

September 27, 2022

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Small Donor Elections Program  
Susan Mottet, Director  
1221 SW 4<sup>th</sup> Ave, Room 220  
Portland, OR 97204

**Re: Addendum to Request for Reconsideration  
Rene for Portland**

Rene for Portland respectfully submits its Request for Consideration and corresponding Addendum (collectively “Reconsideration Request”) consistent with Section 2.16.170 of the Portland City Code (the “Code”).

*\*Please note that over the weekend of September 24-25, 2022, the computers from the Rene For Portland Campaign office at 1010 SW 11<sup>th</sup> were stolen (Portland Police Online Report T22031687). Then, sometime in the early morning hours of September 27, 2022 (today), the glass at the Rene for Portland Campaign office was shattered for a second time. There is not time to submit more complete information about this latest vandalism prior to this submission.*

### **I. Timeliness**

This Reconsideration Request is timely submitted to the Small Donor Elections Program (the “Program”) in that it is within seven (7) calendar days after the Program’s September 20, 2022 letter entitled “Administrative Sanction— Proposed Penalty” (the “Proposed Penalty Letter”).

### **II. Argument**

Rene for Portland leases approximately 3,185 square feet of office space at 1010 SW 11<sup>th</sup> (the “Space”) from Schnitzer Property Management (“SPM”). The location, downtown Portland, has unfortunately become a place where few commercial tenants want to be and where pedestrians have become increasingly unwilling to venture.

Turning a blind eye to these facts, and without relying on anything more than an advertisement (an ad which has not resulted in a lease in over two years), the Director proposes a gargantuan penalty of more than \$77,000 against Rene for Portland. Such a penalty is unjustified for multiple reasons: (1) it lacks factual basis, because other entities can receive (and have received) similar discounts; (2) it does not comply with the relevant legal standards, because there was no

opportunity to cure; and (3) it improperly relies on a grossly inflated value of the supposed fair market value of the Space to calculate the exorbitant penalty. In reality, Rene for Portland's lease for the Space provides as many or more benefits to the landlord and the City of Portland than it does to Rene for Portland.

For these and other reasons, including fundamental fairness, due process and the dilapidated and dangerous realities of downtown Portland in 2022, the Director should reconsider imposing any penalty.

#### **A. Relevant Legal Standards**

Legal standards relating to the Program arise primarily from two sources: (1) Chapter 2.16 of the Code and (2) the Small Donor Elections Administrative Rules (the "Rules"). Rene for Portland also relies on corresponding state law regarding campaign reporting for guidance, in part because that law is far more developed.

#### **B. Scope of Review**

In the Proposed Penalty Letter, the Director identifies the scope of review as follows:

"If you [Rene for Portland] can provide evidence that Schnitzer Property Management has offered members of the general public (to whom no special favor was being granted) discounted rent in similar circumstances to yours, I would be happy to review the evidence and, if appropriate, reduce the amount of the penalty.<sup>1</sup>"

Respectfully, this is not the appropriate standard if the reconsideration is to have any substance. Due process requires that the reviewer must consider much more than whether SPM has offered this discount to others. Among other things, the review must consider the language of the Code and Rules, the circumstances of the proposed violation, and the process associated with the imposition of the violation. These are discussed below.

In any event, to the extent that the only relevant standard is whether SPM has offered similar discounts to others, that factor weighs strongly in favor of Rene for Portland in light of Jordan Schnitzer's recent words:

"I'm saying now publicly, you can put this on the air, if there are nonprofits or political candidates or for-profit

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<sup>1</sup> Proposed Penalty Letter at 5.

businesses that want to get some space at bargain rents, we've got some space.”<sup>2</sup>

### C. Points

#### 1. **There should be no penalty because other entities can receive similar downtown discounts (and already have).**

The Proposed Penalty Letter states:

*“Though campaigns may accept discounts that are available to the general public, a campaign accepting a discount not available to the general public constitutes contribution of the difference between the fair market value and the amount paid.”*<sup>3</sup> (Emphasis added).

The italicized phrase is key. The Director then writes, without support, “The City concludes that all 96.37% of the discount is not available to the general public and therefore a contribution that violates program requirements.”<sup>4</sup>

But similar discounts *are* available to others. In fact, Multnomah County, through the Multnomah County District Attorney’s Office, has leased approximately 1400 square feet at 928 SW Harvey Milk for \$0 per month in rent and \$476 per month in expenses. This includes a parking space at no additional cost and is terminable on thirty days’ notice (if the landlord is able to find another tenant). Upon solid information and belief, there are other leases like this one as well, either already executed or at least under active consideration.<sup>5</sup>

While one can argue that there is a difference between the government taking advantage of discounted rent and a campaign doing so, any such difference is irrelevant for purposes of the present analysis. What matters is whether others beyond Rene for Portland have the option of heavily discounted rent, and they plainly do.

