Public Campaign Financing in Albuquerque:

Citizens Win with Clean Money Elections

by Molly Milligan

CGS

Center *for* Governmental Studies

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FOREWORD

This report analyzes Albuquerque, New Mexico's new system of public campaign financing for municipal elections. Adopted by city voters in 2005, Albuquerque's "Open and Ethical Elections" program offers qualifying candidates significant amounts of full or "clean money" to fund their campaigns. The city has now conducted two elections under its new system.

Based on historical reviews of past Albuquerque elections, interviews with candidates and expert observers, constitutional and legal analyses of Albuquerque's law and examinations of campaign contribution, spending and public financing data for two city elections, this report concludes that Albuquerque's new law has successfully met its goals—to curtail excessive electoral spending, foster issue debates, reduce candidate dependence on private contributions and encourage widespread candidate participation. The report offers several recommendations to improve the law's operation and preserve it against potential constitutional challenges.

CGS has studied public financing of campaigns for over 25 years. It has published several general reports on public financing, including a comprehensive analysis of state and local jurisdictions, *Keeping It Clean: Public Financing in American Elections* (2006); a primer, *Investing in Democracy: Creating Public Financing Elections in Your Community* (2003); and a report on innovative ways to fund public financing programs, *Public Financing of Elections: Where to Get the Money?* (2003).

CGS has also published detailed, jurisdiction-specific analyses of public financing programs in numerous state and local jurisdictions, including: *Public Financing: North Carolina Judiciary* (2009), *Public Campaign Financing in Florida: A Program Sours* (2008); *Public Campaign Financing in Wisconsin: Showing Its Age* (2008); *Public Campaign Financing in New Jersey—Governor: Weeding Out Big Money in the Garden State* (2008); *Public Campaign Financing in New Jersey—Legislature: A Pilot Project Takes Off* (2008); *Public Campaign Financing in Minnesota: Damming Big Money in the Land of 10,000 Lakes* (2008); *Public Campaign Financing in Michigan: Driving Towards Collapse?* (2008); *Political Reform That Works: Public Campaign Financing Blooms in Tucson* (2003); *A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections* (2003); *Dead On Arrival? Breathing Life into Suffolk County's New Campaign Finance Reforms* (2003); *On the Brink of Clean: Launching San Francisco's New Campaign Finance Reforms* (2002); and *Los Angeles: Eleven Years of Reform: Many Successes, More to be Done* (2001). Copies of CGS reports are available at www.cgs.org and www.policyarchive.org.

CGS thanks the public officials, administrators and advocates in Albuquerque and New Mexico who provided valuable information, insights and observations about the city's public campaign financing system.

Senior fellow Molly Milligan authored *Public Campaign Financing in Albuquerque: Citizens Win with Clean Money Elections.* Editorial insight was provided by Tracy Westen and Bob Stern provided editorial insight. Legal interns Katy Wurzbach and Roya Rahmanpour provided valuable drafting and research assistance.

CGS is a non-profit, national non-partisan organization that creates innovative political and media solutions to help individuals participate more effectively in their communities and governments.

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Randy Autio, former Albuquerque City Clerk

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After two election cycles offering full public campaign funding for qualified municipal candidates, the City of Albuquerque should be proud of the successes of its Open and Ethical Elections program (OEE). Of Albuquerque's ten current elected city officials, eight won their seats using public financing. Candidates have reduced their campaign spending. Citizens have seen a return to a form of "retail" politics characterized more by personal contacts with candidates than expensive media advertising. The program has reduced the appearance of undue influence by large campaign donors.

Voters have embraced Albuquerque's public campaign financing program, and officials contacted said they would use the program again instead of raising private donations. None of them needed supplemental "opposing funds" during their campaigns to rebut messages by privately-funded opponents or independent groups. The "clean money" system has an annual budget of one-tenth of one percent of Albuquerque's General Fund, yet the city actually expended only $140,000 in 2007 and $1.094 million 2009, about 76% of the total available over the two election cycles,.

In Albuquerque's recent 2009 campaign for mayor, voters witnessed an aggressive campaign funded entirely by tax dollars. The three mayoral candidates were not diverted from the issues by fundraising pressures. They each critiqued the positions of the others; avoided funding by special interests; campaigned "closer to the people" in meetings and

debates; avoided extensive televised advertising campaigns; and stayed within prescribed expenditure limits. Their spending decreased dramatically from the previous mayoral campaign.

The election successfully met the goals set five years earlier by Albuquerque citizens when they voted overwhelmingly for Open and Ethical Elections: to avoid real or apparent corruption from large contributions; to strengthen public confidence in governmental and election processes; to give candidates adequate funding to run competitive campaigns; to increase the accountability of elected officials to constituents, not contributors; and to insure a fair, responsible and ethical municipal election process.

Since its implementation following the 2005 election, the OEE has:

- Reduced municipal campaign expenditures dramatically to the lower spending levels sought when city residents voted enthusiastically in support of the OEE.
- Generated campaigns characterized by vigorous debates of issues, rather than aggressive media campaigns funded by special interests.
- Encouraged over 60% of candidates appearing on the municipal ballot to accept public financing, including all three 2009 mayoral candidates.
- Encouraged participation by eight of the ten current elected officials, including three newcomers to the municipal stage, two of whom were newcomers to elected politics.
- Witnessed no apparent misuses of funds or spending violations by candidates.
- Saw significant private opposition funds trigger supplemental matching funds in just one race, indicating that privately-funded candidates and "measure finance committees" (local, non-candidate political committees) may have voluntarily moderated their spending.

This report recommends that the Albuquerque City Council should adopt the following improvements to strengthen its Open and Ethical Elections program. These

recommendations will help protect the city against constitutional attacks, safeguard taxpayer monies, increase the credibility of campaign spending using those dollars and improve the transparency of OEE-funded campaigns.

1. **Albuquerque should amend its "Opposing Funds" provision in the City Charter** if the United States Supreme Court invalidates matching funds provisions in public campaign financing programs. Albuquerque's provision currently provides candidates with additional public funding to meet high spending by privately financed candidates and measure finance committees as an incentive to participate in the program. The city should, in the alternative, provide candidates with additional public funding when voters are shown to lack sufficient information to make informed choices at the polls. These new incentives would not chill or threaten nonparticipating candidates' First Amendment rights.

2. **The Council should extend by four weeks the qualifying period in which mayoral candidates may gather $5 contributions.** This would make it easier for mayoral candidates to participate in the OEE.

3. **The Council should identify a dependable source of supplemental funding for the OEE to assure its continued viability.**

4. **Albuquerque should conduct mandatory audits of all participating candidate spending**. Audits would reinforce the credibility of its program, perhaps recover unexpended funds and identify issues for future city oversight.

5. **The Council should amend "Form 5,"** which citizens and candidates fill out to verify receipt of $5 qualifying contributions, to deter more directly any abuse or potential abuse in their gathering.

6. **Albuquerque should improve the City Clerk's website** to make campaign finance information more visible and accessible to site visitors.

7. **Albuquerque should require measure finance committees to state clearly the purpose of their spending** – in support of or in opposition to a particular candidate or measure – in campaign finance disclosure reports.

Albuquerque's Open and Ethical Elections program has been measurably successful in its 2007 and 2009 election cycles. It has encouraged the election of independent, impartial and responsible candidates and assured the public that local government will operate with integrity. It has helped return to Albuquerque the political culture it seemingly lost when earlier popular restraints on electoral spending were set aside.

I. HISTORY OF ALBUQUERQUE'S CAMPAIGN FINANCE REGULATIONS

The City of Albuquerque has for decades expressed deep concern over the distorting affects of money in its municipal elections. In 1974, voters passed Proposition 2 by a 90% margin. It created "an election code for candidates" which strictly limited both contributions to and expenditures by municipal candidates.[1] The law guided Albuquerque municipal elections until 1997, when a court temporarily enjoined the law's spending limits following a legal challenge by a mayoral candidate.[2] Under the challenged provision, candidates could not *raise or spend* an amount for a campaign based on the salary of the office being sought. Council candidates were limited to raising or spending an equivalent to the annual salary of a councilor; mayoral candidates were limited to raising or spending an equivalent to two times the annual salary of the mayor.[3] By 1999, the annual salary of the mayor was slightly over $87,000. In the years leading up to 2000, no incumbent mayor was reelected, in part because spending limitations negated the electoral advantage generally enjoyed by incumbent candidates.[4]

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[1]The Albuquerque City Council ordered a special election held on February 26, 1974, including 5 proposals to amend the City Charter. Proposition 2, section 9, provided: "No candidate for elective office shall allow contributions or make expenditures in excess of the following: As to Councillors . . . , one year's salary as provided by this Charter; . . . As to the Mayor, two times one year's annual salary, as provided by this Charter." Also on the ballot: Proposition 1 created a code of ethics, and was adopted by a 90% margin; Proposition 3 drastically revised the city's election code instituting a mayor/council system of governance to replace one structured around a commission and city manager, and was adopted by a 79% margin; Proposition 4, to create at-large city council seats, and Proposition 5, to permit partisan municipal elections, were defeated, receiving 46.5% and 42.9% of the vote, respectively. *See also* New Mexico Common Cause, *Out of Control: The Rise of Campaign Spending in Albuquerque Mayoral Campaigns* (2005), http://www.commoncause.org/aft/cf/%7BFB3C1&E2-CDD1-4DF6-92BE-BD4429893665%7D/OUTOFCONTROLMAYORALCAMPSPENDING.PDF ("*Out of Control*").

[2] The spending limits were invalidated by a state district judge but later reinstated following the stipulated dismissal of the suit.

[3] Municipal elections in Albuquerque are held in odd-numbered years. The mayoral term is four years; council members also serve four-year terms, but their terms are staggered so that odd-numbered and even-numbered districts are contested in different election cycles.

[4] This was a finding of fact made by the District Court in its ruling to enjoin the spending limitation in Albuquerque's City Charter. *Homans v. City of Albuquerque*, 217 F.Supp.2d 1197 (D.N.M. 2002).

