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MEMORANDUM

TO: Office of the Mayor

FROM: Law Department

DATE: October 15, 2015

SUBJECT: The Scope of the Jersey City Pay-to-Play Ordinances With Regards to PACs

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Introduction

The question presented is how do the Jersey City Pay-to-Play Ordinances apply to Independent Expenditure Committees/Political Action Committees ("PACs") incorporated under federal laws? To determine what restrictions the Jersey City Ordinances impose on PACs, it is necessary to analyze the plain meaning of the language used in the Ordinances. It is then necessary to look to *Citizens United* and its progeny to determine how subsequent case law has altered the law governing PACs along with an analysis of how these cases apply to the Jersey City Ordinances and inform how these Ordinances ultimately limit PACs.

Brief Answer

Jersey City has two Play-to-Play Ordinances, one pertaining to the procurement of professional services and extraordinary unspecifiable services, and the other pertaining to redevelopers. Both Ordinances contain similar restrictions regarding political contributions and contracting with the City, and both restrict contributions to party PACs, PACs making contributions to candidates and related committees, and other "coordinating" PACs.

The Supreme Court has found that laws restricting political contributions only pass constitutional muster if "closely drawn." Consequently, restrictions against contributions to "independent expenditure only" PACs fail constitutional review. Accordingly, the Jersey City Ordinances, which contain language that could be read to prohibit contributions any PAC, can only apply to coordinating and contributing PACs.

Discussion

Plain Language Analysis

Jersey City has two Pay-to-Play Ordinances currently in effect: 1) Ordinance 08-128, titled "An ordinance establishing that a Business Entity which makes political contributions to municipal candidates and municipal and county political parties in excess of certain thresholds shall be limited in its ability to receive public contracts from the City of Jersey City (CONTRACTOR PAY-TO-PLAY ORDINANCE)" (hereinafter, the "Procurement Ordinance"); and 2) Ordinance 09-096, titled the "Redevelopment Pay-to-Play Ordinance" (hereinafter, the "Redevelopment Ordinance").

I. The Procurement Ordinance

The Procurement Ordinance restricts the City from entering into any agreement or otherwise procuring any "professional services," including banking, insurance, or other consulting services (hereinafter, "Professional Services") or "extraordinary unspecified services," including media, public relations, lobbying, parking garage management or other consulting and/or management services (hereinafter, "EUS services") with business entities that have solicited contributions for or made contributions to candidates (including candidate committees or joint candidate committees) for elective municipal office in Jersey City, any Jersey City or Hudson County political committee or political party committee, or any PAC "that regularly engages in the support of Jersey City municipal or Hudson County elections and/or Jersey City municipal or Hudson County candidates, candidate committees, joint candidate committees, political committees, political parties, political party committees" in excess of the contribution thresholds set forth therein. *See* Section 1(e). The Procurement Ordinance further states that:

> No Business Entity who submits a proposal for, enters into negotiations for, or agrees to any contract or agreement with the City of Jersey City or any of its departments or instrumentalities, for the rendition of Professional Services or Extraordinary Unspecified Services shall knowingly solicit or make any Contribution, to (i) a candidate, candidate committee or joint candidates committee of any candidate for elective municipal office in Jersey City, or a holder of public office having ultimate responsibility for the award of a contract, or (ii) to any Jersey City or Hudson County political committee or political party committee, or (iii) any PAC between the time of first communication between that Business Entity and the municipality regarding a specific agreement for Professional Services or Extraordinary Unspecified Services, and the later of the termination of negotiations or rejection of any proposal, or the completion of the performance or specified time period of that contract or agreement.

See Section 1(f). While Section 1(f) contains language that could be read to restrict contributions to any and all PACs anywhere, such an overly broad reading would be absurd. The Procurement Ordinance was clearly intended to apply to political contributions related to Jersey City municipal or Hudson County elections and/or Jersey City municipal or Hudson County candidates, candidate committees, joint candidate committees, political committees, political parties, political party committees.

Section 1(g) provides that the monetary thresholds are a maximum of $300 to any political committee or political party committee, $500 to any Hudson County political committee or political party committee, or $500 to any PAC. *See* Section 1(g). The restriction periods are "within one calendar year immediately preceding the date of the contract or agreement" or until the "later of the termination of the negotiations or rejection of any proposal, or the completion of the performance or specified time period of that contract or agreement." *See* Section 1(e) and (f). The Procurement Ordinance essentially creates a more restrictive pay to play ban than is applicable to municipalities under the State statute.

