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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

AMENDMENTS TO LOBBYING ORDINANCE RELATING TO REGULATION OF
UNCOMPENSATED CHAIRPERSONS OF ORGANIZATION LOBBYISTS

INTRODUCTION

In August 2007, the City Council approved comprehensive changes to the City's lobbying ordinance suggested by the San Diego Ethics Commission [Commission]. San Diego Municipal Code §§ 27.4001- 27.4055.¹ Those changes were designed to better regulate paid lobbyists, to broaden and clarify the information they must disclose, and to make enforcement easier. Since that time, those subject to the ordinance have raised questions and concerns about it to Commission staff. In its Memorandum dated September 24, 2009, the Commission proposes additional changes to "clarify, simplify, or otherwise improve the lobbying laws."

One of the proposed changes is to the definition of "lobbyist." Commission staff currently interpret the definition of lobbyist to include uncompensated board members who lobby on behalf of an organization lobbyist.² Accordingly, they require the organization lobbyists to report the names and activities of both paid and unpaid board members of an organization lobbyist who lobby on behalf of the organization. The proposed change to section 27.4002 includes a new definition for "chairperson" of an organization, whether compensated or not, and adds that person to the definition of lobbyist. Other sections require the organization to include chairperson activities in its reports. Other proposed changes clarify that the names and actions of only compensated officers of the organization will be reportable in the future.

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

² In general, an "organization lobbyist" is 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 organization and who have a total of 10 or more contacts with one or more City Officials within 60 consecutive calendar days. § 27.4002. Examples of organization lobbyists that have registered with the City include the San Diego Regional Chamber of Commerce, San Diego-Imperial Counties Labor Council, and San Diego Coastkeeper.

In general, regulation of lobbying activities may implicate First Amendment rights including rights to free speech, freedom of association, and to petition for redress of grievances. Regulations may also face challenges that they violate equal protection rights if they regulate groups differently. These general principles were described in a June 8, 2006 memorandum from the Commission's General Counsel (a copy of which is attached), and a 2007 City Attorney Report to the Mayor and Council. City Att'y Rpt. No. 2007-12 (July 13, 2007).

The Commission's current request to change the definition of lobbyist has prompted this Office to review in more detail possible legal issues related to the regulation of uncompensated individuals, who may seek to influence government decisions. This Report briefly summarizes applicable laws and registers our legal concerns about the proposed amendment to regulate uncompensated chairpersons of organization lobbyists as lobbyists. It also suggests other legally appropriate changes to the ordinance.

DISCUSSION

I. Constitutional Issues: The Regulation of Unpaid Volunteer Lobbyists

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 drawn" 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. For example, a ban on campaign contributions by lobbyists was found to be invalid because it was not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 44 (1979).

On the other hand, the courts have decided that certain registration and reporting requirements for *paid* lobbyists are not a direct limitation on the First Amendment right to petition for redress of grievances. *Id.* at 47. Applying a "rational basis" legal test, the courts have upheld reasonable reporting requirements for paid lobbyists:

As pointed out above, the registration, reporting, and gift provisions are not direct limitations on the right to petition for redress of grievances. Application of the burdens of registration and disclosure of receipts and expenditures to lobbyists does not substantially interfere with the ability of the lobbyist to raise his voice. While the burden of disclosure might be substantial for those engaging in extensive lobbying activities, the burden is not great when viewed in the context of the total activities engaged in. *Requiring a person engaged in a business to describe it and to report its receipts and expenses may not be viewed in our commercial society as a substantial impediment to engaging in that business.* [Emphasis added].

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.

The 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 Appeals suggests that governments should demonstrate they have legitimate interests that justify their regulations if an ordinance is constitutionally challenged. When adopting an ordinance involving legal issues that have not been precisely decided by a court, the Ninth Circuit suggested that governments decide that the laws are necessary. The decision 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 evidence in the record or governmental findings. *Id.* at 654. The court said: “hypotheticals, accompanied by vague allusions to practical experience” would not be enough to demonstrate a “sufficiently important state interest.” *Id.* at 654.

Courts have plainly addressed and found proper the reasonable regulation of lobbyists who are *paid* to lobby. Such regulations are designed to give lawmakers information about those who seek to influence their legislation, so they may properly evaluate who places pressure upon them. “[F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.” *United States v. Harriss*, 347 U.S. 612, 625 (1954).