A mayoral candidate successfully challenged, and the court enjoined,[5] the spending limit prior to the municipal elections for mayor and city council in the fall of 2001. Campaign spending in that election increased significantly compared to the previous mayoral election in 1997. In February 2004, the United States Court of Appeal for the 10th Circuit denied an appeal to restore the spending limit.[6]

Because Albuquerque citizens were accustomed to limited municipal campaign spending, the federal court's decision to overturn the city's spending limits together with the subsequent, dramatic increases in campaign spending created an environment that encouraged additional reforms.[7] As State Senator Dede Feldman and former United States Senator Fred Harris wrote when the mayoral campaign heated up in 2005, "Albuquerque voters have shown disdain for the role big money plays in politics. Our now defunct spending limits, thrown out by the courts, were highly popular with Albuquerque residents; a 2001 poll showed that 74 percent of likely voters supported those mandatory limits on campaign spending."[8] These elected officials advocated "voluntary spending limits and low-cost public financing."[9]

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[5] After a series of hearings in Federal District Court and interlocutory appeal of that court's denial of a preliminary injunction to the 10th Circuit Court of Appeals, plaintiff Rick Homans was granted the preliminary injunction of the expenditure limits that he sought prior to the 2001 election. *Homans v. City of Albuquerque*, 264 F.3d 1240 (10th Cir.2001). The expenditure limits were permanently enjoined in *Homans v. Albuquerque*, 217 F. Supp. 1197 (D.N.M. 2002).

[6] *Homans v.City of Albuquerque*, 336 F.3d 900, 908 (CA10 2004)(no "convincing evidence" that "expenditure limits are *necessary* to deter corruption.") (emphasis in original).

[7] On March 7, 2003, the City Council passed a "memorial" to support the enactment of "legislation by the New Mexico State Legislature to provide public financing of certain statewide political campaigns (positions on the Public Regulation Commission). Council Bill No. M-03-34. On March 13, 2003, the City Council passed a second memorial resolving that the new Albuquerque/Bernalillo County Government Charter "should include provisions for voluntary public financing of campaigns for local elective office. Council Bill No. M-03-37. http://cabq.legistar.com/legislation.aspx.

[8] State Senator Dede Feldman and former U.S. Senator Fred Harris, "Return Campaigns to Voters," *Albuquerque Journal*, June 18, 2005.

[9] *Id*.

The City Council, reformers and others took action because they were concerned about the appearance of undue influence by large campaign contributors over elected officials as well as access by special interests to city hall decision makers.[10] On June 30, 2005, the Council submitted a charter amendment to the voters. The measure proposed providing "clean money" in the form of full public financing for municipal candidates in return for their pledge to limit their campaign spending and forego accepting any private contributions.

In the months leading up to the October 4, 2005, election, Albuquerque voters watched candidate spending escalate to new heights. The incumbent mayor spent over $1.2 million in his re-election campaign.

The previous mayoral election cycle in 2001 also saw a dramatic increase in spending by mayoral candidates. In 1997, seven candidates spent a combined total of about $486,000. In 2001, eight candidates combined spent more than $1.8 million, and a single candidate spent almost $552,000, more than the combined seven candidates in 1997.[11]

In 2005, however, spending by only four candidates mushroomed to more than $1.5 million.[12] By the end of the campaign, the incumbent mayor spent over $1.2 million, more than twice the amount of the previous high spender. The mayor won re-election

[10] Former City Clerk Randy Autio recalled that concern grew about the "buying of the mayor by the developers, or at least the appearance that that was the case." Interview with Randy Autio, former City Clerk, September 2010. Assistant City Attorney (Election Specialist) Robert Kidd recalled that civic motivation behind the enactment of the OEE was to counter the "perception that somehow successful candidates were those backed by the biggest corporations or donors." Interview with Robert Kidd, Assistant City Attorney, August 2010.

[11] Challenger Rick Homans had expenditures of over $551,000, according to data maintained by the City Clerk. www.cabq.gov/onlinesvcs/campaign.

[12] Clerk of the City of Albuquerque, Campaign Reporting, www.cabq.gov/onlinesvcs/campaign. *See also Out of Control*, pp. 1-3.

with 47% of the general election vote.[13] Just over 41,000 votes were cast for him in that race, meaning that he spent over $29 for each vote he received.

In the same 2005 election, Albuquerque voters overwhelmingly passed the Open and Ethical Elections (OEE) referendum, which created municipal public financing for city council and mayoral campaigns.[14] The vote was a lopsided 69% to 31%. Voters, "fed up with the amount of private money flooding into New Mexico,"[15] decisively continued their strong support for limited spending in municipal campaigns and declared their willingness to spend their tax dollars to achieve that goal.

This report analyzes Albuquerque's OEE to determine whether it has achieved its goals and suggests ways in which it might be improved.

II. DEVELOPMENT OF THE OPEN AND ETHICAL ELECTIONS (OEE) PROGRAM

After losing its appeal in *Homans v. City of Albuquerque*, in 2004, the city looked for a different strategy to deter corruption and contain municipal election costs. The City Council proposed to voters that they adopt the Open and Ethical Elections program in the 2005 municipal election. The measure's supporters explained that adoption of a public financing system for candidates in Albuquerque municipal elections would bring back many aspects of the political culture that had long been in place.

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[13] Mayor Chavez defeated his nearest competitor by more than 21 percentage points. http://www.bernco.gov/upload/images/clerk/past_elections/city_2005_10.html. A run-off election is not held if one candidate receives 40% or more of the vote in the general election. Charter of the City of Albuquerque (hereinafter "Charter"), Art. II, Section 7.

[14] Council Bill No. R-05-298, June 30, 2005, place a proposed amendment to the City Charter on the October 4, 2005, ballot to provide for public campaign financing in municipal elections. (enactment #: R-2005-105). http://cabq.legistar.com/LegislationDetail.aspx?ID=248749&GUID=F0780E5B-FBEF-4EAA-ADC3-96084DA003AB&Options=ID|Text|&Search=Open+and+Ethical+Elections.

[15] Interview with Steve Allen, executive director of New Mexico Common Cause, September 2010.

Voters approved the proposal in October of 2005, just 20 months following the 10th Circuit ruling.

The OEE included several goals to:

- Avoid actual or apparent undue influence or corruption of municipal office holders by large campaign donors.
- Strengthen public confidence in governmental and election processes.
- Provide qualified candidates with adequate funding to run competitive campaigns for election and thereby provide increased choices to city residents in the leadership and direction of the city.
- Increase accountability of elected municipal officials to constituents, rather than contributors.
- Insure a fair, responsible and ethical municipal election process.

Since adoption of the OEE in 2005, the city has conducted two municipal elections during which candidates could seek public financing for their campaigns. The first elections conducted under the program in 2007 were for city council seats, and mayoral candidates were first able to seek public funding in the 2009 city elections.

III. HOW THE OEE WORKS

The Open and Ethical Elections law requires the City Clerk to adopt rules to implement the new program.[16] Specifically, the clerk has ongoing responsibility to determine candidate qualifications; certify participation; disperse city funds to

[16] Charter, Art. XVI, Section 19.

candidates; collect qualifying contributions and other revenues; assure return of unspent disbursements; and provide public education about the OEE.

A. Program Funding

The referendum approved by Albuquerque voters established a specific fund ("the Fund") for the money to be paid to municipal candidates through the program. The city budgets one-tenth of one percent of its General Fund to provide resources for the Fund, as mandated by the city charter.[17] Additionally, money for the program is "deposited directly to the Fund" when received from the following sources:

- Public contributions directly to the public campaign program.[18]
- Unspent qualifying funds raised by candidates seeking public funding of their campaigns.
- Excess qualifying funds as defined by the program.
- Unspent amounts by candidates who withdraw from or become ineligible to participate in the program.
- Unspent amounts by participating candidates at the conclusion of a municipal campaign.
- Additional amounts appropriated by the City Council based on the recommendation of the City Clerk or the City Attorney.[19]

[17] Charter, Art. XVI, Section 10 (D). "One-tenth of 1% of the approved General Fund (Fund 110) appropriation shall be reserved in the Fund to fund Participating Candidates . . . as provided in the Open and Ethical Elections Code." For FY 2011 the amount budgeted for the OEE is $421,000, not including $34,000 for indirect overhead. City of Albuquerque FY/11 Approved Budget, Volume One: Financial Plan, www.cabq.gov/budget/fy2011approved/FY11_Financial_Documents.pdf
[18] *Id.*, Section 10 (E).
[19] *Id.*, Section 10 (C).

B. Candidate Participation

Candidates running in city elections can voluntarily opt into the program if they are able to qualify under its rules, or they may choose to finance their campaigns through private contributions. Candidates who wish to participate in the public funding program are required to raise qualifying contributions to demonstrate their viability.[20] They are permitted to raise seed money "for the primary purpose of enabling the applicant candidate to collect qualifying contributions and petition signatures."[21] If they are certified as qualifying, they receive lump sum grants. When they agree to accept the public funds, candidates must also agree to limit their expenditures[22] and forego spending any other money on their campaign – either their own funds or private contributions. Additional supplemental funds are also available to address high spending by nonparticipating opponents and independent groups.

C. Candidate Certification

In order to be placed on the ballot as a participating candidate, individuals seeking to be certified must raise qualifying contributions and, as do all candidates seeking a place on the ballot, gather petition signatures. The law requires the gathering of qualifying contributions by candidates who seek public funding to ensure that candidates prove themselves viable contenders before receiving any public funds. Candidates are

[20] Charter, Art. II, Section 4. In addition to collecting qualifying contributions, OEE participants must, as do privately financed candidates, qualify for the ballot by obtaining the signatures of citizens: 3,000 petition signatures are required of candidates for mayor and 500 petition signatures are required of candidates for the City Council.

[21] Charter, Art. XVI, Section 3 (R). Seed money may be raised in contributions of no greater than $100 per person. A candidate, however, may contribute up to $500 for his or her campaign. The aggregate amount of seed money may not exceed 10% of the applicable spending limit, an amount calculated by the Clerk of the City of Albuquerque.

[22] Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code (hereinafter "Regulations"), Part A. Expenditures are limited to "an amount that is equal to the amount of revenue distributed to the Participating Candidate from the Fund . . ."

additionally permitted to raise seed money to fund the collection of qualifying contributions and petition signatures. Detailed reports about the candidates' progress in this process are required to be filed with the City Clerk.[23] After candidates file declarations of intent to seek public funding, they obtain receipt books to record the $5 contributions they gather and nominating petitions to be signed by a specified number of registered voters. Subsequent to being certified as a participating candidate, the law requires candidates seeking public funding to comply with contribution and expenditure reporting, exactly the same as nonparticipating candidates, including reporting of in-kind contributions received. [24]

1. *Seed Money*

During a preliminary period of time, candidates can "explore" the possibility of running for office and can seek "seed" money with which to attempt to qualify for the program by later collecting sufficient qualifying contributions and petition signatures. Seed money is defined as cumulative contributions of no more than $100 per person and $500 of the candidate's own money.[25] This "exploratory period" runs between January 1st and February 15th of an election year for mayoral candidates and between March 15th and May 31st for city council candidates. Seed money may not be used for retiring a previous

[23] Regulations, Part C (3) and (4). For 2009 mayoral candidates, on each Friday of the qualifying period after March 1, candidates were required to report their qualifying contributions by turning in the contributions and the receipts that verify the contributions to the clerk. For 2009 council candidates, the contributions and receipts were due on each Friday of the qualifying period beginning May 15.

