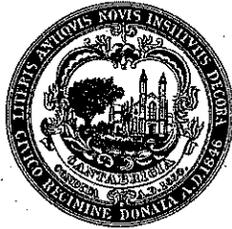


Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Samuel A. Aylesworth
First Assistant City Solicitor



Assistant City Solicitors
Paul S. Kawai
Keplin K. U. Allwaters
Sean M. McKendry
Megan B. Bayer
Brian A. Schwartz
Katherine Sarmini Hoffman

Public Records Access Officer
Seah Levy

CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

April 1, 2019

Louis A. DePasquale
City Manager
City Hall
Cambridge, MA 02139

Re: Awaiting Report #19-12 Re: Report on the Legality and Constitutionality of the Proposed 'Cambridge Publicly Financed Municipal Election Program' and the 'Cambridge Municipal Election People's Pledge'; and Awaiting Report #18-136 Re: Report Back on Submitting a Proposal that Candidates Would Agree to not Accept Donations from Persons Outside of the Commonwealth of Massachusetts

Dear Mr. DePasquale:

This is in response to the two Awaiting Report items referenced above, which are based on Council Order O-8 of 1/28/19, Council Order O-15 of 12/3/18, and Council Order O-4 of 4/30/18. In brief, the City Council is requesting information around the public funding of municipal School Committee and City Council elections; as well as the creation of a voluntary pledge program in which candidates would voluntarily agree to limit their campaign expenditures, restrict the donations they would accept, and publicly release a copy of their most recent federal tax return in exchange for the City notifying voters that participating candidates have taken the pledge. Both of the proposed programs contain elements that are not permitted under current law and present a number of practical difficulties.

A. The "Cambridge Municipal Election People's Pledge"

The proposed "Cambridge Municipal Election People's Pledge" program (the "Pledge") would be a voluntary program. In order to comply with the requirements of the Pledge, candidates would have to limit campaign expenditures (to \$30,000 for City Council candidates; to \$20,000 for School Committee candidates); limit the total of donations accepted (to \$35,000 for City Council candidates; to \$25,000 for School Committee candidates); limit the amount of an individual donation to \$200; agree to release their most recent federal tax return; and not accept donations from outside of Massachusetts. For candidates who participate in the Pledge, the Election Commission would notify voters which candidates are participating by mailing such information to voters, prominently displaying such information on the City web-site and stating such information on the City ballot.

If the proposed Election Commission actions on behalf of candidates taking the Pledge are essential elements of the Pledge, then the most fundamental legal problem with the Pledge is that the proposed actions regarding the notification of voters would likely violate the comprehensive set of campaign finance laws in G.L.c.55 and could violate constitutional principles that prohibit the use of public money to influence an election. Both the General Counsel for the State Office of Campaign and Political Finance and the General Counsel for the Elections Division for the Secretary of the Commonwealth raised this concern in informal discussions.

In Anderson v. City of Boston, 376 Mass. 178 (1978), the Supreme Judicial Court held that Boston could not use public funds to influence voters regarding a referendum that would have changed how real estate is classified for tax purposes. The SJC held that, G.L.c.55 regulating campaign finance was "...comprehensive legislation, enacted after the adoption of the Home Rule Amendment, regulating election financing [which] manifests an intention to bar municipalities from engaging in the expenditure of funds to influence election results." Id. at 185. The Legislature's "strong interest in free and fair elections is expressed in the Constitution of the Commonwealth" in Article 9. In Anderson, the SJC specifically prohibited the use of public funds to pay for printed materials for distribution to voters intended to influence the voters one way or the other. Id. at 200.¹ The SJC noted:

Surely, the constitution of the United States does not authorize the expenditure of public funds to promote the reelection of... local officials (to the exclusion of their opponents), even though the open discussion of political candidates and elections is basic First Amendment material. Government domination of the expression of ideas is repugnant to our system of constitutional government. In this Commonwealth, we might find a constitutional bar to such an attempt at political self-perpetuation in Art. 9 of the Declaration of Rights of our Constitution, concerning free elections, and in considerations of equal protection and due process of law. Id. at n.14.

Therefore, those elements of the Pledge that would require the Election Commission to notify voters which candidates have agreed to the provisions of the Pledge appear to violate the state Constitution. If so, there would be no legal way for the City to adopt the Pledge if it contained that requirement; as a general legal principle, special acts applicable to a particular municipality passed by the Legislature may over-ride general laws applicable to all municipalities, but special acts may not contradict and cannot over-ride Massachusetts or Federal constitutional requirements.

