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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PROPOSED CHANGES TO THE CITY'S LOBBYING ORDINANCE

INTRODUCTION

In an effort to limit corruption and the appearance of corruption in the City's decision-making process, the San Diego Ethics Commission [Commission] has proposed comprehensive changes to the City's lobbying ordinance (San Diego Municipal Code §§ 27.4001- 27.4055)¹ and related Municipal Code sections. The changes are meant to better regulate paid lobbyists, to broaden and clarify the information they must disclose, and to make enforcement easier. In its report dated May 11, 2007 [Commission Report], the Commission summarizes what it considers the most significant changes and provides the rationale for suggesting them. This Office has been asked to assess legal issues regarding the ordinance as proposed. We have reviewed the entire ordinance for that purpose.

DISCUSSION

I. The Potential for Constitutional Challenges.

Regulations of the type proposed by the Commission may face challenges that they violate First Amendment rights including the rights to free speech, freedom of association, and to petition for redress of grievances. They may also face claims they violate equal protection rights if they regulate different groups differently. The Commission includes a memorandum from its General Counsel dated June 8, 2006, that aptly summarizes some of the constitutional principles to be considered in enacting ordinances of this type. This Office cannot anticipate and assess every potential challenge to every aspect of an ordinance as comprehensive as this one, and cannot do so in this report. We provide some general principles as guidance for the City Council's deliberation.

When a regulation significantly limits a fundamental right such as those guaranteed by the First Amendment, the courts generally require that it address a "compelling state interest" and that it be "closely tailored" to effectuate only that interest in order to pass constitutional muster. Such "strict scrutiny" of a regulation by a court often results in the overturning of the regulation.

¹ Section references in this report are to the San Diego Municipal Code unless indicated otherwise.

Fortunately, the courts have decided that registration and reporting requirements for lobbyists are not a direct limitation on the First Amendment right to petition for redress of grievances. *Fair Political Practices Comm'n v. Superior Court*, 25 Cal.3d 33, 47 (1979) (*FPPC*). Applying a more relaxed legal test to most reporting requirements, the courts have found it reasonable to require those that engage in the commercial business of lobbying to describe that business; to report their receipts and expenditures; and to require businesses that employ lobbyists to disclose their expenses for that purpose and the actions they seek to influence. *Id.* at 47-48. This is not to say that every reporting requirement will be treated the same. Reporting requirements may become the subject of stricter scrutiny if they require the reporting of activities that are too far removed from the lobbying activities being regulated. Regulations unrelated to lobbying activities may be considered so onerous that they significantly interfere with the First Amendment right to petition for redress of grievances. For example, applying strict scrutiny, the California Supreme Court invalidated a requirement that lobbying entities report financial transactions that were not related to lobbying activities. *Id.* at 49.

What level of scrutiny a court applies depends entirely on the facts and the nature of the individual challenge. But regardless of the level of scrutiny applied, a recent appellate decision from the Ninth Circuit Court of Appeal suggests that governments must nonetheless demonstrate they have a legitimate interest justifying the regulation if it is constitutionally challenged. Assuming there is no legal opinion approving the precise issues under challenge, the court suggested that governments should deliberate and make findings that the laws are necessary. The findings should occur after the legislative body considers empirical evidence justifying the need for the law, such as testimony, reports, declarations, and surveys. *Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 653, 654 (2007). The *Clean Government* opinion found that a City of San Diego ordinance limiting campaign contributions to the petition-gathering phase of a recall election could not be supported in the absence of such record evidence or governmental findings. *Id.* at 654. The court specifically said that “[h]ypothetical situations not derived from any record evidence or governmental findings accompanied by vague allusions to practical experience” would not be enough to demonstrate a “sufficiently important state interest.” *Id.* at 652-654.

