

February 5, 2008

SDEC Formal Advice Letter No. FA08-01

Councilmember Brian Maienschein  
City Council District 5  
202 "C" St., 10th Floor  
San Diego, CA 92101

Re: Request for Advice Regarding Transferring Funds in Your 2004 Committee to  
Your 2008 Committee

Dear Councilmember Maienschein:

This advice letter responds to your January 23, 2008, request for formal advice from the Ethics Commission regarding an interpretation of the provisions of the City's Election Campaign Control Ordinance [ECCO], which is contained in the San Diego Municipal Code [SDMC]. Your request pertains to your ability to transfer funds from a 2004 committee for City Council office to a committee created to seek the office of the City Attorney in 2008.

### **QUESTIONS**

1. Are you permitted to transfer funds from your 2004 City Council Committee to a controlled committee formed for the purpose of supporting your candidacy for City Attorney in the 2008 election cycle?
2. Does the City's 12 month pre-election fundraising time limit prevent you from transferring funds from your 2004 City Council Committee because those funds were contributed to your City Council Committee more than 12 months before the June 2008 primary election?

### **SHORT ANSWERS**

1. You are permitted to transfer funds from your 2004 City Council Committee to a controlled committee formed for the purpose of supporting your candidacy for City Attorney in the 2008 election cycle, subject to attribution rules and contribution limits.
2. The City's 12 month pre-election fundraising time limit does not prevent you from transferring funds from your 2004 City Council Committee to your 2008 Committee.

## BACKGROUND

On November 7, 2000, you were elected to represent District 5 on the San Diego City Council. You sought re-election in 2004, and won outright in the primary election held on March 2, 2004. You had funds remaining in your campaign committee after that election. For purposes of this letter, we will refer to the committee containing those leftover funds as the "2004 Committee." You are now interested in running in the 2008 primary election for the purpose of seeking the office of the City Attorney. The questions you raise pertain to the extent to which you can use the funds in the 2004 Committee to support your 2008 campaign. For purposes of this letter, we will refer to your existing or prospective City Attorney committee as the "2008 Committee."

## ANALYSIS

### *A. Transfers*

Intra-candidate transfers are expressly authorized in ECCO. According to SDMC section 27.2920(a):

A candidate may transfer campaign funds from one controlled committee to a controlled committee for elective City office of the same candidate. Contributions transferred shall be attributed to specific contributors using a "last in, first out" or "first in, first out" accounting method, and these attributed contributions when aggregated with all other contributions from the same contributor may not exceed the limits set forth in section 27.2935.

Accordingly, ECCO permits you to transfer all of the funds remaining in your 2004 Committee to your 2008 Committee, subject to the transfer rules ("last in, first out" or "first in, first out") identified above. In addition, the transferred contributions, when attributed to individual contributors, may not exceed the individual's contribution limits for the 2008 race. Presumably this will not be an issue for you because the \$320 contribution limits for the 2008 City Attorney race are higher than the \$250 limits that were in effect for your 2004 City Council race.

Note, however, that if an individual makes a contribution to support you in the 2008 primary election prior to a transfer of funds from the 2004 Committee, the amount attributed to that individual in a transfer may not cause the total amount of contributions from that individual to exceed the \$320 contribution limit applicable to the primary election. For example, if someone gives you a \$100 contribution for the 2008 primary election, you may attribute no more than \$220 to that individual when transferring funds from the 2004 Committee to the 2008 Committee for the 2008 primary election. In addition, if you transfer \$250 from the 2004 Committee and attribute it to a particular individual for the 2008 primary election, that individual may not subsequently give the 2008 Committee more than \$70 in additional contributions for the 2008 primary election without exceeding contribution limits.

### *B. Impact of Pre-Election Fundraising Time Limit*

Section 27.2938(a) of the SDMC provides that: "It is unlawful for any candidate or controlled committee seeking elective City office to solicit or accept contributions prior to the twelve

months preceding the primary election for the office sought.” This code section prohibits any candidate running in the June 3, 2008, primary election from soliciting and accepting contributions before June 3, 2007. You have questioned whether or not section 27.2938(a) impacts the ability of your 2008 Committee to use funds transferred from the 2004 Committee, which accepted funds prior to June 3, 2007. For the reasons identified below, we believe that this provision does not impair your ability to effect the transfer.

