



## CITY OF SAN JOSE, CALIFORNIA

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### SAN JOSE ELECTIONS COMMISSION

Fred de Funiak, Chair  
Michael Smith, Vice Chair  
Leon Louie  
Robert Shepard  
Erica Cosgrove

### SAN JOSE ELECTIONS COMMISSION MEETING MINUTES March 11, 2009

#### I CALL TO ORDER

The members of the San José Elections Commission convened at 5:31 p.m. in Room W-262 of City Hall, 200 E. Santa Clara Street, San José, CA 95113.

PRESENT: COMMISSIONERS: Cosgrove, Louie, Shepard, Smith, and de Funiak

ABSENT: COMMISSIONER: None

STAFF PRESENT: Senior Deputy City Attorney Lisa Herrick  
Evaluator Mike Moye  
City Clerk Lee Price  
Deputy City Clerk Michelle Radcliffe

#### II OATH OF OFFICE

There was none.

#### III APPROVAL OF MINUTES

Upon motion by Commissioner Smith, seconded by Commissioner Shepard, and unanimously passed, the Minutes of February 11, 2009, were approved as amended.

V REPORT OF THE CHAIR

There was nothing to report.

VI DISCUSSION ITEMS

- A. Determine next steps in the Commission Decision on the Pending Complaint filed against the San José Silicon Valley Chamber of Commerce Political Action Committee

Documents Filed: 1) Memorandum from City Attorney Rick Doyle dated March 4, 2009 to the Elections Commission providing background information and outlining options the Commission can take regarding the complaint against COMPAC; and 2) Correspondence from James R. Sutton dated March 11, 2009 responding to the City's memorandum

Senior Deputy City Attorney Lisa Herrick stated that there have been no further settlement discussions with COMPAC and recommended that the Elections Commission review the entire record of the Preminger vs. COMPAC complaint and move forward with one of the three options as outlined in the report.

Public Comment: James Sutton stated that his arguments were set forth in his letter and that the Elections Commission had no authority for a do-over. He requested that the Commission chose Option #1 in the City Attorney's Report.

Jay Ross from COMPAC asked the Commission to make a decision tonight and close the matter.

Steve Preminger, Complainant, asked the Commission to review the entire record and continue through the penalty phase.

Chair de Funiak stated that the Commission cannot make any decisions without reviewing the record and stated that, at a minimum, the Commission needed to review the record.

Action: Upon motion by Commissioner Smith, seconded by Commissioner Cosgrove, and unanimously passed, the Commission requested that the City Attorney's Office and/or City Clerk's Office provide the entire record regarding this complaint to the Commission.

James Sutton asked the Elections Commission to review Judge Ware's decision and the decisions out of the Long Beach case, as well.

At 6:05 p.m., the Commission recessed and reconvened at 6:10 p.m. with Commissioners Cosgrove, Louie, Shepard, Smith and de Funiak present.

B. Elections Commission Regulations and Procedures for Elections Commission Investigations and Hearings (Resolution No. 72547)

1. Review and approve final draft of proposed amendments to the Regulations and Procedures and direct the City Attorney and City Clerk to submit them for approval to the City Council

Document Filed: Draft of Resolution No. 72547

Senior Deputy City Attorney Lisa Herrick provided an overview of the draft changes to Resolution No. 72547

Motion: Upon motion by Commissioner Cosgrove, seconded by Commissioner Shepard, and unanimously passed, the Commission directed the City Attorney's Office to ensure Section K of Resolution No. 72547 conforms to existing City Code.

Motion: Upon motion by Commissioner Smith, seconded by Commissioner Cosgrove, and unanimously passed, the Commission directed the City Attorney's Office to go forward with amendments to Resolution No. 72547 as presented, including the amendment stated in the previous motion.

2. Consider a request by Ken Machado, Esq. on behalf of his client, Tom McEnery, to consider procedures for the filing of anonymous complaints

Documents Filed: 1) Correspondence from Kenneth J. Machado, Jr. dated January 16, 2009 to the Elections Commission expressing concerns regarding procedural matter related to the Complaint against McEnery/Urban Markets LLC; and 2) Correspondence from Mike Moye of Hanson Bridgett LLP dated January 22, 2009 responding to Kenneth J. Machado, Jr.

Chair de Funiak asked James McManis, representing "John Doe", if he had any intention of disclosing the name of his client. Mr. McManis replied he did not.

Public Comment: Tom McEnery stated that the issue before the Commission is about how the Elections Commission conducts its business. Mr. McEnery stated that he will cooperate with the Evaluator.

Ken Machado stated that the Elections Commission regulations do not state how the Commission finds "good cause" for anonymity. Mr. Machado asserted that the complainant has no showing for "good cause" and that he is not asking the Commission to decide the merits of the complaint, but rather consider changes to the regulations relating to anonymous complaints.

