



Agenda Report

TO: CITY COUNCIL **DATE:** April 26, 2001
FROM: MICHELE BEAL BAGNERIS, CITY ATTORNEY *MBB*
SUBJECT: CAMPAIGN REFORM AND STATUS AND IMPLEMENTATION OF
CHARTER AMENDMENT PROHIBITING PUBLIC OFFICIALS FROM
RECEIVING A PUBLIC OR CAMPAIGN ADVANTAGE FROM RECIPIENTS
OF CERTAIN BENEFITS

RECOMMENDATION:

It is recommended that City Council consider the information contained in the report and direct the City Attorney to proceed as desired by the City Council.

DISCUSSION:

At the March 2001 election, Pasadena voters adopted Measure B, entitled "The Taxpayer Protection" Charter Amendment, which prohibits City officials from accepting specified gifts, honoraria, employment and campaign contributions from a person after the official makes or votes to approve certain public decisions. As described in the attached memorandum prepared by Craig Steele, of the law firm of Richards, Watson & Gershon, there are a number of legal and practical issues associated with implementation and enforcement of the Measure. The City Council desires to consider these issues and others related to campaign reform in the context of considering the appropriate actions to take with respect to Measure B. Mr. Steele's memorandum sets forth 5 options which the City may consider.

Respectfully submitted,

Michele Beal Bagneris
Michele Beal Bagneris, City Attorney

ATTACHMENTS:

- 1) Memorandum from Craig Steele, Esq.
- 2) Trial Court decision in City of Vista v. Drake
- 3) Copy of Measure B
- 4) Agenda Report Considered by City Council 11/2000 re: Campaign Finance and attachments

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RICHARDS, WATSON & GERSHON

MEMORANDUM

TO: Honorable Mayor and Members of the City Council **File No:** 11131.0001
CC: Michele Beal Bagneris, Esq.
FROM: Craig A. Steele
DATE: April 26, 2001
RE: Status and Implementation of the Oaks Project Initiative

As we have previously discussed with the City Council, the Oaks Project Initiative, the Pasadena Charter Amendment styled "The Pasadena Taxpayer Protection Act" ("the Measure") was passed by Pasadena's voters earlier this year. Our office has previously taken the position that significant portions of the Measure are unconstitutional. In addition, at the City Council's direction, we filed a brief in the California Court of Appeal in the case of *Drake v. City of Vista*, a pre-election challenge to an identical measure in the City of Vista. The City Attorneys of Claremont and Santa Monica joined in our arguments that the Measure is unconstitutional.

In the *Drake* case, the San Diego County trial court ruled that the Oaks Project initiative circulated in Vista was unconstitutional and ordered it removed from the ballot. The Court of Appeal ordered the measure back on the ballot and deferred any decision on constitutional issues until after the election. The voters of Vista passed the Oaks Project measure and a competing measure proposed by the City Council. Because the City Council measure received more votes, that measure took effect and the Oaks Project measure did not. On that basis, the Court of Appeal decided 2-1 that the Vista case was moot and took no action on the constitutional arguments briefed in that case. The relevant briefs filed in the Vista case are included in your packet for an overview of the constitutional issues raised.

The purpose of this memorandum and tonight's session is to discuss the effects of the Measure and its implementation.

The Effect of the Measure

The Measure begins with a statement of findings and declarations. In that statement, the proponents declare that various public decisions "have often been made with the expectation of, and subsequent receipt of private benefits" from the persons or entities positively impacted by the public decisions. There is no citation of evidence or any specific facts that would support those statements. I am informed that one proponent of the Measure testified before the Santa Monica City Council that the proponents had no evidence whatsoever that their statements of findings were, in fact, true. Similarly, no evidence was presented in the *Drake* case to

substantiate those claims. The Measure asserts that there is a “compelling state interest in reducing the corruptive influence of emoluments, gifts, and prospective campaign contributions on the decisions of public officials. . . .”