[24] Charter, Art. XVI, Section 9. Participating candidates file campaign finance disclosure reports pursuant to the Election Code, as does any municipal candidate, whether publically or privately financed. *See also* Regulations, Part D (1).

[25] Regulations, Part B (6) (a) and (b). Two special reports are required of candidates who seek public funding. The first occurs before the collection of any qualifying contributions and includes information on seed money and in-kind contributions. It is filed at the same time a candidate files with the clerk a declaration of intent to seek public funding. The second disclosure report is required at the time the final report of qualifying contributions is due (April 1 for mayoral candidates and June 1 for council candidates, or the next city working day).

campaign debt; the regulations specify that public money "may only be used for the current campaign."[26]

The total amount raised for seed money cannot exceed 10% of the maximum grant available for a candidate running for a particular office. The clerk provides estimates of the applicable spending limit for candidates seeking public funding at the beginning of the exploratory period. Any seed money raised in excess of 10% of that amount is deducted from the amount of the grant.[27] For example, maximum council grants have ranged from about $27,000 to just over $42,000, so that amounts exceeding roughly $2,700 to $4,200 would be deducted from a candidate's grant. In-kind contributions, each having a value "not to exceed 5% of the annual salary" of the office being sought, may also be accepted, so long as, in the aggregate, in-kind contributions do not exceed 10% of the applicable spending limit.[28]

2. *Qualifying Contributions*

Following the exploratory period, there is a "qualifying period" that runs between February 16th and March 31st for mayoral candidates and between May 1st and May 31st for city council candidates, during which seed money may be spent to pay for initial campaign costs associated with the collection of specific "qualifying" $5 contributions and citizen petition signatures. Candidates for City Council must collect individual $5 contributions from one percent of the voters registered in the district in which they seek to run; candidates for Mayor must collect them from one percent of all voters registered

[26] Regulations, Part B (3).
[27] Charter, Art. XVI, Section 6 (C) "Seed money that exceeds 10% of the applicable distribution to a Participating Candidate shall be deducted from the revenues distributed to the Applicant Candidate from the Fund." *See also* Regulations, Part B (4).
[28] *Id.*, Section 3 (K). In-kind contributions do not include the value of personal services volunteered by individuals.

in Albuquerque. In 2009, for example, mayoral candidates were required to raise such contributions from over 3,200 voters. During the qualifying period, a candidate may continue to raise seed money, so long as he or she has not exceeded the "10% of the maximum grant" limit noted above.

3. *Petition Signatures*

During these two fundraising periods, all candidates, whether or not they seek public funding for their campaigns, are required to obtain the signatures of two percent of the voters in the district in which they seek to run. Candidates running for mayor must obtain more than 6,500 signatures.

D. Additional Limitations on Candidates

Once a candidate is certified to receive a grant of public funds to finance his or her campaign, the program specifically prohibits certain uses of that public money. Thus, no public funding is permitted to be used as a contribution to another candidate, political committee or measure, or be used in any race – other than the one in which a publically-funded candidate is running. Candidates may not pay off loans, debts or campaign penalties using public funds. [29]

The program restricts any personal use of public funds. Candidates may not fund out-of-state travel, purchase household items or supplies, make mortgage or rent payments on personal residences, purchase event tickets unless attendance is part of a campaign function, or pay dues or other fees at clubs of any sort unless the cost is part of a specific event. [30] Candidates are permitted to purchase clothing using the public funds,

[29] *Id.*, Section 8.
[30] *Id.*

but only that which "has a campaign message as part of the clothing or is used as a uniform for campaign staff and/or volunteers."[31]

Salaries may only be paid using public funds to individuals who provide bona fide services to the campaign. This bona fide standard also applies to the services of political consultants.

E. Reporting Requirements for Candidates Seeking Public Funding

Candidates who seek public funding must file, prior to seeking any $5 qualifying contributions, a Declaration of Intent to obtain public financing. In the declaration, candidates agree to comply with the regulations for the program and not use any funds received under the Fund to retire a previous campaign debt.[32] Candidates who seek public funding also submit two more special disclosure reports to the city clerk.[33]

1. *Disclosure Reports*

Campaign-related contributions made to and expenditures made by all municipal candidates, publicly funded or not, are monitored through six mandatory pre-election reports to the city clerk.[34] Two additional disclosure reports, however, due several weeks prior to the campaign finance reports from every candidate, are made only by candidates

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[31] Regulations, Part E.
[32] *Id.*, Form 1.
[33] *Id.*, Part C (4).
[34] Charter, Art. XIII, Section 4 (c) (2). Information in these reports determines the availability of matching funds-opposing funds to candidates participating in the Fund. The reports are due as follows:

First report	Friday of the12th week preceding the election
Second report	Friday of the 8th week preceding the election
Third report	Friday of the 4th week preceding the election
Fourth report	Friday of the 2nd week preceding the election
Fifth report	Friday of the week preceding the election
Sixth report	Monday immediately preceding the election

Two other reports are due from candidates and measure finance committees following the election. One must be filed by the 7th day following the election; the other may be filed no sooner than 7 days or later than 45 days following the election.

who seek public funding. In the event a runoff election is necessary, publically-funded candidates must file additional mandatory disclosure reports.[35]

The first of the two initial reports required of publicly-funded candidates is made during the qualifying period, prior to collection of any qualifying contributions, at the same time candidates submit their "Declaration of Intent." This first disclosure report and the Declaration of Intent must be filed no later than March 31 for mayoral candidates and May 31 for city council candidates.[36] It must list all contributors of seed money, including name, address, occupation and employer (including the employer's address), expenditures of seed money and the details of all in-kind contributions, including identification of the contributor and a description of the contribution.[37]

The second disclosure report required of those candidates seeking public financing occurs at the end of the qualifying period and requires further disclosure of seed money and in-kind contributions and expenditures. It is filed at the same time as the final Qualifying Contribution report is due (see below).

2. *Qualifying Contributions Reports*

The Qualifying Contributions report is required to include, for each qualifying $5 contribution:

- The date the qualifying contribution was received, which must be within the qualifying period.

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[35] Regulations, Part B (6) (f).

First report	Friday of the 4th week preceding the runoff election
Second report	Friday immediately preceding the runoff election
Third report	Monday immediately preceding the runoff election
Fourth report	The 7th day following the runoff election
Fifth report	No sooner than 7 days or later than 45 days following the runoff election.

[36] Regulations, Part C (1).

[37] Regulations, Part B (7).

- The name and residential address of the contributor, which must match that contained on the voter registration rolls and which address must be within the district for the office sought by the candidate.
- Copies of receipts issued to each contributor, signed by the contributor and the candidate (which are intended to verify that the contributor knowingly contributed his or her own money for the purpose of qualifying the candidate for public funding, and that the qualifying contributions each are made with the knowledge of the candidate).

The report is initially due from candidates on each Friday of the qualifying period following March 1.[38] The final Qualifying Contributions report is due at noon on the work day immediately following the expiration of the qualifying period: April 1 for mayoral applicants and June 1 for City Council applicants.[39]

F. Funding Distribution

Two days following the certification of those candidates who have met the requirements of the program, the city clerk is required to make the first distribution of funds from the Fund.[40] Candidates receive $1 per each registered voter in the district in which he or she seeks election (either a particular city council district in the case of city council candidates, or the entire city in the case of mayoral candidates). The amount of seed money and qualifying contributions for each candidate are deducted from his or her

[38] Regulations, Part C (4).
[39] Regulations, Part B (6).
[40] Charter, Art. XVI, Section 14 (A).

grant amount.[41] Distributions are specifically subject to the availability of resources in the Fund.[42]

Candidates who are running unopposed are not eligible to receive grants from the Fund following notice from the city clerk that they are unopposed.[43]

G. Matching Funds

The program additionally distributes supplemental matching funds to participating candidates when funds spent in opposition by a nonparticipating candidate "exceed the distribution from the Fund plus any seed money spent."[44] These so-called "Opposing Funds" are paid to participating candidates "as soon as possible after the first, second and third campaign finance disclosure reports are due . . . ."[45] Amounts are calculated based on spending by a nonparticipating opponent or a measure finance committee[46] that makes expenditures in an electioneering ad or mailer that specifies a participating candidate by name or title.[47]

H. Run-off Elections

Albuquerque elections in which no candidate garners more than 40% of the vote require a mandatory run-off election.[48] Publically-funded candidates who participate in run-off elections receive an additional $0.33 per registered voter in the district in which

[41] *Id.,* Section 12 (C).
[42] *Id.,* Section 14 (B).
[43] Regulations, Part H (10).
[44] Charter, Art. XVI, Section 16. These funds, too, are subject to the availability of resources.
[45] Regulations, Part H (9) (a).
[46] A measure finance committee is defined as a political committee that works in support of or in opposition to a candidate, or which supports or opposes ballot measures. A group making independent expenditures is not subject to a spending limit. A group coordinating its expenditures with a candidate is permitted to make a certain amount of expenditures, which are treated as in-kind contributions, *Id.*, Part F (1), the aggregate amount of which is not to exceed 10% of the applicable spending limit. For mayoral candidates that amount is about $5,000. *Id.,* Part H (6).
[47] *Id*., Part H (9) (c).
[48] Charter, Art. II, Section 8 (a).

the run-off election will occur (as opposed to $1 per voter in the regular municipal election).[49]

I. Treatment of Grants to Candidates Who Withdraw

A candidate is permitted to withdraw from OEE following his or her certification as a participating candidate and continue the campaign as a nonparticipating candidate, but he or she must do so by filing a written statement with the city clerk and return "an amount of money equal to all monies distributed to the candidate from the Fund plus interest at the rate of twelve percent per annum."[50] If a participating candidate withdraws entirely from the race, he or she "shall immediately return any amount to the Fund that is unspent . . ."[51]

J. Return of Unexpended, Unencumbered Grant Monies

The public financing scheme adopted in Albuquerque contemplates the return of unexpended funds by candidates within two weeks after the regular municipal election.[52] In two election cycles since the OEE was adopted only one candidate has returned excess funds to the city.[53]

K. Enforcement

The Board of Ethics and Campaign Practices currently has the power to enforce the Open and Ethical Elections Code.[54] Prior to the October 6, 2009, election the City Attorney was responsible for enforcement and violations of the OEE but was only able to

[49] Charter, Art. XVI, Section 15.
[50] Regulations, Part G (2).
[51] *Id.*, Part G (5). Candidate Feroza Jussawalla withdrew from the District 6 race in 2007, as noted below in Table 1 on page 22.
[52] Charter, Art. XVI, Section 8 (C); *Id*., Section 10 (C).
[53] Interview with City Clerk Amy Bailey, August 2010. Candidate Benton returned unspent funds following the District 3 race in 2009, as noted on Table 3 on page 27.
[54] Charter, Art. XVI, Section 21 (amended by Proposition 6 on the ballot in the municipal election, October 6, 2009).

bring criminal penalties. The thrust of the voter-approved charter amendment in 2009 was that most violations of the OEE should be treated as civil, rather than a criminal, matters. There has been only one instance in which an enforcement action was undertaken. Robert Kidd, an Assistant City Attorney, reported that a 2007 city council candidate was found to have overspent. Before any criminal action was initiated by the City Attorney, however, the candidate readily admitted the error and settled with the city for a fine of about $500. According to Mr. Kidd, "The process was rather informal." [55]

IV. ANALYSIS

The Open and Ethical Elections (OEE) program has been in place for two election cycles: 2007 and 2009.