Tom McEnery added that he supports transparency in government and stated that what is most important in this matter is how the Commission is used in the future.

James McManis stated that this was not the time and place to argue the merits of the complaint. He argued that the complaint is not dependent upon the testimony of any individual and that it is based on records. Mr. McManis urged the Commission to wait until the Complaint is adjudicated before deciding if there is any need to change the regulations. He requested that the suggestion be tabled until after the Commission has heard the Complaint.

Alex Stuart, former chair of the Elections Commission, offered historical perspective on the regulations. He stated that the Commission decided to allow anonymous complaints for those "without a voice"; for those who did not have a defense and/or could lose one's job. Mr. Stuart expressed concerns regarding the precedence that the anonymous complaint against the McEnery Family could create and added that the Elections Commission has the power to determine what "good cause" is or is not.

Tom Mertens, former Chair of the Elections Commission, provided more background on the regulations and agreed that the Elections Commission can determine if there is or is not "good cause".

Chair de Funiak suggested that the next steps would be discussion on the Complaint. Commissioner Smith proposed that the Commission delegate the investigation to the Evaluator including deciding if there is "good cause". Commissioner Smith emphasized that he was concerned that the Complaint was released to the public.

Discussion ensued regarding the process of handling a complaint when it is filed.

Rebuttals: Tom McEnery stated that "good cause" has not been shown in the anonymous complaint filed and argued that the fundamental decision needs to be made. He stated that careers can be ruined without showing "good cause" in anonymous complaints and stated that the Elections Commission was established with specific goals for the City of San José.

James McManis referenced Mike Moyer's letter recommending that the Commission defer any legislative recommendations until the Commission gets the Evaluator's report.

- C. Receive status report from the subcommittee on Council Referral #2 regarding limits on contributions to independent expenditures and Council Referrals #4b regarding re-initiating contribution limits on independent expenditures

This item was deferred to April 8, 2009.

- D. Review of the Subcommittee Report on Recommended Actions for Elections Commission Follow-Up to the 2006-07 Election Cycle Analysis

Documents Filed: 1) Memorandum from Commissioner Smith dated March 4, 2009 outlining on the Subcommittee report; 2) Correspondence from Craig Dunkerley from January 24, 2009 regarding a proposed correction to the San José Elections Commission Draft Report of July 3, 2008 Analysis of 2006 Election Cycle Activity

Action: Upon motion by Commissioner Smith, seconded by Chair de Funiak, and unanimously passed, the Commission agreed to request that MGT of America, Inc. do follow-up tasks addressing concerns regarding independent committee expenditures.

Action: Upon motion by Commissioner Smith, seconded by Commissioner Cosgrove, and unanimously passed, the Commission directed the City Attorney's Office to review the MGT Report regarding independent expenditures and make a recommendation about how to amend the San José Municipal Code.

Action: Upon motion by Commissioner Smith, seconded by Commissioner Cosgrove, and unanimously passed, the Commission directed the City Clerk's Office to provide a status report regarding administrative issues and recommendations identified in the 2006-07 election cycle analysis

prepared by MGT and recommend actions to the Elections Commission regarding these issues and recommendations.

## VII MEETING SCHEDULE AND AGENDA ITEMS

The next meeting is scheduled for April 8, 2009 at 5:30 p.m. The following items were asked to be placed on the next agenda: 1) Election of Officers; 2) Update on Instant Run-Off Voting; 3) Receive status report from the subcommittee on Council Referral #2 regarding limits on contributions to independent expenditures and Council Referral #4b regarding re-initiating contribution limits on independent expenditures; 4) Continued discussion on determining next steps on the pending complaint filed against the San José Silicon Valley Chamber of Commerce Political Action Committee; 5) Request MGT to do follow up task on addressing concerns regarding independent committee expenditures; 6) City Attorney's Office to review MGT report regarding independent expenditure's and make recommendations on if and how to amend SJMC and addressing Council regarding referrals; and 7) Status report from Clerk regarding administrative issues and recommendations identified in the 06-07 election cycle analysis report and recommend actions to the Elections Commission regarding these issues and recommendations

## VIII PUBLIC COMMENTS

Antonio Guerra from the Mayor's Office sought feedback from the Elections Commission regarding professional staff support. He also informed the Commission that the Mayor's Budget Message may have direction to have the Office of the City Clerk to place on the Elections Commission workplan a cost analysis of having dedicated staff for the Elections Commission.

## IX ADJOURNMENT

The meeting adjourned at 8:31 p.m.

ATTEST:

  
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LEE PRICE, MMC  
CITY CLERK and SECRETARY TO THE COMMISSION

  
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FRED DE FUNIAK, CHAIR