COUNCIL MEETING
November 20, 2007

SUPPLEMENTAL MATERIAL

Honorable Mayor and Members
of the City Council
City Hall
Torrance, California

Members of the Council:

SUBJECT: Supplemental Material to Council Item No. 12D

Attached is a letter submitted by AFSCME's General Counsel's Office, received November 19, 2007. In their letter AFSCME urges the City Council to reject the proposed ordinance placing limitations on campaign contributions (Item 12D) and the proposed ordinance prohibiting the use of City buildings and equipment for political fundraising (Item 12H).

While AFSCME urges rejection of both ordinances, many of the points raised could be addressed by some minor revisions to the proposed ordinances. This supplemental addresses AFSCME's comments as they relate to the proposed ordinance placing limitations on campaign contributions.

AFSCME argues that entities other than natural persons should be allowed to make campaign contributions to candidates. The law applicable to federal elections bans contributions from corporations and unions, but not political action committees ("PACs"). In discussing the proposed ordinance's limitations on campaign contributions, the Blue Ribbon committee considered whether they should be applied to all forms of legal entities (other than natural persons), including corporations, unions, and PACs. The City of San Diego's campaign finance ordinance bans campaign contributions from corporations, unions, and PACs. The Committee considered modeling the ordinance after the federal law, banning corporations and unions from contributing, but not PACs.

A ban that includes all types of legal entities (other than natural persons) has not yet been reviewed by the courts. There is no legal prohibition on the ban. However, there is also no legal authority authorizing its imposition. After some discussion, the Committee voted to recommend banning contributions from all forms of legal entities other than natural persons.

Respectfully submitted,

John L. Fellows III

Attachment

[32887_1.DOC]

12D

ATTACHMENT A

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November 19, 2007

By Electronic Mail and Facsimile

Honorable Frank Scotto, Mayor
Honorable Gene Barnett, Council Member
Honorable Tom Brewer, Council Member
Honorable Gene Drevno, Council Member
Honorable Paul M. Nowatka, Council Member
Honorable Bill Sutherland, Council Member
Honorable Hope Witkowsky, Council Member
City of Torrance
3031 Torrance Boulevard
Torrance, California 90503

Re: Blue Ribbon Committee on Ethics and Integrity's Proposed Ordinances

Dear Mr. Mayor and Members of the City Council:

On behalf of the American Federation of State, County and Municipal Employees, AFL-CIO and its affiliated Local Union 1117 (collectively "AFSCME"), which represents employees of the City of Torrance, I write in regard to the draft ordinances proposed by the Blue Ribbon Committee on Ethics and Integrity (the "Committee").

AFSCME believes the Committee's endeavor of creating an "aspirational plan that will work as a model to elected, appointed and city employees as a guide to ethical behavior" is a worthy one.[1] However, after reviewing each of the implementing ordinances proposed by the Committee at the City Council's November 6, 2007 meeting, we are concerned that both Draft Ordinances 1 and 6 have grave constitutional deficiencies and unconstitutionally restrict the rights of persons to engage in activity protected by the First Amendment. In light of these concerns, some of which are explained below, we strongly urge the City Council to reject Draft Ordinances 1 and 6 when they are considered at the Council's November 20, 2007 meeting.

[1] *See* "Report and Recommendations to the City Council on Specific Committee Actions," City of Torrance Blue Ribbon Committee on Ethics and Integrity (Council Meeting of Nov. 6, 2007).

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In addition, we would like the opportunity to have a representative appear before the City Council at the November 20 meeting to address the Committee's draft ordinances. In addition, we respectfully request that, pursuant to the authority granted him under § 6.4 of the City Council Rules of Order, the Mayor extend the time allotted for AFSCME's representative to speak from three (3) minutes to fifteen (15).

I. Draft Ordinance 1 Unconstitutionally Burdens the Freedom of Political Association.

Draft Ordinance 1 proposes to do what neither the Federal government nor any State government has done – prohibit all persons from associating to support candidates for public office by combining their funds for the purpose of making contributions to candidates. Instead, only an individual, or a "natural person" as the Draft Ordinance terms an individual, may contribute to candidates for City of Torrance elective office.

