CITY OF MILPITAS

455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479
GENERAL INFORMATION: 408-586-3000, www.ci.milpitas.ca.gov

09/20/2011
Agenda Item No. 4

ATTACHMENTS AND/OR ADDITIONAL MATERIALS RELATED TO AGENDA ITEM AFTER AGENDA PACKET DISTRIBUTION

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September 20, 2011

BY ELECTRONIC MAIL (addressees below)

Mayor and Members of the City Council
& City Attorney
City of Milpitas
455 East Calaveras Boulevard
Milpitas, California 95035

Re: Proposed Ordinance 243.4 – Meeting of September 20, 2011

Dear Mayor and Members of the City Council:

The undersigned represents residents of Milpitas who are concerned that at a time the United States Supreme Court's and the lower courts' rulings are rejecting restrictions on free speech, the City of Milpitas is moving to restrict speech.

This law firm has represented clients on campaign speech matters in the United States Supreme Court, the California Supreme Court and intermediate federal and state appellate courts. Most recently, we successfully represented the Long Beach Area Chamber of Commerce and its political action committees in convincing the United States Court of Appeals for the Ninth Circuit to invalidate the City of Long Beach's limits on contributions to committees that make independent expenditures. (*Long Beach Chamber of Commerce v. City of Long Beach,* 603 F.3d 684 (9th Cir. 2010), *cert. den.* 131 S.Ct. 392 (2010).) We believe your proposed ordinance flatly violates the freedom of speech guarantee of the federal Constitution and the California Constitution's privacy protections. A portion of it also is preempted by the California Political Reform Act. Below, we also outline some of the problems and raise questions that need clarification about definitions, and the lack of definitions in the proposed ordinance.

1. Limit on Contributions to Independent Expenditure Committees - I-210-3.10

The language of the proposed "prohibition" of this section is virtually identical to the language of the City of Long Beach's ordinance limiting contributions to independent expenditure committees in the City of Long Beach that this firm litigated. In that case, we obtained a permanent injunction blocking enforcement of the ordinance as a violation of the First Amendment to the United States Constitution. The language of the prohibition is also nearly identical to a similar ordinance of the City of San Diego that the Ninth Circuit also invalidated in *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118 (2011). Another similar ordinance was the subject of the Silicon Valley Chamber of Commerce's successful lawsuit a few years ago that led to a court order requiring the City of San Jose to pay over $400,000 in attorneys' fees to the successful challengers.

The language not only limits contributions to committees that make contributions to Milpitas candidates but also limits contributions to independent expenditure committees. The Supreme Court and the Ninth Circuit have made clear that such contributions are not subject to limitation because there is no anti-corruption potential involved with independent expenditures. *Citizens United v. Federal Election Commission*, 130 S.Ct. 896, 908, 913 (2010).

Therefore, this element of the proposed ordinance is clearly unconstitutional, and if implemented would subject the City to constitutional attack on the provision with a likely exposure to substantial attorneys' fee awards.

2. I-210-5.20 Disclosure by Independent Expenditure Committees

Milpitas, as a general law city, is subject to the prohibitions and limitations on adopting its own campaign finance regulations set forth in the California Political Reform Act (Proposition 9), Government Code 81000 et seq. Several provisions of the Political Reform Act specifically limit local regulation of campaign finance, Government Code §§ 81013, 81009.5 and 85703 in particular. Government Code §81013 allows local jurisdictions to impose additional requirements to those provided for in the Political Reform Act "if the requirements do not prevent the person from complying with [the Political Reform Act.]" Government Code 81009.5 contains some very specific limitations. Put in less legalese, this statute allows local jurisdictions to regulate (a) local candidates and ballot measure committees, (b) their committees and (c) other committees that are active only in the local jurisdiction or

are primarily formed to support or oppose such local candidates and committees. The local jurisdiction can impose "additional or different filing requirements" than those imposed statewide on all local jurisdictions, only as to elections held in the local jurisdictions.

The proposed Milpitas ordinance attempts to regulate state general purpose committees – committees that are active in state and county elections as well as locally – and it may not do so under Government Code § 81009.5. In particular, proposed Ordinance 243.4, section I-210-5.20 purports to apply to any committee that receives contributions to make independent expenditures or which makes independent expenditures where the committee is an "active participant" in a Milpitas election, which is defined as making an expenditure of $100 or more related to a Milpitas candidate or ballot measure." This proposed disclosure would apply to "general purpose committees," "major donor committees," or "political action committees."

