



OFFICE OF THE CITY ATTORNEY

MEMORANDUM

To: Honorable Mayor and Members of the City Council
From: Michele Beal Bagneris, City Attorney *MBB*
Theresa E. Fuentes, Deputy City Attorney
Date: February 23, 2006
Re: Task Force on Good Government's Final Recommendations

On February 21, 2006, the Task Force on Good Government finalized its recommendations to the City Council regarding proposed changes to the Taxpayer Protection Amendment (Article XVII of the City Charter, "TPA"). The City Attorney's Office attended each Task Force meeting.

The City Attorney's Office submitted various documents to the Task Force for its consideration, and the Task Force has appended those to its separate report to the Council in the February 27, 2006 agenda packet. The City Attorney's Office wishes to draw the Council's attention to its memorandum dated February 9, 2006, attached hereto and titled "Preliminary Analysis of Proposed Amendments to TPA," in which we address the Task Force's proposed changes. Their final recommendation incorporated many of our suggested language changes, however many of the other issues continue to concern us.

Two additional points warrant consideration by the Council. First, if amendments are placed on the ballot, the Council should propose adding a section to the TPA that provides clear authority for the adoption of guidelines for implementation of the TPA. The TPA does not address this issue. We believe that authority to do so is implicit in the TPA. On that basis, in August of 2005 the City Attorney's Office drafted, and Council adopted, guidelines for implementation of the TPA. The Task Force agreed that the authority to adopt guidelines was implicit, and did not warrant further consideration in its deliberations. Nonetheless, since the TPA does not expressly provide such authority, it should be added to any proposed ballot measure. We suggest the following:

Section 1707(e): The City may adopt guidelines for implementation of the TPA that are consistent with the findings and declarations set forth in Section 1702.

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Second, we are concerned that the new restriction proposed by the Task Force to ban campaign contributions from those who are negotiating contracts with the City adds to the potential constitutional infirmities of the TPA. (*See* the Task Force's proposed changes at Section 1704(c).) The Task Force consultant advised that he believed this would be constitutional, however we are concerned about the constitutionality since the case law is not clear on this point. We recommend deleting the proposed Section 1704(c).

Enclosure

cc: Cynthia J. Kurtz, City Manager
Jane L. Rodriguez, City Clerk

CITY OF PASADENA

MEMORANDUM

To: Task Force on Good Government

From: Michele Beal Bagneris, City Attorney
Theresa E. Fuentes, Deputy City Attorney

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Date: February 9, 2006

Re: Preliminary Analysis of Proposed Amendments to TPA

The City Attorney's Office of the City of Pasadena is of the opinion that the currently proposed amendments to the Taxpayer Protection Amendment (Article XVII of the City Charter, "TPA") do not adequately address the following legal and practical infirmities.

BRIEF STATEMENT OF LEGAL INFIRMITIES

1. **Campaign Contributions: The TPA remains overly broad in banning all campaign contributions to candidates for City office, and in banning entire categories of persons from the political process.**

The Task Force has proposed amending the TPA to narrow its ban on campaign contributions to apply only to those running for City office, and the City Attorney's Office believes this is a good first step. However, the TPA remains constitutionally suspect because of its wholesale foreclosure of allowing individuals and entities who receive "public benefits" from participating in the local political process through campaign contributions. Outright bans on contributions have been accepted by courts in extremely narrow situations, none of which are applicable here.

In addition, the TPA remains constitutionally questionable because it prohibits City public officials who vote to confer a "public benefit" from accepting campaign contributions from the recipient of the "public benefit."

2. **Future Employment: The TPA still arbitrarily forecloses rights to pursue lawful employment.**

The TPA remains legally troublesome for its continued ban on appointed officials and City employees from seeking lawful employment from recipients of public benefits for up to five years. While justification has been presented to the Task Force to supposedly support such a ban for elected officials (i.e., election cycles), no justification for a ban of that length for appointed officials or City employees has been presented. Courts sustain limitations on opportunity for employment very carefully, since limitations on future employment impede achievement of economic security, which courts have held is essential for the pursuit of life, liberty and happiness. More narrowly drawn state regulations in the Political Reform Act already address the concerns of the TPA. The TPA's ban comes without supporting evidence of corruption.

