ESCONDIDO
City of Choice

CITY COUNCIL STAFF REPORT

Current Business Item No. 14 **March 4, 2020** **File No. 0650-40**

SUBJECT: Review and Consideration of Campaign Contribution Limits

DEPARTMENT: City Attorney

RECOMMENDATION:

It is requested that the City Council review and consider potential amendments to the Escondido Municipal Election Campaign Control Ordinance to lower the maximum personal contributions from $4,300 for city council candidates and mayoral candidates. It is further requested that the City Council discuss, consider and give staff direction on additional campaign control amendments, if any.

FISCAL ANALYSIS:

Any changes to campaign contribution limits for local Escondido mayoral and council district seats currently in the Campaign Control Ordinance will have no fiscal impact on the City of Escondido.

PREVIOUS ACTION:

The Campaign Control Ordinance was last amended in April 2018.

This current matter was continued from the December 18, 2019, City Council agenda to allow for further research and consideration.

BACKGROUND:

In October 2019, Mayor Paul McNamara asked that the issue of local campaign contribution limits be placed on the future agenda for review and discussion and has further recommended proposed limits for consideration. Subsequently, Councilmember Olga Diaz asked to supplement the agenda item to further consider a limitation when councilmembers accept campaign contributions from persons having business before the City Council and for a period of time after a vote.

State Law Campaign Contribution Limits.

The Political Reform Act ("PRA") regulates campaign finance and disclosure requirements for state and local candidates and committees. A city may also impose its own limits on campaign contributions in municipal elections and impose additional requirements separate from the PRA provided those requirements do not prevent compliance with the PRA. (Government Code § 81013; Elections Code § 10202.) The PRA, first enacted in 1974, is intended to ensure that disclosure of political contributions is accurate, timely, and truthful; to keep voters informed; to make elections fair

by abolishing laws and practices that favor incumbents; and, to provide adequate enforcement mechanisms of its provisions. (Government Code § 81002.) The California Fair Political Practices Commission ("FPPC") has primary responsibility for the administration and implementation of the PRA.

On October 8, 2019, California enacted AB 571, which amended various sections of California's Elections and Government Codes. Generally, the new enactment establishes limitations on contributions to a candidate for local office in the case where the local governing body has not adopted its own limits. Starting on January 1, 2021, the "default" limit on campaign contributions shall be the amount provided for in the Government Code for contributions to candidates running in state legislative races. Today, the limit for a "person" (as defined by the FPPC) to contribute to a candidate is $4,700 per election for state senate and assembly races. However, the law specifically allows a city by ordinance or resolution to impose limits on contributions to candidates for elective city offices that are different from the state limit. (Government Code § 85702.5(a).) That is, a local jurisdiction may enact campaign contribution limits for persons and committees for elective offices in the jurisdiction that are stricter or more liberal than the default limit statute. The law further provides that the FPPC is not responsible for the administration or enforcement of the local campaign limitations ordinances and the local agency may establish its own administrative, civil or criminal penalties.

The Escondido Campaign Control Ordinance.

In 1983, the City of Escondido adopted Ordinance No. 83-46, which provided for Controls on Campaign Contributions. The ordinance was adopted to supplement the PRA.

The Ordinance is commonly referred to as the Campaign Control Ordinance and it has undergone multiple amendments since it was first adopted. For example, in 1997, the Campaign Control Ordinance was amended to conform to Proposition 208, which contained newly adopted statewide campaign laws. However, in 1998, a federal court issued a preliminary injunction prohibiting enforcement of the new state law finding that the limitations on the amounts of contributions was not narrowly drawn to achieve a legitimate purpose in violation of the First Amendment. *California Prolife Council v. Scully* (E.D. Cal. 1998) 989 F. Supp. 1282. The Ninth Circuit Court of Appeals later affirmed the injunction in 1999.

