

MEMORANDUM

To: Charter Revision Committee
From: Charter Revision Working Group
(Ted Siff, Ann Kitchen, Fred Lewis, Margaret Menicucci, Susan Moffat)
Re: Recommendations on Proposed Campaign Finance and Election Charter
Amendments
Date: November 16, 2011

Executive Summary

To improve transparency and promote voter confidence in city elections, the working group recommends a package of campaign finance and election reforms that includes the following proposed charter amendments:

- Create a new 30-day fundraising period following regular, run-off and special elections for the purpose of retiring campaign debt and funding officeholder accounts, provided that officeholder accounts may no longer be used to fund the following items: contributions to charities, contributions to nonprofit organizations, membership dues, advertising and newsletters.
- Increase the limit for officeholder accounts from \$20,000 to \$40,000, provided that officeholder accounts may no longer be used to fund the following items: contributions to charities, contributions to nonprofit organizations, membership dues, advertising and newsletters.
- Clearly establish the jurisdiction and enforcement powers of City Ethics Commission.
- Require timely disclosure of campaign contributions made within 9 days of an election.
- Require disclosure of independent expenditures, including express advocacy, electioneering communications and disclaimers.
- Require electronic filing of all campaign finance and lobbying reports and expenditures in a publicly searchable database.
- Require a public election to approve all new major revenue bonds over a specified dollar amount.

The working group is still considering a small number of additional proposals and will report on these items at a later date.

Need for Campaign Finance Amendments

Within the next year, Austin may transform both the structure and election of our City Council. Like most big life changes, this one is driven by dissatisfaction with the status quo, coupled with the hope that there must be a better way. City leaders cite concerns about an increasingly disengaged electorate and hope that change will spark more robust voter turnout. Members of the public say moneyed interests have effectively limited representation to a select few and hope that defined geographic representation will give average citizens a stronger voice at city hall.

While we laud both goals, we believe that neither can be achieved without key reforms to Austin's campaign finance laws. No matter how many districts we create or how they are apportioned, special interests can still attempt to sway outcomes with infusions of cash - and in fact, may find smaller single-member districts a bargain. Without full confidence in a fair transparent system, fewer voters will see a reason to participate in local elections and civic engagement will continue on its downward spiral. Austin simply cannot afford to get this wrong.

Recent Supreme Court decisions and changes in state and federal practices have only heightened the urgency of such reforms. In the wake of *Citizens United*, corporate contributions for elections are already ramping up, and with them so-called "independent expenditures" that often mask the source of their financial backing. Without firm reporting requirements, common-sense restrictions on use of funds, and clearly defined powers for our City Ethics Commission, even the most dramatic restructuring of our City Council will not realize our hopes for improved civic engagement and representation.

While such reforms could be achieved by code amendments, we believe these provisions deserve the permanency and protection afforded by the City Charter and that the citizens of Austin deserve the opportunity to ratify them at the ballot box. To improve transparency and promote voter confidence in city elections, the CRC working group urges the Committee to support a campaign finance package that includes the charter amendments recommended herein. These proposed campaign finance reforms are appropriate and beneficial under the current at-large system of electing City Council members and are even more critical if the voters decide to move to a district-based system of electing City Council Members.

A. Recommendations Regarding Amendments Proposed by City Council Resolutions

The City Council sent the Committee two resolutions pertaining to campaign finance, containing a total of four potential amendments. After evaluating each of these four items, we refer one proposal to the full Committee for discussion without a recommendation and recommend two proposals for inclusion on the ballot contingent on additional restrictions. We do not recommend the last proposal from Council as this issue is already addressed generally in the current City Charter and specifically in City Code.

1. Resolution 20110428-048

SUMMARY OF PROPOSAL: The proposed amendment would increase the allowed individual campaign contribution for at-large seats to \$700 per person per election, twice the current cap of \$350.

NO RECOMMENDATION: The working group believes this issue requires consideration by the full committee and refers it without recommendation. In preliminary discussions, working group members generally felt the proposed \$700 per person limit was too high, noting that a couple donating to a single candidate in both a general election and a runoff could potentially contribute a total of \$2800 in just one race. Members felt that in the event an increase was found to be warranted, a more reasonable figure might be in the \$400-\$450 range; however, they recognized that others believe a higher cap for at-large positions would be beneficial. Members also discussed the possibility of leaving the \$350 per person cap intact for at-large seats and reducing the limit to \$150 per person for single-member district seats, if single-member seats are ultimately adopted. One working group member recalled that when campaign contributions were raised to their current levels, many felt that the previous cap of \$100 might be viable for smaller single-member district races; in short, the current caps were raised specifically to accommodate running at-large so may still be sufficient at \$350 per person.