Moreover, as noted above, SPM and Mr. Schnitzer give and offer other nonprofits or political candidates (or even for-profit businesses) downtown space at

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<sup>2</sup> Watson, Evan. “He did us a favor’ Schnitzer says the Rene Gonzalez campaign fine is a product of downtown Portland vacancies.” *The Oregonian/Oregonlive.com*, September 22, 2022.

<sup>3</sup> Proposed Penalty Letter at 3.

<sup>4</sup> Proposed Penalty Letter at 3.

<sup>5</sup> For example, a lease with similar terms is at least under consideration at 618 NW Glisan.

bargain rents.<sup>6</sup> This is not hyperbole. As detailed more below, putting tenants in spaces that have been otherwise empty for years has serious advantages—optics, security, having someone else on the hook for vandalism, covering costs, and more.

To fine Rene for Portland under these circumstances is wholly inappropriate and inconsistent with the Program’s criteria. Thus, because a discount is available to others, the Director must reconsider and rescind any proposed penalty.

**2. Any in-kind donation should not be valued anywhere close to \$5,000; under state law, it would not even be reportable.**

**a. The value of any in-kind donation is not over \$5,000.**

The Code and the Rules provide little detail on the specifics of “in-kind contribution” guidelines. The Code leaves it to the Rules to define the term and adds that candidates “may accept In-Kind Contributions in an amount determined by the Portland Elections Commission and published in administrative rules.”<sup>7</sup> That is all the Code says.

As for the Rules, Rule 3F defines “in-kind contribution” as

“a good or service that has monetary value, other than money, that is provided directly by a contributor to a participating or certified candidate.”

Rule 6C limits in-kind contributions “valued at no more than \$5,000 per election per donor \*\*\*.”

The question is—valued how and by whom? Valued by SPM, who has tried unsuccessfully for the last two years to lease the Space at “fair market value”? The value of the Space donated is plainly not \$5,000; it is effectively zero because SPM cannot otherwise rent it. The rent that Rene for Portland pays more than covers SPM’s costs and is pure profit. As Mr. Schnitzer stated:

“There is virtually no leasing activity in downtown Portland, which is part of a much bigger issue. *From my standpoint, [Rene for Portland] did us a favor by taking the space and having people come and go.*” (Emphasis added.)<sup>8</sup>

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<sup>6</sup> See Note 2.

<sup>7</sup> Code 2.16.010.R (defining in-kind contribution) and 2.16.040.D (accepting in-kind contributions in amount set by Rule).

<sup>8</sup> See Note 2.

The Director assumes that the appropriate value is simply SPM's asking price for the lease. But that does not reflect current downtown realities, nor does an advertisement establish the "fair market value." For example, just because someone lists a house for \$1 million does not mean the house is worth \$1 million; rather, the house is worth what someone will actually pay for it. *This is why home appraisals do not rely exclusively on listings; they look at actual recent sales activity.*

Here, the Director compounded this error by not looking at any recent activity, instead assigning the entire fair market value from an ad that had not been answered for two years. This approach does nothing to establish the price that a willing tenant would pay a willing landlord in the current downtown market. And, as explained below, the Director's approach fails to account for the many other market benefits that SPM receives from Rene for Portland.

**b. SPM also benefits by not being responsible for the costs associated with vandalism.**

SPM enjoys another benefit from the Rene for Portland lease—insurance against rampant vandalism. When vandals broke the glass at the Space around August 1 (the act that precipitated this entire investigation and penalty), SPM was not on the hook for repairs—Rene for Portland was. Landlords across downtown Portland who have had their properties ravaged by graffiti and broken glass over the last few years would love to have a tenant defray the costs of this lawlessness, even at a supposed "discount."

And as detailed in italics at the start of this Addendum, Rene for Portland has been the victim of two more criminal acts within the past four days. *Over the weekend of September 24-25, 2022, the computers from the Rene For Portland Campaign office at 1010 SW 11<sup>th</sup> were stolen (Portland Police Online Report T22031687). Then, sometime in the early morning hours of September 27, 2022 (today), the glass at the Rene for Portland Campaign office was shattered for a second time.*

It is no wonder that SPM had been unable to lease the Space for two years.

