Thursday May 6, 2004

Honorable Mayor and Members of
The Hermosa Beach City Council

Regular meeting of
May 11, 2003

CONSIDERATION OF ISSUES PERTAINING TO THE CITY'S CAMPAIGN FINANCE ORDINANCE

RECOMMENDATION

Staff recommends that Council:

1. Receive and file this report.
2. Direct staff to return with proposals for revisions to the City's campaign finance ordinance.

BACKGROUND

Section 2.08.020 of the Municipal Code, adopted in 1987, reads as follows:

"No person shall make, nor shall any candidate for elective office or his or her committee, accept any contribution, gift, subscription, loan, advance, pledge or promise of money in aid of the nomination or election of a candidate which will cause the total given by such person with respect to a single election in support of, or opposite to, such candidate, including contributions to all committees supporting or opposing such candidate, to exceed the sum of two hundred forty-nine dollars ($249.00). This section shall not apply to amounts given by a candidate to his own campaign."

This section prohibits any person from contributing a total of more than $249 in support or opposition to any candidate, whether or not that $249 is contributed directly to a candidate (or the candidate's controlled committee) or to any other committee supporting or opposing a candidate (including, by implication, independent expenditure committees), however that sum may be allocated among the various recipients.

The question raised is the applicability and enforceability of this provision to contributions to independent committees. Prior to 1999, independent committees were not involved in Hermosa Beach elections with regard to the election of candidates (as opposed to ballot measures), and as a result, this issue did not come up. The $249 limit was applied and enforced by the City Clerk to all contributions made directly to candidates and to their controlled committees.

Based on a review of the City's records by the City Clerk, an independent committee was established to oppose a candidate for City Council for the first time in the 1999 municipal election, called the Committee for Accountability on Hermosa Beach City Council ("Committee"). The Committee appeared to have been formed just prior to the election, and the Committee reported several contributions in excess of $249 several months after the election in November 1999. Thereafter, in connection with the 2003

municipal election, an organization called Citizens for a Better Hermosa Beach ("Citizens"), which identified itself as a "County committee," disclosed $6,500 in contributions from five individual donors. Finally, a committee called the Hermosa Beach Downtown Restaurant and Tavern also formed in connection with the November, 2003 election and reported ten contributions, all for $249. While recipients of campaign contributions report to the City Clerk generally how those contributions are spent (i.e. paid to Adelphia or the Easy Reader and the like), the City generally has no specific information as to precisely what the funds are used for.

Because some contributors to these committees exceeded the $249 limit, the question has arisen as to the applicability of Section 2.08.020 to these contributions.

ANALYSIS

In determining the applicability of Section 2.08.020, the meaning of all words and phrases are governed by the Political Reform Act of 1974 found at California Government Code § 81000 *et seq*. *See* Mun. Code § 2.08.010.

Section 2.02.080 applies to three categories of individuals and organizations: persons, candidates, and committees. Candidates include anyone whose names appear on a ballot or have qualified as write-in candidates. *See* Gov. Code § 82007. Persons include all individuals, organizations, and committees. *See* Gov. Code § 82407. This definition would include nearly all the individuals and organizations active in the last City election, including Citizen and Committee.

Committees may be either controlled or independent with reference to a specific candidate. A controlled committee is any that is directly or indirectly controlled by a candidate or that acts jointly with a candidate or controlled committee. *See* Gov. Code § 82016. By contrast, any other committee should be deemed independent. Independent committees only fall within the general state law definition of committee, however, upon receiving $1000 or more in political contributions, contributing $10,000 or more to any political campaign, or making $1000 or more in independent expenditures. *See* Gov. Code § 82013. Independent committees that do not do any of these things are not committees within the meanings of either the statute or the City's regulation, and are thus not subject to reporting requirements of state law or contribution caps imposed by the City.

The scope of the term 'committee' is further limited by the meaning of the phrase "independent expenditure."

> "Independent expenditure" means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate … or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee. Cal. Gov. Code § 82031.

This definition was narrowed in *Governor Gray Davis Committee v. American Taxpayers Alliance*, where the court of appeals held that the definition reaches only "those communications that contain express language or advocacy with an exhortation

to elect or defeat a candidate." *See* 102 Cal. App. 4th 449, 471 (2002) (internal citations and quotations omitted). The court reasoned that interpretatively excising the words "taken as a whole and in context, unambiguously urges a particular result" was necessary to comport with the United States Supreme Court's decision in *Buckley v. Valeo*. The *Buckley* Court had similarly held that first amendment free speech protections required that federal election disclosure requirements be limited to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. 1, 80 (1976).

Thus, under current State law and for the City's purposes, an independent expenditure committee is any person or combination thereof that without being either directly or indirectly controlled by a candidate or acting in concert with a candidate, receives $1000 or more in political contributions and expressly advocates the election or defeat of a candidate. Whether a given organization that is active in City elections is governed by the ordinance thus depends upon the level of contributions it receives or makes and whether it engages in express advocacy for or against a candidate.

Under this definition, Both Citizens and Committee might or might not qualify as independent expenditure committees. Each received political contributions in excess of $1000, but staff does not possess evidence as to how precisely they spent it or whether they engaged in express advocacy.

Finally, it is worth noting that any person may spend unlimited amounts of their own money, without even forming a committee, to engage in political speech (express advocacy or otherwise), subject only to the obligation to report those expenditures.