It is unclear to what extent the legal analysis in the *Clean Government* decision would apply to challenges to this lobbying ordinance. However, it is good practice for the City Council to assure itself of the need to expand the ordinance as requested, particularly if the reporting requirements proposed by the Commission vary significantly from those summarized above that already have been found proper by the courts. The Commission supports its rationale for many of its proposed changes in the materials provided to the City Council. We assume the Commission will provide the Council with any additional evidence it may require for its findings that the proposed changes are necessary to meet the purpose and intent of the ordinance.

This report highlights aspects of the ordinance that may be improved to avoid legal ambiguity and conflict, and to ease enforcement.

II. The Purpose of the Proposed Ordinance.

The purpose of the proposed ordinance is provided in Section 27.4001, which, as completely revised, provides:

It is the purpose and intent of the City Council of the City of San Diego in enacting this division to: ensure that the citizens of the City of San Diego have access to information about persons who attempt to influence decisions of City government through the use of paid lobbyists; establish clear and unambiguous registration and disclosure requirements for lobbyists in order to provide the public with relevant information regarding the financing of lobbyists and the full range of lobbying activities; prohibit registered lobbyists from exerting improper influence over City Officials or from placing City Officials under personal obligation to lobbyists or their clients; promote transparency concerning attempts to influence municipal decisions; avoid corruption and the appearance of corruption in the City's decision-making processes; regulate lobbying activities in a manner that does not discourage or prohibit the exercise of constitutional rights; reinforce public trust in the integrity of local government; and ensure that this division is vigorously enforced.

The proposed ordinance serves the public and City officials in their efforts to avoid corruption and the appearance of corruption by making more transparent the information about who is paying whom to influence City government decisions and making the ordinance easier to enforce.

III. Proposed Changes to Section 27.4024 – Employment of City Officials by Lobbying Entity

Existing section 27.4024 requires lobbyists to report when they employ City officials.² The Commission proposes changes to require lobbying entities to report the employment of the immediate family members of any City official and the employment of any City employee or member of the employee's immediate family. Immediate family includes the spouse, registered domestic partner, and dependent children of the employee. *See* § 27.4002.

² Existing section 27.4024 provides: "If any *Lobbyist* registered or required to be registered under Section 27.4007: (a) employs, in any capacity whatsoever, or (b) requests, recommends, or causes the *Lobbyist's* employer to employ any individual known to be a *City Official*, the *Lobbyist* shall file a written statement with the *City Clerk* within ten (10) Days after such employment. This statement shall set forth the name of the individual employed, the date first employed by the *Lobbyist* or the *Lobbyist's* employer, and that individual's position, title, and department in the *City*."

Proposed section 27.4024 provides:

If any *lobbying entity* employs or retains a current *City Official* or *City employee*, or any member of that official's or employee's *immediate family*, that lobbying entity shall file a written statement with the *City Clerk* within ten calendar days after such employment commences. This statement shall set forth the name of the individual employed, the date the individual was first employed by the *lobbying entity*, and the individual's position, title, and department in the *City*.

The proposed requirement that lobbying entities report the employment of a member of a City official's immediate family appears fully consistent with the intent of the ordinance. It promotes greater transparency and ensures that those City officials who may be lobbied and in a position to influence municipal decisions do not receive undisclosed benefits from lobbying entities. The same is true for the proposed requirement that lobbying entities register and report their lobbying efforts with City officials. *See* §§ 27.4009(a)(4), 27.4009(b)(4), 27.4017 (a)(2)(B) and 27.4017(b)(2)(B).

The same cannot be said, however, for the requirement that lobbying entities report the employment of any *City employee*, or the employee's immediate family. City employees are generally not City officials, in whatever manner the Council elects to define "City Official."³ Moreover, most employees do not influence municipal decision-making. A court could decide that this reporting requirement is unrelated to lobbying activity and subject it to the "strict scrutiny" previously described. *See FPPC*, 25 Cal.3d 33 at 47-49. Such a requirement would only be upheld if the government demonstrates it has a sufficiently important interest *and* the law is "closely tailored to effectuate only those interests." *Id.* at 49, citing *Zablocki v. Redhail*, 434 U.S. 374 (1978). It is unclear how this requirement would meet that scrutiny. Nor do we see a rationale or evidence supporting the extension of the reporting requirements to include the hiring of City employees and their families in the Commission Report.

