



AGENDA REPORT

City Council

MEETING DATE: March 12, 2014

PREPARED BY: Glenn Sabine, City Attorney

DEPT. DIRECTOR:

DEPARTMENT: City Attorney

CITY MANAGER: Gus Vina

To: MAYOR AND CITY COUNCIL

From: CITY ATTORNEY

Re: ELECTION RELATED ITEMS FOR COUNCIL CONSIDERATION AND POSSIBLE ACTION/DIRECTION TO STAFF REGARDING:

- A. TEMPORARILY DESIGNATING A COUNCIL SEAT TO A TWO-YEAR TERM TO EVENLY STAGGER THE ELECTION OF COUNCIL MEMBERS DUE TO THE ESTABLISHMENT OF AN ELECTED MAYOR;
- B. THE IMPACT OF THE *CITIZENS UNITED* DECISION ON THE CITY'S CAMPAIGN CONTRIBUTION LIMITS AND THE POSSIBLE ADOPTION OF RESOLUTION NO. 2014-19 ENTITLED: "A RESOLUTION OF THE CITY OF ENCINITAS IN SUPPORT OF A CONSTITUTIONAL AMENDMENT TO OVERTURN CITIZENS UNITED;" AND
- C. CAMPAIGN CONTRIBUTION LIMITS.

This memorandum responds to the Council's request last fall to bring back several items related to elections. These items appear on the City Manager's Follow-Up Log as follows:

- "Report and sample resolution to temporarily restructure one Council seat to a two-year term in 2016 to accommodate the shift to an elected mayor. Include options for either designating one seat at a two-year term or designating the third highest vote getter as a two year term"
- "Report on impacts of Citizens United decision on City's campaign contribution regulations and sample resolution to support overturning the decision"
- "Report regarding campaign contribution limits to include limits set by other cities to include whether it is legal to cap total contributions received by a candidate"

A. TEMPORARILY DESIGNATING A COUNCIL SEAT TO A TWO-YEAR TERM TO EVENLY STAGGER THE ELECTION OF COUNCIL MEMBERS DUE TO THE ESTABLISHMENT OF AN ELECTED MAYOR

Analysis:

In November of 2012, the electorate passed a Council initiative for the City to have an elected mayor for a two-year term of office beginning in December of 2014. Government Code Section 34902 provides that after the establishment of an elected mayor, at the next succeeding general election in the city, one of the offices of council person, to be filled at the election, shall be designated as the office of mayor, to be filled at the election.

Consequently, after the election of the Mayor in the City, the remaining members of the Council for four year terms will not be evenly staggered. For example, in the 2016 general election, the elected mayor position and three council member seats will be on the ballot. In the 2018 general election, the elected mayor and one council member seat will be on the ballot. Thereafter, this cycle will continue to repeat.

Government Code Section 34906 provides a mechanism whereby the Council may take action to evenly stagger the terms of the Council members and states in pertinent part:

“...if a city has an elected mayor and the election of the remaining members of the city council for four year terms is not evenly staggered, the city council may, on a one-time basis only and prior to the first day for circulating nomination papers for the general municipal election, designate one of the city council offices appearing on the general municipal ballot, other than the office of the mayor, to serve a two-year term, or may provide that of the city council offices appearing on the general municipal ballot, other than the office of the mayor, the one which receives the least votes of those elected (or if there is a tie for such position, as decided by lot)¹ shall serve a two-year term. At all subsequent general municipal elections, each member of the city council elected at such election, other than the mayor if the mayor has a two-year term, shall be elected to serve a four-year term.”

Pursuant to Government Code Section 34906, the earliest the Council could take action to evenly stagger the terms of the Council members would be the 2016 general election. Assuming the Council decides to do so, one Council seat would be designated as a two-year term for that election only (converting back to a four-term after expiration of the two-year term). As such, in the 2018 general election, the elected mayor and two council seats would be on the ballot. In the 2020 general election, the elected mayor and two council seats would be on the ballot. Thereafter, this cycle would continue to repeat.

If the Council decides to implement Government Code Section 34906, we recommend that it do so by ordinance,² and select either of the two options available for purposes of designating a two-year term council seat in the 2016 general election. It should be noted that there may be differing costs associated with the respective options related to the formation of ballot questions and the Office of the County Registrar of Voters. The City Clerk will be prepared to discuss this issue if the Council so desires.