**c. The in-kind donation would not even be reportable under guidance from state campaign finance law.**

Because the Program's rules and regulations regarding "in-kind donations" are sparse, Rene for Portland was forced to look for guidance elsewhere. State campaign finance law addresses the scenario where an in-kind donor recovers the entirety of underlying costs from a donation. Under state law, such an in-kind donation is permissible and not even required to be reported.

“A vendor of food or beverages may sell food or beverages to a committee at a discounted rate. *The discount is not a reportable in-kind contribution as long as the amount charged is at least equal to the vendor’s cost for the food or beverage.*”<sup>9</sup> (Emphasis added.)

While this language expressly applies to food or beverages, the principle is the same. This is not about cash donations—it is about office space, and office space that otherwise remains vacant. SPM is recovering all of its costs and more from Rene for Portland, so there should be no reportable in-kind donation.

In sum, SPM’s donation of the Space was not over \$5,000, and it was not even reportable under guidance from the state. At a minimum, Rene for Portland should be entitled to rely on its good faith determination as to these points.

**3. The sanction is unwarranted because the Director failed to give Rene for Portland any meaningful opportunity to address and/or to cure alleged violations.**

**a. There is a clear right to cure under the Code and the Rules.**

Section 2.16.120 of the Code, which provides the rules for the Director to impose civil penalties, establishes that a candidate must have the opportunity to “cure” violations. This right is so important that it is identified in each of the first two subsections:

“A. Civil Penalties

1. The Director shall establish in in administrative rules a timeline by which *Candidates may cure failures* to comply with this Chapter.
2. The Director may impose a civil penalty as provided in this Section \*\*\* for:
  - a. *Uncured* violation of any provision of this chapter by a Participating or Certified Candidate \*\*\* (emphasis added).”

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<sup>9</sup> 2022 Oregon Campaign Finance Manual—Oregon Secretary of State at 46.

“Cure” provisions are legally common. In essence, it refers to a party *who is made specifically aware of a potential issue* being provided a set period of time (known as the “cure period”) to fix (or “cure”) the issue. That a party must be aware of the issue in order to then be able to cure is self-evident.

Here, the Director established a cure timeline in Rule 18.C that renders the cure protection in the Code irrelevant:

“Violations may be cured without penalty by the reporting deadline for the contribution or expenditure that was in violation.”

The “reporting deadline” is either 30 days after the transaction or, if the election is within 42 days, a 7 calendar day reporting.<sup>10</sup>

In other words, the cure period “provided” is essentially the period within which a candidate would have had to report the matter in the first place, which is no cure period at all. What is the point of an ability to cure a violation when the so-called cure period coincides with the actual reporting period? To have a meaningful opportunity to cure (as required by the Code) a candidate must have both (1) notice of the alleged violation and, once there is notice, (2) a period of time in which to cure.

**b. Rene for Portland was never given any chance to cure the alleged violations based on the supposed value of the contributions.**

Even worse are the circumstances surrounding the original complaint and the nature of the inquiry by the Director—which was never about the supposed value of the in-kind donation. The complaint arose in the aftermath of the August 1, 2022 Oregonian piece about the broken glass and vandalism of the Rene for Portland campaign headquarters.<sup>11</sup> Adding insult to injury, the City of Portland Elections Office received a complaint the following morning based on the article noting a single rent payment, even though the office had opened in May.

That complaint, and the subsequent communications between Rene for Portland and the Director, were completely focused on the timing of reporting, never on the supposed value of the donation. Rene for Portland explained that the

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<sup>10</sup> Rule 14.A.1.a requires candidates to report all contributions and expenditures “on the same schedule as required by the state,” *i.e.* not later than 30 days after the transaction or, within 42 days of the election, 7 calendar days.

<sup>11</sup> Kavanaugh, Shane. “Portland City Council candidate Rene Gonzalez’s campaign headquarters vandalized.” *The Oregonian/OregonLive.com*, August 1, 2022.

single rent payment was for two months and that the next payment was not yet due. Never did the Director ask Rene for Portland about the value of any in-kind donation until the Letter on September 20, when it proposed a whopping \$77,140 penalty for something it had never previously asked about!

Because Rene for Portland was denied any meaningful notice or opportunity to cure this violation, the Director should reverse the proposed sanction.

**4. The fair market value of 1<sup>st</sup> floor commercial NNN space in downtown Portland in 2022, where the landlord at least recovers its costs and can remove the tenant if market conditions ever improve, is much closer to \$0 than the listing price for long-term leases (here, \$6900/month).**

Even if any sanction was appropriate (it is not), the amount of the proposed sanction is outrageous and fails to comport with the reality of the crime and lawlessness that infect downtown Portland in 2022.

