required only if the official received a contribution for himself or herself in the 12 months before the proceeding. Soliciting contributions before a proceeding begins does not, by itself, require disqualification.

A member of an appointed board or commission may avoid disqualification if he or she returns the contribution (or the portion in excess of \$250) within 30 days of learning of the contribution and the pendency of a use entitlement proceeding involving the contributor. Before the body renders a decision in a use entitlement proceeding, members of appointed boards and commissions must disclose on the record all campaign contributions totaling more than \$250 received in the preceding 12 months from parties to or participants in the proceeding. If there is a public hearing, the official must make the disclosure on the public record at the beginning of the hearing. If no public hearing is held, the disclosure must be included in the written record of the proceeding.

◆ **What are the penalties?**

A knowing or willful violation of section 84308 is a misdemeanor, which could result in fines of up to the greater of \$10,000 or three times the amount of the illegal contributions and incarceration in the county jail for up to one year, as well as prohibitions on being a candidate for public office or acting as a lobbyist for four years. Violators also face possible civil penalties of up to \$2,000 per violation.

Taxpayers Protection Amendment of 2000 – Proposition J

City officers and employees who have discretion to approve and actually approve certain contracts known as “public benefits” may not accept campaign contributions, future employment, or gifts in excess of \$50 from the entities or individuals who are deemed “public benefit recipients” of the contract.

● **What is a public benefit?**

The ordinance defines “public benefit” to include contracts to:

- ◆ provide personal services valued in excess of \$50,000 over any 12-month period;
- ◆ sell or furnish any material, supplies or equipment to the City and County valued in excess of \$50,000 over any 12-month period;
- ◆ buy or sell any real property to or from the City and County valued in excess of \$50,000, or lease any real property to or from the City and County valued in excess of \$50,000 over any 12-month period;
- ◆ receive an award of a franchise to conduct any business activity in a territory in which no other competitor potentially is available to provide similar and competitive services, and for which gross revenue from the business activity exceeds \$50,000 in any 12-month period;
- ◆ confer a tax abatement, exception, or benefit not generally applicable to individuals or entities under pre-existing law, which are granted by contract or other agreement to specific private individuals or entities, valued in excess of \$5,000 in any 12-month period; or
- ◆ receive cash payments in excess of \$10,000 in any 12-month period.

The term does not include "public employment in the normal course of business for services rendered." The value of a public benefit is determined at the time the City and County public official approves the public benefit.

• **Who is a “public benefit recipient”?**

The ordinance defines “public benefit recipient” as an individual or entity that:

- ◆ is a party to the contract or other public benefit;
- ◆ has a direct 10% equity, participation or revenue interest in the party to the contract at the time the contract is awarded; or
- ◆ is a trustee, director, partner, or officer of the party to the contract at the time the contract is awarded.

• **What are the penalties?**

A knowing and willful violation of Proposition J by a public official is a misdemeanor. Public officials who violate Proposition J may be liable for restitution to the City’s General Fund and a civil penalty of up to five times the value of the personal or campaign advantage received. In addition, the public official may be disqualified from holding public office or “position[s] within the jurisdiction” in the future. The Ethics Commission may impose an administrative penalty of up to \$5,000 per violation.