In 2007, the campaign contribution limit was increased to $500 and a Consumer Price Index ("CPI") formula was added to allow for future increases over time. In 2013, the Campaign Control Ordinance was amended again to increase campaign contributions to $4,100 and to remove the CPI adjustment. The 2013 amendment also removed the prohibitions on cash contributions by allowing such contributions up to $25.

In April 2018, the Campaign Control Ordinance was last amended in an effort to update the provisions to be largely consistent with the PRA. In addition to increasing the personal contribution limit to $4,300, the Ordinance made changes to the definitions of "Committee" and "Contribution" to

conform to the PRA, changed the amount of allowable cash contributions up to $100, and repealed certain provisions relating to credit and checking accounts. No anonymous contributions are now allowable under Escondido's Campaign Control Ordinance.

Escondido Municipal Code Section 2-103(a), which limits campaign contributions by persons, provides:

> No person other than a candidate shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or opposition to such candidate, including contributions to all committees supporting or opposing such candidate, to exceed four thousand three hundred dollars ($4,300.00).

Escondido Municipal Code Section 2-100 identifies the purpose and intent of the City's efforts to enact regulations and limitations in local campaigns. As stated, the purpose of the Code is to "preserve an orderly political forum in which individuals may express themselves effectively; to place realistic and enforceable limits on the amounts of money that may be contributed to political campaigns in municipal elections; to prohibit contributions by organizations in order to develop a broader base of political efficacy within the community; to limit the use of loans and credit in the financing of municipal election campaigns; and to provide full and fair enforcement of all the provisions of this article."

The City's existing Campaign Control Ordinance governs the campaign contribution limits for local City Council seat races and allows for campaign contributions below the state-mandated limit. It is enforceable today and would continue to be valid and enforceable after AB 571 becomes effective on January 1, 2021. The City Council has the authority to make changes to its local campaign contribution limits provided they are generally compliant with the PRA and AB 571.

First Amendment Issues.

In addition to state and local laws, campaign finance laws can also touch on federal constitutional issues. Most notably, *Citizens United v. Federal Election Comm'n*, 572 U.S. 185 (2014) addressed the issue of a whether the government may restrict independent expenditures for political communications by entities other than individuals (i.e. corporations, unions, non-profits, etc.). The case arose out of a private organization's efforts to air a film critical of Hillary Clinton who was a presidential candidate. At the time, federal law prevented corporations and unions from making campaign expenditures for broadcasts, also known as "electioneering communications," which mention a candidate for office within 60 days of a general election or 30 days before a primary. The United States Supreme Court struck down the law finding that the First Amendment protects associations of people in addition to individual speakers and that the identity of the speaker is not the proper province of the government to regulate. As a result, a federal law that prohibited all

expenditures by corporations or associations would violate the free speech rights guaranteed by the First Amendment.

The decision has been the subject of debate since its inception. Its relevance to this discussion is that the Supreme Court has demonstrated an interest in examining the principles of potential First Amendment violations when the government attempts to limit campaign expenditures that may help or, in the case of *United Citizens,* be arguably detrimental to, a candidate for office. As a result, a city enacting controls over the amounts, timing and source of campaign contributions and expenditures must be mindful of the exacting review of such constraints on candidates for office and their supporters.

Very recently, the United States Supreme Court took up the issue of campaign contribution limits in *Thompson v. Hebdon*, 589 U.S. __ (November 25, 2019) (*per curiam*). In *Hebdon*, the State of Alaska limited the amount an individual can contribute to a candidate for political office, or to an election-oriented group other than a political party, to $500 per year. A contributor who wished to contribute more than the limit to a candidate for office sued the State of Alaska claiming that the low maximum contribution amount constituted a violation of the First Amendment. The District Court and Ninth Circuit Court of Appeal rejected the claim and upheld the restriction. The United States Supreme Court vacated the Ninth Circuit's decision and remanded the case to determine whether "Alaska's contribution limits are consistent with our First Amendment precedents." While not providing clear direction on the Court's opinion on the merits of the question, the Court's decision discussed certain "danger signs" regarding a government limitation on campaign contributions. The Court looked at (1) whether the limit was "substantially lower than previously [judicially] upheld limits;" (2) whether the limit is substantially lower than comparable limits in other states; and (3) whether the amount is adjusted for inflation. While not exhaustive of potential problems with a potentially violative campaign finance law, these are helpful touchpoints for First Amendment judicial review of any City legislation.