The Director bases her calculations on \$6,900 being the monthly fair market rent for the Space. As explained above, this is not appropriate. Once upon a time, in happier days, this amount might have been accurate if a willing tenant would have paid it.

But downtown Portland is no longer in that time. SPM has been unable to lease the Space for two years now. SPM is not alone—vacancy rates for commercial space in downtown Portland are at historic highs, as businesses large and small as well as citizens flee the downtrodden and even dangerous downtown environment. Landlords in downtown Portland like SPM have been reduced to taking whatever they can get to simply tread water and cover costs until things hopefully change.

The Director must recalculate any fine based on this reality. This is especially true given the general \$10,000 maximum fine limitation expressly stated in both the Code and the Rules.<sup>12</sup> Rule 18.A adds in relevant part:

“It is not the intent of this section to discourage participating in the program through excessive penalties for mistakes that do not harm the purpose of this section or the purpose of the program.”

Under these circumstances, a fine of \$77,140 is far beyond the pale and must be repealed or severely reduced.

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<sup>12</sup> Both the Code (Section 2.16.160.A.3) and the Rules (18.B) state the maximum penalty for any violation should generally be \$10,000 for any violation.



**5. Rene for Portland only uses a fraction of the Space and can be removed on 30 days' notice if SPM can ever find a tenant.**

Had the Director actually visited the Space as part of the investigation to see how Rene for Portland uses it, the Director would know that Rene for Portland uses only a fraction of the Space. That there may be campaign signs in windows does not mean the space within the windows was not otherwise empty. It was.

Moreover, as previously mentioned, SPM may remove Rene for Portland on 30 days' notice if it is ever able to find a tenant under present market conditions (similar to the lease provision that the Multnomah County District Attorney has for otherwise unusable downtown space).

The Director should reduce the fine amount to reflect these realities.

**6. The Program has already inappropriately injected itself into this race in a manner hostile to Rene for Portland.**

The damage is already done. By announcing a massive fine—more than seven times the general cap under the Code and the Rules<sup>13</sup>—less than two months before the election, the Director has unfairly injected the Program into this race in a manner hostile to Rene for Portland. News outlets across the region blasted the headlines (in some cases multiple times).<sup>14</sup> Distracted voters viewed the headlines and formed opinions.

Perhaps even worse, the Director—the person who will purportedly act as an impartial judge here—is already on record aggressively against Rene for Portland:

“When you violate the prohibition on large contributions and accept a contribution of \$33,000, that goes against the point of the program to ensure our democracy is strong and healthy and accountable to the people.”<sup>15</sup>

So much for unbiased decision-making, another hallmark of a supposedly strong and healthy democracy.

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<sup>13</sup> See Note 12.

<sup>14</sup> The *Portland Mercury*, which has been hostile to Rene for Portland since the race began, took the opportunity to run two headlines about the “historic” fine and the “sweetheart” deal.

<sup>15</sup> Watson, Evan. “He did us a favor’ Schnitzer says the Rene Gonzalez campaign fine is a product of downtown Portland vacancies.” *Oregonlive.com*, September 22, 2022.

This cannot be how the Program is supposed to work. As detailed above, there are very serious deficiencies and errors, both as to the imposition of any fine in the first place as well as to the exorbitant and wholly unjustified amount.

The request for reconsideration and any ensuing appeal, if necessary, are important processes for exposing these deficiencies. But how can a successful reconsideration or appeal undo what has already happened? It cannot. And how can Rene for Portland trust the impartiality of a Director who is already on record against him? It cannot.

This concern is precisely why a meaningful opportunity to cure—not the ineffectual one offered here—is critical. As previously discussed, Rene for Portland, or any future candidate, should first have the opportunity to address allegations, either through corrective action or raising challenges, prior to the announcement of any aggressive fine. And the Director should attempt to avoid aggressive public statements against a particular candidate, especially while the reconsideration/appeal process is pending.

Six years ago, Jim Comey injected himself and the FBI into the 2016 presidential election when he announced the reopening of an investigation into Hillary Clinton's emails shortly before the election. The impact was massive. Since that fiasco, the consequences of which remain today, government agencies should be particularly sensitive to avoid needlessly and inappropriately influencing elections.

#### **IV. Conclusion**

Rene for Portland looks forward to a thorough, fair and impartial reconsideration of the Proposed Penalty Letter in light of the items above. Today, however, Rene for Portland will be cleaning broken glass from vandalism at the Space yet again.