

MIAMI BEACH

**City Commission Workshop on Proposed Ethics Ordinance
City Hall, Commission Chambers, 3rd Floor, 1700 Convention Center Drive
December 23, 2015**

Mayor Philip Levine
Vice-Mayor John Elizabeth Alemán
Commissioner Michael Grieco
Commissioner Joy Malakoff
Commissioner Micky Steinberg
Commissioner Kristen Rosen Gonzalez
Commissioner Ricky Arriola

City Manager Jimmy L. Morales
City Attorney Raul J. Aguila
City Clerk Rafael E. Granado

City Staff:
Gloria Baez, Mayor's Chief of Staff

In attendance were:

Jean Olin, Outside Counsel
Raoul G. Cantero, III, Florida lawyer and a former Justice of the Florida Supreme Court
Joseph M. Centorino, Executive Director, Commission on Ethics

Members of the public in attendance:

Dr. Morris Sunshine
Mark Samuelian
Marian Del Vecchio
Frank Del Vecchio
Stanley Shapiro

COMMISSION WORKSHOP ON PROPOSED ETHICS ORDINANCE

Mayor Levine called the meeting to order at 2:37:55 p.m.

City Attorney Raul J. Aguila thanked Mayor Levine, City Commissioners and the public for attending the workshop. He stated that pursuant to the directive of the City Commission, they were asked to hold a workshop to discuss proposed amendments to the City's campaign finance reform laws. More importantly, the City Commission requested the Office of the City Attorney to retain a Constitutional expert as well as invite Executive Director Joseph Centorino from the Miami-Dade County Ethics Commission to address the Ordinance, and in particular, to address the Constitutional implications of the Ordinance. City Attorney Aguila introduced former Florida Supreme Court Justice Raoul G. Cantero, III, and acknowledged former Deputy City Attorney Jean Olin, who single handedly drafted the entire City's ethics laws codified to date.

City Attorney Aguila stated that currently the City has a Campaign Finance Reform law in its Code of Ordinances. Current City laws prevent a defined category of prohibited donors; they are vendors, real estate developers, lobbyists for vendors and real estate developers. Under the City Code, *vendors for real estate developers and/or lobbyists*, i.e., "*prohibited donors*" are prevented from giving campaign contribution to a candidate for City of Miami Beach elected office. It also prohibits those candidates from accepting contributions from those prohibited class of donors. Current laws do not prohibit City of Miami Beach elected officials from soliciting contributions on behalf of candidates for City of Miami Beach office. He has opined that they do not prohibit vendors, real estate developers or their lobbyists from contributing to political committees, PACs, unless those contributions are specifically earmarked by those donors to go to a specific candidate (prohibited under State law). They do not prohibit City of Miami Beach elected officials from soliciting political contributions for PACs from these prohibited donors. He referred to the recent formation of a PAC during this last summer and the question asked by a City Commissioner of whether a contribution from a vendor, real estate developer or lobbyist for vendor and/or real estate developer, it was consider a direct contribution and therefore prohibited. Mr. Aguila provided a memorandum of a law to the Ethics Commission and he summarized his opinion that under the law he does not think that the City's current campaign finance reform laws prohibit vendors, real estate developers and their lobbyists from contributing to PACs. In his opinion, those are not considered indirect contributions, unless they are earmarked. He has given that opinion in the past, and there is a written opinion he provided to the Ethics Commission. The issue of solicitation by elected officials and candidates for contributions to PACs, in particular solicitation by these individuals of these prohibited donors for PAC contributions; is not prohibited under the City Code and it is not illegal for elected officials, under the current law, to solicit contributions from these categories of prohibited donors for PACs. The City Commission, being a forerunner in ethics law, requested to address the issue of solicitation of contributions, and in particular solicitation to PACs.

Referring to Page two (2) of the workshop agenda, City Attorney Aguila explained that the first Ordinance sponsored initially by Commissioner Wolfson, is now sponsored by Commissioners Grieco and Steinberg. What this Ordinance does is, in addition to the existing prohibition that candidates for City office cannot accept or deposit campaign contribution from vendors, real estate developers and their lobbyists, this proposed amendment, adopted on first reading in October 14, 2015; would prohibit candidates for City office, as well as City Commissioners from soliciting campaign contributions from vendors, real estate developers and/or their lobbyists. It also defines the term "indirectly," which was not done in the prior Ordinance, to include and prohibit candidates and elected officials from soliciting contributions from prohibited donors for political committees, which support or oppose candidates for City of Miami Beach office. Therefore, the first Ordinance is an absolute prohibition on solicitation. Mr. Cantero will discuss the Constitutional reasons and why the Ordinance has been narrowly drafted to address these issues, which were part of the record and part of the concern raised over the summer.

