

***MEMORANDUM***  
***Office of the City Attorney***



**Date:** June 11, 2015  
**To:** Chair Althea Polanski,  
Members of the Campaign Finance Reform Committee  
**From:** Mike Ogaz, City Attorney *M.O.*  
**Subject:** Campaign Finance Reform Committee Proposals

INTRODUCTION

The Campaign Finance Reform Committee has received two campaign finance reform proposals from different subcommittees. This memo discusses potential legal issues in adopting these proposals.

**Proposal 1**

Contribution Limit

Candidates are generally subject to a \$250 contribution limit per contributor and pay for their own ballot statements, unless they agree to comply with a voluntary expenditure limit.

Voluntary Expenditure Limit

A voluntary expenditure limit of \$15,000 would be available for City Council candidates and a voluntary expenditure limit of \$20,000 would be available for mayoral candidates. Candidates agreeing to abide by this limit will be allowed to raise their contribution limit to \$500 per contributor. They will also receive a "star" next to their name on the ballot and the City will pay their cost of ballot statement.

Candidates who revoke their acceptance of the voluntary limit will need to return the amount of any donation exceeding \$250 and refund the cost of their ballot statement plus \$1,000. Candidates may not withdraw from the voluntary limit after ballot publication.

Time Limitation

For a November election, candidates may not accept contributions before January or after mid-October.

Other Requirements

Donations from any party in a contract with the City must be disclosed (i.e. above a certain amount of money) and must also disclose whether an employer has reimbursed employees for making contributions.

The City is to create a searchable database for FPPC filing information.

The subcommittee also has potential ideas for limiting expenditures by or contribution made to independent political actions committees, and to enact penalties for violating these campaign finance regulations, including loss of office.

## **Proposal 2**

(Subcommittee: Bill Ferguson, Rajeev Madnawat and Syed Mohsin)

### Contributions from Project Applicants

Any person or business with a project pending before the City may not directly or indirectly contribute to a candidate. This includes any person with projects requiring approval by the City Council, the Planning Commission or any Milpitas City Commission, but does not include persons with items of routine business (i.e. a business license) in the City. This prohibition applies to all officers of a corporation, and includes all immediate family members.

### Contributions from Contracting Parties

Any person or business in a contract with the City that has an expected payment of over \$1,000 may not make a campaign contribution. This prohibition applies to the six-month period prior to an election.

### Time Limitations

No contributions may be made to a campaign starting six months prior to an election (i.e. the month of May during an election year) and no contributions may be made after an election is over. Election committee must close by January 31 after an election.

### Penalties

Penalties shall be applied in relationship with the seriousness of the offense. For serious or intentional violations, the penalty shall be disqualification from holding the office and prohibition on running for office for 10 years. If the violation has had a material effect on the election, the candidate will be removed from office.

For example, if the violation amount is under 1/4 of the total spent on the campaign, or less than \$5,000, then the penalty shall be to repay 3 times the amount of the violation. If the violation amount is over 1/4 of the total spent, or over \$5,000, then the penalty shall be loss of the office.

### Standing

Any registered voter of Milpitas would have standing to file a suit on the behalf of the voters of Milpitas. After a complaint has been filed with the City, the City has 90 days to respond to the petitioner. If the City does not take action after this time had expired, then the registered voter can file an enforcement suit. Prevailing party will get attorney fees.

## ANALYSIS

### **I. Voluntary Expenditure Limit**

#### A. Generally, expenditure limits are most likely unconstitutional

Adopting a voluntary expenditure limit is a risky measure. Independent expenditures and candidate expenditures for elected office are protected by the First Amendment because campaign spending is protected speech. At the outset, mandatory limits on campaign expenditures are almost certainly unconstitutional because they are not justified by any government interest. Expenditure

limitations are subject to strict scrutiny review—they must be narrowly tailored to serve a compelling government interest.<sup>1</sup> The only recognized government interest in campaign finance regulation is to prevent corruption or to eliminate the appearance of corruption, but this interest does not justify limitations on campaign expenditures.<sup>2</sup> Thus, expenditure limitations on individuals independently spending and candidate expenditure limits are typically rejected.<sup>3</sup>

