Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
December 7, 2009

In the Matter of

) Complaint No. 09-08
) Complaint No. 09-09
) Complaint No. 09-10
) Complaint No. 09-11
CONSOLIDATED

David Mix filed Complaint Nos. 09-08, 09-09, 09-10 and 09-11 on July 13, 2009.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 09-08 alleging that the Oakland Convention and Visitors Bureau ("Convention Bureau") impermissibly made a contribution of public funds to a campaign committee in support of "Measure C" during the July, 2009, special election. ***Attachment 1.***

Mr. Mix filed Complaint No. 09-09 alleging that the Oakland Museum of California ("Museum Foundation") impermissibly made a contribution of public funds to a campaign committee in support of "Measure C" during the July, 2009, special election. ***Attachment 2.***

Mr. Mix filed Complaint No. 09-10 alleging that the Chabot Space and Science Center ("Chabot Center") impermissibly made two contributions of public funds to a campaign committee in support of "Measure C" during the July, 2009, special election. ***Attachment 3.***

Mr. Mix filed Complaint No. 09-11 alleging that the East Bay Zoological Society ("Zoological Society") impermissibly made a contribution of public funds to a campaign committee in support of "Measure C" during the July, 2009, special election. ***Attachment 4.***

II. BACKGROUND

During a special mail-ballot election held in July, 2009, Oakland voters adopted Measure C, a ballot proposal to add a 3 percent surcharge to the City's Transient Occupancy Tax ("Hotel Tax"). Measure C expressly allocated the proceeds of the increased revenues as follows:

- 50 percent to the Convention Bureau
- 12.5 percent to the Oakland Museum
- 12.5 percent to the Chabot Space And Science Center
- 12.5 percent to the Zoological Society
- 12.5 percent to "cultural arts programs and festivals" that the City would distribute or fund directly

Oakland voters approved Measure C by approximately 77 percent of the ballots cast.

On April 21, 2009, the Office of the City Clerk received a "Statement Of Organization" (Form 410) from a group identified as "Economic Stimulus For Oakland, A Coalition of the Hospitality Industry, Cultural Institutions, Labor and Business" ("ESO Committee"). ***Attachment 5.*** The ESO Committee registered itself as a "primarily formed recipient committee", meaning that it was organized to receive contributions and to make expenditures in support of the measure ultimately designated as Measure C. On June 11, 2009, the ESO Committee filed a "Major Donor And Independent Expenditure Committee Campaign Statement" (aka "Form 461") covering the period between January 1, 2009, and June 6, 2009. ***Attachment 6.*** On July 9, 2009, the ESO Committee filed a second Form 461 covering the period between June 7, 2009, through July 4, 2009. ***Attachment 7.***

The two campaign statements demonstrate the following reported contributions in support of Measure C:

CONTRIBUTOR	DATE	AMOUNT
Convention Bureau	5/1/09	$60,000
Museum Foundation	5/12/09	$30,000
Chabot Foundation	5/18/09	$15,000
Chabot Foundation	7/1/09	$13,000
Zoological Society	5/12/09	$30,000
TOTAL		**$148,000**

The four entities listed in the above chart are private, non-profit corporations formed to support a public facility or perform a public function within the City. Mr. Mix alleges that the four non-profits used "public funds" to make the above-listed contributions. He argues that the four entities constitute de facto "public agencies" by virtue of their creation by, and/or close association with, the City of Oakland; and that any monies received by the four entities are necessarily "public funds" because the funds are ultimately derived from the entities' use of public property and assets. Mr. Mix also argues that pursuant to the terms of their respective operating agreements with the City, the entities are prohibited from using their revenues for campaign purposes.

III. ANALYSIS

A. Applicable Law And Commission Jurisdiction

There are several state laws implicated in Mr. Mix's complaints. Penal Code Section 424(a) makes it unlawful for any "city officer" to appropriate public money or resources, without authority of law, to his or her own use or to the use of another. Government Code §8314 makes it unlawful for local officers and employees to use public resources for campaign activities or other purposes which are not authorized by law. Government Code Section 54954 prohibits an officer, employee or consultant of a "local agency" from spending local agency funds to support or oppose the approval or rejection of a ballot measure. For purposes of Government Code Section 54964, a "local agency" means a county, city, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof. Both Penal Code §424 and Government Code §8314 provide an exemption from its provisions for the "incidental or minimal" use of public resources.