Comparative Local Ordinance Limits.

A survey was conducted of the campaign contribution limits enacted by all municipalities in San Diego County. Attachment 1 provides a spreadsheet of the results of that survey.

To be clear, the campaign contribution limits in other San Diego cities are not controlling of the discretion this City Council has on establishing limits for races in this jurisdiction. However, they may serve as a helpful guide in examining the reasonableness and appropriateness of the City contribution limitations, particularly in jurisdictions with comparable geographic, population, and council district characteristics. Currently, several cities in the County have no campaign contribution limits (Carlsbad, El Cajon, Imperial Beach, National City, and Oceanside). Assembly Bill 571 will apply to those jurisdictions unless they establish their own local limits.

Other cities in the County have individual contribution limits that range from $100 (Poway and Solana Beach) to $1,000 (Lemon Grove) for City Council races. Some limits are indexed for inflation, others are not. The City of San Diego's individual limit for council district elections is $600 and $1,150 for the citywide races for Mayor and City Attorney.

As can be seen from Attachment 1, the City of Escondido's campaign contribution limit is the highest for cities *who have adopted some local limitation*. After the implementation of AB 571, for those cities who have no limits and choose not to amend their laws, the limitation will default to the limits for state legislative races under state law ($4,700).

In light of potential First Amendment issues, and in furtherance of the city's desire to eliminate the potential of "improper influence, real or potential," it is always helpful for a city to periodically examine the economics and fairness of its current campaign financing ordinance. The earlier version of the Staff Report for this matter suggested that the personal campaign contribution limit of $4,300 be reduced to $250 for councilmember races and from $4,300 to $800 for citywide mayoral races. Those reductions would likely survive a legal challenge.

In examining cities of generally comparable size in the County of San Diego (population of 100,000-500,000) who have adopted a local ordinance, Escondido's limit is materially higher. On the other hand, assuming the cities with no local controls will be set at the state limit of $4,700 in January 2021, Escondido's limit would be lower than three of the six cities in that category. The Cities of Oceanside, Carlsbad and El Cajon would be set at the state level and only the Cities of Chula Vista and Vista would have lower amounts than Escondido.

The average campaign contribution limit in cities with populations between 50,000 and 100,000 is $1,000. Those cities include San Marcos, Encinitas, National City, La Mesa, Santee and Poway. Cities with a population lower than 50,000, including Imperial Beach, Lemon Grove, Coronado and Solana Beach, have an average campaign contribution limit of $1,500. The City of San Diego has nine council districts with roughly 150,000 people in each district. The City's campaign contribution limit is $600 for councilmember districts and $1,150 for the two city-at-large elections for mayor and city attorney in a city with a total population of approximately 1.4 million.

To be clear, the contribution amounts are entirely a function of City Council discretion and should reflect the real conditions of campaigning in this City. The Councilmembers are in a unique position to understand the practicalities and economics of raising and spending money for elective office in this City and must use that experience in identifying a limit that is consistent with the First Amendment and the stated purpose of the City's own Campaign Control Ordinance.

<u>Timing of Implementation and Disposition of Existing Campaign Funds.</u>

After the first notice that this subject matter was up for council discussion last year, questions and comments were received by this office regarding the timing of the implementation of any new rules

and what impact a new limitation would have on existing campaign fund accounts. The suggestion has been made that campaign contribution funds lawfully received in the past should be disgorged to allow for a level playing field going forward among all candidates, challengers and incumbents alike.