We have found no cases approving the regulation of uncompensated volunteers who engage in lobbying. We also were unable to find any city or county in California that imposes lobbying regulations and disclosure requirements on unpaid lobbyists.³ If such a regulation were

³ The Fair Political Practices Commission generally defines a “lobbyist” as an individual who is *compensated* and who engages in direct communication, other than administrative testimony,

challenged, it is unclear whether a court would continue to apply a rational basis test, or would subject such regulation to stricter scrutiny. It is also unclear whether the requirements suggested for defending such a regulation in the *Clean Government* decision would apply in a challenge to that ordinance.

Regardless of the legal tests to be applied in any challenge, it is the better practice for the City Council to assure itself of the legal and factual *need* to extend the lobbying ordinance to regulate uncompensated persons who lobby before it does so, especially since this process has not been approved by California courts. At minimum, the Council should satisfy itself that imposing these regulations on uncompensated chairpersons of organization lobbyists is necessary to meet the purpose and intent of the ordinance. Alternatively, if the Council elects to regulate only compensated lobbyists, we suggest revisions to the ordinance to accomplish that purpose.

II. The Proposed Amendments to Regulate Uncompensated Chairpersons

A. Purpose and Intent of the Lobbying Ordinance.

The lobbying ordinance focuses primarily on the use of paid lobbyists. Like the federal law discussed in the *Harriss* case, it is intended to promote transparency and to avoid corruption:

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. [Emphasis added].

§ 27.4001

with a qualifying official for the purpose of influencing legislative or administrative action on behalf of any person other than his or her employer, Cal. Code of Regs. tit. 2, § 18239.

Consistent with the above purpose, the lobbying ordinance imposes disclosure requirements on “lobbying firms” that receive compensation to engage in lobbying activities on behalf of any other person, and “organization lobbyists” that provide compensation to employees to engage in lobbying activities:

Lobbying firm means any entity that receives or becomes entitled to receive any amount of monetary or in-kind *compensation* to engage in *lobbying activities* on behalf of any other *person*, and that has at least one *direct communication* with a *City Official* for the purpose of *influencing a municipal decision*.

Organization lobbyist means 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. An employee of any parent or subsidiary of the business or organization is considered an employee of that entity. “Employees” of an *organization lobbyist* include the owners, officers, and employees of the business or organization.

§ 27.4002

B. The Regulation of Uncompensated Chairpersons of Organization Lobbyists.

The Commission’s proposed amendments add the definition of “chairperson,” requiring organizational lobbyists to meet reporting requirements for those individuals, whether or not the chairpersons receive compensation from their organizations. They also amend the definition of “lobbyist” to include a chairperson who engages in lobbying. *See proposed §§ 27.4002, 27.4007(b) and 27.4017(b).*

Chairperson means the individual holding the highest position of authority on an organization’s board of directors, regardless of whether that individual is compensated or uncompensated. A *chairperson* includes an individual occupying that position in an acting or temporary capacity.

Lobbyist means any individual who engages in *lobbying* on behalf of a *client* and any individual owner, compensated officer, *chairperson*, or employee who engages in *lobbying* on behalf of an *organization lobbyist*. *Lobbyist* also means any individual owner,

compensated officer, *chairperson*, or employee who has been designated on a *lobbying firm's* or *organization lobbyist's* registration form as being expected or authorized to *lobby*.

The Commission provides its rationale for regulating paid *and* unpaid chairpersons at page 3 in its September 24, 2009 Memorandum: "It is fairly common for the chairperson of an organization's board to participate in lobbying activities."

The Commission's current request seems inconsistent with a primary purpose of the ordinance -- to regulate paid lobbyists. It also seems a puzzling reversal of the Commission's position throughout 2007, when discussing the regulation of uncompensated advocacy. In its May 11, 2007 Memorandum to the City Council, the Commission's Executive Director indicated the following:

. . . [T]he Commission heard no objections to the proposed registration thresholds, with the exception of several lobbyists who recommended that the Commission go further in its definition of lobbyist by including people who are not compensated for their lobbying activities. The Commission considered this option, but ultimately concluded that *the regulation of uncompensated advocacy would have the unintended effect of also regulating constituents who are simply seeking to communicate with their elected officials*. It is the Commission's view that regulating uncompensated lobbying activities would inevitably result in a complicated and overly broad ordinance, as well as a highly confused regulated community. Moreover, as evidenced in the attached comparison chart reflecting lobbying laws in place in other jurisdictions, *it is highly unusual for government agencies to regulate unpaid individuals as "lobbyists."* [Emphasis added].