While Milpitas may regulate "city general purpose committees" and "city major donor committees," it may not regulate state or county general purpose committees, major donors and PACs. The State Fair Political Practices Commission, in its 2001 opinion, *In re Olson*, 15 FPPC Ops. 13, O-01-112, made this perfectly clear, in analyzing a particular requirement the City of Los Angeles, a charter city, applied to state general purpose committees, including the state political parties and county central committees.

This proposed provision has *several* defects: (1) As noted, the ordinance requires these committees to file Form 461 reports in the City for $100 expenditures, which the Political Reform Act does not give authority for Milpitas to require of state or county filer committees.[1] (2) The ordinance also would require recipient committees to file FPPC Form 461 reports, which state law does not require such committees to file. Recipient committees file FPPC Form 460 reports. The City has no power to require them to file those reports locally either. (3) The proposed ordinance refers inconsistently to filing reports for $100 or more in expenditures, but then refers to filing reports within "10 days of the date the communication is broadcast, mailed, delivered or otherwise disseminated to the public...." There is no mention of making the expenditure within 10 days of contributing or spending $100, which

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[1] State law requires general purpose committees or others that make independent expenditures are required to file an FPPC Form 465 in the local jurisdiction identifying independent expenditures of $1,000 or more at the time they file their regularly-required state campaign reports at the state level. (Gov. Code, § 84203.5.)

as noted above would illegally conflict with state law in any event.

Milpitas may regulate "city committees," i.e., those of candidates or committee principally operates within the city—see, e.g., Gov. Code, § 84200.5(l)) but not state or county general purpose committees. This matter is preempted by state law, the California Political Reform Act, which the ordinance purports to follow (I-210-7.10), except where they conflict. Your proposed ordinance in this respect "conflicts" with that state law.

3. Proposed Chapter 220 (I-220-1.10;- I-220-4.10) Regulation of Campaign Consultants

Proposed new Chapter 220 of the Municipal Code purports to define the term "campaign consultant" and requires that a campaign consultant disclose his or her name, business address and phone number, client names and any elected City offices "at issue."

The proposal purports to apply to persons or entities (I-220-2.10) "whether formally declared or not" (unnumbered section 3) "working in" or "affecting campaigns for elected public office in the city of Milpitas." Section 4 (I-220-4.10) however uses slightly different language," in campaigns for or relating to elected public office in the City of Milpitas."

These regulations are vague and overbroad. What does "affecting campaigns for elected public office" mean? Many political activities indirectly could "affect" a campaign for public office in Milpitas, including activity not actually occurring within or otherwise reportable under the City's and the state's campaign reporting requirements, as properly applied. The use of vague terms like this leave persons potentially subject to the ordinance unaware of its impact and the possibility they could be subject to criminal prosecution (as an infraction) for its violation.

What if a potential consultant doesn't "work in" Milpitas? What difference if any exists between "affecting campaigns" and engaging in activity "relating to public office," two similar but not identical terms?

We understand from our Milpitas clients that an individual working for Mayor Esteves was represented to be a "volunteer" during the campaign (who presumably would not come within the

$250/month threshold) and that this individual later was paid both fees and expenses of $5,000. (See campaign disclosure reports transmitted by separate email document and press reports.) Would such payments have required the consultant to disclose under the proposed ordinance?

Finally, the proposed ordinance appears to require a covered consultant to disclose all clients, not just those who are candidates in the City. Such coverage would be totally unrelated to the purpose of disclosing Milpitas-related campaign consulting activity. The only justification for such a broad scope of disclosure would be to use the information about a consultant's other (non-Milpitas, non-campaign) clients for guilting by association and attempts to punish the consultant, the consultant's other clients, or both. This provision in its overbreadth violates the privacy interests protected by the California Constitution. *City of Carmel-by-the Sea v. Young*, 2 Cal.3d 259 (1970). In that case, our Supreme Court said:

> The governmental purpose of the statute here at issue is declared in section 3600. Briefly, it is to assure the people to the fullest extent possible that the private financial dealings of public officials and of candidates for public office 'present no conflict of interest between the public trust and private gain.' Obviously the elimination and prevention of conflict of interest is a proper state purpose, but that alone does not justify 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.
>
> (2 Cal. 3d at pp. 268-69.)