The Measure prohibits elected and appointed public officials from receiving a “personal or campaign advantage” from a person or entity if the public official has previously approved or voted to approve a “public benefit” for that person or entity in a specified period.

The term “personal or campaign advantage” is defined to include any gift, honoraria, emolument, or personal pecuniary benefit of a value in excess of \$50; any employment for compensation; and any campaign contribution for any elected office the official may pursue.

The public approvals (called “public benefits”) that trigger the application of the measure are:

1. Personal services contracts in excess of \$25,000 over any 12 month period;
2. Sale of material, equipment or supplies to the City in excess of \$25,000 over a 12 month period;
3. Purchase, sale or lease of real property to or from the City in excess of \$25,000 over a 12 month period;
4. Non-competitive franchise award with gross revenue of \$50,000 or more in any 12 month period;
5. Land use variance, special use permit, or other exception to an established land use plan, where the decision has a value in excess of \$25,000;
6. Tax “abatement, exception, or benefit” of a value in excess of \$5,000 in any 12 month period;
7. Payment of “cash or specie¹” of a net value to the recipient of \$10,000 in any 12 month period.

The “public benefits” described above would be aggregated to include benefits to individuals and partnerships, firms, and associations when the individual has either a 10% or greater equity investment in the entity or is a trustee, partner, director or officer of the entity.

¹“Specie” is defined in Websters Ninth New Collegiate Dictionary as “money in coin.”

Elected and appointed officials who approve or vote to approve a public benefit would then be prohibited from accepting personal or campaign benefits from the recipients until **the earlier of** one year after the expiration of the official's current term of office, one year after leaving office, or five years from the date of the approval. The Measure would require City officials to "practice due diligence" to determine whether a benefit has been conferred and to monitor personal and campaign advantages to ensure that illegal receipts are promptly returned. City officials would be required to promptly provide, upon inquiry by any person, a list of all persons known to them who qualify as covered public beneficiaries. The Measure also purports to apply to all decisions to approve "public benefits" made by a City public official serving in an official role with **any other** governmental agency, including those agencies outside the territorial jurisdiction of the City.

There is no penalty imposed on a recipient of a public benefit (hereinafter referred to as "recipient") who violates the Measure. Indeed, it is not illegal for a recipient to convey a "personal or campaign advantage." However, the act of accepting a "personal or campaign advantage" from a recipient by a public official could be a misdemeanor and subject to civil remedies. A finding of civil liability in an action brought by any resident of the City could subject the public official to, cumulatively:

1. Restitution of the amount of the "advantage" to the City's General Fund;
2. A civil penalty of up to five times the amount of the "advantage," paid 10% to the petitioner and 90% to the General Fund;
3. Injunctive relief;
4. Disqualification from future public office in the City if the violations are wilful, egregious, or repeated;
5. Payment of the prevailing plaintiff's attorneys fees. The public official is not entitled to recover attorneys fees if he or she prevails.

The Measure contains a standard severability clause.

The effect of the Measure, if valid, on current and future officials of the City would thus be quite extensive. First, public officials would be prohibited from receiving gifts, honoraria and other pecuniary benefits in excess of \$50 from recipients of "public benefits." Second, the Measure would prohibit officials from seeking lawful employment from any person or entity who received a "public benefit" during the applicable time periods described above. Given the large number and variety of defined "public benefits" conveyed by the City of Pasadena each year, the impact of this prohibition on individual officials could be quite substantial. Although the Measure does not define the term "employment," it is safe to assume the proponents intended to preclude various employment arrangements, including consulting agreements and basic representation such as by a lawyer or law firm. Third, public officials would be prohibited from receiving campaign contributions *for any office* from recipients of public benefits.

The Measure would require a very burdensome amount of record-keeping on behalf of the City and each affected official. The City is required to provide written notice of these requirements to all prospective recipients of public benefits. Each officeholder is required to practice "due diligence" to ascertain the recipients of public benefits and to provide to "any person" upon request the names of those persons who qualify as recipients of public benefits.