2. Resolution 20110428-048

SUMMARY OF PROPOSAL: This proposed amendment would create a new 30-day fundraising period following regular, run-off and special elections for the purpose of retiring campaign debts and funding officeholder accounts.

RECOMMENDED WITH ADDITION: The working group recommends this item only if it includes language specifically restricting officeholder accounts from funding the following items, which are currently allowed: contributions to charities, contributions to nonprofit organizations, membership dues, advertising and newsletters. The working group does not recommend this item for inclusion on the ballot absent this added restriction.

REASONING: Winners of elections are often left with large personal debts or unpaid bills from various vendors. We believe there is a legitimate public interest in ensuring that officeholders are focused on job responsibilities, not worried about debt retirement, and for that reason we support the creation of a 30-day post-election fundraising period. However, officeholder accounts should be clearly limited to expenses directly related to the discharge of that public office, not used to fund items that are essentially political in nature. Expenses such as contributions to charitable or nonprofit organizations, membership dues, newsletters or other advertising may allow an incumbent to gain favor with groups and individuals, but do not advance a true public interest; therefore, any

charter amendment that increases funding to officeholder accounts, directly or indirectly, should also eliminate these questionable uses. (Note: We have specifically prohibited these uses in both proposed amendments dealing with officeholder accounts to ensure their restriction in the event that only one proposed amendment is adopted).

3. Resolution 20110428-048

SUMMARY OF PROPOSED AMENDMENT: This proposal would increase the limit for officeholder accounts to \$40,000, double the current limit of \$20,000.

RECOMMENDED WITH ADDITION: As with Item 2 above, the working group recommends this proposed amendment only if it includes language specifically restricting officeholder accounts from funding the following items, which are currently allowed: contributions to charities, contributions to nonprofit organizations, membership dues, advertising and newsletters. The working group does not recommend this item for inclusion on the ballot absent this added restriction.

REASONING: The costs of living in Austin have risen dramatically in recent years and the expenses of our city officeholders have risen with them. Therefore we feel it is reasonable to increase the amount that may be retained in an officeholder account from the current \$20,000 cap to \$40,000. However, as previously noted, we strongly believe that officeholder accounts should be limited to purposes that are directly related to the discharge of that public office, and that any charter amendment that increases funding to officeholder accounts, directly or indirectly, should eliminate these questionable uses. Again, we have specifically prohibited these uses in both proposed amendments related to officeholder accounts to ensure their restriction in the event that only one proposed amendment is adopted.

4. Resolution 20110623-94

SUMMARY OF PROPOSED AMENDMENT: This proposal would establish that campaign contributions for a run-off election may only be collected after the election day of the general election for which a run-off is to be held.

DO NOT RECOMMEND: This proposal is not recommended for inclusion on ballot.

REASONING: This topic is already addressed generally under the current City Charter and specifically by City Code. City Charter Section 8 (F)(2) states that a candidate or candidate's committee may not solicit or accept a political contribution except during the last 180 days before the election. City Code Section 2-2-7 specifically provides that a general election and a run-off election each have separate campaign periods and that the campaign period for a runoff election begins the day after the date of an election at which no candidate receives a majority of the votes. This section further states that a candidate may only raise funds for an election during an authorized campaign period.

Given this, we believe the current language is sufficient and that any problems related to this issue are due to erroneous interpretation or lack of enforcement.

B. Additional Recommended Campaign Finance and Election Amendments

In addition to the proposals from City Council, the working group strongly recommends the following proposed charter amendments as key campaign finance and election reforms that are urgently needed and deserve the durable protection afforded by the City Charter. For each proposal, we first identify the current problem, followed by a brief summary of the solution provided by the proposed amendment.

1. Clarify Jurisdiction and Enforcement Powers of City Ethics Commission

PROBLEM: The City of Austin currently has no functioning mechanism to enforce violations of city campaign finance laws. For over ten years, the City of Austin's Legal Department has taken the position that the existing City Ethics Commission has jurisdiction only over city conflict of interest complaints, but not city campaign finance complaints. As a result, there is effectively no enforcement of Austin's local campaign contribution limits and additional campaign disclosure provisions. The City Ethics Commission has recommended to successive city councils that they clarify current law to specifically state that the Ethics Commission has jurisdiction over city campaign finance violations, but to date no City Council has publicly considered this request. If the City Ethics Commission's provisions were clearly applied to campaign finance complaints, the Ethics Commission would be able to hear evidence under oath and make a recommendation as to whether a violation has occurred, authority it currently lacks. However, even with this change, authority to prosecute violations would still remain with the City Attorney, which could be problematic under certain circumstances particularly where there may be the appearance of a conflict of interest. For this reason, we also recommend that the City Ethics Commission be given authority to hire a special prosecutor at its discretion in cases where it believes such action is necessary.