If there is no evidence to support this change, this Office suggests the City Council consider deleting the references to City employees and City employees' families in section 27.4024.

This Office proposes an alternate revision to section 27.4024 as follows:

If any *lobbying entity* employs or retains a current *City Official* ~~or~~ *City employee*, or any member of that official's ~~or employee's~~ *immediate family*, that lobbying entity shall file a written statement with the *City Clerk* within ten calendar days after such

³ We discuss the Commission's proposed revision to the "City Official" definition *infra*.

employment commences. This statement shall set forth the name of the individual employed, the date the individual was first employed by the *lobbying entity*, and the individual's position, title, and department in the *City*.⁴

IV. Section 27.4002 – Definitions.

The Commission proposes extensive modifications to the definitions in section 27.4002 and also retains some existing language. This Office suggests alternative language to some definitions to cure ambiguities and meet other legal concerns.

A. Organization Lobbyists.

The existing ordinance focuses on the regulation of individual lobbyists. The proposed ordinance focuses greater attention on the regulation of groups who are involved in lobbying as a business or who compensate others to lobby for them. Proposed section 27.4002 defines a new category of “organization lobbyist” and later sections require such entities to register and file quarterly reports. *See* §§ 27.4009 (b) and 27.4017(b).

The proposed definition of an organization lobbyist is: “any business or organization, including any non-profit entity, that provides *compensation* to one or more employees who have a total of 10 or more separate *contacts* with one or more *City Officials* within 60 consecutive calendar days for purposes of *lobbying* on behalf of the business or organization.”⁵ § 27.4002. The definition encompasses non-profit organizations and the actions of their employees who lobby and who receive any compensation, not only those who are salaried.

We assume the Commission will provide the City Council with evidence to justify the need to broaden regulated entities to include organizational lobbyists. Assuming that occurs, this Office suggests the language be modified to avoid overbreadth and ambiguity.

The Commission did not want a law “that would effectively require average citizens to register as lobbyists for simply exercising their right to petition their elected representatives on an issue that may affect their employers.” Commission Report at page 2. Yet the proposed definition as phrased could be read to penalize employers if their employees did just that, by requiring the employer to register and report. For example, employees who might lose employment if the City Council took certain action might *want* to freely express their views to support their employer's position against the action by making the threshold number of ten contacts with public officials. If the employees took paid time off to make these contacts, the

⁴ Unless otherwise indicated, this Report displays language proposed by this Office as strikethrough (deletions) or underlined (additional) text.

⁵ Compensation is broadly defined to include “any economic consideration for services rendered or to be rendered not including reimbursement for travel expenses.” § 27.4002.

organization might become subject to the proposed ordinance, whether or not the organization authorized the contacts or knew they were occurring.

Moreover, an organization lobbyist must quarterly report any “employee” who “engaged in *lobbying activities*”⁶ regardless of whether the employee engaged in that activity on behalf of the organization or was authorized to do so. *See* § 27.4017(b)(2)(C).⁷ Yet when registering, an organization lobbyist must report only those employees who are authorized to lobby for it. *See* § 27.4009(b)(3). The proposed requirements to report actions of employees not authorized to lobby for the organization, or to consider those actions when determining who is required to register could raise unnecessary legal issues unless these sections are clarified. Accordingly, this Office suggests the following alternative language.

