



**CITY OF BOULDER  
CITY COUNCIL AGENDA ITEM**

**MEETING DATE: January 15, 2019**

**AGENDA TITLE**

**Consideration of a motion to accept the December 11, 2018 Study Session  
Summary of the Campaign Finance and Elections Working Group.**

**PRESENTERS**

Jane S. Brautigam, City Manager  
Lynnette Beck, City Clerk  
David Gehr, Chief Deputy City Attorney  
Kathy Haddock, Senior Counsel  
Geoff Wilson, Outside Legal Consultant

**EXECUTIVE SUMMARY**

This agenda item provides a summary of the December 11, 2018 City Council Study Session on the work of the Campaign Finance and Elections Working Group and direction for the future of the working group.

## **STAFF RECOMMENDATION**

### **Suggested Motion Language:**

Staff requests council consideration of this matter and action in the form of the following motion:

Motion to accept the December 11, 2018 Study Session Summary of the Campaign Finance and Elections Working Group.

## **BACKGROUND**

Background information can be found in the December 11, 2018 Study Session Memorandum and materials found here:

[https://documents.bouldercolorado.gov/WebLink/0/edoc/167326/2018\\_12\\_11\\_SS%20Packet.pdf](https://documents.bouldercolorado.gov/WebLink/0/edoc/167326/2018_12_11_SS%20Packet.pdf)

## **NEXT STEPS**

The working group and members of staff will form a subcommittee to draft two ordinances which will address the recommended revisions to Chapter 13-2, “Campaign Financing Disclosures,” and Chapter 13-4, “Complaints Related to Election Procedures and Regulations.”

The working group’s work will be complete once the above-mentioned ordinances have been submitted to council for approval, early March 2019.

## **ATTACHMENTS**

A – Summary of the December 11, 2018 Campaign Finance and Elections Working Group study session

**City Council  
Study Session Summary  
December 11, 2018  
Campaign Finance and Elections  
Working Group Report**

**PRESENT**

**City Council:** Mayor Suzanne Jones, Council Members Cindy Carlisle, Lisa Morzel, Mirabai Nagle, Sam Weaver and Bob Yates.

**Staff Members:** City Manager Jane S. Brautigam, Chief Deputy City Attorney David Gehr, Senior Counsel Kathy Haddock and City Clerk Lynnette Beck; Outside Legal Consultant Geoff Wilson.

**Campaign Finance Working Group Members:** Matt Benjamin, Steve Pomerance, Allyn Feinberg and Mark McIntyre.

**PURPOSE**

The purpose of this study session was to provide council with the final report from the Campaign Finance and Elections Working Group. Council Members were asked to discuss and provide direction on the group's recommendations related to campaign finance.

**INTRODUCTION AND PRESENTATION OVERVIEW**

City Manager Jane Brautigam thanked the working group members for all their contributions on this final phase of the working group's charter. Jane also explained that the members of the working group were selected because of the experience that they have had in the local election process. The group included several council candidates and members of the community who had worked on campaigns. Ms. Brautigam noted that based on experience from prior elections, the working group first developed a list of issues that addressed its charter. Thereafter, it studied what the options were to address the issues as well as the legal constraints. The working group had assistance from outside counsel to research and advise on constitutional and other legal issues relating to elections.

Ms. Brautigam reminded council of the working group charter section that was the basis for the evening's presentation:

Recommend laws that promote the integrity of the election process by:

- providing for maximum campaign finance disclosure under existing law; and
- providing for maximum campaign finance disclosure in ways that have not previously been judicially recognized, considering both the objectives of election integrity and constitutional rights.

Matt Benjamin presented the working group's recommendations.

## **SUMMARY OF PRESENTATION AND COUNCIL DISCUSSION**

Matt Benjamin presented on behalf of the working group. After each relevant topic, outside legal consultant Geoff Wilson commented on any legal issues surrounding the recommendation. Senior Counsel Kathy Haddock also answered questions for council.

For the working group's specific recommendations, Mr. Benjamin began by outlining the problem and then describing the recommendation to address the problem. The presentation covered the following topics:

### **1. Expand the Definition of Express Advocacy**

**Problem:** "Express Advocacy" does not capture all forms of advocacy that may be regulated under current law as express advocacy. As drafted, it is limited to language such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject."

**Recommendation:** Add and broaden the definition of "express advocacy" to include all the terms set forth in *Buckley v. Valeo*, along with words or symbols that are the "functional equivalent" of these terms.