SUMMARY OF PROPOSED AMENDMENT: This proposed charter amendment would state explicitly that the City Ethics Commission, established in Chapter 2, Article 7 of the City Code, has jurisdiction over all alleged city campaign finance and campaign disclosure violations. It would provide that the current Commission processes apply to such alleged violations and ensure funding for all reasonable and necessary expenses of the Commission in fulfilling its duties. It would preclude the City Council in the future from weakening or limiting the powers of the Commission by ordinance, though Council would retain the authority to strengthen the Commission's powers if desired. It would also grant the Committee authority to appoint a special prosecutor in cases where it finds this action necessary, with funding provided by the City.

2. Require Timely Disclosure of Campaign Contributions Made Within 9 Days of an Election

PROBLEM: Currently, city candidates and political action committees (PACs) are not required to report contributions and expenditures made in the last nine days before a city election until after Election Day has passed. Unfortunately, some parties have exploited this loophole to prevent Austin voters from learning the sources and amounts of major campaign contributions or expenditures until after they have cast their ballots.

Texas has already closed this loophole for state candidates and PACs influencing state elections, requiring that contributions over \$5000 and expenditures over \$1000 against a specific candidate made in the last nine days before Election Day must be reported within one day. However, this loophole still exists at the city level.

SUMMARY OF PROPOSED AMENDMENT: The proposed charter amendment would require all candidates and political committees to report within one business day contributions and expenditures made in the last nine days before Election Day at the following levels: (1) candidates shall file a report whenever their contributions or expenditures in aggregate exceed \$2500; (2) PACs shall file a report whenever their contributions, expenditures, or independent expenditures in aggregate exceed \$2500, or when they make independent expenditures opposing a specific candidate that exceed \$1000. Note: While this proposal mirrors state reporting requirements, the suggested reporting thresholds are lower because city elections usually involve significantly less money than state elections.

3. Require Enhanced Disclosure of Independent Expenditures, Including Express Advocacy, Electioneering Communications, and Disclaimers

PROBLEM: Entities that are not candidates or official PACs may currently avoid disclosure of independent expenditures and funding sources because state and city laws have not been updated to address the increasingly common practice of using nonprofits organizations, ad hoc groups, unions, corporations or other entities for political purposes. Current city law does require independent expenditures over \$1000 to be disclosed within 7 business days or, if made in the last 9 days before the election, within 48 hours. But neither state nor city law explicitly defines independent expenditures to clearly require disclosure of electioneering communications such as sham issue ads, i.e., ads that do not expressly say to vote for or against a candidate but are clearly under the circumstances intended to influence an election.

The Supreme Court Ruling in the Citizens United case now allows corporate and union funds to be used for independent expenditures intended to influence city elections; but if the electioneering communications in question do not specifically say to vote for or against a candidate, they can escape reporting requirements under current city law. This deceptive practice is expected to increase in the future as local copycats follow growing, abusive practices at the national level.

However, since the Citizens United decision, courts have upheld laws requiring disclosure of corporate and union funding of independent expenditures, including

electioneering communications that do not expressly advocate the election or defeat of a candidate. Courts also have held that third-party expenditures, corporate or otherwise, made in “coordination” with a candidate’s campaign may be treated as an in-kind contribution to a campaign.

To address this growing problem, the working group strongly recommends a charter amendment to require disclosure of independent electioneering communications and coordinated expenditures made by any entity or person in city elections, modeled on effective, recent provisions from other jurisdictions that have been upheld by the courts.

SUMMARY OF PROPOSED AMENDMENT: The proposed charter amendment would explicitly require the disclosure of independent expenditures and electioneering communications *by all persons*, including corporations, unions, 501c nonprofit organizations, unincorporated associations and individuals.