The Commission does not have the authority to determine violations of state law. Pursuant to its General Complaint Procedures, however, the Executive Director may recommend that a complaint be referred to "another governmental or law enforcement agency better suited to address the issues." [GCP Section III(B)(1)(e)]

B. Use Of "Public" Funds

Mr. Mix argues that the revenues the four corporations receive as a result of their operations constitute "public moneys", "public resources" or "public funds" for purposes of the above-cited statutes. Mr. Mix provides no legal authority for the above contention. Commission staff could find no case in which the above-cited provisions were applied to non-profit corporations. Also, as a general rule, non-profit "public benefit" corporations are legally entitled to receive, possess, encumber or transfer money and property consistent with their expressed public purposes and pursuant to powers granted to them under state law. Such corporations are not prohibited from using their financial resources to influence legislative or ballot measures, so long as this influence is not a "substantial part" of their activities. Violation of the "substantial part" requirement may ultimately affect a corporation's tax-exempt status.

The following describes in greater detail each corporation's relationship with the City and its respective response to Mr. Mix's allegations:

1. <u>Convention Bureau</u>

The Convention Bureau was formed primarily to market Oakland as a travel destination and to promote local business. Under two service contracts with the City, the last one having a stated term between November 30, 2007, and June 30, 2009, the City agreed to pay the Convention Bureau an amount not to exceed $650,000 annually, plus an incentive bonus, in exchange for marketing services. The incentive bonus was based on the amount that the City's Hotel Tax exceeded specified targets. The contract was terminated at the City's option on December 31, 2008. The contract contained the following relevant provision:

"Political Prohibition. Subject to applicable State and Federal laws, moneys paid pursuant to this Agreement shall not be used for political purposes, sponsoring or conducting candidate's meetings, engaging in voter registration activity, nor for publicity or propaganda purposes designed to support or defeat legislation pending before federal, state or local government."

According to the Convention Bureau's representative, R. Zachary Wasserman (who also serves as treasurer of the ESO Committee), the Convention Bureau raised $793,127 in "private dollar support" since 1999. He said this money was set aside in a separate, unrestricted fund from which the $60,000 contribution was drawn. Thus he maintains that no "City funds" paid pursuant to the operating agreement were used to make the contribution to the ESO Committee. ***Attachment 8.***

2. <u>Zoological Society</u>

The Zoological Society operates as a non-profit public benefit corporation whose stated purpose is to "acquire. . .maintain, operate and control zoological gardens" for the benefit of the public. Under an existing operating agreement with the City, the City maintains title to the zoo property and the animals in it. The Zoological Society is authorized to collect and use "all revenues collected at the zoo and park" and to "raise funds in any other lawful manner." The existing operating agreement provides a relevant provision similar to the one contained in the Convention Bureau agreement:

"POLITICAL PROHIBITION. Subject to applicable law, funds received pursuant to this agreement shall not be used for political purposes, sponsoring or conducting candidate's meetings, engaging in voter registration activity, or for publicity or propaganda designed to support or defeat legislation and ballot measures pending before federal, state or local government. The SOCIETY shall not use the property for political purposes, including, but not limited to, political fundraising or campaigning."

The Zoological Society Executive Director Joel Parrott stated to Commission staff in a letter dated July 28, 2009, that the Zoological Society's contribution of $30,000 was part of a total budget of $11,400,000 and therefore "not a significant portion of our overall budget" for federal tax status purposes. In addition, Mr. Parrott stated that the Zoological Society raises more than $280,000 each year from private donations and that these donations were the source of its contribution to the Measure C campaign. ***Attachment 9.***

Commission staff contacted the Controller for the Zoological Society, Biruk Weldhana. He said the contributions were made from the Zoological Society's operating account, into which is deposited revenue from private donations as well as revenue generated from the Zoological Society's zoo and park operations. He said however the funds within the operating account are internally segregated for

accounting and auditing purposes. He told Commission staff that there is a separate "sub-account" for private donations to the Zoological Society and that this particular sub-account was debited for the contribution to the Measure C campaign.