For organization lobbyist as defined in section 27.4002:

any business or organization,
including any non-profit entity,
that provides *compensation* to
one or more employees for the
purpose of lobbying on behalf of
the business or organization and
who have a total of 10 or more
separate *contacts* with one or
more *City Officials* for that
purpose within 60 consecutive
calendar days. ~~for purposes of
lobbying on behalf of the
business or organization.~~

For the reporting requirement in section 27.4017(b)(2)(C):

(C) the name of each owner, officer, or employee of the
organization lobbyist who engaged in *lobbying activities* on behalf

⁶ “Lobbying activities” are broadly defined to mean “the following and similar activities that are related to an attempt to *influence a municipal decision*: (a) *lobbying*; (b) monitoring municipal decisions; (c) preparing testimony and presentations; (d) engaging in research, investigation, and fact-gathering; (e) attending hearings; (f) communicating with clients; and (g) waiting to meet with *City Officials*.” Proposed § 27.4002. “Lobbying” means “*direct communication* with a *City Official* for the purpose of *influencing a municipal decision* on behalf of any other person.” *Ibid*. “Direct Communication” means “(a) talking to (either by telephone or in person); or (b) corresponding with (either in writing or by electronic transmission or facsimile machine).” *Ibid*.

⁷ Proposed section 27.4017(b)(2)(C) provides: “the name of each owner, officer, or employee of the *organization lobbyist* who engaged in *lobbying activities* during the reporting period with regard to that specific *municipal decision*.”

of the organization lobbyist during the reporting period with regard to that specific *municipal decision*.

B. “Contact.”

The Commission’s proposed definition of “organization lobbyist” sets the threshold for registration of the organization if one or more employees makes a “total of 10 or more separate *contacts* with one or more *City Officials* within 60 consecutive calendar days for purposes of *lobbying* on behalf of the business or organization.” We leave to the City Council’s determination whether this proposed threshold meets the “substantial level of advocacy” the Commission seeks to regulate.⁸ Commission Report at page 2.

The Commission informed this Office of the intent behind proposed subsection (c) of the definition of “contact” in section 27.4002.⁹ It was to allow organizations, when assessing the threshold number of contacts for registration purposes, to count multiple identical or substantially similar writings to multiple City officials as only *one* contact per municipal decision. We conclude the proposed phrasing of subsection (c) of the definition does not accomplish this intent.

We suggest alternative language for subsection (c) of the definition of “contact” that will better reflect the Commission’s intent as follows:

Multiple identical or substantially similar written communications made by letter, facsimile or electronic mail to one or more *City Officials* pertaining to a single *municipal decision* may be considered a single *contact* for that *municipal decision*.

C. “City Official.”

⁸ This Office notes that the Mayor has the authority to make many municipal decisions and to recommend municipal decisions to the City Council under the Mayor-Council form of government. That would bring to nine the number of elected officials who may be lobbied to influence a municipal decision. The number reaches ten with inclusion of the City Attorney. *See* Commission Report at page 3, referencing only eight elected officials who may be lobbied.

⁹ Proposed section 27.4002 defines contact to mean “the act of engaging in a *direct communication* with a *City Official* for the purpose of *influencing a municipal decision*. For purposes of this definition: (a) each discussion with a *City Official* regarding a different *municipal decision* is considered a separate *contact*; (b) each discussion regarding a *municipal decision* with a *City Official* and members of that official’s immediate staff, or with multiple immediate staff members of the same *City Official*, is considered a separate *contact*; (c) each substantially similar communication, regardless of whether it is made by letter, e-mail, or facsimile, pertaining to one or more *municipal decisions* to one or more *City Officials* is considered a separate *contact* for each *municipal decision*.”

The Commission originally proposed a modification to the existing definition of “City Official” in section 27.4002 as follows:

City Official includes: (a) any elected or appointed *City* officeholder, including any *City* officeholder elected but not yet sworn in; and (b) any *City Board* member; and (c) any employee of the *City*, except for classified employees as that term is defined in San Diego Charter section 117, who is required to file a statement of economic interests pursuant to the California Political Reform Act of 1974, as amended; and (d) *City* Council members acting in their capacity as Housing Authority and Redevelopment Agency officers; and (e) any consultants of the *City* who are required to file a statement of economic interests pursuant to the California Political Reform Act of 1974, as amended.