**Legal comment:** Geoff Wilson explained that legally, this reflects the evolution of campaign finance disclosure in a lot of jurisdictions, and the case law now includes the functional equivalent of the express advocacy "magic words."

**Council discussion:** Council asked if a group might be able to get an advisory opinion from the attorney's office or clerk's office if it wants to do something but is not sure if it crosses the *Buckley* line. Staff responded that Dianne Marshall, the Campaign Finance Administrator, is available for these types of questions, and that if staff needs legal interpretation, they will consult the city attorney's office. Council requested that staff produce a guidebook with examples.

**Council direction:** Council Members agreed with the recommendation to add and broaden the definition of "Express Advocacy" to include all the terms set forth in *Buckley*, along with words or symbols that are the "functional equivalent" of these terms.

### **2. Require Disclosure for Electioneering Communications**

**Problem:** The city does not have any disclosure requirements for contributions and expenditures for electioneering communications. Electioneering communications are intended to influence the outcome of an election but do not meet the definition of "express advocacy."

**Recommendation:** Define and regulate electioneering communications by: defining “electioneering communication” as a communication that refers to a candidate, ballot measure, or petition during an election cycle; and requiring disclosure for electioneering communication spending aggregating \$1,000 or more in the same manner and schedule as reporting of express advocacy.

**Legal comment:** Mr. Wilson commented that this was the ultimate evolution of the case law, applying a disclosure requirement to communication that involves no express advocacy at all, but that merely mentions a candidate within a certain proximity to the election. The working group also recommended requiring electioneering disclosures in issue elections, and that is uncharted territory, legally. In the 2003 *McConnell* case, the U.S. Supreme Court legalized disclosure for candidates, but Mr. Wilson was unaware of it being applied in the context of issue elections. The applicable court test for this is that there has to be a substantial relation between the regulation and an important governmental interest like deterring quid pro quo corruption, which is not relevant to issue elections. Before applying this to issue committees, Mr. Wilson recommended further investigation.

**Council discussion:** Council Members asked where the \$1,000 threshold came from, about the dollar limits in Denver and Longmont and suggested that our threshold be similar. Mr. Wilson explained that the \$1,000 came from state law. Denver’s threshold is \$1,000; Longmont’s is \$250. Mr. Wilson provided examples of electioneering communications: communications or advertisements that mention a candidate, but do not rise to the level of express advocacy, such as, “Joe is a good person.” Mr. Wilson referenced the “checklist” that came up in the working group’s discussions. He advised that those types of communication could be deemed express advocacy, but if not, they would fall under an electioneering definition. The telephone calls made to voters during the 2017 election were another example of electioneering, because they did not specifically advocate for the election of a person.

**Council direction:** Council Members directed staff to go forward with electioneering disclosures for candidate elections and asked staff to do more investigation around the legal risks for issue elections.

### 3. Identify the Natural Persons Who are Making Contributions and Expenditures

**Problem:** Contributions by entities to candidate and ballot measure committees are not required to disclose the natural persons who are behind an entity’s contributions.

**Recommendations:** Require detailed disclosure requirements for entities making contributions to candidate or ballot measure committees and/or expenditures on express advocacy or electioneering communications.

- It identifies a natural person with every contribution.
- Provides maximum transparency for constituents.
- The working group did not settle on a specific recommendation, other than making sure that the top contributing natural persons are identified.

**Legal comment:** Mr. Wilson reminded council that the test for these types of issues is that there must be a substantial relation between the disclosure regulation and the accomplishment of an important governmental interest. The courts have said the three governmental interests are (1) preventing quid pro quo corruption or its appearance, (2) getting information to enforce campaign finance rules, and (3) providing general information to the public. The third point is the only rationale for requiring disclosure in issue elections, the first two don't apply. The disclosures recommended by the working group must be considered in the context of the city's \$100 contribution limit for candidates, and in the context of such a low contribution limit, the court might not find that additional disclosure requirements substantially serve an important governmental interest. The courts may look more favorably on additional disclosure requirements for issue elections because there are no associated contribution limits. However, the courts have indicated that there is very limited public interest in any kind of disclosure related to ballot issue elections and have struck down reporting regimes where small amounts (\$3,500) of money were involved at the state level. The numbers may be scalable, so in local elections, the amount may be smaller. The courts have not indicated what the correct number is.