In addition to violating the prohibition of spending public funds to influence voters in an election, the element of stating information on the ballot indicating which candidates made the Pledge and, by implication, which did not, would violate current provisions of the City Charter (G.L.c.43, §112) and other state law (G.L.c.54, §41). The Charter specifies the form and contents of City election ballots. The Charter provides for what information shall be on the official ballot and provides that no official ballot shall have printed thereon any political

¹ In Anderson, the SJC mentioned but did not explicitly decide whether the appropriation at issue in the case to influence a referendum vote was a constitutionally permissible expenditure of funds for a public purpose, or whether the proposed use of funds violated constitutional principles of equal protection and due process.

designation or mark related to the name of any candidate "...or anything showing how he was nominated or indicating his views or opinions." A statement that a candidate has taken the Pledge would indicate certain of that candidate's views or opinions. Additionally, G.L.c.54, §41 provides what information shall be on a local ballot, which includes that candidate's name, street address, and, if the candidate is an incumbent the words "Candidate for Reelection." In the case of Galluccio v. Election Commissioners of Cambridge, 339 Mass. 587 (1959), the SJC held that the words "Candidate for Reelection" required by G.L.c.54, §41 should be added to the Cambridge ballot even though not specifically required by the Plan E Charter (i.e. G.L.c.43, §112) because adding such language was not inconsistent with the Charter section and was otherwise required by the General Laws.

Although the Pledge as proposed does not appear to be legally permissible, I am not aware of any legal prohibition against a candidate voluntarily agreeing to limit his/her campaign expenditures, deciding which campaign donations to accept and in what amounts, and even releasing his/her individual tax returns. I note however that tax returns contain some normally confidential personal information such as the social security numbers of the filer, any joint filer, and any dependents. Candidates may not want to release an unredacted tax return publicly. Therefore, in my opinion a candidate could take the Pledge and promote that fact himself or herself, without the involvement of the Election Commission or other City department.

B. The "Cambridge Publicly Financed Municipal Election Program"

The proposed "Cambridge Publicly Financed Municipal Election Program" (the "Program") would also be a voluntary program and would allocate City funds to candidates to help finance their campaigns. The Program would only be available to candidates meeting certain income eligibility requirements, such as those used to determine eligibility for affordable housing. Candidates (if any) meeting the low-income eligibility requirements would receive \$15,000 if a City Council candidate and \$10,000 if a School Committee candidate for non-personnel campaign expenditures: if they do not raise more than an additional \$20,000 or \$15,000 respectively; if they expend no more than \$30,000 and \$20,000 respectively; if they accept individual contributions of no more than \$200 per individual; if they release a copy of their Federal income tax return; if they agree not to accept donations from people outside Massachusetts; if they return to the City any unspent amounts of publicly funded campaign funds after the election; and if they subject their campaigns to audit by the City to ensure compliance with the requirements of the Program.

There are constitutional concerns raised by the Program. The Program and the Pledge considered above are similar in that, as conceived, they both would provide public benefits to candidates in exchange for the candidate meeting certain requirements. The Program and Pledge differ in that the Pledge proposes to provide public benefits in specific forms that require the City to "speak" to voters directly via published materials that would in a way express support for particular candidates. The Program would provide public funds directly to candidates. While there are many forms around the country at both the state and local level of public funding for candidates, each program, and each element of each program, must be constitutional under the First Amendment. Some elements of public funding programs have been struck down by the courts on First Amendment grounds, while others have not. It is difficult to predict how courts will analyze aspects of public funding programs that they have not considered before, but I offer the following analysis.

A significant constitutional issue for the Program is that it is to be offered only to candidates who meet some low personal income threshold, but not to other candidates. In McCutcheon v. Federal Election Commission, 572 U.S. 185 (2014), the United State Supreme Court held that a statutory aggregate campaign contribution limit violated the First Amendment. In McCutcheon, 572 U.S. at 191, the Court stated what reasons may justify governmental limits on campaign contributions, finding that:

Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. [citations omitted] At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others.... Any regulation must instead target what we have called “quid pro quo” corruption or its appearance.

Furthermore, the Court stated (Id. at 206-207):

This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. [citations omitted] We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equalize the financial resources of candidates.’ [citations omitted] The First Amendment prohibits such legislative attempts to ‘fine-tune’ the electoral process, no matter how well intentioned.

