CITY OF OAKLAND

Office of the City Attorney

Legal Opinion

TO: **PRESIDENT JANE BRUNNER AND HONORABLE CITY COUNCIL**

CC: Mayor Ronald Dellums
City Administrator Dan Lindheim

FROM: City Attorney John Russo

DATE: April 20, 2010

SUBJECT: Analysis of Change to Contribution Limit for Candidates Who Agree to Voluntary Expenditure Limit

---

I. INTRODUCTION

Triggered by the City of Oakland's first implementation of ranked choice voting, the City Council is considering amending Oakland Municipal Code section 3.120.50 (B). The amendment would change the per person contribution limits for candidates who agree to be bound by the voluntary expenditure limits from $700 to $1,000. The proposal would also change the limits for broad based political committee contributions from $1,300 to $1,600. The proposal would not amend the $100 contribution limits for candidates who do not agree to be bound by the voluntary expenditure limits.

At the Thursday, April 15, 2010, Rules and Legislation Committee (Rules Committee) meeting, the Executive Director of the Public Ethics Commission raised a concern about increasing only the $700 limit. The Executive Director was concerned that the City Council was not raising the $100 limit for candidates who did not accept contribution limits. The Rules Committee then asked the City Attorney's Office to prepare a legal opinion on the issue the Executive Director of the Public Ethics Commission raised at the meeting.

Because the City Council will consider the amendment at its April 20, 2010, meeting, the City Attorney's Office provides this brief analysis on an expedited basis.

II. QUESTION

Does the change of the per person contribution limit from $700 to $1,000 for candidates who adopt the voluntary expenditure limit raise legal issues?

III. SUMMARY CONCLUSION

If the City Council changes the contribution limit from $700 to $1,000, to protect against constitutional challenges, the Council should also simultaneously change the contribution limit for candidates who do not adopt the expenditure limits. That lower limit should be changed from $100 to $200 to maintain the original 5-1 ratio as established in the original 1999 Oakland Campaign Reform Act.

IV. LEGAL ANALYSIS

A. Oakland's Current "Cap Gap" Campaign Finance Structure

Under the Oakland Campaign Reform Act (OCRA), Section 3.12.050 (B), candidates who agree to be bound by the voluntary expenditure ceilings are limited to $700 for contributions from persons. The Oakland Campaign Reform Act states: "For candidates who adopt the expenditure ceilings . . . no such candidate . . . shall accept contributions totaling more than five hundred dollars ($500.00)." (Id.) The $500 has been increased to $700 under the Consumer Price Index escalation provision of Section 3.12.050(G), which rounds to the nearest $100.

Candidates who do not agree to be bound by the voluntary expenditure ceiling are limited to $100 for contributions from persons. (OMC 3.12.050 (A).) This amount has never been increased because the inflation adjusted amount is only $130.06, but the nearest hundred is still only $100.

The academic literature calls this dual contribution limit approach "variable contribution limits" or "cap gap." (Goldberg, Deborah, Brennan Center for Justice, Writing Reform p. V-1 (updated February 17, 2008).) Thus Oakland's cap gap under the original 1999 OCRA was at a 5-1 ratio ($500 to $100).

For the purposes of this opinion we refer to the contribution limit for candidates who agree to be bound by the voluntary expenditure limit, currently $700, as the "Upper Contribution Limit." We refer to the contribution limit for candidates that do not agree to be bound by the voluntary expenditure limit, currently $100, as the "Lower Contribution Limit."

The current proposal introduced by Councilmember Ignacio de la Fuente would change the Upper Contribution Limit to $1,000. The proposal does not change the $100 Lower Contribution Limit.

B. Political Expenditures Are Speech

Since 1976, the United States Supreme Court has deemed (1) campaign expenditures or spending "speech" protected by the U.S. Constitution's highest protection for free speech, and (2) that mandatory spending limits were unconstitutional. (Buckley v. Valeo, 44 U.S. 1, 54-58 (1976).) However, the Court did say that the voluntary acceptance of campaign spending limits, conditioned upon public financing, were constitutional. (Id. at 57 n. 65.)

Utilizing this guidance, Oakland has established a campaign finance system where the limitations on campaign expenditures are voluntary. A candidate "voluntarily" accepts an expenditure ceiling in exchange for the opportunity to collect contributions at the upper level ($700 instead of $100).

A few courts have examined cap gaps and have struck down at least one cap gap because the broad disparity between Upper and Lower Contribution Limits. Such disparity made the connected expenditure coercive and not voluntary.

The U.S. Court of Appeals in the First Circuit found that a cap gap at a 2-1 ratio was not a coercive incentive to Rhode Island's voluntary expenditure limits. (Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38-39 (1st Cir.1993).) In contrast, a district court in Kentucky found that a 15-1 cap gap was coercive. (Wilkinson v. Jones, 876 F.Supp. 916,929-930 (W.D.Ky.,1995).) Kentucky's law gave a candidate who accepted expenditure limits a 5-1 contribution edge plus public financing, totaling a 15-1 gap.

Oakland originally enacted its cap gap campaign finance structure with a 5-1 ratio for contributions from persons. No one has successfully challenged the per person limits since enactment in 1999. The 5-1 ratio is well below the 15-1 ratio invalidated in Kentucky.

V. CONCLUSION

If the City Council changes the Upper Contribution Limit to $1,000, it should also change the Lower Contribution Limit in tandem to maintain the original 5-1 ratio between the Upper and Lower Contribution Limit first established in OCRA in 1999.

Very truly yours,

Mark Morodomi for

JOHN A. RUSSO
City Attorney

Attorney Assigned:
Mark T. Morodomi

650795-1