The first municipal candidates eligible to receive public funding through the OEE ran for city council in 2007, when even-numbered city council seats (Districts 2, 4, 6, and 8) were contested. In 2009, the office of mayor and the odd-numbered city council seats (Districts 1, 3, 5, 7, and 9) were contested.

Of the ten current incumbent elected municipal officials in Albuquerque, eight won their seats using public funding for their campaigns. Their eight campaigns spent a combined total of just over $512,000, which is less than one half of the more than $1.2 million spent by one mayoral candidate in 2005. In fact, the entire bill for the OEE over the 2007 and 2009 election cycles was just over $1.2 million, which represents about 76% of the total amount mandated (one-tenth of one percent of the city's General Fund) for the OEE for those two elections. Thirteen candidates were fully funded.

[55] Interview with Assistant City Attorney Kidd, September 2010.

Interestingly, since implementation of the public funding program, there have been no run-off elections in municipal races, even in aggressively-contested, multi-candidate races and open seat races.

A. The 2007 City Council Election

In 2007, ten candidates ran for four city council seats. Six of them qualified for public funding, although one withdrew before Election Day. Of the five remaining publically-financed candidates, two were victorious: incumbent Debbie O'Malley in District 2 and newcomer Rey Garduno in District 6. O'Malley was an incumbent progressive who supported adoption of the OEE and garnered 72% of the vote. Garduno, a newcomer to elective politics, won 49% of the vote in a four-way open seat race. Turnout on Election Day was just over 10%.

To be certified by the city clerk as a qualified candidate, each candidate seeking public financing was required to raise contributions from one percent of registered voters in the particular district in which he or she ran. The number of these qualifying contributions varied, because the districts themselves did not contain equal numbers of registered voters. The number ranged from 253 contributions ($1,264 in $5 per voter increments) to 383 contributions ($1,913 in $5 increments).

The five grants to candidates made from the Fund in 2007 ranged between $24,000 and $32,000. The total grant amount distributed by the city was about $139,700, even though the city's budget had allocated more than $480,000 to the Fund. Supplemental matching funds, called Opposing Funds, were available at an amount of not more than two times the original amount received by any candidate. Only one candidate received additional funds – just over $1,600 – based on the spending of opponents, but

the funds were released to that participating candidate too late in the campaign to be utilized effectively.[56]

Table 1

Open and Ethical Election Participant Grants and Spending, 2007

		Grant	Seed Money	In-Kind Contribution	Expenditures
Dist. 2	Debbie O'Malley (I)*	$ 29,820 1,638[57]	$ 4,709	$ 2,034	$ 31,299
Dist. 4	Paulette de'Pascal	$ 31,692	$ 3,270		$ 36,167
Dist. 6	Rey Garduno*	$ 25,903	$ 1,278		$ 25,439
	Kevin Wilson	$ 26,720	$ 460	$ 500	$ 26,628
	Joan Griffin	$ 24,140	$ 3,400	$ 2,771	$ 26,786
	Feroza Jussawalla	$ 26,295	$ 885		$ 2,655
Total Dispersed		**$166,208**			
Returned to Fund[58]		**$ 26,520**			
Total OEE Funds Expended		**$139,688**			

(I) incumbent
* elected

Councilor O'Malley later compared her first electoral campaign in 2003 to her publically-funded campaign in 2007. She noted that in 2003:

"A great deal of time was spent fundraising. I spent every morning for a month or so calling people and asking for money." She continued, "Industry [was] putting lots of money in campaigns to get their candidates elected. That was the first time such contributions had appeared in council races. Because there was no spending cap, it

[56] Interview with Councilor Debbie O'Malley, August 2010.
[57] Opposing Funds grant.
[58] Ms. Jussawalla withdrew from the race after the first reporting period; she returned the grant, less expenditures plus interest of $225, to the Fund.

[raising money and planning expenditures] was flexible. I could strategize and call on my district network. But many other candidates couldn't even get in the race."

In the 2007 race, O'Malley admitted that the spending limit "was a downside." On the other hand, she continued, "with the [OEE] program, you do a lot more outreach and the voters have a lot more ownership of the election process, because many of them have given $5 to help get a candidate qualified."[59] She stated that she did not believe the requirements for qualification as a council candidate were too daunting.

Table 2

Cost Per Vote for All Candidates, 2007[60]

Office	Candidate	Votes Received	Expenditures	Cost Per Vote
Dist. 2	Debbie O'Malley (I)*	3,229 (72%)	$ 35,222	$10.91
	Katherine Martinez	1,235 (28%)	$ 38,280	$31.00
Dist. 4	*Brad Winter* (I)*	3,086 (81%)	$ 26,289	$ 8.52
	Paulette de'Pascale	707 (19%)	$ 36,167	$51.16
Dist. 6	Rey Garduno*	1,957 (49%)	$ 25,439	$13.00
	Kevin Wilson	906 (23%)	$ 26,628	$29.39
	Joan Griffin	799 (20%)	$ 26,786	$33.52
	Blair Kaufman	344 (9%)	$ 4,255	$12.37
Dist. 8	*Trudy Jones**	2,538 (100%)	$ 32,337	$12.74

(I) incumbent
* elected
Italicized name indicates candidate was privately financed

[59] Interview with Councilor O'Malley, August 2010.
[60] The expenditure amount for candidates does not include spending reported during the qualifying period. It includes campaign spending reported beginning on July 13, 2007.

The 2007 participating candidates were bound by expenditure limits, because they agreed to accept public financing from the city. Their privately-financed opponents did not have to limit their spending. Table 2 above shows that the spending of privately-funded candidates was not out of line with the spending of the publically-funded candidates, perhaps because public expectation supported the spending limits imposed by the OEE. The two candidates who were incumbents spent less than their opponents, whether or not they participated in the OEE. Two of the four publicly financed candidates prevailed, and privately financed candidate was unopposed.

The 2007 election was for many purposes the dress rehearsal for the mayoral race, which took take place two years later. Most observers believe that the city got through the 2007 election well.[61]

Following the 2007 election, the city council refined the OEE to assure that it would operate smoothly on the larger, city-wide stage.

The city council changed the campaign finance reporting regulations to improve the effectiveness of the supplemental matching funds provision. Instead of only six reporting dates, with four of them prior to Election Day,[62] the council settled on eight reporting dates. It increased to six the number of pre-election reports and added reports

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[61] Interview with City Clerk Autio, September 2010; interview with Assistant City Attorney Kidd, September 2010, and New Mexico Common Cause, *Returning Elections to Voters, Albuquerque's Success with Voluntary Public Financing of Campaigns (2007)* http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/RETURNING%20ELECTIONS%20TO%20VOTERS.PDF.

[62] For the 2007 election, campaign finance reports were required of all candidates and measure finance committees according to the following schedule:

First Report	Friday of the 12th week preceding the election
Second Report	Friday of the 4th week preceding the election
Third Report	Friday of the week preceding the election
Fourth Report	Monday immediately preceding the election

Two other reports were due from candidates and measure finance committees following the election. One was due the 7th day following Election Day; the other was due the 45th day after Election Day.
Office of the City Clerk, *2007 Election Guide*, http://www.cabq.gov/clerk/documents/2007%20Election%20guide%20May%2029%202007.pdf/view.

due the eighth and second weeks preceding the election. This was intended to assure that spending that might trigger Opposing Funds to a publically-funded candidate could be calculated and public funds dispersed in time for the candidate to make effective use of them.[63]

Also, voters in 2009 approved various charter amendments, including one intended to depoliticize the office of the city clerk by making it more independent of the mayor and the council. [64] The new provision added by Proposition 3, which passed with 66% of the vote, requires an "open and competitive hiring process conducted by the Mayor with the advice and consent of two-thirds of . . . the Council," and it specifies that the clerk's term coincide with the mayor's unless the clerk is removed for cause.[65]

B. The 2009 Mayoral and City Council Elections

Many observers believed that the October 6, 2009, municipal elections in Albuquerque would determine the future of public funding in the city. The mayoral election in 2009 offers a textbook example of the value of public funding in democratic elections. The OEE is on solid ground.

The election was a success for many reasons, not the least of which was that the vigorous campaign for mayor attracted several credible candidates during the qualifying period, and each of the three candidates ultimately on the ballot was certified to run their campaigns with full public funding. Every one of the five winning city council candidates opted-in to the OEE, including two who were not incumbents. Residents noticed a

[63]On December 8, 2008, the City Council passed an ordinance amending Article XIII, sections 2 and 4, of the Elections Code, including a provision to increase required reporting by candidates and measure finance committees. File # O-08-52 (Enactment # O-2008-44). http://cabq.legistar.com/legislation.aspx.

[64] Interview with Councilor O'Malley, August 2010.