It is difficult to see how making the Program available only to low income candidates furthers the City’s interest in preventing corruption or the appearance of corruption. Singling out low income candidates for public funding appears to be an attempt to “equalize the financial resources” of low income candidates with the financial resources of candidates who have more personal financial resources to invest in a campaign, or to “level the playing field,” or to “level electoral opportunities,” which are precisely the interests that the Supreme Court in McCutcheon rejected as constitutionally invalid under the First Amendment. There does not appear to be a basis for asserting that low income candidates are more likely to be corrupt, or appear to be corrupt, than candidates whose income is a little or a lot higher than the low income threshold. While the prevention of corruption or the appearance of corruption could be asserted as a basis for a public funding program made available to all candidates, regardless of personal income, there does not appear to be any such basis for public funding to be provided only to low income candidates.

In Davis v. Federal Election Commission, 554 U.S. 724 (2008), the Supreme Court struck down a public funding regime that tried to level the financial resources of candidates who were able to invest large amounts of their own money into their campaigns with those candidates who could not do so. The Court held in Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett, 564 U.S. 721, 748 (2011) that: “[D]iscriminatory contribution limits meant to ‘level electoral opportunities for candidates of different personal wealth’ did not serve ‘a legitimate government objective’ let alone a compelling one.”

Recently, the SJC in 1A Auto, Inc. v. Director of the Office of Campaign and Political Finance, 480 Mass. 423 (2018) held that the State's ban on corporate contributions to candidates was constitutional. The SJC noted that, "...laws that limit political spending must be recognized as 'operating in an area of the most fundamental First Amendment activities.'" Id. at 428. The SJC noted the longstanding distinction first articulated in Buckley v. Valeo, 424 U.S. 1 (1976) between laws that limit independent expenditures and laws that limit contributions to candidates. "[I]ndependent expenditure limits are subject to strict scrutiny, whereas contribution limits are reviewed under a less rigorous standard, and will be upheld as long as they are 'closely drawn' to match a 'sufficiently important interest.'" The SJC noted that in the 40 years since Buckley, the Court has declared unconstitutional almost every independent expenditure limit that has come before it, and has upheld most contribution limits. Id. at 429-430.

Although in 1A Auto the SJC was considering corporate contributions and corporate political expenditures, it is possible that the courts would take a dim view of the candidate campaign expenditure limits set in the Program. The City would be curtailing the rights of candidates to spend as much money as they deemed necessary to run a campaign, thereby limiting the candidates' ability to exercise their right to speak, as a condition of receiving public funding. However, basing the contribution and expenditure amounts on historical candidate expenditures for City Council and School Committee races are factors that a reviewing court would view favorably in assessing the constitutionality of those limits. In Randall v. Sorrell, 548 U.S. 230 (2006), the Supreme Court struck down as violative of the First Amendment certain provisions of the Vermont Campaign Finance Reform Act that set limits on the amounts that candidates for state office could spend on their campaigns, and that limited too much how much individuals, organization and political parties could contribute to candidates for state office. The Court noted that it had upheld contribution limits in the past, but not all such limits will be constitutional.

Assuming the Program would pass constitutional muster, creation of the Program would require a special act passed by the State Legislature and signed by the Governor because the City's Home Rule powers to legislate locally do not include the power to regulate elections, especially not inconsistently with State law. In the Program, for example, there is the proposed requirement that individual contributions be limited to \$200 per individual even though in G.L.c.55, the individual donation limit is \$1,000.

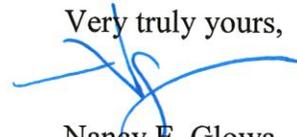
There are also practical enforcement and compliance issues that would need to be addressed. These include how the City would administratively determine compliance with Program requirements and what the City would do in the event it discovers that candidates have violated Program requirements. The City could not rely on the State's Office of Campaign and Political Finance to administer and enforce any of the Program's local requirements. Penalties for violating Program requirements would have to be created, or else candidates in the Program would have no legal incentive for complying with its terms. The City would have to expand its administrative capacities to manage and oversee the Program. Also, as conceived, the Program would allow any candidate meeting the low-income threshold to obtain public money. Many public funding programs contain other eligibility requirements, such as having to raise a certain amount of small donations to prove that the candidacy has some support. For the Program, a candidate could obtain City money and not raise any money on his/her own either before or during the campaign. A candidate who doesn't spend the public money for campaign purposes is required under the Program to return "unspent" funds, but there could be difficult enforcement

issues if a low-income candidate has received and misspent the public funds on non-campaign items and then the City tries to recover the misspent funds from that low-income individual.

Conclusion

For the reasons stated, both of the proposed programs contain elements that are likely not permitted under current law and present a number of practical difficulties as outlined above.

Very truly yours,



Nancy E. Glowa
City Solicitor