The plain meaning of the language contained in the Procurement Ordinance clearly prohibits two things: 1) the City from contracting for Professional or EUS services with any entity that has made a contribution above the thresholds set forth in the Ordinance; and 2) a business entity seeking to secure a Professional or EUS Service contract with the City from making a contribution in excess of the thresholds set forth in the Ordinance. *See id.*

II. The Redevelopment Ordinance

The Redevelopment Ordinance applies to "any entity or individual seeking to enter into a redevelopment agreement or amendment thereto, or is otherwise seeking to obtain rights to develop pursuant to a redevelopment agreement." The Redevelopment Ordinance states that Jersey City shall "not enter into an agreement, amend an agreement, or otherwise contract with any redeveloper…if that redeveloper has made any 'contribution' (as such term is defined at N.J.A.C. 19:25-1.7, which definition includes loans, pledges and in-kind contributions)…(ii) to any Jersey City or Hudson County political action committee or political party committee, or (iii) to any continuing political committee or political action committee that regularly engages in the support of Jersey City municipal or Hudson County elections and/or Jersey City municipal or Hudson County candidates, candidate committees, joint candidate committees, political committees, political parties, political party committees…" *See* Section 1(a).

The Redevelopment Ordinance goes on to require all redevelopment agreements to contain a provision which prohibits redevelopers from "soliciting or making contributions" to "any 'PAC', between application to enter into a redevelopment project and the later of the termination of negotiations or rejection of any proposal, or the completion of all matters or time period specified in the redevelopment agreement." *See* Section 1(b). As with the Procurement Ordinance, the Redevelopment Ordinance was clearly intended to apply to political contributions related to Jersey City municipal or Hudson County elections and/or Jersey City municipal or Hudson County candidates, candidate committees, joint candidate committees, political committees, political parties, political party committees. The Ordinance further provides that "the contribution and disclosure requirements in this Ordinance shall apply to all redevelopers as well as professionals, consultants, or lobbyists contracted or employed by the business entity ultimately designated as the redeveloper to provide services related to the…redevelopment agreement." *See* Section 4. For the Redevelopment Ordinance, the restriction periods are "three months prior to the entering of an agreement" or until the "later of termination of negotiations or rejection of any proposal, or the completion of all matters or time period specified in the redevelopment agreement." *See* Section 1(a) and (b). As the Redevelopment Ordinance does not set forth a contribution limit threshold, it appears no amount is permissible. *See id.*

Both the Procurement Ordinance and Redevelopment Ordinance define "contribution" pursuant to N.J.A.C. 19:25-1.7, which states:

> "Contribution" includes every loan, gift, subscription, advance or transfer of money or other thing of value, including any in-kind contribution, made to or on behalf of any candidate committee, joint candidates committee, political committee, continuing political committee, political party committee or legislative leadership committee and any pledge or other commitment or assumption of liability to make such transfer. For purposes of reports required under the provisions of the Act, any such commitment or assumption shall be deemed to have been a contribution upon the date when such commitment is made or liability assumed. Funds or other benefits received solely for the purpose of determining whether an individual should become a candidate are contributions.

With regards to PACs, the Redevelopment Ordinance's plain meaning is clear and establishes two prohibitions: 1) the City shall not enter into a redevelopment agreement with a redeveloper that has solicited or made a contribution to a PAC that regularly engages in the support of Jersey City municipal or Hudson County candidates and related committees and parties; and 2) once a redevelopment agreement is being negotiated, the redeveloper is precluded from making a contribution to a PAC that regularly engages in the support of Jersey City municipal or Hudson County candidates and related committees and parties during the life of the redevelopment agreement.

Based on the plain meaning of the Procurement and Redevelopment Ordinances, the application of the limitation imposed on contributions to PACs turn on whether the PAC regularly engages in the support of or advocate in support of Jersey City municipal or Hudson County candidates and related committees and parties. Based on this requirement, if a PAC were to abstain from advocating for a candidate, related committee or entity, the PAC can accept contributions from any source without violating the Jersey City Pay-to-Play Ordinances.