The second Ordinance, which is a disclosure of solicitation, is presented as an alternative to the first Ordinance. This Ordinance was initially sponsored by Commissioner Deede Weithorn and is now sponsored by Commissioners Grieco and Steinberg. The Ordinance is not meant to supplement the prohibition on solicitation; but as an alternative, it would not prohibit either candidates or City Commission from soliciting campaign contributions from prohibited donors or PACs; however, it would require candidates in City Commission to disclose the name of the persons solicited from and the amount of the contribution solicited. Under State Statute, there is a current law, which requires the Governor and the Legislature to disclose any contributions or solicitations for contributions to PACs.

The last Ordinance, now sponsored by Commissioner Rosen Gonzalez, addresses campaign consultants, which is defined as those individuals who handle campaigns of elected officials), and it prohibits campaign consultants from lobbying the City Commission for a period of 12 months following the swearing in of any City of Miami Beach official for whom the consultant provided campaign consulting services within the past election cycle. This is a separate Ordinance. City Attorney Aguila

asked Mr. Centorino to address the prohibition and disclosure Ordinances from his point of view and what his recommendations have been regarding these legislation.

Joseph Centorino, Executive Director, Commission of Ethics, appreciates the fact that they have been part of the process. He is aware of how the process has evolved from the PAC solicitation became an issue last summer, and they are able to issue a legal opinion as the Ethics Commission retains the authority to provide a final and binding interpretation of local Campaign Finance Ordinances. During the past summer, Mr. Centorino expressed concern over the practice of direct and to some extent by indirect solicitation by elected officials for contributions from many sources, where there is interaction between an elected official and an individual, lobbyist, City contractor, or one who has direct interest in the influence of public policy and decision making in the government of Miami Beach, as it is an opportunity for possible corruption. Miami Beach is at the forefront trying to deal with the issue of campaign finance and has always complimented the City for taking the initiative and adopts legislation addressing the acceptance and solicitation of contributions from people having direct interest in the operations of local government. He deferred to Mr. Cantero for his Constitutional expertise, but stated that his sense of concerns have to do with the public's right of free speech in a political process. The existing and proposed Ordinances target probably the most insidious form of corruption, which is the interaction with people that have directly seeking influence in terms of raising funds or soliciting funds, at times without the intent of corruption, but it can be a perception of corruption, which can be damaging to the integrity and credibility of the government. Mr. Centorino added that he is in support of Commissioner Wolfson's proposed Ordinance and is endorsed by the Ethics Commission. The disclosure Ordinance is a step in the right direction, but he is concerned that this seems to deal only with direct solicitations; he does not see the word "indirect" which may invite indirect solicitation that does not have to be disclosed. There are people that have concerns with possible Constitutional objections that can be raised, but he believes this is a well-tailored approach to dealing with a serious problem, which is not only Miami Beach but also all levels of government. For the record, the extent to which the City is unique, as a small city, under 100,000 residents, on a per capita basis, there is no other City in Miami-Dade County, which comes close to the City in terms of the per capita basis, the amount of well financed resources that go into the influence of local government and the state that great deal of private interests and development of the community; there may not be another municipality in the State; Miami Beach may be the most lobbied small City in America. That is why the City should be concerned about this. There is great deal of development, is a small area, concentrated, there are huge financial stakes in play, with major companies in the resort business and tourist business coming in. He thinks the uniqueness of the City, as a place that has, at least structurally, a great tendency to have that influence and opportunity for corruption needs to go into the record. He does not think the City is any worse than other places he has seen, but the City is unique in the opportunity for the potential for financed influence and uniqueness for corruption. The City has already taken the step, and the next may be banning the solicitations. There is a loophole in the first Ordinance that has led to practices that people have felt diminished the credibility of government. He is supportive of the prohibition. He has not studied the campaign consulting one, but added that this is an area of concern. He has seen cities where lobbying becomes very targeted and certain political consultants have relationship with elected officials, and are hired just to lobby the elected officials that they have this consulting relationship with, and that is very damaging to the public's perception of integrity of government. He suggested bringing a proposed Ordinance to the Ethics Commission if the City moves forward with it.