According to the plain language of section 27.2938(a), it is unlawful for your 2008 Committee “seeking elective City office [of City Attorney] to solicit or accept contributions prior to the twelve months preceding the primary election” for City Attorney. Thus, assuming that your 2008 Committee existed on June 3, 2007, it could not have begun to solicit or accept contributions for the City Attorney race prior to June 3, 2007.

Soliciting or accepting campaign contributions to support your 2008 candidacy, however, is not equivalent to transferring contributions from an earlier committee. The funds in the 2004 Committee were solicited and accepted for a 2004 Council District race; they were not collected for the 2008 City Attorney race. In other words, for purposes of the funds in the 2004 Committee, the “office sought” referred to in section 27.2938(a) pertains to your 2004 Council District office, not the office of the City Attorney in 2008. Transferring funds from the 2004 Committee to the 2008 committee does not mean that the contributions obtained in 2004 were accepted for a 2008 election. Accordingly, the acceptance of contributions in 2004 does not violate section 27.2938(a)’s fundraising time limit, even if those contributions are ultimately used for a 2008 election (subject to attribution and contribution limits).<sup>1</sup>

*C. The Statutes’ Plain Language Unambiguously Supports The Transfer*

Pursuant to well-settled rules of statutory construction, courts interpret a statute to effect its legislative intent. *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center*, 19 Cal. 4th 851, 860 (1998). “A statute’s plain meaning controls the court’s interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need or should go beyond that pure expression of legislative intent.” *Id.* at 861.

The language of SDMC section 27.2920(a) is unambiguous in authorizing a candidate to transfer campaign funds from one controlled committee to another controlled committee for elective City office of the transferring candidate. Further, the language of SDMC section 27.2938(a) is unambiguous in regulating the time period in which a candidate may solicit or accept contributions and clearly silent on any affect of the 12-month time limit on the transfer of funds. The statutory language does not even hint that the pre-election fundraising time limit impedes a transfer of campaign funds. Given the plain language of both the intra-candidate transfer provision and the 12-month time limit for soliciting or accepting contributions, further analysis is not required to conclude that the City Council did not intend for the 12-month pre-election fundraising time limit to prevent the transfer of your 2004 City Council Committee campaign funds to your 2008 Committee. Nonetheless, in the interests of eliminating any doubt as to the

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<sup>1</sup> In 2004, ECCO contained no time limits with regard to the acceptance of contributions. You would have been permitted, therefore, to collect contributions in 2004 for a 2008 City Attorney race even without the transfer rule; those funds would have been “grandfathered in” when SDMC section 27.2938 went into effect in 2005.

legitimacy of the transfers in question, we provide below an overview of the legal issues germane to such an analysis.

*D. Sections 27.2920 and 27.2938 Operate Concurrently and in a Harmonious Manner*

SDMC sections 27.2920 (transfers) and 27.2938 (time limits) were both adopted on September 7, 2004 with the City Council's approval of Ordinance O-19317. There is a presumption that legislative bodies are aware of existing, related laws and will maintain a consistent body of statutes. *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 54 (1968). In other words, courts will presume that the City Council knew how to adopt both code sections without one invalidating the other. "There is a presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supercede the earlier." *Id.* at 57. "Courts are bound to maintain the integrity of both statutes if they may stand together." *Department of Personnel Administration v. Superior Court*, 5 Cal. App. 4th 155, 192 (1992).

There is ample support for these two statutes to operate concurrently and without one invalidating the other. The City added section 27.2920 (transfers) to ECCO to permit and regulate intra-candidate transfers at the local level. Section 27.2920 essentially mirrors, and incorporates by reference, the rules that permit intra-candidate transfers for state offices under the Political Reform Act. Cal. Gov't Code § 85306. The intent to conform ECCO to California law is explicitly stated by section 27.2920(b), which provides: "It is the intent of this section that transfers of a candidate's campaign funds be consistent with the provisions of law set forth in title 2, section 18536 of the California Code of Regulations." This regulation interprets the state transfer rule at Government Code section 85306. By placing its own transfer language in ECCO, the City established, for the first time, that transferred contributions would be subject to local attribution rules and contribution limits (and not the state's contribution limits, which have no relevance to local races).