¹ According to Dictionary.com, lot is defined as “one of a set of objects, as straws or pebbles, drawn or thrown from a container to decide a question or choice by chance.”

² Government Code Section 36937(a) provides that an ordinance relating to an election takes effect immediately.

Alternative actions include:

1. Direct Staff to bring back an appropriate ordinance for Council consideration implementing Government Code Section 34906 for the 2016 general election which designates one of the Council seats on the ballot to serve a two-year term.
2. Direct Staff to bring back an appropriate ordinance for Council consideration implementing Government Code Section 34906 for the 2016 general election which requires the candidate elected who received the least votes to serve the two-year term, and in the event of a tie for second place, the two-year term seat shall be decided by lot.
3. Take no action and thereby allow the terms of the Council members to become unevenly staggered after the 2014 election.

B. THE IMPACT OF THE *CITIZENS UNITED* DECISION ON THE CITY'S CAMPAIGN CONTRIBUTION LIMITS AND THE POSSIBLE ADOPTION OF RESOLUTION NO. 2014-19 ENTITLED: "A RESOLUTION OF THE CITY OF ENCINITAS IN SUPPORT OF A CONSTITUTIONAL AMENDMENT TO OVERTURN *CITIZENS UNITED*"

Summary:

- In *Citizens United*, the United States Supreme Court struck down laws restricting corporate spending on advocacy of specific candidates and positions. Generally, corporations are no longer barred from using general treasury funds to fund political communications or from promoting candidates and positions close to elections.
- *Citizens United* did not alter restrictions on direct contributions to candidates.
- As such, *Citizens United* does not impact the City's campaign contribution limits contained in Encinitas Municipal Code "EMC" Chapter 2.16 (see below) which are applicable to persons, including candidates and committees (as defined).
- The "Money Out of Politics" group has requested that the Council adopt a resolution calling for a constitutional amendment to overturn *Citizens United* based on reasoning contained therein and an information sheet provided to the Council for the record (see Attachment containing resolution and information sheet).

Analysis:

Citizens United v Federal Election Commission (2010) 558 U.S. 310, is a case in which the United States Supreme Court (in a 109 page opinion) held that the First Amendment prohibits the federal government from restricting political independent expenditures by corporations, associations or labor unions. The lobbying group "Citizens United" wanted to air a film critical of Hillary Clinton and to advertise the film during television broadcasts in apparent violation of the "Bipartisan Campaign Reform Act" (commonly known as the McCain—Feingold Act or "BCRA") enacted by Congress in 2002. In a 5-4 decision, the Court held that portions of Section 203 of the BCRA violated the First Amendment.

Section 203 of BCRA defined an “electioneering communication” as a broadcast, cable or satellite communication that mentioned a candidate within 60 days of a general election or 30 days of a primary election. The section also prohibited expenditures by corporations and unions for such communications. The lower court held that Section 203 of BCRA applied and prohibited “Citizens United” from advertising the film within the 30 days of the 2008 Democratic primaries. The Supreme Court reversed, striking down those provisions of BCRA that prohibited corporations (including non-profit corporations) and unions from making independent expenditures and “electioneering communications.”

Significantly, for purposes of this memorandum, *Citizens United* did not alter restrictions on direct contributions to candidates.³ As such, *Citizens United* does not impact the City’s campaign contribution limits contained in EMC Chapter 2.16 (see below) which are applicable to persons, including candidates and committees (as defined).

It should be noted that in 2012, the California State Senate adopted a resolution calling upon the U.S. Congress to pass a constitutional amendment to overturn *Citizens United*.⁴ At that time, California was the sixth state to do so. Since then, we understand that many other states, as well as cities, have either considered or adopted similar resolutions.

The “Money Out of Politics” group has requested that the Council adopt a resolution calling for a constitutional amendment to overturn the *Citizens United* decision based on reasoning contained therein and an information sheet provided to the Council for the record (see Attachment containing resolution and information sheet).

Alternative actions include:

1. Receive the *Citizens United* report and adopt Resolution No. 2014-19 entitled: “A Resolution of the City of Encinitas in Support of a Constitutional Amendment to Overturn *CITIZENS UNITED*.”
2. Receive the *Citizens United* report and take no action.

C. CAMPAIGN CONTRIBUTION LIMITS

Summary:

- Under existing law, EMC Chapter 2.16 no contributor shall contribute more than \$250 per election to any candidate, their controlled committee or a committee formed to support a candidate, respectively. The Council adopted the \$250 limit in 2002.
- The imposition of candidate contribution limits are constitutional and, to date, courts have recognized only corruption, the appearance of corruption, and circumvention of otherwise valid campaign finance regulations as sufficiently important government interests to support a restriction on campaign contributions.