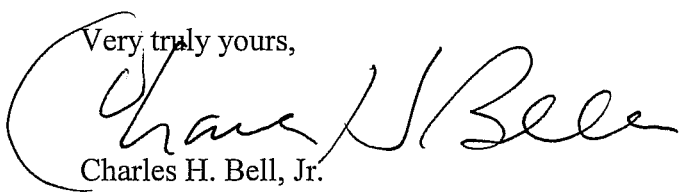
4. Voluntary Expenditure Limits – I-2.10-6.10-6.40

The proposed ordinance provides for an annual $60,000 expenditure limit for candidates. The proposal appears to require the candidate to spend that amount each year or it will be lost. In other words, this is not a per-election type limit where the candidate would have the discretion to spend the aggregate amount for the election period. The proposal also allows a candidate who breaks the limit to pay the fine associated with an infraction, without any other penalty. There is no provision that would prohibit violation within a specified time prior to an election, or waive the contribution limit for the violator candidate's opponents above the $500 per election provided in the measure. Thus, the proposal is toothless and affords an injured candidate no effective recourse. This needs to be re-thought.

CONCLUSIONS

The proposed ordinance has both constitutional flaws (limits on contributions to independent expenditure committees), state preemption issues (attempt to require state general purpose committees to file special local reports), vagueness issues (overbroad reach of consultant disclosures) and "toothlessness" issues (with respect to the ineffectual "voluntary spending limit" provisions). We encourage the City Council to reject the proposals.

Very truly yours,



Charles H. Bell, Jr.

CHB: sd

Enclosures

Mayor Jose Esteves: jesteves@ci.milpitas.ca.gov
Vice Mayor Pete McHugh: pmchugh@ci.milpitas.ca.gov
Councilmember Debbie Giordano: dgiordano@ci.milpitas.ca.gov
Councilmember Armando Gomez: agomez@ci.milpitas.ca.gov
Councilmember Althea Polanski: apolanski@ci.milpitas.ca.gov
City Manager Tom Williams: twilliams@ci.milpitas.ca.gov
City Attorney Mike Ogaz: mogaz@ci.milpitas.ca.gov
City Clerk Mary Lavelle: mlavelle@ci.milpitas.ca.gov

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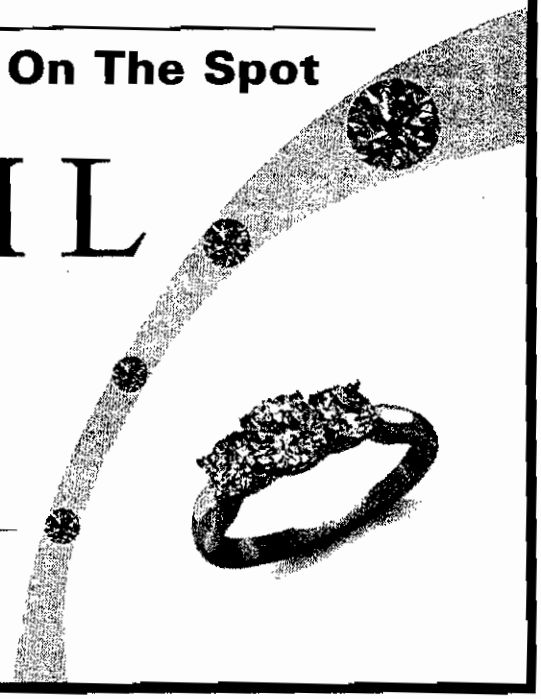


WE DO ALL JEWELRY AND WATCH REPAIRS ON PREMISES!

n Esteves

Thank You, Milpitas!

Susan and I deeply appreciate the support and the confidence expressed by the voters of Milpitas and our all-volunteer campaign team. I am humbled by the opportunity to again serve the residents and citizens of Milpitas as your Mayor.

As we embark upon the work of government, I ask for your continued support as we improve the quality of life for families, be responsible in the fiscal management of limited city resources, provide a supportive environment for businesses, and inculcate ethical behavior in government.

I look forward to working with the other members of the City Council on the challenges facing our great City. I congratulate Council Members Armando Gomez and Althea Polanski on their re-election.

I would like to extend my deep gratitude to my family and to the large extended family of volunteers who worked so hard to make our campaign a success.