[65] Charter, Art. V, Section 4 (e).

difference in the method of campaigning on the part of all the candidates. "The campaign consisted more of retail politics – meet and greets, mailers, town hall meetings with groups of voters, radio spots – more like local political campaigns should look like."[66] Albuquerque citizens experienced a lively mayoral campaign that focused more on important local issues and voter contact and less on special interest issues and aggressive media campaigns that were the focus of the preceding two elections in 2001 and 2005. "I think the candidates [. . .] stayed on the issues by and large," commented political scientist Timothy Krebs.[67]

There were no violations of the expenditure limits to which the candidates had agreed. The grants made to candidates were adequate to assure competitive campaigns. Most of the publically-funded candidates had more money to spend than their privately-funded opponents.

In a hotly-contested three-way race for mayor and in five city council districts (three of which featured contested races), the voters were presented with important issues. Independent expenditures were minimal and of little consequence to the campaigns of the publically-funded candidates. Supplemental matching funds were not triggered in any race. Turnout on Election Day was 25%, up from 10% in 2007.

[66] Interview with Matt Brix, policy director of the Center for Civic Policy, September 2010.
[67] Timothy Krebs, professor of political science, University of New Mexico, quoted by Dan McKay, "Mayoral Race Down to the Wire," *Albuquerque Journal*, October 4, 2009.

Table 3

Open and Ethical Election Participant Grants and Spending, 2009

		Grant	Seed Money	In-Kind Contribution	Expenditures
Mayor	Richard Berry*	$319,220	$28,651	$ 28,651	$308,935
	Martin Chavez (I)	$328,680		$ 31,309	$328,814
	Richard Romero	$297,934	$34,280	$ 22,878	$331,153
Subtotal		**$945,834**			**$968,902**
Dist. 1	Ken Sanchez (I)*	$ 35,577		$ 939	$ 8,770
Dist. 3	Isaac Benton (I)*	$ 29,424	$ 2,930	$ 200	$ 29,197
Dist. 5	Dan Lewis*	$ 42,482	$ 4,988	$ 4,687	$ 41,583
Dist. 7	Michael Cook*	$ 36,450	$ 925	$ 316	$ 31,163
Dist. 9	Don Harris (I)*	$ 32,811	$ 20	$ 987	$ 32,822
Subtotal		**$176,744**			**$145,535**
Total Dispersed		**$1,122,578**			
Returned to Fund[68]		**$ 28,508**			
Total OEE Funds Expended		**$1,094,070**			

(I) incumbent
* elected

The city had approved a budget of $1.17 million for the Fund in fiscal year 2009. This proved sufficient, although there was concern that there would be so many candidates that the city would not be able to fund them all.[69] The city clerk for the 2009 election, Randy Autio, noted, "There was not a single Ethics Board challenge in the 2009

[68] District 1 candidate Sanchez was unopposed and, pursuant to Section 10 of the regulations, returned $26,807 to the fund at the time of the Third campaign finance report (September 11, 2009). District 3 candidate Benton had unspent funds following the election and, pursuant to the Charter, Art. XVI, Section 8 (C), returned $1,701 to the fund at the time of the Eighth campaign finance report (November 20, 2009).
[69] Interview with Councilor O'Malley. August 2010. *See also* Dan McKay, "City May Lack Money to Fund '09 Campaigns," *Albuquerque Journal*, November 11, 2008, and "Obtaining Public Money is 'Painstaking,'" *Albuquerque Journal*, March 23. 2009.

campaign. It was one of the cleanest elections that I could have hoped for."[70] Steve Allen, executive director of New Mexico Common Cause, remarked about the election, "The system worked great in both elections. Albuquerque's approach to campaign financing encouraged candidate participation in the program and was very attractive to them. The voters won; it was money well spent."[71]

[70] Interview with City Clerk Autio, September 2010.
[71] Interview with Steve Allen, New Mexico Common Cause, September 2010.

Table 4

Cost Per Vote for All Candidates, 2009[72]

Office	Candidate	Votes Received	Expenditures	Cost Per Vote
Mayor	Richard Berry*	36,466 (44%)	$308,935	$ 8.47
	Martin Chavez (I)	29,140 (35%)	$328,814	$11.28
	Richard Romero	17,458 (21%)	$331,153	$18.97
Dist. 1	Ken Sanchez (I)*	5,322 (100%)	$ 8,770	$ 1.65
Dist. 3	Isaac Benton (I)*	3,598 (59%)	$ 29,197	$ 8.11
	Alan Armijo	2,462 (41%)	$ 30,697	$12.47
Dist. 5	Dan Lewis*	6,229 (56%)	$ 41,583	$ 6.68
	Michael Cadigan (I)	4,898 (44%)	$ 26,617	$ 5.43
Dist. 7	Michael Cook*	7,795 (96%)	$ 31,163	$ 4.00
	David Green (w/i)	351 (4%)	21	$ .06
Dist. 9	Don Harris (I)*	6,392 (79%)	$ 32,822	$ 5.13
	David Barbour	1,677 (21%)	$ 3,620	$ 2.16

(I) incumbent
(w/i) write-in candidate
* elected
Italicized name indicates candidate was privately financed

[72] The expenditure amount for candidates does not include spending reported during the qualifying period. It includes spending reported beginning July 17, 2009.

1. *The Mayoral Race*

In 2007, the voters approved a ban on contributions to candidates from business entities or individuals in contractual relationships with the City.[73] This legislation became a game changer for, although business entities and city contractors were still permitted to contribute to measure finance committees (local, non-candidate political committees), candidates could no longer look to them as sources of contributions. The OEE thus became more attractive to the candidates than traditional fundraising, "because obviously one of the easier ways to raise money is through business entities," observed Clerk Autio.[74] Candidates who were not independently wealthy may have opted to campaign with public funds rather than risk being unable to compete if they could not raise enough money from individual contributors or unions.

Three candidates remained in the mayoral race late in March and all three qualified for OEE grants. They adopted significantly different strategies in spending their OEE grants. Incumbent Mayor Martin Chavez saved about 60% of his money for the last four weeks of the campaign; up to that stage of the election he reported expenditures of just over $128,000. State Senator Richard Romero spent the most of any of the mayoral candidates in the early stages of the campaign -- $227,000 – which was more than 75% of his grant. Richard Berry, the State Representative who won the race, spent just over half of his grant – $174,000 – saving over 40% of his grant for the last four weeks of the

[73] The ban was approved by voters 72% to 28% in Proposition 2 in the 2007 municipal election, which amended the City Charter, Art. XIII, Section 4, by adding a new subsection (f). The ban states: "No candidate shall accept a contribution in support of the candidate's campaign from any corporation, limited liability company, firm, partnership, joint stock company or similar business entity. No candidate shall accept a contribution in support of the candidate's campaign from any person, other than a City employee, who at the time of the contribution is in a contractual relationship with the City to provide goods or services to the City."

[74] Marjorie Childress, "New Campaign Finance Rules Will Shape ABQ Mayor's Race," *New Mexico Independent*, February 9, 2009.

campaign. In contrast, at the same point of the 2005 mayoral race, Chavez had reported expenditures of more than $700,000.

Ultimately, challenger Berry defeated incumbent Chavez by nine percentage points and avoided a run-off election by garnering 44% of the vote. The third candidate, Richard Romero, former Democratic leader of the New Mexico Senate, received 21% of the vote. All three candidates were well known to Albuquerque voters before the mayoral race began.

Two early mayoral hopefuls were city council members whose familiarity with voters generally ended at the edge of their districts. Council incumbents M. Debbie O'Malley and Michael Cadigan left the mayoral race in the spring of 2009, because they anticipated being unable to raise the required number of qualifying contributions.[75] They stated that the problem was not the required 3,200 contributions but the too brief time -- six weeks -- in which to collect them. Cadigan noted that the process was time consuming and difficult. He said, "Not only do people often not have cash or checkbooks on them these days, but many also don't know the system so you have to spend a lot of time with them."[76] Both he and Councilor O'Malley suggested that the short period of time gave a built-in advantage to candidates who had ready city-wide networks to assist them with the task, and they advocated an extension of the period to collect the contributions by four to six weeks. They argued that such a change would not compromise the integrity of the OEE. It would merely provide interested candidates sufficient time to participate, thus allowing voters more choices in the voting booth on Election Day.[77]

[75] Cadigan opted to seek reelection to his city council seat, a race he lost.
[76] Marjorie Childress, Blog entry, *New Mexico Independent*, March 16, 2009.
[77] Interview with Councilor O'Malley, August 2010.

2. *The City Council Races*

The five 2009 city council district races each included a candidate who qualified for public funds. Three of those candidates were incumbents, who won handily. Indeed, one of them, Ken Sanchez, was uncontested in the District 1 race. Incumbent Councilor Isaac Benton of District 3 later commented that "there was a big difference [running as a participating candidate]. Not having to fundraise—I had more time to focus on the issues." He continued, "I do not like asking for large contributions and as a publicly-financed candidate, I did well, so I would opt-in again."[78] He won by 18 percentage points and spent $4,500 less on the 2009 campaign than he had in 2005. The other incumbent, Don Harris in District 9, won by 58 percentage points and spent about $33,000. In 2005, Harris prevailed after spending nearly $89,000, of which $65,000 was spent on a run-off election.

The fourth OEE participant, conservative businessman Dan Lewis, upset incumbent Michael Cadigan by 16 percentage points. Even though new to electoral politics, Lewis did not believe the qualification requirements for the OEE were too steep. He called those requirements "a good balance and part of the vetting process. A candidate has to show support and the ability to get volunteers. You have to have a good team." [79]

Lewis stated that "I liked that the election was issue oriented and there was no added pressure of fundraising. I was able to focus on the message and the issues rather that the fundraising."[80] Interestingly, he was the beneficiary of substantial independent expenditures opposing incumbent Cadigan.[81] One observer noted that Cadigan was

[78] Interview with Councilor Isaac Benton, July 2010.
[79] Interview with Councilor Dan Lewis, July 2010.
[80] *Id.*
[81] http://cognosout.cabq.gov/cognos8/cgi-bin/cognos.cgi

privately funded and could not, therefore, receive matching funds. This had the effect of encouraging the independent spending in that race, and energized the conservative base in Albuquerque to the benefit of all of the more conservative candidates on the city-wide ballot.[82] Lewis stated emphatically that in the future he would opt-in again "because the way the system is set up discourages not participating."[83]

The other participating candidate was businessman Michael Cook in District 7, a newcomer to electoral campaigning who faced only token write-in opposition.