Neither federal nor state law directly address this issue. While the council has discretion in the timing of the effectiveness of any ordinance limiting funding, a law requiring the disgorgement of lawfully received campaign contributions raises constitutional and other concerns. First, the effect of requiring a candidate to return contributions of properly contributed and acquired monies implicates (at least) the First Amendment rights of persons who had made the contributions in the first instance. The council would need to make legislative findings that there was a sufficiently important interest and the de-funding of existing accounts is "closely drawn" to achieve that interest. See, *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976) (campaign limits may be constitutional if the government demonstrates a sufficiently important interest and the employed means are closely drawn to avoid infringement of the candidate's and contributor's rights.) As noted above, the courts have looked very carefully at government attempts to interfere with a contributor's and candidate's efforts to participate in a campaign for elective office.

Second, an involuntary disgorgement of an existing campaign account containing properly received contributions may constitute an unconstitutional due process violation under state and federal law. The California Constitution provides that a "person may not be deprived of life, liberty, or property without due process of law…" (Cal. Const. Art. I, § 6.) The Fourteenth Amendment to the United States Constitution similarly provides that, "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law…" The law is clear that the reference to the prohibitions on State actions in the United States Constitution applies to local public entity actions (ordinances). Should a candidate holding funds in an existing account prior to the effectiveness of such a law be involuntarily forced return those properly received funds, such a law would have all the hallmarks of a due process violation.

Third, the required disgorgement of an account containing lawfully received funds due to a new enactment appears to be an *ex post facto* law in violation of the federal and state constitutions. *Ex post facto* is Latin for "from a thing done afterward." The United States Constitution at Article I, § 9, and the Constitution of the State of California at Article I, § 9, prohibit the respective legislatures from passing *ex post facto* laws. Here, a forced return of money would have to be premised on the position that the candidate has received a past advantage that must be removed. However, that "advantage" was lawful before such a new law and making it criminal after the effectiveness of the change raises the appearance of an *ex post facto* law.

Finally, there may be fundamental fairness issues with such a proposal. For example, a candidate may have made certain strategic decisions regarding expenditures in a race assuming future campaign activity based on existing law. Further, a candidate's campaign may contend that it incurred costs in raising those campaign account funds now subject to return and there would be no

means of recouping those costs under a disgorgement scheme. Under either of these scenarios, a change in the campaign contribution law may unfairly affect a candidate who had been operating lawfully under the current ordinance.

Voting and Limitations Related to Persons with City Business.

Councilmember Diaz has inquired about consideration and discussion of an additional limitation to local campaign contributions.

The question was posed whether the City could impose a further restriction on councilmember voting and/or acceptance of contributions when a person has a matter pending before the council or for a period of time after a council vote (*e.g*. 12 months). As an example, the City of San Marcos enacted Municipal Code Section 2.16.070 in 2003.

San Marcos Municipal Code Section 2.16.070 provides in relevant part as follows:

(a) Within twelve (12) months after receiving a campaign contribution or other income totaling one hundred dollars ($100) or more from any source … no City Councilmember shall make, participate in making or attempt to influence any government decision or action that will have a reasonably foreseeable material financial effect on the campaign contributor or other source of income that is distinguishable from its impact on the public generally or a significant segment of the public, as defined by the Political Reform Act of 1974.

(b) No City Councilmember shall accept any campaign contribution or other income from any source totaling one hundred dollars ($100) or more within twelve (12) months after he or she has made, participated in making, attempted to influence or influenced any government decision or action that had a material financial effect on the campaign contributor or other source of income that is distinguishable from its impact on the public generally or a significant segment of the public, as defined by the Political Reform Act of 1974.

State law provides a similar statute touching on the subject of accepting contributions from persons having business before state agencies, boards and commissions.

Government Code § 84308(b) provides in relevant part that no agency officer may “accept, solicit or direct a contribution of more than $250 from any party [applicant]… as from any participant [interested person] while a proceeding involving a license, permit or other entitlement for use is pending before the agency and for three months following the date of a final decision is rendered in the proceeding if the officer knows or has reason to know that the participant has a financial interest ...”