Raul J. Aguila, City Attorney, stated that the Ethics Commission's recommendation of the prohibition Ordinance does not include Constitutional review of the Ordinance. The reason they convened this workshop is that the making of political contribution has been determined by the Supreme Court to be the essence of First Amendment free speech. Therefore, when looking at ways to regulate political free speech, there has to be a compelling governmental interest, and the regulation has to be narrowly tailored. The Supreme Court has narrowed that compelling governmental interest, so that currently

there either has to be a quid pro quo corruption, or the appearance of quid pro quo corruption.

Raoul G. Cantero, III, Constitutional expert, stated that it is true that campaign contributions implicate the First Amendment, and out of all the provisions in the Constitution of the United States, the First Amendment is probably one the Supreme Court has guarded the most. He mentioned cases of burning of the flag, or Citizens United five years ago, where the Supreme Court said that making political contributions is a way of political speech, where people make their feelings known to candidates, and the Supreme Court protects that as well. The Supreme Court has developed various standards and nomenclature in that area of free speech, and they look at it and give it scrutiny; by looking at different laws with different lenses or with a microscope. The government has to have a compelling interest in order to regulate in that area, and as City Attorney Aguila said, there is compelling interest in preventing quid pro quo corruption or the appearance of quid pro quo corruption, which is defined as doing favors as an elected official because that person gave them something. He disagrees with this opinion, but that is the law of the land. The law is not always clear in this area; the facts and circumstances of each case are important and the Court may uphold and invalidate the law at times based on different facts. It is hard for a Constitutional lawyer to tell what and what is not prohibited. He explained that those cases that have been upheld the most are the ones for disclosure of solicitation, contribution, and the Courts have said that the public has the right to know and there is no danger in informing the public of who has been contributed to what or how much, unless there is evidence that there will be retaliation for having contributed. Secondly is the ban on contributions and accepting them, and these are examined with scrutiny; in other words. As long as there is evidence in the record of past corruption or the appearance of corruption, not necessary within a local but within a surrounding local, where there is a clear danger and clear reason for the remedy, then those things have been upheld. The most controversial would be the prohibition on solicitation, because solicitation has been held by some Courts as, once removed from the quid pro quo corruption. He gave examples of cases decided by different Courts on each. As to the campaign consultants, there are very few cases in that area on prohibiting campaign consultants from lobbying the group in which they acted as consultants. The overwhelming number of cases is about former elected officials themselves lobbying their former body for a period of 12 months to two years, and those are generally upheld. He does not think there is a danger as far as campaign consultants, but is unable to say with absolute certainty as this incident has not arisen and the facts and circumstances are important to withhold it.

Mayor Levine asked Mr. Cantero if City Hall could prohibit lobbyists or attorneys from lobbying the City; and Mr. Cantero answered in the negative. Mayor Levine also asked if a similar legislation was adopted in Miami-Dade County, to which Mr. Cantero responded that there was nothing regarding legislation on solicitation at County level. There was a proposed Ordinance by County Commissioner Caba that is a disclosure Ordinance, and would require disclosure of all PACs, regardless whether they were raising money from candidates.

Raul J. Aguila, City Attorney, added that there is a proposed amendment to Miami-Dade County Code, which passed on first reading and going to committee on January 12, 2016. For those who do not know, the County Code also applies to municipalities and elected officials; therefore, if the County Ordinance passes it would apply to the City of Miami Beach.

Commissioner Grieco asked Mr. Cantero for his assessment on the current law in Miami Beach that prohibits lobbyists, developers and vendors, from making political contributions. He explained that there has been a line of case law created since that law was put in the books, which discussed campaign contributions ten years ago.

Mr. Cantero stated that for his reading of the Ordinance, it applies to vendors, real estate developers and lobbyists for those two groups of people, so it seems that the City Commission was trying to narrowly tailor a prohibition on those groups that represented the greatest danger of quid pro quo

corruption. The reasons why these particular groups were targeted are important in determining the Constitutionality of the Ordinance.

Jean Olin, former Deputy City Attorney, added that such was the type of reference support that was put into evidence, and at the time, the standard for compelling governmental interests did include undue influence, which basically means that if there was a threat of or an appearance of corruption due to the idea that if one gives an elected official a campaign contribution, that person will have some "special" type of access to the office of that elected official. There was actual testimony put into record as well as instances of corruption and appearance of corruption.