After hearings before the Rules Committee and to address concerns raised at those hearings, the Commission proposes a definition for the City official who may be lobbied as reflected in Alternate A, which provides:

City Official means any of the following officers or employees of the *City*, which includes all *City* agencies: elected officeholder; Council staff member; Council Committee Consultant; Council Representative; Assistant City Attorney; Deputy City Attorney; General Counsel; Chief; Assistant Chief; Deputy Chief; Assistant Deputy Chief; City Manager; Assistant City Manager; Deputy City Manager; Management Assistant to City Manager; Treasurer; Auditor and Comptroller; Independent Budget Analyst; Budget/Legislative Analyst; Financial Operations Manager; City Clerk; Labor Relations Manager; Retirement Administrator; Director; Assistant Director; Deputy Director; Assistant Deputy Director; Chief Executive Officer; Chief Operating Officer; Chief Financial Officer; President; and Vice-President. *City Official* also means any member of a *City Board*.

The rationale for the proposed change was to lessen the burden on reporting entities. Commission Report at page 8. This Office is concerned that the proposed definition no longer encompasses the consultants previously included. Nor does it include City officeholders who have been elected but not yet sworn in, or persons appointed to fill elective office. The Commission provides no rationale for these omissions in its Report.

Moreover, the onset of Mayor-Council form of government has resulted in the creation of a number of high-level positions with new job titles. The creation of the new titles prompted the Commission to add titles that had been omitted to the definition of “City Official” in proposed Alternative A. Commission Report at page 8. The need for Alternative A shows the significant enforcement limitation in the proposed definition. Because the definition of “City Official” is

primarily limited by the title an official uses, a change in an official's title would exempt the official from the lobbying activities the ordinance seeks to regulate, at least until the ordinance is amended.

We suggest that a better course for enforcement purposes is to return to the Commission's originally-proposed definition with some slight modifications. This includes those individuals currently omitted and encompasses all unclassified employees of the City who must file statements under the Political Reform Act. The individuals holding these positions are those likely to influence municipal decision-making. In addition, adoption of this proposed definition of "City Official" would include the "immediate staff" of all elected officials, without the need to amend the ordinance every time a new title is created.¹⁰ The burden to report contacts with these individuals should be no greater than that to report contacts with City Board members. *See* Commission Report at page 8. This definition would also include those officials who are appointed to fill elective office, or who are elected but not yet sworn in to office. Accordingly this Office recommends a slightly modified version of the Commission's originally-proposed definition of "City Official" as follows:

City Official includes any of the following: (a) any elected or appointed *City* officeholder, including any *City* officeholder elected but not yet sworn in; ~~and~~ (b) any *City Board* member; ~~and~~ (c) any employee of the *City*, ~~except for who is not a~~ classified employees as that term is defined in San Diego Charter section 117; and who is required to file a statement of economic interests pursuant to the California Political Reform Act of 1974, as amended; ~~and (d) City Council members acting in their capacity as Housing Authority and Redevelopment Agency officers;~~¹¹ and (e) (d) any consultants of the *City* who are required to file a statement of economic interests pursuant to the California Political Reform Act of 1974, as amended.

D. "Municipal Decision."

Section 27.4002 also defines a "Municipal decision" that a lobbyist may seek to influence, largely re-incorporating existing language. In pertinent part, it provides that a municipal decision is:

¹⁰ The ordinance does not provide a definition for "immediate staff" as used in the definition of "contact." That omission could raise an issue in enforcing the registration and reporting requirements for organization lobbyists. Adoption of the City Attorney's proposed definition for "City Official" with its more generic phrasing removes that issue.

¹¹ We think it unnecessary to include the actions of City Councilmembers acting solely as officers of the Housing Authority and Redevelopment Agency. Those bodies are formed and governed under state law.

- (a) the drafting, introduction, consideration, reconsideration, adoption, defeat, or repeal of any ordinance or resolution; and . . .
- ¶(c) a report by a *City Official* to the *City Council* or a *City Council Committee*; and . . .