V. RECOMMENDATIONS FOR IMPROVEMENT

A. Alternatives to Albuquerque's "Opposing Funds" Provision

Supplemental matching funds in public campaign finance programs, which give participating candidates additional funding to reply to messages by well-funded, nonparticipating candidates and opposing independent groups, are also designed to give candidates an incentive to accept public financing, forego traditional fundraising and limit their campaign expenditures. These provisions, however, have also provided fodder for recent constitutional challenges in federal courts. These challenges may undermine the public financing programs that matching funds were specifically intended to strengthen. The U.S. Supreme Court will have the opportunity to determine the fate of supplemental matching funds in public financing programs across the country, perhaps before the end of its 2010-2011 term.

[82] Interview with Matt Brix, Center for Civic Policy, September 2010. "Everything aligned properly [for conservative candidates]: the D5 race and the lack of enthusiasm by Democrats, which is even more evident today."
[83] *Id.*

1. *Albuquerque's Supplemental Matching Fund Provision*

Candidates accepting public financing in Albuquerque receive an initial lump sum of public money for their campaigns after they are certified as participating candidates. The OEE also offers them additional funding of up to twice the amount of the original grant if funds spent by either (1) an independent group in opposition to a participating candidate or (2) an opposing, nonparticipating candidate "who has the highest total of Expenditures and supportive Independent Expenditures"[84] exceed the amount of the grant received by a participating candidate, plus any seed money spent.[85]

In other words, the OEE gives participants the ability to respond to well-funded attack messages, even though it does not allow participants to raise additional funds from private sources. Thus, supplemental matching funds, called "Opposing Funds" in the city charter, give candidates an incentive to opt into the program without fear that they will be left defenseless against well funded attacks.

2. *Federal Courts Divided on the Constitutionality of Matching Funds*

Several federal circuit courts have divided over whether to extend the Supreme Court's 2008 holding in *Davis v. FEC,*[86] which struck down a provision allowing certain federal candidates to raise additional *private* contributions, and invalidate supplemental matching fund provisions in *public* campaign financing programs. In *Davis*, the Supreme Court applied strict scrutiny to strike down the so-called Millionaire's Amendment to the federal Bipartisan Campaign Reform Act of 2002. That amendment provided that if a candidate for the United States Congress – running in an election in which *all* candidates are *privately* financed and subject to the *same* federal election rules – funded his or her

[84] Charter, Art. XVI, Section 3 (M).
[85] *Id.*, Section 16.
[86] *Davis v. FEC*, 128 S. Ct. 2759 (2008).

campaign with *personal funds* in excess of a specified threshold amount, then opposing candidates in the same race could raise private contributions under contribution limits that were treble the normal legal limits for federal campaigns. The *Davis* Court ruled that the political speech of a self-funded candidate was impermissibly chilled by this asymmetrical scheme, because spending by a wealthy candidate could trigger a benefit to his or her opponent, allowing that opponent to raise larger private contributions than the wealthy candidate could.

The Supreme Court recently agreed to hear a challenge to a supplemental matching funds provision in Arizona's program of statewide public campaign financing. Appellants argue that the supplemental matching funds available to participating candidates in Arizona, which are available when independent groups or opposing, nonparticipating candidates spend over a specified amount, are analogous to the asymmetrical contribution limits struck down in *Davis* and impermissibly chill the political speech of those groups and nonparticipating candidates (neither of whom are bound by the restrictions or regulations of the public financing program). *McComish v. Bennett*[87] is scheduled for oral argument on March 28, 2011.

The Ninth Circuit rejected the reasoning of the *McComish* appellants, because it determined that Arizona's matching fund provision "places only a minimal or indirect burden on Plaintiffs' speech and that the Supreme Court's latest campaign finance decision, *Citizens United v. Federal Election Commission* reaffirmed that intermediate scrutiny applies to such laws." [88] The appellate court noted that "the Supreme Court has held that it is constitutional to subject candidates running against each other for the same

[87] *McComish v. Bennett,* 611 F.3d 510 (9th Cir. 2010)
[88] *Id.* at 513, 525, citing *Citizens United v. FEC,* 130 S.Ct. 876 (2010).

office to entirely different regulatory schemes when some candidates voluntarily choose to participate in a public financing system,"[89] and that the public financing scheme approved by the Supreme Court in the seminal *Buckley v. Valeo* decision was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[90] It concluded that Arizona's supplemental matching funds program did not create a burden on speech.

The Ninth Circuit distinguished *Davis* "because it singled out the speakers to whom it applied based on their identity (wealth),"[91] while Arizona's "matching funds provision makes no such identity-based distinctions."[92] In other words, Arizona's law dispenses supplemental funds to participating candidates whose privately-financed opponents spend over a certain amount, whether or not they have funded their campaigns personally. Because it does not "distinguish between different sources of nonparticipating candidates' financing at all"[93] the program places only an "indirect or minimal" burden on the speech of nonparticipating candidates.[94]

The Ninth Circuit reasoned that Arizona's matching funds are substantially related to Arizona's interest in providing an incentive to candidates to participate in its public financing program, which furthered Arizona's interest in deterring corruption or the appearance of corruption,[95] recognized since 1976 by the *Buckley* court as a compelling governmental interest. It concluded that "[i]n this case, as in *Buckley* and

[89] *Id.* at 522, citing *Buckley v. Valeo*, 424 U.S. 1, 97 (1976).
[90] *Id.*, quoting *Buckley* at 92-93.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at 523.
[95] *Id.* at 525.

Citizens United, the burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds. The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign expenditures."[96]

Two other federal circuit courts later disagreed with the Ninth Circuit's holding. The Second Circuit, ruling on a provision in Connecticut's public campaign financing program,[97] and the Eleventh Circuit, in a ruling involving Florida's program,[98] found that *Davis* makes the provision of matching funds in public campaign financing programs impermissible under the First Amendment. They identified a burden that "chilled" the free-speech rights of nonparticipating candidates and independent expenditure groups because matching funds in the public campaign finance programs are triggered by the spending of nonparticipating candidates or independent groups. Applying strict scrutiny, as did the *Davis* court, these federal appellate courts concluded that matching fund provisions fail because they "severely" burden the First Amendment interests of nonparticipating candidates and are not the least restrictive way for states to further the states' acknowledged interest in fighting the appearance of corruption.

Supplemental matching fund provisions thus currently stand in a precarious position. If the U.S. Supreme Court reverses the Ninth Circuit in *McComish*, which seems possible because it refused to enjoin the district court's ruling invalidating the

[96] *Id.*
[97] *Green Party of Connecticut v. Garfield*, --- F.3d --- , 2010 WL 2737153 (2nd Cir. 2010).
[98] *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010).

matching funds provision,[99] its ruling would undermine a key incentive for candidates to participate in public financing programs and undermine the stability of any such system.

3. *Four Proposed Solutions:*

The Supreme Court may uphold Arizona's supplemental funding trigger, in which case this provision of Albuquerque's law can remain intact. Should the Court declare Arizona's trigger fund unconstitutional, however, CGS suggests four alternative reforms that each would circumvent the constitutional issue, eliminate this threat to Albuquerque's program and strengthen the OEE for years to come. The suggested changes would give candidates incentives to participate in the city's public financing program either through increased lump-sum grants, a generous public match for small private contributions, or the promise of supplemental funding not based on the expenditures of any opposing candidate or group.

Albuquerque's program of public funding of campaigns is strong. Every effort should be made to preserve it.

Option (a): Repeal the current trigger mechanism and increase the dollar amount for grants.

Under this option, Albuquerque would increase the amount of public funding available to participating candidates to at least $1.50 per voter. Increased funding would continue to make the program attractive to candidates, particularly in the absence of a promise of supplemental matching funds. All qualified candidates would receive larger lump sum grants and would be free to strategize their expenditures accordingly. This option would likely increase OEE expenditures, even if participation does not increase.

[99] Order in Pending Case, 09A1133, http://www.scotusblog.com/wp-content/uploads/2010/06/09A1133_McComish_v_Bennett.pdf

Option (b): Adopt matching funds modeled on New York City's system.

In New York, the city matches small contributions ($175 or below)[100] raised by participating candidates from private contributors at a $6-to-$1 ratio.[101] This system requires participating candidates to demonstrate a broad base of support by raising a large number of small contributions. The generous match gives candidates a built-in incentive to participate, and taxpayers in New York find it attractive because their money is not wasted on frivolous candidates who cannot raise many small private contributions and will thus do not receive much public funding. This "hybrid" model of small private contributions and public funding is considered a legitimate alternative, even by those who are committed to clean money systems.[102] Of course, it has the downside of requiring candidates to continue to fundraise throughout the campaign.

Option (c): Disperse additional grants when races which are "competitive."

CGS alternatively proposes that the city consider retaining the supplemental funding aspect of the OOE but change its trigger mechanism from the current program, which relies on opponent spending over a specified amount, to a program based on a lack of voter information. This suggestion, like *option (d)* below, is an innovative yet untested approach developed by CGS. It would allow Albuquerque to continue to provide participating candidates with the incentive of supplemental funding. This option assumes

[100] New York City Campaign Finance Act, Section 3-703 (2) (a). www.nyccfb.info/act-program/CFACT.htm

[101] *Id.*, Section 3-705 (2) (a). The New York City Campaign Finance Board has said, "Both [clean money programs like Arizona's and New York City's system] seek to reduce the influence of large, access-seeking contributions. We strongly believe that these goals are best achieved when most candidates participate. If public financing programs cannot provide an adequate level of public funds to candidates whose opponents opt out, candidates will not take part. New York City's experience with bonus matching funds is instructive . . . . Additional public funds for candidates facing a high-spending non-participant have helped *increase* – rather than restrict – the volume of speech in City elections." http://www.nyccfb.info/press/news/press_releases/2010-12-1.pdf.

[102] Interview with Matt Brix, Center for Civic Policy, September 2010; interview with Steve Allen, New Mexico Common Cause, September 2010.

that voters would need additional information to cast an informed ballot. It is on that basis that supplemental funding would be dispersed, triggered by the competitiveness of the race in the relevant district.

Specifically, the city would increase to $1.50 or more the dollar amount per voter and dispense first-stage grants of 60% of the total amount possible for an election in a particular district. The city would disperse the remaining 40% of the available monies only if the result of a simple poll shows the voters need more election-related information to make up their minds. The poll should be conducted on the Friday four weeks before Election Day and would ask two or three questions at most.[103] If the poll results show that a participating candidate was either ahead by 15 or fewer percentage points, or within that margin of the leader, *AND* had "educated the voters" (expended 50% or more of his or her initial grant by the day of the poll), the city would disperse supplemental funding to that participating candidate because the race was "competitive," the assumption being that voters would benefit from more information prior to Election Day. Only those participating candidates who meet both criteria would receive supplemental funding. Privately funded candidates, of course, would have the opportunity to continue to raise additional contributions.