It is not clear to Commission staff how the "Political Prohibition" language contained in the operating agreement applies to the Zoological Society's contribution. On one hand, the "Political Prohibition" language applies to "funds received pursuant to this agreement." And the operating agreement expressly authorizes the Zoological Society to "raise funds in any other lawful manner" including presumably, private donations. Thus it could be argued that the "Political Prohibition" language contractually restricts the Zoological Society from using even private donations to oppose or support local ballot measures. On the other hand, the introductory clause of the "Political Prohibition" language provides that the restriction is "[s]ubject to applicable law. . ." It is unknown whether this clause was intended to permit the Zoological Society to contribute to ballot measure campaigns subject to the "applicable law" that permits a non-profit corporation to support or oppose ballot measures so long as it does not constitute a "substantial part" of its activities. [1]

3. <u>Museum Foundation</u>

The Museum Foundation was established in 1989 as a non-profit, public benefit corporation to raise funds and to support the Oakland Museum. The Museum Foundation provides employees to help run the facility who work with City-paid curatorial staff. The Museum Foundation is authorized to receive grants, donations and other funds for the Museum's benefit. The City owns the land, buildings and artwork which comprise the Oakland Museum. Under an existing operating agreement with the City, the Museum Foundation retains the revenues received from facility rentals, the museum store, admissions, membership and fundraising activities. Such funds are specified to be used "for the benefit of the Museum."

The existing operating agreement between the City and the Museum Foundation also contains "Political Prohibition" language identical to the one contained in the Zoological Society's operating agreement (see above).

Museum Executive Director Lori Fogarty stated in a letter dated July 24, 2009, that the $30,000 contribution the Museum Foundation made to the ESO Committee was the only campaign contribution made during the 2008-2009 fiscal year and "well below the limits allowed by law for non-profits to contribute to ballot initiatives." She stated that the contribution was approved by the Foundation's board of trustees and that "no public funds were utilized in any way." ***Attachment 10.*** Ms. Fogarty told Commission staff that the contribution was drawn on the Museum Foundation's operating account, into

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[1] *For purposes of disclosure, the spouse of the Commission's Executive Director provided market research consulting services to the Zoological Society on a pro bono basis during 2008 through approximately March, 2009. Also, the Executive Director attended an Oakland Zoo fundraiser in June, 2009, on passes provided to his spouse by his spouse's employer, the Clorox Company.*
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which revenues from the Museum's store and ticket sales are deposited, as well as private donations. She said the operating account does not utilize internal sub-accounts to segregate private donations from other funds.

Based on the above information, Commission staff has the same questions as expressed in the preceding section regarding the possible contractual restriction on the use of funds received pursuant to the operating agreement for political purposes (i.e., revenue from the Museum store and ticket sales comingled with other funds in the operating account from which the contribution was drawn).

4. Chabot Foundation

The Chabot Foundation was incorporated as a non-profit public benefit corporation to provide services and funds to the Chabot Center, a public joint powers agency formed by and among the City of Oakland, the Oakland Unified School District and the East Bay Regional Park District. Under the joint powers agreement, the Chabot Foundation is recognized as a separate legal entity that has no authority or responsibility for operating the science center facility. The Chabot Center operates the facility and sets and keeps the admission fees.

The City has no written agreement with the Chabot Foundation, according to Jill Knowland, Finance Director and Chief Financial Officer of the Chabot Center and Chabot Foundation. She said funds from Measure C or other public agencies are directed to the Chabot Center. She said the two contributions made to the ESO Committee came from a Chabot Foundation savings account established for "all donations made to the Foundation." She stated in a sworn declaration that the source of the donations were "individuals, corporations and foundations" and that "[n]o funds from any public agency" are deposited into this savings account. ***Attachment 11.***

In the absence of any contractual agreement with the City potentially limiting the Chabot Foundation's contributions to a local ballot measure campaign, and the sworn statement that no funds from public agencies comprise the source of the account from which the two contributions were made, Commission staff cannot determine any basis on which to conclude "public funds" were used to make the Chabot Foundation's contributions.