***Citizens United* and its Relevant Progeny**

In *Citizens United v. FEC*, the Supreme Court in a 5-4 ruling struck down the ban covering corporate expenditures on political campaigns as unconstitutional and held that corporations can fund communications that expressly advocate for or against candidates, provided that there is no coordination with a candidate or campaign. 558 U.S. 310, 361 (2010). With this ruling, the Supreme Court made clear that only certain types of campaign finance laws comport with the First Amendment. Since contributing money to a political cause is a form of speech, preventing quid pro quo corruption, or its appearance, is the only governmental interest strong enough to justify restrictions on political speech. *Id*. at 357-61. Since *Buckley v. Valeo*, the Supreme Court has instructed courts to review different kinds of campaign finance regulations with different degrees of scrutiny. 424 U.S. 1, 19-25, 44-45 (1976). *See also McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (plurality opinion); *McConnell v. FEC*, 540 U.S. 93, 134-38 (2003), *overruled in part on other grounds by Citizens United, supra*.

Laws that limit a person's independent expenditures on electoral advocacy are subject to strict scrutiny. *McCutcheon*, 134 S. Ct. at 1444, *citing Buckley*, 424 U.S. at 44-45. Under that standard, "the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest." *Id.* Laws that regulate campaign contributions, however, are subject to "a lesser but still 'rigorous standard of review,'" because "contributions lie closer to the edges than to the core of political expression," *McCutcheon*, 134 S. Ct. at 1444, quoting *Buckley*, 424 U.S. at 29. "Under that standard, '[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444, quoting *Buckley*, 424 U.S. at 25; *see also SpeechNow.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) (en banc). This lesser scrutiny is the standard that applies to the Jersey City Ordinances. It has two prongs. The first requires a sufficiently important interest. The second requires that the Ordinances be "closely drawn" to meet the important interest, i.e. "closely drawn to avoid unnecessary abridgment of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444, *quoting Buckley*, 424 U.S. at 25. Satisfying this second prong "require[s] 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served[;] . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Id.* at 1456-57, *quoting Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989).

Two months after *Citizens United*, in *Speechnow.org v. FEC*, the Federal Court of Appeals for the D.C. Circuit held that contributions to groups that only make independent expenditures could not be limited in the size or **source**. 599 F.3d 686 (D.C. Cir. 2010). While the *Speechnow.org* case is a D.C. Circuit case, the FEC issued two companion advisory opinions in 2010, *Club for Growth* and *Commonsense Ten*, which formally established the framework for independent-expenditure only committees ("IEOC") known as "Super PACs" by clarifying that a PAC that collects money from corporations or unions cannot coordinate directly with candidates or political parties but can discuss strategy and tactics through the media. *See* FEC Advisory Opinion 2010-09 (*Club Growth*); and FEC Advisory Opinion 2010-11 (*Commonsense Ten*). The net result of this body of law is that a PAC that acts totally independent of a candidate, campaigns, and political parties can receive contributions from unions, corporations, individuals and other organizations without limits and with different reporting requirements than candidates.

Super PACs can engage in unlimited political spending including expressly supporting a candidate so long as it is independent. *See* 2 U.S.C. § 441a(a); 11 C.F.R. Part 109. There are however, two major exceptions to the coordination rule. First, in response to a request from the Majority PAC and House Majority PAC, the FEC issued an advisory opinion concluding that candidates can attend, speak at, or be a featured guest at a Super PAC's fundraiser. The advisory opinion further provided that all solicitations by a candidate, including solicitations at an event held by a Super PAC, are subject to the source and limit restrictions of the FEC. *See* FEC Advisory Opinion 2011-12 (*Majority PAC* and *House Majority PAC*). Second, courts have reasoned that the same rationale which applies to limits on the amount donors can contribute to candidates and parties, also applies to PACs that in turn contribute to or coordinate with candidates. *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 403-04 (D. Vt. 2012); Buckley, 424 U.S. at 23-26. This means a Super PAC can make contributions to candidates in any sum but the PAC must provide the funds from an account segregated from the accounts funding the PAC's independent expenditure activities, and all of the funds in the segregated account must be from FEC legal sources and subject to FEC limits. *See Casey v. FEC*, D.D.C. No. 11-259 (June 14, 2011).