OTHER ISSUES

1. Tracking of bids on contracts.

The proposed expansion of the TPA to apply to all bidders on contracts will require further expenditure of taxpayer resources. The City will have to come up with a separate tracking list, train staff to understand the new prohibition, and dedicate staff time to maintaining the list.

This office has mentioned to the Center for Governmental Studies its concern that an outright ban on campaign contribution is constitutionally suspect. Thus, expanding this ban could contribute to the TPA's constitutional infirmities, instead of limiting them.

2. Tracking nonprofits.

Even though the proposed amendments delete application of the TPA to trustees, directors, partners or officers of certain nonprofits, the proposed amendments would require continued tracking of these persons by the City for disclosure purposes only. To hopefully avoid confusion, the City will necessarily have to devise a separate list for this disclosure, which will require additional expenditures of taxpayer resources.

Even with separate lists, there may be confusion as to whether the TPA applies to the listed persons, and those persons may decide not to make campaign contributions for fear of at least being perceived as violating the TPA, or somehow otherwise acting improperly, thus chilling the exercise of their free speech rights. Finally, as written, the language proposing this tracking is very confusing.

3. Campaign Contribution Limits

While it is lawful for the City to impose campaign contributions, it is our understanding that this issue is beyond the scope of direction given to the Task Force by the City Council. We believe the Task Force was created to address the legal infirmities already in existence in the TPA, and not to get to the question of whether there should be campaign contribution limits within the City.

4. Enforcement by District Attorney

It is not clear that the District Attorney has the authority to take civil action, or that the City can delegate such authority to the District Attorney. We further question whether the City can mandate that any other public entity take criminal misdemeanor or civil enforcement action under our Charter. It may be the case that the City could request, and pursuant to contract pay for, outside enforcement by another governmental entity such as the County or State, subject to relevant state laws.

SUGGESTED LANGUAGE CLARIFICATIONS

1. Strike the word "clerk" from sections 1703(a)(9) and 1706.5(d).
2. In section 1703(b)(2) – add a comma between (3) and (4); add a comma before the phrase "and (6)"; delete the last sentence because it confuses the issue of whether the

- TPA applies to trustees, directors or officers of nonprofits, or, if the sentence is to be retained, add the word “only” between “disclosure under”.
3. As written, the phrase “unless there is reason to believe” in Section 1703(a)(8) could be unconstitutionally vague. Replace with a more concrete and specific standard, or end the sentence at “less than \$5,000.”
 4. Delete the phrase proposed to be added, or rewrite the added section to 1704(b) to read:
... jurisdiction of the City. Section 1704(a) shall apply to agencies outside the City on which a City public official sits only if the outside agency voluntarily provides to the City the information called for in Section 1703 for those public benefits granted by the outside agency.
 5. Rewrite Section 1704(c) to read:
No person who bids on a contract with the City, or enters into a lease agreement or land sales agreement with the City, with a value in excess of \$25,000, which requires approval by the City Council, shall make any campaign contribution to any member of or candidate for the City Council, or committee controlled by the member or candidate, from the time the Request for Proposal or other bid process has been issued or from the time negotiations commence, until the negotiations have terminated. Once negotiations have terminated, this Article continues to apply to the public benefit recipient. This section does not apply to low bid contracts as defined by Section 1002 of the City Charter.
 6. Delete Section 1706.5 or, if retained add a preamble to Section 1706.5 which reads:
The following campaign contribution limits are in addition to the restrictions set forth in Section 1704 above.
 7. If retained, rewrite parts of Section 1706.5 to read:
 - (a) City district races: No person may make, and no person may accept, a campaign contribution of more than one thousand dollars (\$1,000) per election.
 - (b) Mayoral race: No person may make, and no person may accept, a campaign contribution of more than two thousand dollars (\$2,000) per election.
 8. Reconsider who should be the enforcement authority in Section 1707.