Option (c) responds to the fact that Albuquerque has spent significant amounts of public funding over the past two election cycles in races that were lopsided.

- In 2007, only District 6 had a campaign that arguably was competitive four weeks before Election Day, yet in two other districts (District 2 and District 4) candidates received and spent their entire grants. The winner in

[103] The poll contemplated by this option would ask, for example: Q: Have you heard this name? (ask about four names, two are planted phonies, names to be rotated). Q: Can you tell me when the next city election is? Q: If the election were today, for whom you would vote?

District 2 won by 44 percentage points, and the winner in District 4 prevailed by 62 percentage points.

- In 2009, the race for mayor was very competitive four weeks before Election Day, but races in District 7 and District 9 were not; candidates in those races were still given full grants and those funds were spent. In District 7, the winner, facing only write-in competition, received 96% of the vote, and in District 9 the winner received 79% of the vote.

If this option had been adopted prior to the 2009 municipal election and the grants were based on a formula of $1.50 per voter, this option would have resulted in the following scenarios:

- The District 3 race would not have been considered competitive. Incumbent Isaac Benton used public financing to defeat a privately financed challenger by about 19 percentage points. Benton's grant from the city was $29,400. Using the new scheme, Benton would have received a first-stage grant of $26,520, and could have been eligible, assuming he also met the expenditure threshold, to receive an additional $17,680 four weeks before Election Day in a competitive race (for a total of $44,200). Because the race was not within the 15 point competition threshold, no additional funding above his initial grant from the City would have been dispersed. In fact, he returned slightly more than $1,700 in unexpended funds to the OEE Fund.

- The District 9 race also would not have been considered competitive. Incumbent Don Harris used public financing to defeat a privately financed challenger by about 58 percentage points. His grant was $32,811. Under this proposal, while he would have been eligible to receive close to $49,200 in a competitive race in which he additionally met the expenditure threshold, because his race was not competitive he would have received only an initial grant of $29,500, slightly less than the amount which was more than adequate to secure his victory in 2009.

- In the 2009 mayoral race, the grants varied somewhat (based on the seed money raised) but the race among the three candidates was competitive throughout. Thus, each candidate would have received $315,000 initially and only if a particular candidate had expended $157,000 by the fourth Friday before Election Day (in other words, had not held back significant funding but had "educated" the voters) would additional public funding have been released to him. Candidates would have had an incentive to participate because there would be clear rules to assure the release of supplemental funding. The most a candidate would have been able to spend under this scenario would have been $525,000.

Option (d): Disperse supplemental funding when there are substantial numbers of "undecided" voters four weeks before an election.

Option (d) is another innovative approach, devised by CGS, which has not been tested in the courts; nevertheless, it also offers the promise of improving voter information and providing participating candidates the significant incentive of additional funding to communicate their messages.

As in *option (c)*, the city would calculate grants for publicly financed campaigns using a formula of $1.50 per voter or more. Grants would be dispersed in two stages, with the first stage comprising 60% of the total amount possible for an election in a particular district. The city would disperse the remaining 40% of the available monies only if the result of a simple poll shows the voters needed more election-related information to make up their minds. The poll would be conducted in the relevant districts on the Friday four weeks prior to Election Day. It would simply ask the voter whether he or she has already decided for whom to vote, or whether the voter is "undecided." If the poll results indicate that 15% or more[104] of the voters queried were undecided *AND* a participating candidate had expended 50% or more of his or her initial grant by the day of the poll, then the city would distribute supplemental funding to the participating candidate(s) in that district who meet the expenditure threshold, enabling them to continue to communicate their messages. Privately funded candidates would have the opportunity to continue to raise additional contributions.

[104] This percentage can be varied depending on local circumstances. Requiring a higher percentage of undecideds (e.g. 20%) would be more sparing of city funds. A lower percentage of respondents may be undecided, however, if a participating candidate is faced by a high-spending wealthy opponent or independent expenditure group.

The trigger mechanism suggested here assumes that a significant number of undecided voters would benefit from further campaign-related information prior to Election Day, and it is on that basis that supplemental funding would be dispersed. This option would be easy to implement, because the city would only ask one question in the poll: "Have you decided who you will vote for in the [relevant district] race?" It would not "chill" the speech of non-participating candidates because it would not be triggered by non-participating candidates' expenditures.

Assumptions that support both options (c) and (d):

Both options (c) and (d) would continue the city's stated goals to

(1) Deter corruption or its appearance,

(2) Encourage participation in the OEE, and

(3) Strengthen confidence in governmental and election processes.

In addition, each suggestion would be supported by a strong governmental interest in allowing candidates to provide voters with additional information as the basis for release of supplemental funding, rather than basing such funding on the calculation of an opponent's spending, thereby avoiding a trigger mechanism that is vulnerable to constitutional challenge.

Further, because these options recognize the government's interest in creating an informed electorate, they directly further the principles set forth in *Buckley* that the ability of citizens to "make informed choices among the candidates for office is essential . . ."[105] and that "debate on public issues should be uninhibited, robust, and wide-open."[106]

[105] *Buckley*, 424 U.S. at 14.
[106] *Id.*, citing *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

CGS suggests that, whether based on a close "competitive" race or a significant bloc of "undecided" voters, 15 percentage points represents a reasonable bright line to justify the further expense of taxpayer monies. Under either option, the need for additional voter information would directly link to the *Buckley* Court's finding that public funding of campaigns is appropriate to "enlarge public discussion and participation in the electoral process."[107]

Either approach requires the city to increase the total amount of its OEE grants to $1.50 or more per voter, but it would not disperse any grant in a lump sum (we suggest that only 60% be dispersed in the first stage), and it might not disperse a significant part of the budgeted funds at all. Instead, the city would award grants in two stages, the second stage being based on a demonstrated need for more money to be spent in a particular race, and only on that basis. This would be "demonstrated" by (i) requiring that candidates expend a certain percentage of their initial grant (we suggest 50%) by the date of the poll, so that candidates only receive supplemental funding if they have sought to educate voters in the early weeks of the campaign, and (ii) conducting a simple poll in the relevant district, the question(s) always being the same,[108] to determine if the race warrants further expenditures in order to give citizens more campaign information before voting on Election Day. In races that do not meet the determined threshold, additional funds would be withheld and not spent, ultimately saving the city money.

The promise of a supplemental, second-tier grant, based on a larger total grant made possible by increasing the amount of public funding per voter, would provide an

[107] *Id.* at 92-93.
[108] CGS recommends that the City Charter be amended to include the specific language of the poll question(s), so that the question(s) never change, meaning the poll would be consistent and completely transparent.

important incentive to candidates to opt-in to the OEE at the beginning of the campaign cycle. Because supplemental funding would be available only in certain races, based on objective poll results, the plan would be tailored to protect the city's resources.

Albuquerque's political culture does not favor overspending – no mayoral candidate spent more than $360,000 in 2009. Mandatory audits, also recommended in this report, would help assure that expenditures are for legitimate campaign purposes. But these proposals would still hold out sufficient grant amounts to provide participating candidates with an attractive alternative to fundraising from private sources. Increasing participation has been one of OEE's strengths in the last two election cycles and is a benefit to Albuquerque voters. The fact that all three 2009 mayoral candidates participated in the OEE allowed them to avoid the taint of undue influence by special interests, a significant achievement at any level of politics.

Instituting either of these two-tiered approaches to triggered supplemental funding of publicly financed candidates would require city charter changes that would:

(1) Determine what percentage of the total funding available to an OEE participant will be released in the first-tier grant. CGS suggests 60% of the grant theoretically available be released to candidates initially.

(2) Define the percentage of the percentage "competitive gap" or "undecided" poll respondents in a race that would trigger the release of supplemental funds. CGS recommends 15% in either option.

(3) Determine the day the poll would be conducted. CGS recommends the Friday of the fourth week before Election Day and suggests the poll be called the Four Week Poll.

(4) Determine when the supplemental grants would be dispersed. CGS recommends the Monday following the Four Week Poll.

(5) Determine an appropriate percentage of the grant and the date by which it must be expended in order for the publicly financed candidate to be eligible for supplemental funding based on poll results. CGS recommends that 50% of the initial grant be required to be expended by the day of the Four Week Poll.

(6) Embed the perennial poll question(s), intended to measure the need for further voter information in particular races, in the City Charter. Candidates and voters alike will thus have notice of the exact questions to be asked of respondents.

B. Extend Period to Gather Mayoral Qualifying Contributions by Four Weeks

The issue of the amount of time for mayoral candidates to collect qualifying contributions should be addressed by the city council before the next mayoral election cycle begins. Whether candidates are required to gather too many contributions in too abbreviated a period, particularly candidates who lack city-wide name recognition before the qualifying period begins, or whether the task is made reasonably difficult to guard against funding candidates who do not have demonstrated broad appeal, should be clarified for candidates and voters alike.

Other jurisdictions have statutes that provide much longer periods of time in which candidates gather qualifying contributions. In comparably sized Portland, Oregon,[109] for example, candidates in its public financing program are allowed four and one-half *months* to gather qualifying signatures. It should be noted that in Portland all six

[109] The population of Albuquerque is 535,239, according to the City's web site; the population of Portland is 582,130, according to Portland State University. http://www.pdx.edu/sites/www.pdx.edu.prc/files/media_assets/2009CertPopEst_web3.pdf.

of the elected officers, not just candidates for mayor, run at large, and candidates in Portland need only gather 1,500 qualifying contributions.

Proposed Solution:

The city should extend the time frame for gathering $5 contributions by mayoral candidates, who must obtain significantly more of these contributions than their city council counterparts. By adding four weeks to the current six weeks, candidates without city-wide name recognition will be able to develop networks of support throughout the city and gather the required number of contributions, currently a daunting task for mayoral candidates simply because the number of required contributions is so high.

C. Alternate Sources of OEE Funding

The city should consider using additional funds from sources outside the General Fund, together with the designated one-tenth of one percent from the General Fund, as a way to ensure that the Fund will be able to accommodate all candidates who can qualify. As Councilor Benton has declared, "The program has worked well overall. We will address any funding issues. It's the cost of good government."[110]

Proposed Solution:

A possible source, perhaps banking both on widespread voter support for the OEE and on Albuquerque's status as one of the nation's most affordable places to visit, might be a small fee on room occupancy ("fifteen cents -- $0.15 -- for clean elections") within the city limits. Based on a 50% occupancy rate for approximately 15,000 hotel rooms, a fifteen cent per night fee would generate $410,625 annually to supplement the fund.[111]

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[110] Interview with Councilor Benton, July 2010. He noted that the general fund "is stressed right now" and that the City Council "will probably have to discuss that soon."