**Council discussion:** Council Members asked whether candidate contributions could be limited to only those from natural persons, like the new Denver law. Staff responded that Denver's limits are tied to the matching fund program. Because the matching fund program is voluntary, Boulder could also use that approach and disqualify candidates from the matching if they take money from non-natural persons. Candidates who do not participate in the matching funds program would be able to accept contributions from non-natural persons but would have to disclose the names of the contributors.

Matt Benjamin noted that addressing the LLC disclosure was looked at as more of a preventative move for a problem that may come up down the road. It is not a well-defined issue that is seen happening now. The working group didn't have any clear evidence that it is something that is systemically causing elections to be swayed in a dramatic way. Council agreed that this does happen, but it is a small fraction of the total contributions.

Council suggested tying the requirement to take contributions from real persons to the matching funds program. Council also discussed imposing a percentage limit on contributions from LLC. For example, no more than a certain percentage of a candidate's contributions could be from LLCs.

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**Council direction:** For candidate elections, council supported changes to require natural-person only contributions to candidates accepting matching funds.

For ballot measure elections, Council Members talked about what information it might

want to be disclosed – owners, CEO, board of directors, etc. Council Members noted that it was too complicated to give staff definitive direction without more information. Additionally, most of the disclosure information would be captured with the candidate matching fund rule. If another city has figured out how to handle disclosures on business entities, council would like to hear about it, but otherwise, council directed staff to leave it the way it is.

#### **4. Clarify the Regulations for Committees that Coordinate Advertising**

**Problem:** Unofficial Candidate Committees and Issue Committees have jointly purchased advertising or collaborated on other forms of advocacy materials.

**Recommendations:** Specify how the costs of joint advertising should be allocated and reported. Allocation must be proportional to the committee's portion of advertising and the cost of the advertisement. Reporting must include the total cost of the joint material and the amount the committee paid for its portion. Continue to prohibit contributions to one committee being provided to another committee.

**Legal comment:** There were no legal issues associated with this recommendation.

**Council direction:** Council Members agreed with this recommendation and suggested that staff be trained and ready to provide advisory opinions and that the rules be simple and related to measurement of the print in the material.

#### **5. Ensure Proper Disclosure for Various Types of Media**

**Problem:** The Boulder Revised Code does not regulate the format of the disclosures required on campaign materials. Ad disclosures are inadequate because they only require identification of the committee's name and not the identity of the individuals who are paying for the material and/or its dissemination.

**Recommendations:** Adopt ad disclosure standards (ribbons) that address:

- formatting, including the size, type, font, clarity, duration, location, etc. of any required disclosures across a variety of media types; and
- include names of natural persons, not just name of entity or committee.
- There are a range of options that could be considered by council for how best to accomplish this objective.

**Legal comment:** The ribbon requirement was challenged in *Citizens United* and was upheld by the U.S. Supreme Court. However, in the context of Boulder's \$100 candidate contribution limit, Mr. Wilson questioned if the ribbon substantially serves an important governmental interest. Issue committee contributions are not limited and maybe be looked upon more favorably.

**Council discussion:** For candidates, contributor information is already disclosed and can be viewed on the website. Council Members did not make any changes to the content of

the disclosure ribbon but specified that the ribbon be standardized and readable and that it apply to electronic ads as well. Staff clarified that committees must have the “paid for by” language. Natural persons can make independent expenditures that exceed \$100, and a disclosure report is required if the amount is in excess of \$200.

**Council direction:** For issues, council wanted the ads to disclose, in a readable format, the top three donors over \$1,000. The donors do not need to be disclosed down to the natural person, corporate names are acceptable.

## 6. Clarify the Role of the City Clerk

### **Problems:**

- Confidentiality Standards. Complaints about potential election violations are required to be kept confidential by city staff unless a hearing is scheduled. The complaints are generally released by the complaining party.
- Hearing Officer. Perceived unfairness - should the city clerk be in a position to act as the hearing officer for disputes about the clerk’s own decisions?
- Election Complaint Administrator. Perceived unfairness of the city manager as the named person to administer election complaints, since the city manager is hired by the very people whose actions may be under investigation.