"[C]ontributions made to a common fund for the purpose of forwarding a particular candidacy is a function of rights of association which are protected by the First Amendment." *Service Employees Intern. Union v. Fair Political Practices Comm'n.*, 747 F.Supp. 580, 588-589 (E.D. Cal. 1990), citing *FEC v. National Conservative PAC*, 470 U.S. 480, 495 (1985). Draft Ordinance 1 burdens this protected First Amendment right by prohibiting persons from contributing to a common fund, such as a political committee, for the purpose of using those combined funds to make contributions to candidates. For this reason, the ordinance must be at least closely drawn to match a sufficiently important governmental interest.[2] *See Randall v. Sorrell*, 126 S.Ct. 2479,

[2] This heightened level of scrutiny is applied to *limits* on political contributions, which, unlike expenditure limits, "'involve[e] little direct restraint on' the contributor's speech," but "do restrict 'one aspect of the contributor's freedom of political association,' namely the contributor's right to support a favored candidate...." *Randall,* 126 S.Ct. at 2491 (internal citations omitted). Because *limits* on contributions nonetheless allow contributors to make some "symbolic expression of support evidenced by a contribution," and do not infringe on a contributor's right to discuss candidates and issues, the courts have applied this heightened level of scrutiny to those burdens, rather than the strict scrutiny normally applicable to First Amendment burdens. *See Id.* However, because Draft Ordinance 1 is not a mere *limit* on contributions to candidates from persons other than individuals, but is, rather a strict *prohibition* on contributions from those persons, the courts would likely strictly scrutinize such a burden on the freedom of political association rather than apply the form of heightened scrutiny applicable to contribution limits. But, we leave aside the discussion of which level of constitutional scrutiny is applicable to the burdens imposed by Ordinance 1 and apply the less severe heightened scrutiny, treating the absolute bar to contributions from persons other than individuals as if it were simply a contribution limit.

2491 (2006). However, because Draft Ordinance 1 burdens protected interests in a manner disproportionate to the public purposes it is intended to advance, it is not closely drawn to match a sufficiently important interest and is an unconstitutional burden on the First Amendment rights of contributors and candidates.

The courts have recognized that preventing actual or apparent corruption is a sufficient justification for imposing limits on contributions to candidates. *See Buckley v. Valeo,* 424 U.S. 1, 23-38 (1976). Even presuming that the purpose of Draft Ordinance 1 is to further this interest, the prohibition on contributions to candidates from persons other than individuals is not closely drawn to match this interest.

First, it is no more corrupting for a political committee to contribute $10, $50, or $1,000 to a candidate than it is for an individual business owner to contribute $1,000 to that same candidate. Indeed, allowing less affluent individuals to pool their funds in a political committee or a political party for the purpose of contributing to their favored candidate permits candidates to raise funds without relying solely on individuals who can afford to contribute the maximum amount to a candidate, and, thus, lessens the likelihood that officeholders will favor the interests of wealthy individuals over the less affluent in exchange for campaign contributions.

Second, while the Supreme Court acknowledges that limits on campaign contributions may prevent corruption and its appearance, it has also recognized that "contribution limits might *sometimes* work more harm to protected First Amendment interests than their anticorruption objectives could justify." *Randall*, 126 S.Ct at 2491-2492, citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395-397 (2000); *Buckley*, 424 U.S. at 21. Such a situation would arise when contribution limits are so low or so strict as to prevent candidates from raising sufficient funds necessary for effective campaign advocacy or they "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage..." *Randall*, 126 S.Ct. at 2492.