Commissioner Malakoff stated that she is in favor of prohibition on solicitation and the Ethics Commission has endorsed it, but asked if this prohibition on solicitation can be upheld.

Mr. Cantero explained that if there is evidence on the record that there is danger from these groups, then it has substantial likelihood to be upheld, but these are factual and specific. He gave other cases in which the cases were upheld and/or invalidated.

Discussion held regarding solicitation from City employees.

Ms. Olin added that City employees are permitted to make a campaign contribution, but the intent of the Ordinance prohibits the elected official from soliciting an employee.

Discussion continued.

City Attorney Aguila clarified that the City Manager recommends that the City employees stay neutral during elections, but it is the employee's Constitutional right to not only participate in the electoral process, but also to give contributions as well. For the record, Mr. Centorino, Mr. Cantero and Ms. Olin have discussed what was experienced this past summer, and the record is as good as it is going to get. There is great deal of record support, but notwithstanding that these cases are fact specific, the idea that if this Ordinance is adopted, if challenge, it is likely to receive microscopic scrutiny.

Discussion continued regarding Constitutional rights.

Mayor Levine asked Mr. Cantero if he felt that this prohibition would stand any kind of a challenge. Mr. Cantero stated in the affirmative.

Commissioner Grieco has concerns that this painfully helps rich people run for office, because if someone can self-fund a campaign, versus someone who cannot, and he believes they are empowering rich people and he has reservations about that. He also has concerns about hamstringing elected officials that are trying to do good government in a clean manner. Candidates may be able to solicit aggressively from prohibited donors, raise hundreds of thousands of dollars, and say they are doing it to file for a seat and then change their minds. Therefore, he has practical reservations about what he thinks is good government, as long as it is evenly applied across the board.

Raul J. Aguila, City Attorney, stated that if the Ordinance is challenged, a Court will look at whether the Ordinance is narrowly tailored, so it is the strictest means of curtailing free speech, and it does not have unintended consequences in other areas as well. The Ordinance would stand the challenge because it is narrowly tailored so it is the least means of achievement the governmental interests involved, to prevent corruption or the appearance of corruption.

Discussion continued.

Joseph Centorino, Executive Director, Commission on Ethics, added that it would be unfair for a candidate to raise money from contractors, and if the Ordinance does not prevent this, then an ancillary Ordinance may have to be drafted.

Discussion continued regarding soft money. Commissioner Grieco is concerned that if they apply the definition of what a candidate is, which is incorporated in the Ordinance, a "candidate to be" can raise funds and change the seats he is running for, and apply the money to his candidacy. They are prohibiting the act of soliciting; they are talking passing an Ordinance that prohibits soliciting, and conceptually it is great, but his concern is that it is an uneven application; people not in office, or people not filed as candidates, can raise funds, and this is a muddy situation. That is why at State or County level they do not go that far. This is the only reservation he has, the fairness of it and the ability of the City Commission to evenly apply it.

Mayor Levine asked City Attorney Aguila if he can tailor the Ordinance in a manner in which two years or so prior to running for office, one cannot raise any soft monies from any of the prohibited donors.

Mr. Cantero explained that candidates do not know if they are running for office that far ahead in advance. Discussion continued.

Commissioner Grieco stated that the problem is that 99.9% of the PACs have unknown committee chairs and there is no way to go back and prove that they solicited for a campaign contribution two years in advance.

Discussion held regarding soft money.

Mr. Centorino stated that he does not see this happening in the City; it is more tailored to the solicitation by the candidate and not from other sources. He does not think these changes that dynamic. People with means will still have advantages, but he does not see this affecting that in a significant way.

Discussion continued on soliciting on behalf of elected officials.

City Attorney Aguila added that as Commissioner Grieco stated during the first reading of the Ordinance, the term direct solicitation needs to be further defined. Moving forward towards second reading, this is a revision they feel it is appropriate and needed.

Commissioner Steinberg stated that there would always be loopholes and she thinks they need to try to move forward as best as they can and move it forward and take it to a level where they can all be proud.

Vice-Mayor Alemán asked that when referring to prohibited donors that are listed online, what is to prevent an equal threat from a prospective real estate developer who would like to have an influence on the City Commission to fund their campaign, and should they have this added.