The adoption of section 27.2938 (time limits) stemmed from several governmental interests relating to the increased access to contributors enjoyed by elected officials every day in office, even years before an election. The City sought to limit the potentially corrupting influence that could result from incumbents soliciting and accepting money outside of campaign season, particularly from parties with business before the City. Such increased access arguably may also have discouraged challengers from running against incumbent officers. In addition, there were concerns that allowing fundraising throughout an entire term of office would come at the expense of incumbents performing their official duties.<sup>2</sup>

By adopting section 29.2720, the City Council unquestionably favored the concept of allowing intra-candidate transfers. It would not be reasonable, therefore, to suggest that the Council expressly permitted intra-candidate transfers under section 27.2920 and then, within the same ordinance, adopted section 29.2738 as a means of virtually eliminating the ability of a candidate to make intra-candidate transfers, particularly when the two sections are not inconsistent in

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<sup>2</sup> The August 29, 2003, Memorandum from Charles B. Walker to the Rules Committee discusses some of these rationales.

language or purpose.<sup>3</sup> Established rules of statutory construction compel the courts to “select the interpretation that comports most closely with the apparent intent of the Legislature, with a view toward promoting, rather than defeating, the general purpose of the statute and avoiding an interpretation that would lead to absurd consequences.” *People v. Walker*, 29 Cal. 4th 577, 581 (2002).

Recognizing intra-candidate transfers does not defeat the general intent behind the adoption of section 27.2938’s fundraising time limits, i.e., addressing the potentially corruptive influence of contributions on officeholders and minimizing the time spent in campaigning. Moreover, recognizing the concurrent operation of the 12-month time limit promotes the legislative intent in enacting section 27.2920 to explicitly permit transfers of campaign funds at the local level, subject to the City’s contribution limits. Prohibiting the transfer of funds collected for an earlier campaign based on the 12-month time period limitation would nullify section 27.2920 and defeat entirely the City’s intent in adding it to ECCO.

Notably, because transferred contributions are subject to attribution rules that require the application of contribution limits for each contributor whose contributions are transferred, the City’s transfer rules do not increase, but instead may decrease, the amount of money that a particular individual may give to support a candidate.<sup>4</sup> Thus, a ban on intra-candidate transfer would not advance the City’s interests in using contribution limits as a means of eliminating corruption and the appearance of corruption. In addition, if banned from making the transfers, you would now almost certainly have to devote more time and energy to fundraising for the 2008 election, and those efforts would be made at the expense of your ability to perform your official duties. Such an outcome would undermine another of the rationales behind the adoption of section 27.2938.

Assume for sake of argument that SDMC section 27.2938 operates to ban you from transferring funds from the 2004 Committee to the 2008 Committee on the basis that funds collected prior to June 3, 2007, could not be used for an election in 2008. Under this interpretation, the City’s intra-candidate transfer provisions would have little or no reason for existing. Those provisions would allow you, at most, to transfer your 2004 funds to another race occurring in 2004, or to transfer your 2008 funds to another race taking place in 2008. It is a rare exception, and hardly the rule, for a candidate to run for two different elective offices within the same election cycle. Courts typically reject statutory interpretations where the “exception swallows the rule.” *Mycogen Corp. v. Monsanto Co.* 28 Cal. 4th 888, 902 (2002).

Thus, an interpretation of section 27.2938 that bans intra-candidate transfers would effectively eliminate the purpose for adopting section 27.2920 instead of construing the plain language and legislative history of sections 27.2920 and 27.2938 to read them in a manner that recognizes and respects the intent and purpose behind both sections. Further, as discussed more fully below,

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<sup>3</sup> The rules applicable to transfers and time limits apply to both incumbents and challengers. Both types of candidates may collect contributions for one election subject to section 27.2938’s pre-election time limits, and both types of candidates may choose to transfer those contributions to seek a future elective office, subject to section 27.2920’s transfer rules. In other words, all of the candidates for City Attorney in 2008, regardless of who prevails, will have an opportunity to transfer any leftover funds to a 2010 race, or a 2012 race, etc.

<sup>4</sup> A transfer ban would allow a 2004 contributor to give you an additional \$320 for the 2008 primary, while the absence of such a ban limits that person to giving you no more than an additional \$70 for the 2008 primary.

construing the 12-month fundraising limit to ban intra-candidate transfers of campaign funds contravenes First Amendment protections.

*E. First Amendment Issues*

An interpretation of SDMC section 27.2938 that bans your 2008 Committee from accepting a transfer from your 2004 Committee would necessarily fail to take into consideration the First Amendment protections that these types of transactions enjoy. In *Service Employees International Union [SEIU] v. Fair Political Practices Commission [FPPC]*, 955 F.2d 1312 (9th Cir. 1992), the Ninth Circuit Court of Appeal invalidated a ban on intra-candidate transfers that had been adopted by California voters in 1988 as part of Proposition 73. The court described such transfers as “expenditures” and stated that a transfer ban operated as an expenditure limitation “because it limits the purposes for which money raised by a candidate may be spent.” *Id.* at 1322.