***Citizens United* and the Jersey City Pay-to-Play Ordinances**

Applying the strict scrutiny standard of review articulated in *McCutcheon* to the Jersey City Ordinances requires the identification of the interest underlying the Ordinances and a determination of its sufficiency. If the interest is sufficient, then it is necessary to determine if the Ordinances create a legal framework that is "closely drawn." *See* 134 S. Ct. at 1444. As indicated in the whereas statements at the beginning of the Jersey City Pay-to-Play Ordinances, the stated objective of the Ordinances is to protect against quid pro quo. The U.S. Supreme Court has repeatedly held that "the Government's interest in preventing quid pro quo corruption or its appearance [is] 'sufficiently important'" to justify the regulation of campaign contributions. *McCutcheon*, 134 S. Ct. at 1445, *quoting Buckley*, 424 U.S. at 26-27. In fact, the Court has "stated that the same interest may properly be labeled 'compelling,' so that the interest would satisfy even strict scrutiny." *Id.* at 1445, *citing FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

The Supreme Court has also made clear that this interest doesn't exist where contributions are made to independent expenditure PACs. *See Citizen United*, 558 U.S. at 359. The Third Circuit, addresses the issue of quid pro quo in *Lodge No. 5 of FOP v. City of Philadelphia*, where it held that "[t]here is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors, such as a political action committee, to a candidate, as when a donor contributes to a candidate directly. The risk of quid pro quo corruption is generally applicable only to the narrow category of money gifts that are directed to a candidate or officeholder." 763 F.3d 358, 378 (3d Cir. 2014)(citations omitted). In reaching this conclusion, the Third Circuit highlighted an argument made by the petitioner, that contributors to the PAC at issue have no say in how the funds are disbursed. *Id.* The Court notes that this separation is the reason why courts of appeals have consistently invalidated restrictions on contributions to PACs. *Id.* In the absence of control or earmarking by the donor, the concern about corruption is arguably lessened when an intermediary, such as any one of a wide variety of PACs, or "SuperPACs," makes independent determinations about how to use its money. *See id.*

In *Citizens United*, the Supreme Court declared that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 558 U.S. at 345, *quoting Buckley*, 424 U.S. at 47. Several Courts of Appeals have concluded that an anti-corruption rationale therefore cannot apply to contributions to groups or PACs that engage only in independent expenditures. Seven U.S. Courts of Appeals, including the Third Circuit, and a number of U.S. District Courts have universally agreed that limits on *contributions to* independent expenditure only PACs do not withstand First Amendment scrutiny. *See, e.g. The Fund for Louisiana's Future v. Louisiana Board of Ethics, et al.*, 17 F. Supp.2d 562 (E.D. La. 2014) (contribution limits to independent expenditure only "SuperPAC's" struck down); *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enterprise v. Texas Ethics Comm'n*, 732 F.3d 535, 537-38 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Thalheimer v. Ciity of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010), cert. denied, 131 S.Ct. 392 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686, 694-96 (D.C. Cir. 2010) (en banc), cert. denied*, Keating v. FEC*, 131 S.Ct. 553 (2010); *New York Progress and Protection PAC v. Walsh*, No. 13-6769, 2014 WL 1541781, at *2-4 (S.D.N.Y. Apr. 24, 2014) (enjoining defendants

from applying and enforcing contribution limits provision of New York election law against the plaintiff independent committee and its individual donors, and noting that the Second Circuit "clearly directed the [c]ourt to strike down the limit on contributions to independent PACs"); *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 403-04 (D. Vt. 2012); *Yamanda v. Weaver*, 872 F. Supp. 2d 1023, 1042-43 (D. Haw. 2012).

Given the supremacy of First Amendment rights and the well-established principle that quid pro quo concerns are not implicated where a person contributes money to an independent expenditure PAC, it is clear that any reading of the Jersey City Ordinances that prohibits contributions to independent expenditure PACs would not survive constitutional review.

Conclusion

Based on the plain language of the Ordinances, all a PAC must do to not violate the Ordinances is refrain from advocating for a candidate for or holder of Jersey City or county office.

Moreover, based on *Citizens United* and the body of law that has resulted, it is clear that a PAC can accept a contribution from any entity so long as there is no coordination between the PAC and a candidate for or holder of Jersey City or county office, especially with regards to advocacy in support of the candidate or holder of office. Moreover, the entity cannot play a role in deciding how funds are disbursed.

The above notwithstanding, if a business entity conflicted from giving to a candidate for or holder of Jersey City municipal or county office does give to a PAC, that PAC is precluded from making contributions to a candidate for or holder of local office in Jersey City or the County in a sum greater than $300 and from an account that is not segregated and has observed all applicable contribution rules and laws.