³ It did leave intact disclosure and disclaimer requirements related to independent corporate spending on elections.

⁴ Assembly Joint Resolution 22 (ALR 22).

- Candidate contribution limits cannot be so low as to prevent the mounting of an effective campaign. Contribution limits in different jurisdictions are judged by courts on an individual, fact-specific evaluation on a case-by-case basis.
- The intent of equalizing political opportunities between candidates and parties has been rejected by the courts as a sufficiently important government interest and cannot be used as a basis for a limitation on campaign contributions. Consequently, the imposition of a cap on total contributions received by a candidate could be perceived as intended to equalize political opportunities between candidates and would likely be invalidated.
- Six cities in the County of San Diego do not impose campaign contribution limits. The remaining cities impose campaign contribution limits ranging from \$4,100 to \$100 per person or entity.

Analysis:

Existing law regarding campaign contribution limits in the City is contained in EMC Chapter 2.16. Specifically, EMC Section 2.16.010 entitled “Application,” provides as follows:

“A. The provisions of this Chapter are applicable to persons, including candidates and committees, participating in an election within the City and, in addition to the requirements of the Political Reform Act as amended, whose provisions, definitions and interpretations are to be relied upon in administering this Chapter, except as otherwise provided for herein. (Gov. Code Section 81000 et seq.)

B. As used in this Chapter, ‘committee’ shall include any person or combination of persons who directly or indirectly receives contributions or makes expenditures or contributions for the purpose of influencing or attempting to influence the action of the voters for or against the election of one or more candidate.”

EMC Section 2.16.020 entitled “Limitation and Disclosure: Contribution to Candidates and Committees” provides as follows:

“1. No contributor shall contribute more than \$250 total to any candidate or their controlled committee, for any one election.

2. No contributor shall contribute more than \$250 total, for any one election, to any committee, as defined in Section 2.16.010.B, formed to support or oppose a candidate.

This section shall not apply to candidates’ contributions of his/her personal funds to his/her own campaign account.”

The Council adopted EMC Section 2.16.020 limiting contributions to \$250 in 2002. Prior to that time, and since incorporation, contributions were limited to \$100.

In November of 1996, the California voters approved Proposition 208 which was intended to amend the California Political Reform Act (“PRA”) pertaining to campaign contributions, campaign spending limitations, and lobbyist activities. In 1998, the United States District Court for the Eastern District of California issued a preliminary injunction prohibiting enforcement of the provisions of the PRA enacted under Proposition 208.⁵ Among other things, the District

⁵ *California Prolife Council PAC v Scully* (ED Cal 1998) 989 F Supp 1282, aff’d (9th Cir 1999) 164 F3d 1189.

Court specifically concluded that contribution limits contained in Proposition 208 “must fail because they are set at a level precluding an opportunity to conduct a meaningful campaign.”⁶

In November of 2000, the California voters approved Proposition 34, which is largely aimed at elections for state legislative and constitutional offices. Proposition 34 repealed the majority of Proposition 208, and most significantly, repealed all of Proposition 208’s limits on contributions applicable to local elections. To date, cities retain the statutory authority to adopt local ordinances regulating campaign finance issues. Specifically, Elections Code Section 10202 states: “A city may, by ordinance or resolution, limit campaign contributions in municipal elections.” The PRA imposes contribution limits for state candidates and generally requires all candidates and committees to disclose campaign contributions and expenditures. The PRA, however, authorizes local governments such as cities to enact campaign contribution limits provided they do not otherwise conflict with the PRA.⁷

In *Buckley v Valeo* (1976) 424 US 1, the United States Supreme Court concluded that because contribution limitations necessarily infringe on the contributor’s ability to engage in free communication and association, they impinge on First Amendment freedoms.⁸ The Court further concluded that the government interest of eliminating the appearance of impropriety and actual corruption associated with large contributions justifies the burdens placed on First Amendment rights.⁹ Nevertheless, restrictions on contributions continue to warrant a “rigorous” standard of review.¹⁰ Local restrictions on contributions may be sustained if the city demonstrates a sufficiently important interest and employs means “closely drawn” to avoid unnecessary abridgement of associational freedoms.¹¹ The courts have recognized only corruption, the appearance of corruption, and circumvention of otherwise valid campaign finance regulations as sufficiently important governmental interest to support a restriction on campaign contributions.¹²

It is also important to note that the goal of equalizing political opportunities between candidates and parties has been rejected as a sufficiently important government interest and cannot be used as a basis for a limitation on campaign contributions.¹³ Consequently, the imposition of a cap on total contributions received by a candidate could be perceived as intended to equalize political opportunities between candidates and would likely be invalidated.