Constitutional Issues

We have previously provided to the City Council an analysis of the ways in which the Measure is, in our view, unconstitutional. The trial judge in the *Vista* case, the only court to rule on the merits of the various constitutional arguments, held that the Measure is unconstitutional. Unfortunately, that trial court decision was rendered moot by the election result in the City of Vista. However, a copy of the trial court's judgment is included in your packet for information purposes.

Various lawyers, including myself, have argued publicly that the Measure is unconstitutional for a number of reasons. The following is an overview of the most significant legal problems in the Measure. It is important to understand at the outset that the Measure restricts speech and expressive conduct, as well as the contributors' and public officials' constitutional rights to associate with each other. The act of giving a campaign contribution to a public official has long been recognized as political speech worthy of First Amendment protection. While a typical "anti-corruption" measure would implicate First Amendment rights by restricting the **contributor's** right to make a contribution or give a gift to a public official, this Measure would restrict recipients' speech by making it illegal for a public official to accept the beneficiaries' gifts or contributions. The proponents of the Measure will undoubtedly argue that First Amendment rights are not implicated at all, or to a lesser extent, since the Measure does not apply to the "speaker" (the person making the contribution), but rather to the "listener" who would receive the gift or contribution. Of course, a speaker's right to speak has little value if government has forbidden the intended audience from listening.

Assuming the Measure restricts the fundamental rights of free expression and association, courts will examine its provisions to determine whether the proponents of the Measure have demonstrated that a "sufficiently important governmental interest" justifies the regulation and that the Measure "employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *FPPC v. Superior Court* (1979), 25 Cal.3d 33, 45; *see also, FEC v. Mass. Citizens for Life* (1986), 479 U.S. 238, 265. This means that the Measure must regulate only the speech necessary to solve the particular problem at hand, and no more. The only "government interest" held by the United States Supreme Court to be of sufficient importance in this context is eliminating "corruption or the appearance of corruption" in politics. *Buckley v. Valeo*, 424 U.S. 1, 21-28, 96 S.Ct. 612 (1976). In the consistent view of the Supreme Court over nearly 25 years, corruption or the appearance of corruption arises when the

possibility of a *quid pro quo* exists between candidate and contributor. In the Court's view, this *quid pro quo* occurs when a contributor makes a contribution with the expectation that the recipient will take a certain action or vote a certain way.

In our view, there are at least six significant legal problems with the Measure as drafted (each of which is discussed below):

1. The Measure would have the potentially unconstitutional effect of absolutely prohibiting beneficiaries from exercising their First Amendment right to make contributions. The courts have never sanctioned an outright ban on contributions by individuals, for example.
2. The campaign contribution bans in the Measure are preempted by State and federal law. Further, the provisions of a City Charter cannot legally regulate the conduct of officials of separate legal entities outside the jurisdiction of the City.
3. There is no evidence that "after the fact" contributions, gifts or employment relationships are somehow more corrupting or potentially corrupting than contributions or gifts made in advance of a governmental decision.
4. The Measure would have a discriminatory impact between officials who approve or vote to approve items and those who vote to deny, and their supporters.
5. The Measure could be read to prohibit the receipt of income and other funds from investments and employment that pre-date the passage of the Measure.
6. The vagueness of the Measure, its over breadth, the strict liability standard, and the inadequacy of existing law, could subject public officials to significant penalties for violations of the law.

In defense of the Measure, the proponents have argued that it is narrowly tailored to prohibit city officials from making decisions that are influenced by promises of post-approval employment, gifts, payments and campaign contributions. The proponents argue that the Measure is in fact very limited in scope. The proponents also contend that the Measure adds to, and is not preempted by, existing law, and that it is within the voters' power to adopt. The arguments on both sides of the issue have been very thoroughly briefed by lawyers for both sides in briefs filed in the *Vista* case. Copies of those briefs are available in the City Attorney's office for any interested party.

Implementation

At the City Attorney's request, I have prepared the following list of steps that must be taken to implement the Measure.