Id. at p. 3; *also see* Commission Memorandum to the Rules Committee dated February 21, 2007.

Consistent with the Commission's position in 2007, this Office does not interpret the current ordinance to regulate uncompensated individuals. More importantly, the documentation provided by the Commission for extending the ordinance to regulate volunteer uncompensated chairpersons of an organizational lobbyist's board, does not provide adequate legal justification for such regulation, in our opinion. Accordingly, if the Council wishes to extend the ordinance to include such individuals in this ordinance, the record should contain adequate justification to help the City defend it against potential constitutional challenges.

On the other hand, if the Council determines the lobbying ordinance should regulate only those who receive compensation for lobbying, which would more closely conform to legally acceptable practices, we suggest the ordinance be clarified as indicated in the alternate version of

the ordinance accompanying this Report. Our clarifications retain the definition of chairperson, modifying it to include compensated individuals only. We have also included a change to the organizational lobbyist definition to be consistent with other changes recommended by the Commission.

C. Definition of a Firm's or Organization's "Officers."

The Commission's proposed changes will require organization lobbyists to report only the actions of compensated "officers." The Commission's memorandum, however seems to confuse who may qualify as an "officer" of such an organization, implying that board "members" and "officers" are legally synonymous. They are not.

The word "officer" as used in this ordinance and other laws has a discrete legal meaning. It does not mean that all corporate board members are officers as the Commission implies at page three of its September 24, 2009 Memorandum. Officers include those persons in an organization who are charged with certain powers and have the duty to exercise certain functions. *See* Black's Law Dictionary 1235 (4th ed. rev. 1968). For example, corporate officers are different than general corporate board members. Duties and powers for nonprofit corporate officers are established in the articles of incorporation or corporate bylaws. *See e.g.* Cal. Corp. Code §§ 5151 and 5213.

In order to minimize future legal confusion as to which individuals are officers of an "organization lobbyist," or of a "lobbying firm," we recommend including a definition of "officer," within the definitions of those two entities as follows:

Officers of a *lobbying firm* include those individuals charged by the firm with certain powers and duties as designated by the firm, its bylaws or articles of incorporation.

Officers of an *organization lobbyist* include those individuals charged by the organization with certain powers and duties as designated by the organization, its bylaws or articles of incorporation.

CONCLUSION

Generally, courts have upheld reasonable disclosure requirements for paid lobbyists because the regulations are not a substantial impediment to engaging in the lobbying business, and are not so onerous to constitute a significant interference with the fundamental right to petition government. However, we found no cases that contemplate the regulation of unpaid lobbyists, in particular the unpaid chairperson of an organization's board of directors who lobbies on behalf of the organization.

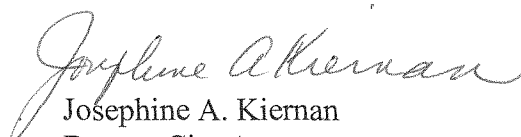
It is not entirely clear whether a court would find that the regulation of unpaid individuals who lobby on behalf of their organizations is subject to a “strict scrutiny” or a “rational basis” test. It is possible that a court would apply a lesser standard than “strict scrutiny” because the proposed regulations require only disclosures, rather than a complete restriction on certain political activities. However, even meeting a rational basis test might prove difficult. If the primary goal of the City’s lobbying ordinance is to regulate *paid* lobbyists, it is difficult to see how expanding the ordinance to include *unpaid* lobbyists meets that goal.

We recommend the Council take a very close look at whether it should extend the definitions in the ordinance to include uncompensated chairpersons of the boards of organization lobbyists as suggested. Before it decides such expansion is necessary to meet the purposes of the lobbying ordinance, the Council should ensure the record contains evidence justifying the need for the law, such as testimony, reports, declarations, and surveys, which may help the City to defend it against constitutional challenge.

Alternatively, we suggest changes to the ordinance to help ensure only compensated individuals are included within the reporting requirements, and to clarify who are officers of the registering entities. Those changes are reflected in the alternate version of the ordinance attached to this report.

Respectfully submitted,

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Attachments