Finally, cities may constitutionally prohibit corporate contributions to candidates.¹⁴ This type of restriction may be upheld upon a showing of a compelling governmental interest — a very rigorous standard.¹⁵ “Even then, the state must employ means closely drawn to avoid

⁶ In dicta, the court indicated that local campaign contribution limit ordinances might pass constitutional muster depending on the limitations imposed in the context of facts pertinent to the particular jurisdiction such as size, available new media coverage, and cost of media, printing and staff support.

⁷ Govt. Code Section 85703.

⁸ *Buckley*, 424 US at 19.

⁹ *Buckley*, 424 US at 21.

¹⁰ *Nixon v Shrink Missouri Gov’t PAC* (2000) 528 US 377, 378.

¹¹ *Buckley v Valeo*, *supra*.

¹² *Buckley*, 424 US at 26.

¹³ *Buckley*, 424 US at 48.

¹⁴ See *First National Bank of Boston v Bellotti* (1978) 435 US 765, 787-88, fn. 26; *Federal Election Commission v Weinsten* (S.D.N.Y. 1978) 462 F. Supp. 243.

¹⁵ See *id.* at 786 (citations omitted); *Federal Election Commission v Weinsten*, F.Supp at 246, fn. 3 (citations omitted).

unnecessary abridgement of speech”.¹⁶ For example, cities such as Berkeley and San Francisco have enacted bans on corporate contributions to candidates.¹⁷

Survey of campaign contribution ordinances in the County of San Diego:

The following Cities do not impose campaign contribution limits:

- 1) Carlsbad
- 2) Oceanside
- 3) National City
- 4) La Mesa
- 5) El Cajon
- 6) Imperial Beach

The remaining Cities impose campaign contribution limits as designated in the order of highest to lowest:

1. Escondido
Population 143,911
Limits contributions to \$4,100 per person or entity. Cash contributions limited to \$25.00.
(Last amended 2013)
2. Lemon Grove
Population 26,000
Limits contributions to \$1,000 per person or entity. Contribution limits adjusted annually by applying the San Diego County Consumer Price Index (“SD County CPI”). (Last amended 2011)
3. Santee
Population 54,000
Limits contributions to \$650 per person or entity. Contribution limits adjusted annually by applying the SD County CPI. (Last amended 2009)
4. San Diego
Population 1,326,000
Limits contributions from individuals to \$500 for District-wide election and \$1,000 for Mayor/City Attorney election. Limits contributions from political party committees to \$10,000 for District-wide election and \$20,000 for Mayor/City Attorney election. Contribution limits adjusted annually by applying the SD County CPI. (Last amended 2013)
5. Chula Vista
Population 244,000
Limits contributions from individuals to \$310 per election and businesses/committees to \$1,050 per election. (Last amended 2013)

¹⁶ See *ibid.*

¹⁷ Note: a new California law SB 594, which became effective on January 1, 2014, prohibits nonprofit organizations from using public resources (as defined) for any communications that expressly advocate for or against a state or local ballot measure, or for the election or defeat of a candidate, or that constitutes a campaign contribution.

6. City of Vista
Population 98,000
Limits contributions to \$300 per person. Limited to candidates running for the office of Mayor or City Council member only. (Last amended 2000)
7. San Marcos
Population 86,000
Campaign contribution ordinance limiting contributions made by “persons” only. Dollar amount limited to \$250. (Last amended 2013)
8. Coronado
Population 24,000
Limits contributions to \$200 per person or entity. (Last amended 1994)
9. Solana Beach
Population 13,400
Limits contributions to \$120 per person and \$5,340 per local election committee. Contribution limits adjusted annually by applying the SD County CPI. (Last amended 2012)
10. Poway
Population 48,382
Limits contributions from individuals and local election committees to \$100. (Last amended 2012)
11. Del Mar
Population 4,200
Limits contributions to \$100 per person or entity. (Last amended 2005)

Alternative actions include:

1. Maintain status quo regarding campaign contributions limits—receive report and take no action (do not direct staff to bring back an ordinance amending Chapter 2.16).
2. Revise campaign contribution limits—receive report and direct staff to bring back an ordinance reflecting amendments to Chapter 2.16 as directed by Council.