Sincerely yours,
Jose 'Joe' Esteves

Paid for by EstevesforMayor2010
FPPC ID# 1323566

ESTEVES FOR MAYOR 2010; FPPC# 1323566

SCHEDULE E DATA
PAYMENTS MADE

Covers period 17 OCT thru 31 DEC 2010

	ADDRESS OF PAYEE						AMOUNT
PAYEE	STREET	CITY	STATE	ZIP	CODE or	DESCRIPTION OF PAYMENT	PAID
Sunnyhills Neighborhood Assn		Milpitas	CA	95035		ad - newsletter	$225.00
SL Carter Press and Service	2075 Bering Dr #M	San Jose	CA	95131	LIT	printing/mailing services	$2,458.13
Milpitas Post	59 Marylinn Dr	Milpitas	CA	95035		ad	$816.75
Viet Press USA	1688 S King Rd	San Jose	CA	95122		ad - Vietnamese newspaper	$500.00
Milpitas Post	59 Marylinn Dr	Milpitas	CA	95035		ad	$1,633.50
USPS	450 S Abel St	Milpitas	CA	95035	POS		$850.00
USPS	450 S Abel St	Milpitas	CA	95035	POS		$500.00
SL Carter Press and Service	2075 Bering Dr #M	San Jose	CA	95131	LIT	printing/mailing services	$1,857.25
Glenn Mayor	942 Schoolhouse Rd	San Jose	CA	95138	FND	golf tournament fees	$2,090.00
Susan R Esteves	825 Canada Dr	Milpitas	CA	95035		reimbursement - miscellaneous expenses, including food	$1,538.84
Susan R Esteves	825 Canada Dr	Milpitas	CA	95035		reimbursement - supplies	$523.06
Milpitas Post	59 Marylinn Dr	Milpitas	CA	95035		ad	$469.46
Alfred Garcia	801 Oxen St	Paso Robles	CA	93446		reimbursement - miscellaneous expenses and services	$5,000.00
Ralph Abaya	5646 Hughes Pl	Fremont	CA	94538		ads - graphic arts services	$500.00
USPS	450 S Abel St	Milpitas	CA	95035	POS		$320.00

Payments >= $100	**$19,281.99**
Payments < $100	**$88.00**
Interest paid on loans	**$0.00**
TOTAL PAYMENTS MADE	**$19,369.99**

Gomez retained their positions on the council, bearing six others to earn re-election for four more years.

Esteves returns to a mayoral seat he lost to terms limits two years ago and handily won the mayoral contest over his opponents Pete "Primo" McHugh, Debbie Giordano and Rob Means.

Esteves garnered 41.89 percent of votes, while the next closest, Giordano, received 28.03 percent of votes. McHugh got 24.40 percent of votes cast and Means 5.6 percent of votes cast, the Santa Clara County Registrar of Voters Office reported.

"I feel good and I'm very happy," said Esteves, 64, after the polls closed and votes began to tally Tuesday night, from his election night party in an office building off South Milpitas Boulevard. "I look forward to really serving again."

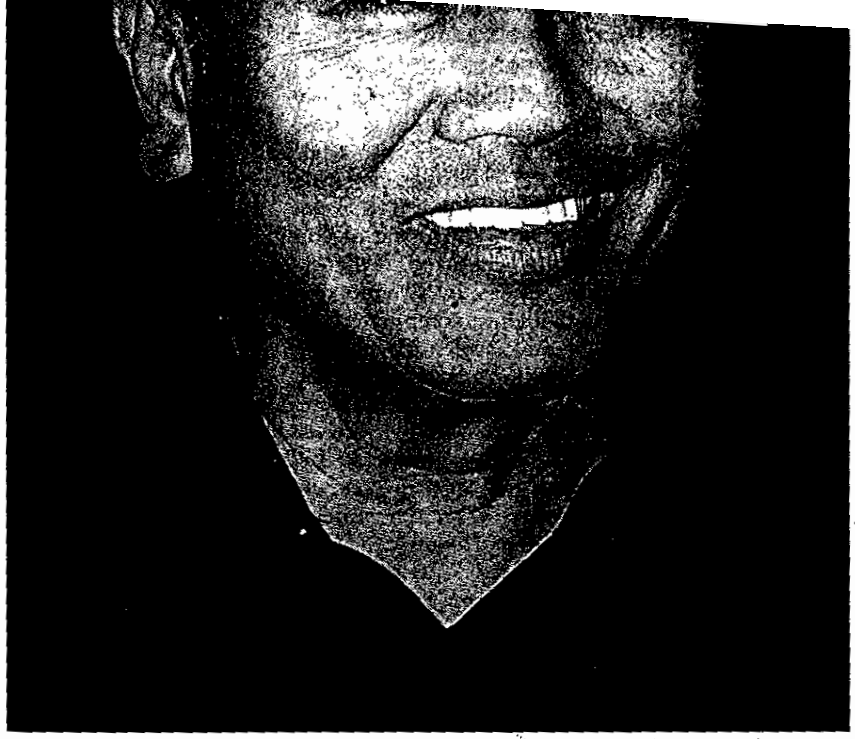
Esteves said his campaign's success was due in part to its ability to draw many voters from the city's multi-ethnic groups including the Vietnamese, Indian, Chinese, Sikh, Korean and Filipino communities.