This language may not accurately reflect the Mayor-Council form of government, in which the Mayor has separate powers to make certain municipal decisions. Accordingly, this Office suggests new language be added to these subsections to reflect the governance change as follows:

- (a) the drafting, introduction, consideration, reconsideration, adoption, defeat, ~~or repeal, or veto~~ of any ordinance or resolution; and . . .
- ¶ (c) a report by a *City Official* to the *City Council*, ~~or a City Council Committee, or to the Mayor~~; and . . .

V. Section 27.4004 – Exceptions.

Proposed section 27.4004 lists persons and activities exempt from the ordinance. More specifically, section 27.4004(c) provides a list of “sole activities” in which persons may engage and not subject themselves to the ordinance’s requirements. Most of these activities are related to the competitive bid process, such as responding to a request for proposals. The Commission proposes a new phrase be added to subsection (c) so that it provides that “any *person* whose sole activity includes one or more of the following, unless the activity involves *direct communication with a member of the City Council or a member of the City Council’s immediate staff*.” (proposed new phrase underlined.)

The new phrase appears unnecessary because the phrase “sole activity” speaks for itself. We suggest deletion of the underlined phrase to avoid confusion. Our proposed modification is as follows:

- 27.4004. . . (c) any person whose sole activity includes one or more of the following; ~~unless the activity involves *direct communication with a member of the City Council, or member of the City Council’s immediate staff*~~

VI. Sections 27.4009 and 27.4017-Registration and Quarterly Reporting Requirements.

Existing sections 27.4009(a)-(e) and 27.4017(a)-(j) require that lobbyists provide certain specific information when they register and when they file quarterly reports. In addition to the specific information, existing sections 27.4009(f) and 27.4017(k) also require lobbyists to report:

- any other information required by the City Clerk consistent with the purposes and provisions of this division.

Proposed sections 27.4009 and 27.4017 have been expanded to list more specific information to be included in the registration forms for lobbying firms and organizational lobbyists, and in the quarterly reporting forms for lobbying firms, organizational lobbyists, and expenditure lobbyists. Each proposed section contains subsections that also require the different lobbying entities to report:

any other information required by the *Enforcement Authority* or the *City Clerk* consistent with the purposes and provisions of this division. *See* §§ 27.4009(a)(9); 27.4009(b)(11); 27.4017(a)(11); 27.4017(b)(11); and 27.4017(c)(6).¹²

The broad language of these catch-all provisions is troubling. We recognize the proposed language is incorporated in large part from the existing ordinance and simply amended to add the Commission. However it may have originated, these subsections could be read to provide both the Clerk and the Commission with unilateral authority to add to the required information filers must report so long as the changes are consistent with the purposes and provisions of the Lobbying Ordinance. Failure to comply with any new requirements imposed by the Clerk and Commission might even expose filers to administrative, civil or criminal penalties. *See* § 27.4055.

We have found no evidence to support giving the authority to create new rules to the Clerk or the Commission either in general law or in other Municipal Code sections. Providing unilateral power to the Clerk and the Commission to create new rules for filers may even conflict with the limited authority given to the Commission by other ordinances. The Commission may only recommend ordinances for the Council's enactment, and may only create regulations subject to the City Council's approval. For example: the Commission has the power "to monitor, administer, and enforce the City's governmental ethics laws, [and to] *propose* new governmental ethics law reforms . . ." (§ 26.0401); the Commission may "*propose* updates of [the City's Governmental Ethics Laws] laws to the City Council for its *approval*" (§ 26.0414 (f)); and the Commission may also "adopt additional rules and regulations, *subject to approval of the City Council*, to carry out the purposes of this Division" (§26.0414(h)). (emphasis added.)