ATTACHMENT

RESOLUTION NO. 2014-19

A RESOLUTION OF THE CITY OF ENCINITAS IN SUPPORT OF A CONSTITUTIONAL AMENDMENT TO OVERTURN CITIZENS UNITED

WHEREAS, free and fair elections are essential to American democracy and effective self-governance; and

WHEREAS, in *Citizens United v. Federal Election Commission*, the United States Supreme Court held that independent spending on elections by corporations and other groups could not be limited by government regulation, a decision that allows for unlimited corporate spending in elections; and

WHEREAS, in reaching its decision in *Citizen's United*, the Supreme Court interpreted the First Amendment of the Constitution to afford corporations the same free speech protections as natural persons; and

WHEREAS, the *Citizens United* decision has proven to be one of the Court's most controversial decisions and supersedes state and local efforts to regulate corporate activity in their campaign finance laws; and

WHEREAS, in his eloquent dissent Justice John Paul Stevens stated that "[c]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established"; and

WHEREAS, members of Congress are seeking to amend the Constitution in order to reverse the *Citizens United* decision and establish that corporations are not entitled to the entirety of protections of natural persons; and

WHEREAS, Several dozen municipalities, including New York City, Los Angeles, and San Diego, have successfully passed resolutions opposing the Supreme Court's interpretation of the Constitution in *Citizens United* and supporting Constitutional amendments; and

WHEREAS, the City of Encinitas has a long history of demonstrating support for 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; and to prohibit contributions by organizations in order to develop a broader base of political efficacy within the community;

NOW THEREFORE BE IT RESOLVED, by the Council of the City of Encinitas that it respectively disagrees with the Supreme Court's interpretation of the Constitution in *Citizens United* regarding the rights of corporations; and

BE IT FURTHER RESOLVED, that the Council joins other cities in calling on Congress to begin the process entirety of amending the Constitution to provide that corporations are not entitled to the protections or "rights" of natural persons, specifically so that the expenditure of corporate money to influence the electoral process is no longer a form of constitutionally protected speech.

PASSED AND ADOPTED this _____ day of _____, 2014 by the following vote, to wit;

AYES:

NAYS:

ABSTAIN:

ABSENT:

Teresa Arballo Barth, Mayor

ATTEST:

Kathy Hollywood, City Clerk

A Resolution Calling for a Constitutional Amendment to Overturn the *Citizens United* Decision

A group of San Diego County citizens are requesting a resolution from the City of Encinitas that would express support for a constitutional amendment to overturn the United States Supreme Court decision in the case of *Citizens United v. Federal Elections Commission*. That decision invalidated a century of local, state and federal legislation that had restricted corporate and union spending in political campaigns. The 2010 court decision has unleashed a flood of unlimited, often anonymous, campaign spending.

The effects of the decision will be to undermine existing law, flood the airwaves with corporate and union advertisements, and undercut landmark reforms that I and many others fought to secure to put elections back in the hands of the American people. In short, today's decision was a serious disservice to our country. - Senator Olympia Snow (R-Maine) 1/21/2010

I think super PACs as such are in fact very dangerous in the long run. There's something fundamentally, profoundly wrong about what's happening. And it's happening in both parties, and in the long run it's going to be very negative and very destructive of our system. - Newt Gingrich 11/13/2012

The problem of unlimited, anonymous campaign spending has not been confined to federal races. Over \$3.5 million was spent by independent expenditure committees in the 2012 San Diego mayoral election. Over \$10.5 million was spent by independent committees in the L.A. mayoral election earlier this year. There is no reason to believe that San Diego County elections will be immune.

A grassroots coalition of organizations has come together to campaign for a constitutional amendment that will reverse the *Citizens United* decision. The coalition includes Common Cause and the Sierra Club among many other local and national organizations.

The City of San Diego adopted a resolution condemning the *Citizens United* decision last December by a vote of 8-0. Chula Vista adopted a resolution on August 6th by a 5-0 vote and Lemon Grove adopted its resolution in July. Local activists are working to get resolutions from other municipalities in San Diego County and believe that they are likely to succeed in Coronado, Del Mar and La Mesa with the expectation that more will follow.