1. Certify the election result and file a copy of the Measure with the Secretary of State. A charter amendment is not effective until it has been received and filed in the Secretary of State's office.
2. As of the effective date of the Measure, the City must begin to compile and distribute a list of those persons or entities receiving "public benefits" from the City. The list will be a public document and will fulfill the requirement in the Measure that officials make such a list available to any member of the public who requests it. Recipients must remain on the list for a period of five-years after the date of approval. The compilation of this list will require a four-step process:
 - a. Designate the person or persons with the responsibility for maintaining and distributing the list.
 - b. Create a distribution list by determining the City officials to whom the Measure applies, and a regular schedule for distribution. We have previously advised that the Measure clearly applies to the City Council, Planning Commission, CDC, and other bodies with final decision-making authority, as well as a large number of key decision-makers on the City staff, such as the City Manager, City Attorney, Department Heads and potentially to any other staff members with the authority to approve contracts or make any final approval decisions.
 - c. Define as precisely as possible, using the definitions described above, the types of "public benefits" covered by the Measure.
 - d. Create a mechanism for reporting the approval of "public benefits" to the person charged with maintaining the list. Obviously, the potential list of "public benefits" approved in a City such as Pasadena in any given year could be extraordinarily broad. "Public benefits" could range from major contracts to perform public works construction to land use decisions permitting room additions at a single family home.
3. Draft language regarding the applicability and prohibitions of the Measure to be included in City RFP's, contracts, invitations to bid, resolutions or notices of approval, and informational materials. Applicants for "public benefits" must be notified of the reach of the Measure.

4. Require that each applicant for any “public benefit” disclose, as a condition of applying, the name of any person who holds an equity or revenue interest in the applicant that exceeds 10%; and the names of all trustees, directors, partners or officers of the applying entity. There is no exception in the Measure for silent partnerships, limited or general partnerships, inactive stock owners or any other typical business combination. In addition to covering the actual recipient of the public benefit, the prohibitions of this Measure apply to various partial owners who may have no actual knowledge or role in the application or “public benefit” at issue.
5. The City must compile the same information from each outside agency in which a City public official serves. This will be a significant burden on other governmental agencies such as the Burbank-Glendale-Pasadena Airport Authority, the MTA, the Blue-Line Authority and numerous other agencies.
6. Educate all affected decision-makers regarding the prohibitions of the Measure. Briefly-stated, once a covered public official exercises discretion to approve or votes to approve a “public benefit,” that official may not accept any employment for compensation, any campaign contributions, or any gift or honoraria in excess of \$50 from a recipient or anyone with a greater than 10% interest in the recipient.

Options

We have identified the following five possible options for the City Council's consideration.

1. Implement the Measure on an interim basis and direct staff to prepare a charter amendment to cure the constitutional deficiencies in the existing Measure.
2. If a party adversely affected by the Measure - not a proponent - brings a legal challenge, the City could bring a cross-complaint for declaratory relief. This cross-complaint by the City would seek the guidance of the court as to the validity of the Measure. Any potential decision-maker, political contributor or employer could be a plaintiff in this type of challenge to the Measure.
3. Based on an extensive public report from the City Attorney presented at a public meeting, the City Council could determine not to implement specific portions of the Measure once it takes effect. This would require some analysis of the severability of the valid portions of the Measure. The City's announcement that portions of the initiative will not be enforced will likely generate a lawsuit by the proponents to force implementation of the entire Measure.
4. The City Council could initiate its own lawsuit challenging the validity of the Measure. This could put the City in the awkward position of affirmatively challenging the decision of its own voters. However, it also serves to protect the constitutional rights of those potentially affected by the Measure.
5. Certify the election result, direct the City Clerk to file a copy of the adopted Measure with the Secretary of State and fully implement and enforce the Measure. It is likely that at some point in the future some person subject to the Measure would challenge its validity, either as a defense in a prosecution, or in a civil rights case, or both. The City would be forced to defend the Measure and would likely be ordered to pay attorneys fees and perhaps significant damages if the Measure was found to be unconstitutional.