As proposed, this Office concludes these subsections may conflict with other code provisions and may be unenforceable. Accordingly, this Office recommends sections 27.4009(a)(9), 27.4009(b)(11), 27.4017(a)(11), 27.4017(b)(11) and 27.4017(c)(6) be modified to make them consistent and enforceable as follows:

any other information required by regulation of the *Enforcement Authority* or the *City Clerk* consistent with the purposes and provisions of this division, and as approved by the City Council.

VII. Miscellaneous Provisions Requiring Clarification.

In reviewing this ordinance we note there are other provisions that could be clarified to enhance enforcement ability.

¹² The Enforcement Authority refers to the Ethics Commission. *See* § 27.4002.

A. “Seeking to Hold.”

The proposed definition of “candidate” in section 27.4002 provides:

Candidate means any individual who is holding, or seeking to hold, elective *City* office.

The ordinance does not define what is meant by “seeking to hold” elective *City* office. Nor do we find that phrase in other sections of the Municipal Code. The absence of a definition may make this portion of the section unenforceable. Accordingly, we recommend the definition of “candidate” be modified to incorporate the definition of the same word in section 27.2903¹³ of the City’s Election Campaign Control Ordinance as follows:

Candidate means any individual who is holding, ~~or seeking to hold,~~ elective *City* office, or otherwise meets the definition of candidate under Section 27.2903.

B. “Ministerial Action.”

The proposed definition of “ministerial action” in section 27.4002 provides:

Ministerial action means any action that does not require a *City Official* to exercise discretion concerning any outcome or course of action. A *ministerial action* includes, but is not limited to, decisions on private land development made pursuant to Process 1 as described in Chapter 11 of the Municipal Code.

Communications regarding such ministerial actions exempt those persons engaging in them from requirements of the ordinance. § 27.4004(f). However, discerning which actions require an official’s exercise of discretion and which do not can become problematic. The single example provided in the proposed definition adds confusion to that discernment because we understand Process 1 decisions may involve the exercise of discretion. We recommend the proposed definition be modified to delete the single example as follows:

¹³ Section 27.2903 provides: “*Candidate* means any individual who: (a) is listed on the ballot for elective *City* office; or (b) has begun to circulate nominating petitions or authorized others to do so on his or her behalf for nomination for or election to a *City* office; or (c) has received a contribution or made an expenditure or authorized another person to receive a contribution or make an expenditure with the intent to bring about his or her nomination for or election to any *City* office; or (d) is a *City* officeholder who becomes the subject of a recall election. A *City* officeholder “becomes the subject of a recall election” on the earlier of: (1) the date a notice of intention to circulate a recall petition is published pursuant to the recall provisions of this article; or, (2) the date a statement of organization for a committee to recall the officeholder is filed with the *City Clerk* or the Secretary of State pursuant to state and local law.”

Ministerial action means any action that does not require a *City Official* to exercise discretion concerning any outcome or course of action. ~~A ministerial action includes, but is not limited to, decisions on private land development made pursuant to Process 1 as described in Chapter 11 of the Municipal Code.~~

CONCLUSION AND RECOMMENDATIONS

This Office applauds the Commission's extensive work in the suggested updates to the City's lobbying ordinance and appreciates the opportunity to review the entire lobbying ordinance. This report provides the City Council with principles to use in determining whether changes are justified and suggests modifications to make the ordinance clearer, easier to enforce, and stronger against a potential legal challenge. This Office supports the introduction of the proposed ordinance with the alternate language we suggest below, for the reasons set forth in more detail throughout this report.

The following is a summary of our recommendations:

1. Assuming there are no facts to support extending the reporting requirements of lobbying entities to include the hiring of City employees and their families, this Office recommends deletion of the references to City employees and City employees' families in section 27.4024 as follows:

If any *lobbying entity* employs or retains a current *City Official* ~~or City employee~~, or any member of that official's ~~or employee's~~ *immediate family*, that lobbying entity shall file a written statement with the *City Clerk* within ten calendar days after such employment commences. This statement shall set forth the name of the individual employed, the date the individual was first employed by the *lobbying entity*, and the individual's position, title, and department in the *City*.