Subsection (c) of Section 84308 further provides that "prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use before an agency, each officer of the agency who received a contribution within the preceding 12 months in an amount of more than two hundred fifty dollars ($250) from a party … shall disclose that fact on the record of the proceeding."

Government Code § 84308 does *not* apply to City councilmembers in their role as representatives of their districts or as the mayor because they are directly elected by the voters from this jurisdiction. Government Code §84308(a)(3). However, these rules do apply to a councilmember who is acting as a voting member of another agency.

One issue to consider is whether the implementation of voting restrictions similar to those in the City of San Marcos could affect the City's ability to achieve a quorum to conduct business. That is, to the extent past contributions force councilmembers to recuse themselves from voting, circumstances could arise where a quorum of three councilmembers may not be achievable and conducting city business could be hampered. Equally true, to the extent that the use of campaign contributions could be "weaponized" as a means of strategically eliminating a council member's opposition to a project, the council may wish to consider whether that would ever be a realistic possibility. There also exists the prospect that opponents of council decisions may wish to use such an ordinance to initiate questionable litigation over issues such as whether the council member had a sufficient material or financial interest in the vote or decision thereby violating the ordinance. Clearly, if such a rule was implemented, councilmembers would need to be hyper-vigilant as they review the council agendas to ensure that there are no upcoming matters requiring their recusal.

Other than the need to consider the potential for impacts to voting on city business, this office has no recommendation on the implementation of a law similar to the City of San Marcos or Section 84308, or some version of it. This office seeks direction on what type of amendments the City Council is looking for, if any, in the City's Campaign Control ordinance to address this subject.

CONCLUSION:

The City Council has authority, and has exercised its authority in the past, to set campaign contribution limits consistent with state law. The council members are most knowledgeable about the difficulties and practicalities involved in raising money for a local election both as an incumbent and as a challenger in this jurisdiction. The benchmark for setting any local limits should be that it neither advantages nor disadvantages any candidate, is consistent with First Amendment and state constitutional principles, will be an amount that is fair to all who seek to achieve an elective office and to contributors who wish to voice their First Amendment right to support local candidates. Moreover, any limits should be focused on achieving the goals in the City's Campaign Control ordinance.

Although only used in one city in the County, the City of San Diego, the use of a proportional difference for district seat vs. citywide races is supportable from the perspective of the costs associated with running a citywide race for elective office such as the mayor compared to a district

race. The appropriate amounts and ratios are best left to the sound discretion of the City Council provided the above constitutional principles of campaign fairness are observed.

This office and staff are prepared to assist the City Council with making any further amendments to the Escondido Municipal Code on this matter and related matters.

APPROVED AND ACKNOWLEDGED ELECTRONICALLY BY:

Michael R. McGuinness, City Attorney
2/26/20 5:06 p.m.

ATTACHMENTS:

1. Attachment 1 (Survey of Local Agency Campaign Contribution Limits)

Attachment 1

Survey of Local Agency Campaign Contribution Limits

City	Contribution Limit	
CARLSBAD		N/A
CHULA VISTA	Individual Committee	$350* $1,190*
CORONADO	Individual City Contractors	$200 $0
DEL MAR	Individual Committee	$200 $2,000
EL CAJON		N/A
ENCINITAS		$250
ESCONDIDO		$4,300
IMPERIAL BEACH		N/A
LA MESA		Voluntary Expenditure Limits
LEMON GROVE		$1,000*
NATIONAL CITY		N/A
OCEANSIDE		N/A
POWAY		$100
SAN DIEGO	City Council Mayor/City Attorney Committee	$600* $1,150* $11,400/ $22,750**
SAN MARCOS	Individual Committee	$250 $500
SANTEE		$700*
SOLANA BEACH	Individual Aggregate	$100* $5,000*
VISTA		$300

* indexed for inflation, may be higher

** $11,400 for City Council and $22,750 for Mayor/City Attorney