B. For general law cities, voluntary expenditure limits cannot be used as a precondition to accepting public funding.

Next, there are certain limitations on the types of incentives that may be used to encourage accepting the voluntary expenditure ceiling. Cities must also ensure any adopted incentives are truly voluntary, rather than coercive. For one, general law cities cannot encourage candidates to accept voluntary expenditure limits by offering to publicly fund the campaign if the candidate agrees to the expenditure limit. Although the U.S. Supreme Court has stated that Congress may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations, California Government Code section 85300 prohibits general law city candidates from accepting public funding.

C. Differing contribution limits based on acceptance of spending limits could be problematic.

Further, there is a significant risk in allowing candidates who accept voluntary expenditure limits to receive contributions that are larger than those allowed for candidates who decline to limit their spending. In California ProLife Council PAC v. Sully<sup>4</sup>, a federal district court in Sacramento struck down as unconstitutional a State law that provided differing contribution limits depending solely on whether the candidate had accepted voluntary contribution limits. Likewise, in Davis v. Federal Election Com., the Supreme Court struck down a federal election campaign law (the “Millionaire’s Amendment”) that increased the contribution limit for those candidates who face a self-funded opponent.<sup>5</sup> Under the amendment, if a candidate financed his campaign with personal funds in excess of a statutory threshold amount, his opponent would be able to receive individual contributions three times above the normal contribution limit. In invalidating this law, the Court reasoned that it has never upheld a law that imposes “different contribution limits for candidates who are competing against each other.”<sup>6</sup> This scheme of discriminatory contribution limits thus imposed a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech.<sup>7</sup>

D. Application: the proposed voluntary expenditure limit is problematic because it cannot be a precondition to City-funded ballot statements, and differing contribution limits based on accepting the spending limit is highly suspect.

Proposal 1 contains provisions to set a voluntary expenditure limit for City Council and

<sup>1</sup> Randall v. Sorrell (2006) 548 U.S. 230, 247; see also Davis v. FEC (2008) 554 U.S. 724, 737; Long Beach Area Chamber of Commerce v. City of Long Beach (2010) 603 F.3d 684, 691-92; Lincoln Club v. City of Irvine (9th Cir.2001) 292 F.3d 934, 937.

<sup>2</sup> Randall, 548 U.S. at 247; Buckley v. Valeo (1976) 424 U.S. 1, 45.

<sup>3</sup> Long Beach, 603 F.3d at 692.

<sup>4</sup> California ProLife Council PAC v. Sully (E.D. Cal. 1998) 989 F.Supp. 1282.

<sup>5</sup> (2008) 128 S.Ct 2759.

<sup>6</sup> Id. at 2771.

<sup>7</sup> Id. at 2772.

mayoral candidates. This limit is a precondition to receiving a higher contribution limit, an indicator on the ballot statement and City-funded ballot statements. There are two potential problems with this expenditure limit. First, it appears that the City-funded ballot statement would be a publicly funded campaign activity and prohibited by Government Code section 85300 (“no public officer shall expend and no candidate shall accept *any public moneys* for the purpose of seeking elective office”).

Additionally, in light of Davis and Sully, it would be problematic to allow a contribution limit higher than the normal threshold for candidates who agree to accept the voluntary expenditure limit. This is particularly true since the allowable contribution limit (\$500) for candidates who agree to the spending limit is double the amount of the normal threshold (\$250). Perhaps the City could defend this expenditure limit by arguing that the contribution limits here do not create a gap as large as the limits in Davis (three times the normal limit), and thus do not substantially burden a municipal candidate’s campaign spending ability. This argument could be bolstered by decreasing the difference between the contribution limits for candidates that agree to the spending limits and candidates who do not. Nonetheless, any difference in spending limits would create risk under the Davis analysis.