2. Assuming the Commission provides the City Council with satisfactory reasons to broaden the scope of regulated entities to include organizational lobbyists, this Office recommends use of the following alternative language related to organizational lobbyists:

The definition of "organization lobbyist" in section 27.4002:

any business or organization, including any non-profit entity, that provides *compensation* to one or more employees for the purpose of lobbying on behalf of the business or organization and who have a total of 10 or more

separate *contacts* with one or more *City Officials* ~~for that purpose~~ within 60 consecutive calendar days. ~~for purposes of lobbying on behalf of the business or organization.~~

For organization lobbyist reporting requirements in section 27.4017(b)(2)(C):

(C) the name of each owner, officer, or employee of the *organization lobbyist* who engaged in *lobbying activities* on behalf of the organization lobbyist during the reporting period with regard to that specific *municipal decision*.

3. To accomplish the Commission's intent that multiple identical or substantially similar written communications count as only one contact for the threshold determination for registration of organizational lobbyists, this Office recommends the following alternate language for subsection (c) of the definition of "contact" in section 27.4002:

(c) Multiple identical or substantially similar written communications made by letter, facsimile or electronic mail to one or more *City Officials* pertaining to a single *municipal decision* may be considered a single *contact* for that *municipal decision*.

4. To address omissions and to improve enforcement ability, this Office recommends a return to a modified version of the original definition of "City Official" proposed by the Commission as follows:

City Official includes any of the following: (a) any elected or appointed *City* officeholder, including any *City* officeholder elected but not yet sworn in; ~~and~~ (b) any *City Board* member; ~~and~~ (c) any employee of the *City*, ~~except for~~ who is not a classified employees as that term is defined in San Diego Charter section 117; and who is required to file a statement of economic interests pursuant to the California Political Reform Act of 1974, as amended; ~~and (d) *City Council* members acting in their capacity as Housing Authority and Redevelopment Agency officers;~~ and (e) (d) any consultants of the *City* who are required to file a statement of economic interests pursuant to the California Political Reform Act of 1974, as amended.

5. To more accurately reflect the Mayor-Council form of government, this Office recommends the definition of a "Municipal decision" in section 27.4002 be modified as follows:

(a) the drafting, introduction, consideration, reconsideration, adoption, defeat, ~~or~~ repeal, or veto of any ordinance or resolution; and . . . ¶ (c) a report by a *City Official* to the *City Council*, ~~or~~ a *City Council Committee*, or to the Mayor; and

6. This Office proposes deletion of the proposed new phrase in section 27.4004(c) as follows:

27.4004. . . (c) any person whose sole activity includes one or more of the following; ~~unless the activity involves direct communication with a member of the City Council, or member of the City Council's immediate staff~~

7. This Office recommends that proposed sections 27.4009(a)(9), 27.4009(b)(11), 27.4017(a)(11), 27.4017(b)(11) and 27.4017(c)(6) all be modified as follows:

any other information required by regulation of the Enforcement Authority or the City Clerk consistent with the purposes and provisions of this division, and as approved by the City Council.

8. To avoid ambiguity and to permit greater ease of enforcement this Office recommends that the definition of “candidate” as proposed in section 27.4002 be modified as follows:

a. *Candidate* means any individual who is holding, ~~or seeking to hold,~~ elective *City* office, or otherwise meets the definition of candidate under Section 27.2903.

9. To avoid ambiguity and to permit greater ease of enforcement, this Office recommends that the definition of “ministerial action” as proposed in section 27.4002 be modified as follows:

Ministerial action means any action that does not require a *City Official* to exercise discretion concerning any outcome or course of action. ~~A ministerial action includes, but is not limited to, decisions on private land development made pursuant to Process 1 as described in Chapter 11 of the Municipal Code.~~

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

Honorable Mayor and City
Council

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July 13, 2007

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RC-2007-12