The application of the above rules to independent expenditure committees is complicated by both the definitions discussed above and the language of Section 2.08.020 itself.

First, the section prohibits all persons (and by extension all committees, independent or otherwise) from contributing more than $249 in single election cycle to any combination of a candidate, the candidate's controlled committee, or any independent committee that supports that candidate or opposes the election of the candidate's opponent. The contributor is free to allocate the funds amongst these individuals and committees, but must keep the total contributions below the $249 limit. To complicate things further, only contributions used by independent committees for "express advocacy" come within the limit, meaning that a contributor must know how his or her contribution is to be used in order to know whether or not the contribution is legal.

Second, the section prohibits every "candidate and his or her committee" from receiving any contribution that would cause the contributor to exceed the $249 cumulative cap. Two possibly troubling features of this prohibition should be noted:

1. The cumulative cap is not just administratively difficult to enforce, but also seems to place an affirmative duty on candidates and controlled committees to police all donations made by their contributors.

2. The prohibition on receiving contributions and any duty created thereby does not apply to independent expenditure committees. The use of the possessive phrase "his or her committee" in connection with a

> candidate in the first instance can only be read as pertaining to a controlled committee. The second instance, however, refers to "all committees supporting or opposing such candidate." The use of the word "all" and reference to committees opposed to a candidate strongly suggest that as used here, "committees" refers to both independent and controlled committees. Having created this distinction, the section then forbids only candidates and controlled committees from accepting contributions that would cause the donor to exceed the cumulative cap. Whether or not this was the City's intention when adopting this ordinance is unknown. What is means is that an independent committee that accepts contributions in excess of $249 is not in violation of the provision, only the contributor is (and then, only to the extent the contribution is used for "express advocacy").

Hence, the individuals who, as persons, contributed to Citizens may have violated Section 2.08.020 by exceeding the $249 contribution limit to independent committees if their contribution was used for more than $1000 worth of express advocacy.

In addition to the complexities that arise from the language of the Section itself, there is a question as to whether it is enforceable as to independent committees at all. In this regard, the law is in flux.

Restrictions on political contributions face a high standard of judicial review because the protection political speech is at the core of First Amendment protections. *See Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 387 (2000). Such restrictions must therefore serve a compelling interest and be narrowly drawn to address that interest. The Supreme Court has only ever recognized three government interests sufficiently compelling to justify restricting campaign contributions: preventing corruption, the appearance of corruption, and the circumvention of valid campaign finance regulations. *See Buckley v. Valeo*, 424 U.S. 1 (1976). Any and all of these interests are sufficient to justify capping contributions to candidates.

Last year, the Fourth Circuit Court of Appeals held in a case entitled *North Carolina Right to Life v. Leake*, that a North Carolina contribution limitation applied to independent expenditure committees was unconstitutional. The court observed that the purpose of contribution limitations is to prevent *quid pro quo* type corruption; that is, that once elected to office, a candidate will be beholden to a large contributor. The court found that this danger was not present in the case of contributions to independent committees that are acting completely independently of a candidate. The court concluded that the corruptive influence of contributions for independent expenditures is more novel and implausible than that posed by contributions to candidates, and as a result, must be supported by "convincing evidence which demonstrates that there is a danger of corruption due to the presence of unchecked contributions to" independent committees. The court struck down the North Carolina law as unconstitutional.

The United States Supreme Court vacated the *Leake* opinion only weeks ago and remanded it back to the Fourth Circuit for reconsideration in light of *McConnell v. FEC*. *See Leake v. NC Right to Life, Inc.*, 2004 WL 875548 (U.S.). This order is unlikely to result in a reversal of the original *Leake* decision with respect to the contribution caps, however, because *McConnell* did not address caps on contributions to independent

expenditure committees. As a result, although Leake is no longer good law, its reasoning is likely to eventually be readopted.

Even if the Fourth Circuit re-adopts its decision in the *North Carolina* decision, it is not binding in California, because we are located in the 9th Circuit Court of Appeals. Further, it is possible that the decision could again be appealed to the Supreme Court. At most, the decision raises the specter that similar limitations on contributions to independent committees could be invalidated as unconstitutional on the basis of the same reasoning. The 9th Circuit narrowly avoided addressing this issue last year, in a case entitled *Lincoln Club of Orange County v. City of Irvine,* 292 F.3d 934 (9th Cir. 2002), ruling that as applied in that instance, an Irvine ordinance limiting contributions to independent committees was tantamount to a limitation on expenditures, thus requiring a stricter standard of review. The Hermosa Beach ordinance does not have such a feature.

In summary, in order to ascertain whether any contributor to independent committees violated Section 2.08.020, it will be necessary to ask the City Prosecutor to investigate how the contributions to those committees was spent (i.e. whether they were spent on express advocacy), and whether in his judgment a criminal conviction against those persons contributing in excess of $249 is achievable given the above analysis. With respect to the Citizens committee, it will also be necessary to look more closely into the assertion that as a County committee, it is exempt from our contribution limitation.

Finally, if is strongly recommended that staff return to Council with proposals for revisions to the City's campaign finance ordinance.

FISCAL IMPACT

Unknown.

Respectfully submitted,

MICHAEL JENKINS, CITY ATTORNEY

Concur:

STEPHEN BURRELL
CITY MANAGER

Fiscal Impact:

Viki Copeland, Finance Director