It appears that the ability to receive a “star” next to a candidate’s name on the ballot is not a coercive condition, as candidates can freely choose whether to receive that recognition. In the end, the main concern for the City would be the difference in contribution limits based solely on acceptance of the spending limit.

## II. Contribution Limit/Ban

### A. Contribution limits cannot be overly restrictive, and must be closely drawn to serve an anti-corruption interest.

Contribution limitations are reviewed under a less stringent standard than the strict scrutiny applicable to expenditure limits. First, contribution limitations must be justified by a government interest to prevent corruption or the appearance of corruption. The government must point to legislative findings and a factual record (such as evidence of past improper quid pro quo contributions or overwhelming voter approval of contribution limits) to demonstrate that it has a sufficient interest in preventing corruption or the appearance of corruption and justify the particular limit.<sup>8</sup> For example, a city cannot rely on hypothetical examples of potential corruption or a recent pattern of corrupt conduct in local politics to justify its contribution limitations ordinance.<sup>9</sup>

Second, contribution limitations must be closely drawn to serve the corruption-prevention interest and also must be adjusted for inflation.<sup>10</sup> In Randall v. Sorrell, the Supreme Court has struck down a contribution limitations law for being too restrictive, which would prevent donors from making contributions and challengers to raise sufficient funds to mount a meaningful campaign.<sup>11</sup> Prior to Randall, a federal district court similarly enjoined a contribution limit for being too low to allow candidates to mount an effective campaign.<sup>12</sup> The City’s current campaign contribution limit of \$250 has never been challenged or to our knowledge criticized publicly as being too low to allow a candidate to mount an effective campaign.

<sup>8</sup> Citizens for Clean Government v. City of San Diego (9th Cir. 2007) 474 F.3d 647, 653-654.

<sup>9</sup> Id.

<sup>10</sup> Randall, *supra*, 548 U.S. at 261.

<sup>11</sup> Id. at 256-57.

<sup>12</sup> Scully, *supra*, 989 F.Supp. at 1298-99.

B. Prohibiting contributions by contractors and project applicants could be justified.

Courts in other jurisdictions have conflicting rules on banning contributions from contractors to candidates. For instance, the Second Circuit Court of Appeals in Green Party of Connecticut v. Garfield upheld a Connecticut law that banned contributions by State contractors, prospective State contractors, their principals, and their immediate family members to either the executive branch or legislative branch.<sup>13</sup> The court determined that the contribution ban was closely drawn to the State's anticorruption interest. Since the purpose of the ban was to combat actual and the appearance of corruption, and there had been recent scandals of corruption in the State, the ban on contractor contributions was closely drawn to address incidents of corruption and the perception of corruption brought on by these scandals.<sup>14</sup> In contrast, the Supreme Court of Colorado in Dallman v. Ritter struck down as vague and overbroad a constitutional amendment enacted by Colorado voters banning contributions to candidates by State contractors and contributions made on behalf of their immediate family, for the duration of the contract and for two years thereafter.<sup>15</sup> The court found that several provisions of the amendment were overbroad (i.e. the definition of a "government contract" and the penalties imposed) and vague in their application, and thus violated the First Amendment.

C. Application: the proposed contribution limit and the ban on contractor contribution seem appropriate, and the City should ensure they are closely drawn to be no more restrictive than necessary.

Proposal 2 contains provisions to ban contributions from pending project applicants and contracting parties (including their family members) with the City. In order to minimize the risk of these provisions being challenged, the City should support them with evidence of corruption or the appearance of corruption, if such evidence exists. It is risky to rely solely on hypothetical ideas of corruption or predictions of corruption.

For example, the City can point to its experience dealing with contributions from project and contract applicants that were able to raise a significant amount of funds to support specific candidates and raise concerns of corruption.

The City can use this evidence to support the contribution ban on contractors and project applicants and argue that by totally shutting off the flow of money from contractors to candidates, it eliminates any notion that contractors and project applicants can influence future council members and the mayor by donating to their campaigns. Further, if there is no strong evidence of actual corruption as there was in Green Party of Connecticut, the City should consider narrowing the contribution ban to avoid possible overbreadth challenges. In sum, if the City can sufficiently support the contribution limit/ban and closely tailor it to an anti-corruption interest, it could utilize these provisions to regulate campaign contributions from project applicants and contracting parties.