The *SEIU* court looked to the ruling in the landmark case of *Buckley v. Valeo*, 424 U.S. 1 (1976), wherein the U.S. Supreme Court established that a “strict scrutiny” standard is applicable to any law seeking to limit or prohibit campaign expenditures. Under this standard, any law that operates to limit expenditures must be narrowly tailored to serve a compelling governmental interest. After applying the *Buckley* standard to Proposition 73’s intra-candidate transfer ban, the *SEIU* court determined that the ban was not a narrowly tailored means of serving a governmental interest. *SEIU*, 955 F.2d at 1322. In the *SEIU* case, the FPPC argued that “the ban was justified by the government’s interest in preventing funds from being raised for one office and spent for another.” *Id.* The court found, however, that this interest could be served “by means far more narrowly tailored and less burdensome” than through an intra-candidate transfer ban (i.e., avoid misleading contributors by requiring candidates to inform them that their contributions could be spent on other races). *Id.* The court concluded that “the intra-candidate transfer ban fails the narrowly-tailored prong of the strict scrutiny test.” *Id.*

A similar result can be found in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), where the Eighth Circuit Court of Appeal also rejected the validity of an intra-candidate ban, stating that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Id.* at 1428. In other words, your acceptance of contributions for the 2004 race does not force you to use those funds to speak for that election; they can be used for a future election barring the imposition of a prohibition or limitation that can survive strict scrutiny.

The City cannot, therefore, ban intra-candidate transfers unless it identifies a compelling government interest for doing so, and the ban is a narrowly tailored means of accomplishing that interest. ECCO does not support a compelling government interest in banning intra-candidate transfers through the express permission of such transfers in section 27.2920 or implicitly through 27.2938’s 12-month time period limitation. Before adopting the ordinance that enacted sections 27.2920 and 27.2938, the City Council did, in fact, consider banning intra-candidate transfers. At an August 2, 2004, City Council meeting, Councilmember Donna Frye asked the City Attorney’s office to provide legal guidance regarding the City’s ability to prohibit a candidate from transferring funds from one committee to another. Councilmember Frye’s interest in doing so was based on the same rationale identified in the *SEIU* case – preventing a person’s

contribution for one race from being used on a future race without the contributor intending such future use. In a memorandum to the City Council dated October 28, 2004, Deputy City Attorney David James opined that, for the reasons identified in the *SEIU* case, the City may not ban intra-candidate transfers as a means of addressing the concerns raised by Councilmember Frye. Ultimately, the City Council adopted sections 27.2920 and 27.2938 in full recognition that these laws were providing an express means through which a candidate may transfer leftover funds to a future campaign.

Because ECCO expressly permits (rather than bans) intra-candidate transfers, it is not susceptible to an interpretation that it impliedly contains a ban through the operation of section 27.2938's time period limitations. A legislative body "cannot do indirectly what it is prohibited from doing directly." *Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects*, 40 Cal. App. 4th 1359, 1375 (1995). In other words, ECCO should not be interpreted to indirectly impose a ban absent a showing that the City has met the strict scrutiny standards associated with First Amendment concerns. As set forth above, applying section 27.2938's time limitations to the transfers you are contemplating would effectively operate to ban virtually all intra-candidate transfers because such transfers typically do not take place within the same election cycle. Thus, until the City Council establishes that a ban on intra-candidate transfers serves as a narrowly tailored means of serving a compelling governmental interest (a feat the state failed to meet in the *SEIU* case), we may not read ECCO to directly or indirectly impose such a ban.

### CONCLUSION

As set forth above, the City of San Diego's campaign finance laws restrict pre-election fundraising, and also permit intra-candidate transfers. ECCO may be interpreted in a harmonious manner that gives full force and effect to both provisions. For the reasons set forth above, section 27.2938 does not prohibit your 2004 Committee from transferring funds to your 2008 Committee so long as the funds are attributed to the 2004 contributors using an acceptable accounting method, and so long as no individual's aggregated contribution exceeds the contribution limits applicable to the 2008 City Attorney race.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

Sincerely,

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By: Stephen Ross  
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