Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
January 5, 2009

In the Matter of)
) Complaint No. 08-11
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David Mix filed Complaint No. 08-11 on October 31, 2008.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 08-11 alleging that the City of Oakland violated laws prohibiting the use of public resources for campaign purposes by posting or allowing the posting of campaign signs on City property. He also claims that opponents of City-wide ballot measure "OO" failed to file any campaign finance reports as required under the California Political Reform Act. ***Attachment 1.***

II. COMMISSION JURISDICTION

The Commission's authorizing ordinance directs the Commission to "review all policies and programs which relate to elections and campaigns in Oakland and to report to the City Council regarding the impact of such policies and programs on City of Oakland elections and campaigns." [O.M.C. Section 2.24.020] While Commission staff questions whether this authorization is sufficient to confer Commission jurisdiction over the issues Mr. Mix raises in his complaint, the Commission has previously undertaken review of specific election and campaign practices to determine whether to refer a matter to another governmental or law enforcement agency for further investigation. It is not settled that the Commission has jursidiction through its enforcement procedures over the issues raised.

III. FACTUAL SUMMARY

A. Political Signs

Mr. Mix alleges that during a period of time preceding the November 4, 2008, municipal election (and for at least a month thereafter), he observed campaign signs posted on City-owned property. Specifically, he said he observed signs supporting the passage of Measure NN (proposed police parcel tax); Measure WW (bond authorization for park acquisition and restoration); and Measure OO (mandatory budget set-asides for youth-oriented programs); as well as signs supporting the candidacies of Kerry Hamill (at-large City Council) and Phil Daly (Superior Court Judge), at various locations throughout the City. He said some of the signs were located on

City-owned property such as parking garages operated by Douglas Parking, street medians and parking strips. He also said he observed some of the signs on private property, presumably without the owners' permission and in violation of the City's "sign ordinance."[1]

Mr. Mix told Commission staff that he had made several calls to the City's public works department during the course of the campaign to have signs removed. He claims he spoke with several City employees who recorded the locations of the offending signs and who said they would be removed. He claims many of them were never removed and that some were still posted weeks after the election.

Commission staff spoke with Brooke Levin, Assistant Director for the Public Works Agency ("PWA"). Ms. Levin said the PWA typically receives a number of complaints about political sign posting during any given election. She said her department is guided by a set of operating procedures that direct City field crews to remove political signs posted on public property and structures. ***Attachment 2.*** City field crews are directed to remove signs posted on City property and structures and transport them to the City's corporation yard where they are stored until retrieved by the respective campaigns. According to Ms. Levin, signs on private and state property, including the perimeter fencing, are not removed by City personnel.

Commission staff spoke with Arthur Watson and Sabrina Jones from the PWA. Mr. Watson says that he recalls getting a few calls for sign removal but was unable to recall anything specific about the nature of the complaints. Ms. Jones manages PWA's call center which receives hundreds of complaints for graffiti and trash removal. She was unable to search a database of call records to verify the type and location of any specific sign removal request. Both Mr. Watson and Ms. Jones said they never received any direction or order not to remove political signs from City property.

Commission staff spoke to Eugene Zahas, treasurer for "The Oakland Fund," a ballot measure committee formed for the purpose of opposing Measure OO. He said the "No on Measure OO" campaign purchased signs that were distributed throughout the City by volunteers, some of which may have ended-up on City property. He said there was absolutely no agreement between the campaign and any City representative or official for posting "No On Measure OO" signs on City property.

Commission staff contacted Doug Linney, the campaign coordinator for the "Yes on Measure NN" campaign. Mr. Linney told Commission staff that he was asked by Mayor Dellums and several councilmembers if he would be able to manage the campaign in support of Measure NN. He said he was asked to serve as a paid coordinator "late in the game." He said as part of the campaign he ordered and had posted approximately 1,000 campaign signs throughout the City. He said he retained Mario Juarez to help coordinate the sign distribution. Mr. Juarez told Commission staff

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[1] O.M.C. Section 5.06.020 make it unlawful for any "person, candidate or political committee" to post a sign upon public property or on private property without the owner's written permission. The City may remove any sign posted on public property.

that the "Yes on Measure NN" were distributed mainly by volunteers who were instructed not to post signs on public property. Both Mr. Linney and Mr. Juarez denied that there was any kind of deal or agreement with the City to permit campaign signs on City property. In fact, Mr. Juarez said that approximately 70 percent of the Yes On Measure NN signs were removed within five days of their posting. He suspects a good portion of them to have been removed by PWA field crews.

B. Absence Of Formal Campaign Committee

Mr. Mix states in a letter supplementing his complaint that he could find no record of any campaign committee formed to oppose Measure OO, despite the presence of numerous campaign signs to that effect. ***Attachment 3.*** Commission staff was able to obtain copies from the Office of the City Clerk for "The Oakland Fund" which demonstrates the receipt of $15,254 in contributions and $7,526 in expenditures as of the last pre-election statement filed before the November 4, 2008, election. (Reporting for the final two weeks before the election will be a part of the committee's semi-annual filing due no later than January 31, 2009.) Commission staff cannot identify any irregularity, error or omission on the face of "The Oakland Fund's" current campaign filings.

Similarly, Mr. Mix asserts that the campaign committee in support of Measure NN, "Citizens For A Better Oakland", is a "sham" and a "hoax." The campaign statements demonstrate that the "Citizens For A Better Oakland" committee received a total of $19,500 in contributions and, as of October 18, 2008, had spent $3,330. (Again, a final report for all pre-election contributions and expenditures will be filed with the Committee's semi-annual filing due no later than January 1, 2009.) Commission staff cannot identify any irregularity, error or omission on the face of "Citizens For A Better Oakland's" current campaign filings.

III. ANALYSIS

A. Applicable Law

Penal Code Section 424(a) makes it unlawful for any city officer to appropriate public funds 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. Both Penal Code §424 and Government Code §8314 do not apply to the "incidental or minimal" use of public resources.

The California Supreme Court has ruled that in the absence of "clear and explicit legislative authorization" a public agency may not expend public funds or resources to promote a partisan position in an election campaign. Public agencies may, however, provide educational information to the voters to assist them in making informed decisions about public matters. [Stanson v. Mott, (1976) 17 Cal.3d 206.]

B. Political Signs

Mr. Mix alleges that the City "allowed and probably encouraged if not participated in" the posting of signs in support of Measure NN and in opposition to Measure OO. He bases this allegation not on any factual showing of City involvement, but on the City's asserted "interest" in having Measure NN pass and Measure OO fail. He also argues that the City improperly promoted a partisan position in an election campaign by allowing campaign signs to remain on City property after he and others requested to have them removed.

There is little written record of the City's abatement of political signs in the November, 2008, election. But even if the City failed to respond to specific requests to remove campaign signs, this alone is inadequate proof that City representatives condoned or promoted a partisan position on Measures OO and NN. There is no information from any source that City representatives deliberately waived or relaxed sign enforcement measures for campaign signs on City property. Such a showing is necessary, in Commission staff's opinion, to support the type of allegation that Mr. Mix is making.

C. Campaign Statements

The Oakland Campaign Reform Act (OCRA) does not regulate the filing or adequacy of ballot measure campaign statements. Such matters are regulated under the California Political Reform Act and generally enforced by the Fair Political Practices Commission. Commission staff cannot perceive any defects or deficiencies on the face of either campaign filings to date.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 08-11 on grounds there is no information to support a violation of local law over which the Commission has jurisdiction.

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.*