City Attorney Aguila informed that elected officials have the due diligence to determine who is a vendor or a real estate developer. The current Ordinance states that by confirming with the Procurement Division's City Records to verify the status of any vendor or real estate developer, one relies of what the City provides.

Discussion held regarding prohibition by real estate developers. City Attorney Aguila explained its definition: either someone who is negotiating a development agreement with the City and is very specific Chapter 163 Florida Statute Development Agreement, or someone negotiating a Florida Land

Use map or zoning map change. In answering Mayor Levine's questions, City Attorney Aguila stated that there are two real estate developers listed in the prohibited contribution list at this time.

Discussion continued regarding prohibiting solicitation on developers and vendors and soft money.

City Attorney Aguila clarified that if an elected official solicits someone that is not doing business in Miami Beach for a contribution for a PAC and he is not a City vendor, there is no prohibition there; however, that person subsequently cannot become a Miami Beach vendor under the existing law. If they amend the existing law to prohibit solicitation of vendors, they cannot subsequently become a City vendor.

Discussion continued.

Commissioner Grieco disagreed and added that there is no prohibition that captures the one that is solicited and then has an impact on their ability to do business. They are talking about the concern of people buying influences in the City or doing legal bribing. The law says that the elected official cannot go out and seek to be bribed. This concern raised, which is very valid, is that they are not capturing the right issue, because current vendors or developers are then treated differently than people from the outside. Until the Ethics Commission says that this law applies to soft money contributions, he disagrees that there is nothing about the amendment that they want to add that changes the lobbyist ability to contribute to a PAC that is participating in City elections.

City Attorney Aguila agrees that existing laws does not preclude any soft money contributions, unless they are earmarked, which is illegal. If they amend it and define a solicitation by an elected official or candidate, that would be captured under the existing law as an indirect contribution.

Discussion continued.

Commissioner Rosen Gonzalez asked why not look at disclosure and why her Ordinance (deal with campaign consultants) was not considered or dismissed.

City Attorney Aguila clarified that the campaign consultants Ordinance she sponsored was not dismissed. Out of three Ordinances, the one she sponsored poses the least Constitutional issues. In terms of heightened scrutiny, the proposed the campaign consultants Ordinance has the best chance.

Discussion held regarding disclosure Ordinance.

Mayor Levine stated that this was a great attempt, from a perception point of view, to make a decision in January from this City Commission. They have heard from the legal team and it has been a great conversation.

City Attorney Aguila added for the record that Option 2 is that a candidate or commissioner has to proactively disclose who they are soliciting for. This is what every State representative has to do on a monthly basis.

Commissioner Steinberg stated that the summer was an interesting experience and they should move forward in a positive way; defining a candidate, as suggested by Commissioner Grieco, is very important. The suggestion about the indirect solicitation should also be defined. She commends County Commissioner Cabo for proposing the ethics reform, but wants to worry about what they do in the City. For now, they can perhaps sit with Commissioner Grieco, between first and second reading, to work on the language, to make it Constitutional and ethically correct.

City Attorney Aguila explained that the need to define indirect funding is critical, and the sponsor of the Ordinance agreed with Commissioner Grieco's amendment. Prohibition versus disclosure, there are two Ordinances before the City Commission. He thanked the City Commissioners because it has been an important exercise for the Office of the City Attorney. He asked Mr. Cantero to explain what the nature of the action would be and what the City's exposure would be if there is a challenge.

Mr. Cantero stated that a declaratory injunction action, not necessarily from damages, but most Constitutional cases are brought as injunction and stop them from enforcing this Ordinance; if filed in Federal Court or even State Court, according to USC 1983, which allows private causes of action for unconstitutional behavior, a plaintiff can potentially get the attorney's fees if they prevail.

Discussion continued.

City Attorney Aguila stated that this is soliciting soft money contributions for PACs that support or oppose Miami Beach candidates. If it is a Florida PAC that is supporting Miami Beach candidates, then they too are captured in this Ordinance.

Mr. Cantero thanked everyone for having him.

Mayor Levine adjourned the workshop at 4:07:28 p.m. and stated that any public hearing will be held at the January 13, 2016 Commission Meeting. He thanked everyone in attendance.

Handouts or Reference Materials:

1. Ad 1110
2. Weekly Meeting Notices for the Week of December 21-25, 2015
3. Attendance sign-in sheet