**Recommendations:** The working group recommends the following changes to the roles of the city clerk and the city manager:

- Election Complaint Administrator - the clerk, rather than the city manager.
- Administrative Complaint Practices - divergent points of view in the group about how and whether to address this concern. Views:
  - Disclose complaints: The clerk should make publicly available the complaint and related documents and avoid expressing an opinion.
  - Do not disclose complaints: no disclosure of complaints unless it is determined there should be a hearing.
- Challenges of clerk decisions in campaign finance and the petition process should require an external hearing officer.

**Legal comment:** None.

**Council discussion:** Council discussed having mutual aid agreements with other governmental entities to serve as hearing officers for election violations. Staff explained that this could be done with former lawyers who serve as hearing officers, rather than with governmental entities. Council wanted the hearing officers to be from other communities and not active in Boulder politics.

Council discussed campaign finance violations and defined two tiers: (1) primarily administrative matters that could be made compliant through oversight done by the clerk’s office, such as a missed filing deadline, and (2) third-party complaints alleging a violation of campaign finance law.



**Council direction:** Complaints alleging a violation of law, and their conclusions, should be made public to make the process transparent. The cure process is included in this public disclosure. Council asked that the ordinance give examples of things that could be handled administratively by the clerk versus things that might require a hearing.

Council asked what happens for non-curable offenses, such as print violations. Staff responded that the code mentions remedial and corrective measures, but that it is not clear about who has the power to enforce the measures and where the authority comes from. This would be clarified in the reorganization of the campaign finance enforcement Chapter 13-4 to include a fine schedule.

Staff explained that the code says that decisions on election violations cannot be appealed to the city council and that this has been interpreted by some to mean that there is no appeal at all. The code provides that if someone does not like what staff does, that person has the right to a quasi-judicial hearing under chapter 1-3, and that is where the hearing officer would come in. If someone doesn't like the ruling of the hearing officer, the appeal would go to Boulder County District Court. Council would like the code to be clearer about this.

Matt Benjamin also presented some other ideas that the group discussed in their meetings that he believed would need further review by council.

- Review and update enforcement provisions.
  - How enforcement is administered.
  - Consistent application of election rules.
  - Consequences for violations.
- Revise the campaign finance chapter in its entirety.
  - Make code easy to understand for voters and people that participate in campaigns.
  - Streamline, clarify and eliminate redundant provisions.

**Legal comment:** None.

**Council discussion:** Staff explained that ordinances have been drafted that reflect approximately 95 percent of the working group's work. Going forward, staff would like to work with a small team from the group to finish the revisions in the first quarter of 2019 to implement some of the recommendations for the 2019 election. Restructuring of the campaign finance enforcement (13-4) chapter will be looked at during this time. Restructuring of the campaign finance disclosure requirements (13-2) chapter will be brought forward with the working group's recommended changes in the first quarter of 2019.

Staff described the elections work plan and clarified that only items that were part of the original charter of the working group are included.

Mr. Benjamin also presented several issues that the group believed would warrant further consideration in the future:

- Contribution limits for candidate committees and unofficial candidate committees generally should be attributable to natural persons.
- Review and adjust matching fund approach.
- Enhance public information materials explaining enforcement procedures and related appeals.
- Revisit city contractor contribution regulations.
- Establish an election commission.

**Legal comment:** None.

**Council direction:** Council directed staff to review and adjust the matching fund approach to tie the total expenditure amount to a cost of living or inflation increase, rather than having a flat \$20,000 (this amount was adjustable until 2016, when it was changed to a flat amount).

## **7. Elections Work Program for the City Clerk's Office.**

The final element of the presentation was by Lynnette Beck who discussed the work program for 2019 and 2020. Ms. Beck outlined the elections work plan and related timeline as follows:

- Develop signature verification procedures for all initiative petitions (municipal and charter) to implement for June 2019.
- Initiative, referendum and recall process changes to implement in early 2019.
- Campaign Finance Enhancements:
  - Phase 1 – Implement partial for 2019.
  - Phase 2 – Develop plan for remainder in 2020.
- Electronic signature and online petitioning:
  - Phase 1 – eSign: Implement for June 2019.
  - Phase 2 – Online Petitioning: Scope Q3, council check-in Q4.
- Vote 16/non-citizen voting – Get feedback from council at the February 26 study session.

Council Members felt there was very good progress made regarding campaign finance reform and election rules and thanked the working group for its focused attention on this complicated topic. Council also commended the working group members for demonstrating the leadership and the ability to collaborate and cooperate and show the community how we can get along. Council also acknowledged the hard work and contributions of Geoff Wilson and expressed appreciation for having him work with the group.