"They have known what I've been doing," Esteves said, adding he used Asian media outlets to advance his campaign in the preceding weeks and days leading up to Nov. 2. "I've been active in these communities and understand their concerns."

Esteves, a native of the Philippines, said he also believed he earned the Filipino vote based not on his ethnicity, but on his record as the previous mayor of Milpitas.

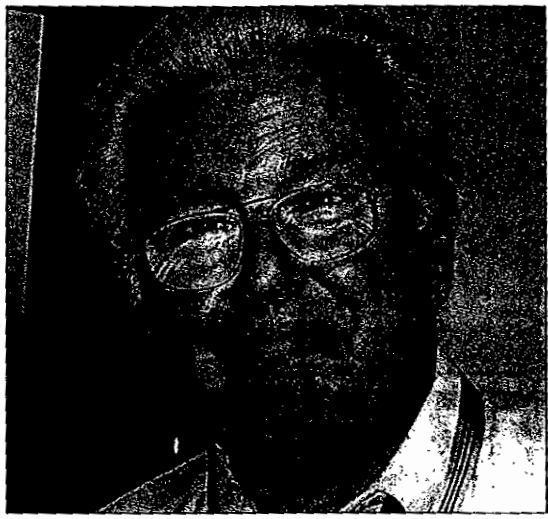
"They respect me and they believe in me," Esteves said. "It's not because I'm Filipino; it's because they believe in what I've done."

Al Garcia, Esteves' campaign manager, agreed that the Asian vote was a huge factor in this election. But Garcia also noted the Esteves camp was able to field more volunteers — up to 300 — than other mayoral candidates, many of whom started their campaigns a year ago.



Mayor-elect Jose Esteves is stunned watching the first results from the Santa Clara County Registrar of Voters Tuesday night that show him leading Debbie Giordano by 14 percentage points. He led all night, garnering more than 4,000 votes for about 42 percent of the vote.

Mayoral candidate Debbie Giordano watches returns at her home on Grand Teton Drive. She ran second with 28 percent of the vote.



Pete McHugh watches returns come in at Realty World on South Abbott Avenue. He said he expected to be neck-in-neck with Jose Esteves but ended third with 24 percent of voters supporting him.

Photos by Rosalynda Thorn

"We really didn't start until July," Garcia said, adding the active portion of the campaign began in the last two to three months. "By starting late, we worked hard not to wear out our volunteers."

Garcia added volunteers and supporters from the city's different ethnic communities — not money — helped Esteves win the race. Esteves' campaign raised more than $55,000, while McHugh raised about $74,000 and Giordano raised nearly $72,000 through contributions and personal loans. Means raised less than $1,000.

Giordano, born in Poughkeepsie, N.Y. and whose parents moved the family to Milpitas in 1958 from that state, on Tuesday hoped for a victory similar to the one achieved by a baseball franchise that moved to San Francisco from New York that same year.

"I was hoping for a Giants win tonight," Giordano said inside her Grand Teton Drive home, noting the prior night's World Series win in Texas.

Giordano said despite her loss she was honored to have run in the mayoral race.

"I think the main reason I ran was to bring discussion of the issues," Giordano said.

McHugh said for his campaign he had expected a tighter race — mainly against Esteves.

"I am surprised at Jose's strong lead," McHugh, 68, said. "I thought it would be Jose and I, neck and neck."

McHugh, a former Santa Clara Cour

Please see next p.