In *Randall*, the Supreme Court struck down the contribution limits imposed by Vermont's Act 64. Act 64 permitted individuals, political committees and political parties to each contribute up to $400 per 2-year election cycle to statewide candidates. *See generally, Id.* The Court found evidence in the record of the case to suggest that such low contribution limits "significantly restrict the amount of funding available for challengers to run competitive campaigns." *Id.* at 2495. In addition, the Court determined that

the low limits on other organizations, particularly political parties, threatened the right to associate, and would "severely inhibit collective political activity" by preventing those organizations from using small contributions from donors to assist individual candidates. *See Id.* at 2497.

After taking these effects into consideration and weighing them against Vermont's justifications for the limits, the Court determined that Act 64's limits "burden[ed] First Amendment interests in a manner that [was] disproportionate to the public purpose they were enacted to advance." *Id.* at 2500. For this reason, the Court concluded that the limits violated the First Amendment.

Under Draft Ordinance 1, individuals may contribute up to $1,000 to a candidate for a City of Torrance elective office. AFSCME does not take issue with that individual contribution limit. We do, though, assert that the prohibition on a city candidate's acceptance of contributions from any other source or combination of individuals prevents certain candidates, particularly challengers, from amassing funds necessary to run effective campaigns and "severely inhibits collective political activity" by preventing small donors from pooling their funds to assist individual candidates. Because these burdens disproportionately outweigh any governmental interest advanced by the Ordinance, it unconstitutionally restricts the freedom of political association protected by the First Amendment.

Accordingly, we respectfully urge all Members of the City Council to vote against Draft Ordinance 1.

II. Draft Ordinance 6 Is Both Unconstitutionally Overbroad and Underinclusive.

The Committee's Draft Ordinance 6 proposes a Chapter 8 to be added to Division 1 of Torrance Municipal Code. As stated in § 18.1.1 of the Draft Ordinance, the purpose of the Chapter is to prohibit "the use of City Buildings and equipment for political fundraising." The manner in which it attempts to do so is so overbroad as to prohibit a substantial amount of protected speech "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) as to be unconstitutional.

Proposed § 18.1.3 provides, that "[n]o person or political organization shall make a contribution to a candidate and no candidate, or political organization shall solicit or accept a contribution or engage in prohibited fundraising while on or in the Property of the City."

a. "Contribution"

Proposed § 18.1.2.d defines "contribution" to include "all loans and transfers of money or other thing of value to or by any candidate, elected official or political organization and all pledges or other commitments or assumptions of liability to make any such transfer."

This definition does not limit the scope of the term "contribution" based on the purpose for which the loan or transfer is made or used. The Draft Ordinance prohibits any "person" (defined broadly to include, in essence, any individual, organization or group of persons acting in concert) from giving any "thing of value" to a candidate on or in "Property of the City." For instance, under Draft Ordinance 6, a candidate's spouse or child is prohibited from giving them a birthday gift on City property, a group of constituents may not present an officeholder who is a candidate with an award for community service, and an employer, such as the City of Torrance, may not give an employee who is a candidate the salary, wages and benefits to which they are entitled. As these examples illustrate, the broad range of activity prohibited by the ordinance is unconstitutionally overbroad, and prohibits activities which the City has no legitimate interest in restricting, much less deterring.

b. "Political Organization"

The proposed ordinance prohibits a "political organization" from engaging in certain activities on or in City Property – namely, transferring any thing of value to a candidate, soliciting or accepting any thing of value or engaging in "prohibited fundraising." However, Draft Ordinance 6 fails to define "political organization," leaving every organization to guess whether or not it will be deemed an organization prohibited from soliciting or accepting any thing of value while on or in City Property.

This may prohibit charitable organizations which conduct nonpartisan voter registration activities or social welfare organizations which engage in grassroots lobbying activities from soliciting volunteer services – a thing of value – while on or in City Property. Indeed, it may prohibit AFSCME from soliciting people to become members of the union. Under such uncertain circumstances, organizations may, rather than seeking to vindicate their rights, "choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

In the area of First Amendment freedoms, the government may regulate only with narrow specificity. *See NAACP v. Button,* 371 U.S. 415, 433 (1963). Draft Ordinance 6 does not do so. Instead, it sweeps broadly, with a dearth of specificity. The effect of the proposed ordinance is to restrict core First Amendment activities of organizations and individuals which the City neither intends to restrict, nor has any legitimate, let alone compelling, interest in regulating.