### **III. Disclosure and Other Requirements**

Both proposals contain additional provisions on establishing time limits on contributions, creating disclosure requirements, and imposing penalties for violations in accordance with the level of

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<sup>13</sup> Green Party of Connecticut v. Garfield (2010) 616 F.3d 189.

<sup>14</sup> Id. at 204-205.

<sup>15</sup> Dallman v. Ritter (Colo. 2010) 225 P.3d 610.

offense. Subject to the rules below, the City is unlikely to have problems in enforcing these provisions.

A. Time and penalty provisions should be closely drawn to serve anti-corruption interests.

The City's proposed time limits on contributions and penalties for violation are not likely to be challenged, as there is no authority against such regulation and, as stated in the proposals, both San Francisco and Santa Clara currently have laws (without having been challenged) restricting the time of contribution and imposing penalties for violation of their campaign finance regulations. Previously, the City of Milpitas had removed its time limit restriction, which prohibited "soliciting for campaign contributions except during the period nine (9) months prior to and three (3) months after an election, from its Campaign Contribution Ordinance. That time limit was determined to be overly restrictive, as it (1) does not distinguish between incumbents and challengers; (2) fails to account for the fact that corruption can occur both within and outside of the time limits; and (3) does not distinguish between large, corrupting contributions, and small, innocuous ones. Therefore, that time limit was too broad in restricting speech and would likely be invalidated if challenged. The time limit proposed at this time should contain parameters to avoid these shortcomings.

Furthermore, as discussed above, any regulation on campaign contributions should be closely drawn to serve the government's anti-corruption interest. Here, the time limits in both proposals provide at least a six-month window to allow contributions prior to an election. Thus, it does not seem that the time limit provisions would be overbroad in suppressing more political speech than necessary.

As for penalties, Proposal 2 suggests that a candidate in violation of these laws should repay 3 times the amount of the violation. This penalty could be questionable as the triple payment is a significant number. Perhaps further discussion is required to determine if this penalty is closely tailored to a violation.

B. Disclosure requirements must be substantially related to a legitimate government interest.

Campaign disclosure requirements are viewed under an "exacting scrutiny" standard, which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.<sup>16</sup> Here, Proposal 1 suggests that donations from contractors above a predetermined amount and employer reimbursements for contributions should be disclosed. The latter would be helpful information to determine compliance with the current aggregation provisions. It also calls for the creation of a searchable database for FPPC filing information. Indeed, it appears that these requirements are substantially related to the City's interest in eliminating corruption. The proposed requirements specifically targets contractor contributions that exceeds a certain amount and employer reimbursements to employees making a contribution, which relates to the City's interest in combating corruption or the appearance of corruption (although potentially unnecessary should the City choose to ban all donations from contractors). The City should be prepared to support its interest in eliminating corruption or the appearance of corruption and show that its disclosure requirements are not more restrictive than necessary.

Additionally, Government Code section 81013 provides that a local agency may impose additional requirements on any person if the requirements do not prevent the person from complying

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<sup>16</sup> Citizens United v. Federal Election Com'n (2010) 558 U.S. 310, 366-67.

with State law. As such, the City is permitted under section 81013 to enact disclosure requirements beyond the FPPC filing requirements for independent expenditure committees (IEC). These laws require identification of the contributors to the IEC and their profession and or address. This gives the public some idea of where the IEC money is coming from and what interests it may represent. Other laws require large print on print materials and on media ads identifying the IEC or candidate committee that paid for the ad. Such requirements that are not inconsistent with State law would create greater visibility and openness to the campaign process.

I hope this memorandum is helpful to the Committee in its pursuit of Campaign Finance Reform. I will attend your next meeting to discuss these concepts and to provide further research and opinions as may be desired by the Committee.