C. Additional Issues

During the course of investigating these complaints, Commission staff noted the following issues arising from the California Political Reform Act.

1. Use Of Prescribed Forms

The California Political Reform Act requires political committees to file pre- and post-election reports of their financial activities on forms prescribed by the Fair Political Practices Commission (FPPC). As a "primarily formed recipient committee", the

ESO Committee is required to report its contributions and expenditures on FPPC Form 460. Instead, the ESO Committee attempted to report its financial activities on FPPC Form 461, which is reserved for so-called "Major Donors" and "Independent Expenditure Committees." The essential difference between a recipient committee and a major donor/independent expenditure committee is that a recipient committee receives contributions from other persons and uses those contributions to make other contributions and/or expenditures; major donors and independent expenditure committees use their ***own money*** to make contributions or independent expenditures. Thus the failure by a recipient committee to use Form 460 is not one of form over substance -- The use of Form 461 by the ESO Committee possibly caused the mis-characterization of certain reported expenditures.

After this matter was brought to the attention of the ESO Committee's treasurer, the ESO Committee filed on November 9, 2009, a Form 460 which the ESO Committee characterizes as an "amendment" and "replacement for previously filed Forms 461." ***Attachment 12.*** It is still not clear to Commission staff that all expenditures have been properly reported and/or characterized on this most recent filing.

2. <u>Use Of Cashier's Check For Contribution Of $100 Or More</u>

Government Code Section 84300(c) provides that "[n]o contribution of one hundred dollars ($100) or more other than an in-kind contribution shall be made unless in the form of a written instrument containing the name of the donor and the name of the payee and drawn from the account of the donor . . ." The FPPC advises that contributions of $100 or more "made by money order, cashier's check, or traveler's cheque are prohibited and must be returned to the contributor, or, if made anonymously, sent to the Secretary of State for deposit in the state's general fund." [See FPPC "Campaign Disclosure Manual 2"; Chapter 9; Page 2].

At Commission staff's request, Mr. Wasserman provided copies of the contribution checks submitted to the ESO Committee from the four non-profit entities. The two checks from the Chabot Foundation ($15,000 and $13,000, respectively) were cashier's checks drawn from a savings account the Chabot Foundation maintains at Union Bank in San Francisco. ***Attachment 13.*** According to Ms. Knowland's declaration, the money used to make the contributions was held in a savings account for which there were no checks issued. Because the Chabot Foundation did not want to comingle funds with the Chabot Center, she said she directed that the money to be issued in the form of a cashier's check directly from the savings account to the ESO Committee, rather than transferred to and issued from the Chabot Center's checking account.

It does not appear from any of the ESO Committee's campaign filings that the cashier's checks were ever returned to the donor. It appears instead that all or a sizeable portion of the Chabot Foundation's contributions was expended by the ESO Committee. (The ESO Committee reports that it spent $145,055 of the total $150,000 it received.)

IV. STAFF RECOMMENDATION

Commission staff recommends that Complaint Nos. 09-08, 09-09, 09-10 and 09-11 be dismissed on grounds that the Commission has no jurisdiction or authority to determine alleged violations of state law or alleged breach of a City contract.

Pursuant to General Complaint Procedure Section GCP Section III(B)(1)(e), Commission staff recommends that the Commission:

1) refer to the Office of the City Attorney the issue of whether the Zoological Society and/or the Museum Foundation violated any material term of their respective operating agreements with the City in connection with their campaign contributions to the ESO Committee;

2) refer to the FPPC the issue of whether the ESO Committee or any person violated provisions of the California Political Reform Act and/or the regulations thereto in connection with the use of Form 461 by a primarily formed recipient committee;

3) refer to the FPPC the issues of whether the Chabot Foundation or any other person violated provisions of the California Political Reform Act and/or the regulations thereto by making two contributions in excess of $100 on a cashier's check; and

4) refer to the FPPC the issues of whether the ESO Committee or any other person violated provisions of the California Political Reform Act and/or the regulations thereto by receiving, expending and/or failing to return the two Chabot Foundation contributions.

Respectfully submitted,

Daniel D. Purnell
Executive Director

** *City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*