Independent expenditures would be defined to include both express advocacy, in which voters are urged to vote for or against a specific named candidate, and electioneering communications, which are identified using the accepted “bright line electioneering test.” The bright line test requires disclosure of independent expenditures that involve: (1) communications that in aggregate exceed \$2500; (2) refer to a clearly identified candidate or ballot measure; (3) are disseminated by television, radio, billboard, mass mailing or telephone bank; (4) are publicly distributed within 60 days of an election; and (5) are targeted to the candidate’s electorate, defined as 5000 people eligible to vote or 2% of the electorate, whichever is less. (Note: All the terms in the preceding definition would be defined in even greater detail using language from model laws). The City Code’s 1994 definition of “coordination with a campaign” (which currently applies only to cooperation and sharing of strategic communications between candidates and third-parties making expenditures) would be expanded to include cooperation, consultation, or a broader sharing of pertinent campaign information between a third party or his or her agents with a candidate or his or her agents.

The proposed amendment would also mandate that all independent expenditures and their sources be reported within 5 business days if made more than 60 days before an election. If made between 60 days and 10 days before an election, independent expenditures would have to be reported within 48 hours. Independent expenditures made within 9 days before an election would be reported within 24 hours to conform with the above-recommended reporting requirement for candidates and PACs.

Finally, the working group also strongly recommends that the usual “paid by” disclaimers on communications purchased by independent expenditures in Austin elections be required to provide additional disclosure, as these entities often operate under generic or intentionally misleading names. To ensure transparency, the proposed charter amendment would require communication disclaimers to state the names of the five largest contributors to the entity within the preceding 12 months, an approach that has been successfully implemented in Connecticut.

4. Require Electronic Filing of all Campaign Finance and Lobbying Reports and Expenditures in a Publicly Searchable Database

PROBLEM: The City of Austin requires the reporting of all campaign contributions and expenditures, as well as lobbyist registration and expenditures, but not in a form that is readily accessible or searchable by the general public, despite commonly available technology that would provide such access. Currently, most campaign and lobbyist reports are only available in hardcopy form, requiring a trip to the City Clerk's office and hours, if not days, of hand-sorting depending on what information is sought. Those reports that are filed electronically are typically in a locked PDF format, which presents yet another roadblock to electronic searches. Both the State of Texas and the City of Houston already require electronic filing of these documents in a searchable database. For a city that prides itself on technological savvy, it is surprising that Austin does not facilitate meaningful public access to this information because it clings to a paper filing system.

SUMMARY OF PROPOSED AMENDMENT: The proposed charter amendment would require any entity that contributes, accepts, or expends funds related to a city election to file all required reports electronically and that such reports would be publicly available in a searchable database. This amendment would apply to candidates, candidate committees, PACs, bundlers, lobbyists, or any entity engaged in independent expenditures, and would also require lobbyists to register and file any regular reports electronically for inclusion in a searchable database. The amendment would require that the database be fully operational no later than six months after voter approval of this measure.

4. Require a City Election to Approve Major New Revenue Bonds Over a Specified Dollar Amount

PROBLEM: Article 7, Section 11 of the City Charter states: "All revenue bonds issued by the city shall first be authorized by a majority of qualified electors voting at an election held for this purpose." Despite such clear language, since the 1990s, the city has largely ignored this provision, citing a superseding state law that allows cities to issue revenue bonds without a public vote. However, just because state law allows an action does not necessarily mean it is good public policy. Revenue bonds fund our municipally owned electric and water utilities, and decisions regarding major new projects may have far-reaching consequences both for citizens' wallets and for the direction of our city as a whole. In light of recent discussions about voter turnout, we believe Austin residents are more apt to become engaged voters when they are consulted on major civic decisions and are treated as capable of casting informed ballots. Though the working group was not unanimous regarding this issue, a majority of the members felt that major revenue bonds should be subject to a City election before approval. Other subcommittee members had concerns about what impact this change in procedure would have on Austin's ability to operate its Energy and Water Utilities as well as other enterprise departments competitively. The working group recommends discussion of the full Committee to determine a reasonable dollar amount threshold for this amendment.

SUMMARY OF PROPOSED AMENDMENT. Public elections would be required to initiate new debt for major projects over a specified dollar amount (threshold amount to be determined by full Committee). Elections would not be required for refinancing of existing debt or in emergency situations, defined as an imminent catastrophic threat to the health and safety of citizens not of the city's own making.

Conclusion

The working group respectfully submits the above recommendations to the full Committee for future discussion and possible action. The working group is continuing to evaluate a small number of additional proposed amendments and may submit further recommendations to the full Committee at a later date.

Submitted to the Charter Revision Committee (CRC) by members of the CRC Working Group: Ted Siff, Ann Kitchen, Fred Lewis, Margaret Menicucci, and Susan Moffat

November 16, 2011