c. Prohibited Fundraising

Proposed § 18.1.3 prohibits a candidate or political organization from engaging in "prohibited fundraising while on or in the Property of the City." The draft ordinance provides eight (8) examples of "prohibited forms of fundraising" and states that prohibited forms of fundraising "are not limited to" those eight (8) examples, but (lacking the "narrow specificity" required for government regulation of First Amendment freedoms, *Id.*) fails to provide guidance as to the precise limits of prohibited forms of fundraising. Thus, especially in light of the proposed ordinance's broad definition of "contribution" and failure to define "political organization," this prohibition on "engaging in prohibited fundraising while on or in the Property of the City" creates a vast potential to chill protected First Amendment expressive activities, and, as compared to the narrow range of activity at which the ordinance purports to be directed, is substantially overbroad.

In addition to its over breadth problems, Draft Ordinance 6's prohibition on "prohibited fundraising while on or in the Property of the City" is underinclusive. The proposed ordinance prohibits the use of City property for fundraising "on or in the Property of the City," but does not likewise restrict the use of City property for fundraising on private property. For instance, a candidate is prohibited from soliciting or accepting contributions using City letterhead while on the Property of the City," but the proposed ordinance does not prohibit the same candidate from using City letterhead to solicit or accept contributions while on private property.

Indeed, an officer of a political organization may be prohibited from soliciting or accepting a contribution – any thing of value – on behalf of that political organization while waiting in line to pay a City parking ticket and using a personal telephone or computer. But, Draft Ordinance 6 does not prohibit that same political organization from soliciting or accepting a contribution using a City-owned telephone or computer while on private property. The stated purpose of the ordinance is to "prohibit the use of City Buildings and equipment for political purposes" but it only prohibits the use of City property

for "prohibited forms of fundraising" conducted "on or in the Property of the City." Because the proposed ordinance does not apply equally to prohibit the use of that property for fundraising conducted on private property, the proposed ordinance is underinclusive.

Consequently, Draft Ordinance 6 is constitutionally overbroad and underinclusive, and we respectfully urge all Members of the City Council to vote against its enactment.

III. Summary

Draft Ordinance 1's prohibition on contributions to candidates for City of Torrance elective offices from persons other than individuals is not closely drawn to meet the only sufficiently important governmental interest for which it could be offered – to prevent real or apparent corruption. Instead, the prohibition on contributions from non-individuals prevents certain candidates, particularly challengers, from amassing the funds needed to run effective campaigns and otherwise prohibits the collective political activity that occurs when contributors pool their funds to support a candidate. These burdens disproportionately outweigh any governmental interest advanced by Draft Ordinance 1. It therefore unconstitutionally restricts the freedom of political association protected by the First Amendment.

Draft Ordinance 6 is unconstitutionally overbroad. The breadth of its language sweeps within its scope substantial amounts of protected First Amendment activity that the City of Torrance has no authority to restrict and likely does not wish to regulate.

In addition, Draft Ordinance 6 is underinclusive. It fails to restrict the use of City property for fundraising activity conducted on private property to the same extent that it regulates the use of City property for those activities conducted on City property.

For the reasons set forth above, the City Council should oppose the adoption of the Committee's Draft Ordinances 1 and 6.

Thank you for your careful consideration of this important matter. We have little doubt that the City Council respects the rights of all persons to participate fully in the civic life of our communities and that you share AFSCME's strong interest in protecting the rights afforded to each of us by the Constitution of the United States. We look forward to working with you on this and other matters of mutual concern.

If you have any questions, please contact me at your convenience.

Sincerely,

Larry P. Weinberg
General Counsel

cc: Honorable Sue Herbers, City Clerk
Honorable Linda M. Barnett, City Treasurer
John Fellows, Esq., City Attorney
Ron Pohl, Esq., Assistant City Attorney
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