[111] Voters might be in favor of such a fee given their strong support for the OEE if the burden of good government could be shared with visitors. See *Lodging, Rental Car and Meal Taxes on Travelers in the*

Other possible sources are suggested in the 2003 CGS publication *Public Financing of Elections: Where to Get the Money?*[112]

D. Audits of Campaign Spending

OEE participants are not audited after the election to determine whether they have spent public funds appropriately. Auditing would reinforce the value of the program.

Campaign finance disclosure reports, required under the Election Code of all candidates whether or not participating in the OEE, currently are submitted to the clerk and reviewed during the campaign by an independent contractor, who has access to campaign bank statements and bank accounts.[113] The contractor, a certified public accountant, determines if the forms properly list contributions and expenditures and is responsible for identifying instances of non-compliance, such as missing information for a contributor. In such cases, the candidate involved receives a notification letter and is given a 10-day period to correct the identified error.[114]

Top 50 U.S. Cities, National Business Travel Association, July 2008 (Albuquerque central city and airport per diem taxes fall below the average and most common rates in the top 50 cities in the country). In 2009, voters approved 59% to 41% a tax not that dissimilar to this proposal: a quarter-cent transportation gross-receipts tax (which amounts to 25 cents on a $100 purchase).

[112] http://cgs.org/images/publications/Where_to_get_the_money.pdf.

[113] Charter, Article XIII, Section 9, provides: (b) There is hereby created the position of Campaign and Election Auditor. The Auditor shall be either a Certified Public Accountant or a Registered Public Accountant and shall: 1. Be retained by the Board as an independent contractor to serve from the established date of filing of the Declaration of Candidacy for each election until ninety days following the specified final date set forth for filing of the final statement on disclosure of campaign financing; provided, that the Board in its discretion may retain the services of the Auditor at other times including elections in which only measures are to be placed on the ballot. 2. Monitor all disclosure statements to examine the accuracy and compliance by the person filing such statements with the provisions of this Election Code and with any Rules and Regulations promulgated by the Board, and provide such other services as may be required by the Board. 3. At the direction of the Board, be available to assist candidates and Measure Finance Committees in connection with this Election Code and with any Rules and Regulations promulgated by the Board, and provide such other services as may be required by the Board.

[114] Interview with City Clerk Autio, September 2010.

In 2007 and 2009, the city followed this procedure to review the campaign finance disclosure reports for all candidates, whether or not participating in the OEE. The clerk for the 2009 election noted that, with respect to that race, all of the identified errors involved very minor omissions that were corrected within the 10-day time frame. Indeed, there were only a handful of violations, and they occurred early in the campaign. He believes that the lack of many problems noted later in the campaign resulted from campaign managers becoming more familiar with Albuquerque's unique rules.[115]

This type of monitoring differs greatly from the comprehensive audits that should be conducted with respect to the expenditures of participating OEE candidates. In the interest of assuring that taxpayer money is being judiciously spent – as opposed to being just spent – audits specifically geared toward verifying that expenditures are legitimate campaign expenditures should be added to the city's necessary oversight.

Because the current system is not designed to oversee the propriety of candidate spending, there is an unintentional gap in accountability between the taxpayers and the candidates. Citizens simply do not know if their dollars are being spent appropriately and, thus, whether the OEE is meeting its stated goals.

The city charter outlines permissible and impermissible uses of OEE funds.[116] It enumerates issues that should be the focus of post-election oversight by the city, including a prohibition on personal use of campaign funds, ban on using OEE funds to retire a previous campaign debt, purchase of certain property by a campaign,

[115] Additionally, the regulations of the Board of Ethics and Campaign Practices call for a mandatory pre-election meeting to permit inspection and/or audit of each candidates campaign financial records. Rules & Regulations of the Board of Ethics & Campaign Practices, Section 5 (M). This requirement was described by Mr. Autio as "archaic," because the reports are online. He said that in 2009 there was no public input at all during this meeting. Interview with City Clerk Autio, September 2010.
[116] Charter, Art. XVI, Section 8.

compensation to campaign staff, forfeiture of unspent seed money and return of unexpended funds within a two-week time frame after Election Day.

Proposed Solution:

The credibility of the OEE depends on city-wide support from the taxpayers. The Office of the Independent Auditor routinely reviews city programs and is well suited to conduct post-election audits of campaigns funded by the OEE. The council should mandate that the city auditor undertake this task. These audits should review the complete records of all participating candidates to verify that taxpayer funds are appropriately spent and to identify problem areas for the Council.

E. Verification of Signatures

The former city clerk reported that the significant task of verifying signatures, to determine whether individual candidates had qualified for grants under the OEE, was a burden on his small office. To provide the most accurate verification possible of qualifying contributions, the policy of the city clerk is to verify every signature, rather than to verify only a random sample.[117] In 2009, this tremendous burden included the verification of about 20,000 individual signatures.

The clerk specifically cited the difficulty of linking a particular $5 qualifying contribution to a particular signature, because many contributors used cash. As he noted, in those cases there is no way to assure that the person who signed the affidavit gave the $5. The bills can be bundled together and are not distinguishable. This issue, and the possibility that the current process is open to abuse, was also raised by one of the potential candidates for mayor who dropped out of the race.

[117] Interview with City Clerk Autio, September 2010.

Proposed Solution:

To address this concern, Form 5 should be re-written to clearly state the transaction between the voter and the candidate, the reason for the transaction, that the funds given are those of the voter, the identifying information for both the voter and the candidate or agent, and awareness of the penalty for committing perjury. A copy of proposed language for Form 5 appears in the Appendix. A clear declaration that a voter has made the $5 contribution, under penalty of perjury, would minimize abuse of this important phase of candidate qualification.

F. Clearer Navigation and Identifying Labels on the Clerk's Website

Mayor Berry vigorously advocates increased transparency for Albuquerque city government on the city's web site. Accordingly, the city should significantly clarify basic information about city elections and campaign finance for web site visitors, particularly because the OEE is currently "policed" via complaint. Thus, it is important that information on campaign financing is properly labeled and clearly displayed to make it accessible.

Former and present city clerks agree that the current web site is showing its age. Finding specific disclosure records filed by the candidates and measure finance committees on the city's web site is difficult. The current system is cumbersome to use, because its information is not organized in an intuitive way, and campaign finance information is sorted through a number of software filters that are poorly labeled.[118] Furthermore, the major links to the reports are not defined in terms of what information they lead to and why that particular information has been filtered in that particular way

[118] An additional admittedly minor complaint is that the pull-down list of candidates is organized alphabetically by first name. The more intuitive approach would be to alphabetize this list by the candidates' last names.

("Current Campaign Records," "All Campaign Records," "Summary Audit Reports," etc.). There is no guide to inform visitors about required content in the various reports submitted ("Q1," "M1," "S1," etc.). There is no way to tell if a measure finance committee has spent its funds supporting or opposing any particular candidate. The reports available are not sortable. Researchers also were not able to open any requested document in excel form.

Despite this, comprehensive information does exist for the visitor if he or she can find it among the various groupings of campaign finance reports, and according to the clerk this information is available instantaneously once it is submitted by the candidate.[119]

One additional note: the clerk's web site contains a number of very helpful documents, including many which provided historical context, that were hidden from view unless a visitor happened to press a link on the "Elections" page on the City Clerk's site for "procedures" (which was embedded in the sentence: "The City Clerk established campaign procedures that publicly financed candidates for political office follow under the Open and Ethical Election Code."). A list of very helpful documents was displayed. Unfortunately, that link has been removed recently and the site no longer informs tell visitors how to find this trove of documentary information.

Proposed Solution:

The most basic change would edit the first page of the city's web site so that visitors would see a link for "City Elections Information" instead of the current "Upcoming Elections," which is misleading and incomplete. Once the visitor has

[119] Interview with City Clerk Autio, September 2010.

navigated to the city clerk's section of the web site, there should be clear, headline-type links leading visitors to:

- Important dates for candidates and voters, and specific information about upcoming elections.
- Campaign finance disclosure reports for candidates and committees, including a legend explaining (1) the substance of the reports that can be found under specific headings and (2) what the abbreviations on the reports stand for (i.e., "S1," "M2," etc.).
- Archived information about past elections, including complete lists of candidates and comprehensive election results.
- The City Charter and all regulations relating to municipal elections.
- A historic archive of all statutes and other ordinances, regulations, court cases, and reports relating Albuquerque's municipal elections.

These changes would not be difficult to implement, and would greatly enhance the accessibility of the information that is already there.

G. Improved Disclosure Reports

Candidates, including those running for mayor, did not have to decide whether they would run until nominating petitions were due on April 28, 2009. Citizens could not follow early contributions and expenditures, however, because the city's campaign finance reporting system has software flaws that make some important information difficult, if not impossible, to retrieve. Specifically, there are no dates displayed to

website visitors for individual transactions, despite the fact that candidates are required to keep records of "all financial records pertinent to the campaign."[120]

By far the most confusing example was that of then incumbent, Mayor Martin Chavez. Voters interested in how his fundraising efforts would comply with the OEE were probably left scratching their heads. The Mayor filed quarterly disclosure reports as a current office holder, including those due for 2008. In addition, he filed OEE reports on seed money contributions and in-kind contributions on January 1, 2009, and April 1, 2009. These reports, like all disclosure reports posted on the city clerk's web site, were immediately available to interested citizens when they were electronically filed.

Even in their most final form, however, none of the reports available on the city's web site included the date of any transaction. It was therefore nearly impossible to follow the money raised and spent by the Mayor from the first report required of him in 2009 to the first campaign finance report required of all candidates on July 17, 2009. In a January 15, 2009, quarterly report, the Mayor reported contributions of $41,050 and expenditures of exactly the same amount, but there are no dates for any contribution or expenditure. Voters were left in the dark about when this money actually was raised or spent.

In addition, site visitors were likely perplexed because news reports told them that the Mayor had gathered all the necessary $5 qualifying contributions by March 6, 2009[121] but apparently had done so without raising or spending any seed money.[122] At the same time, other candidates reported raising and spending significant amounts of seed money

[120] Charter, Art.XIII, Section 4 (J) (2).
[121] Marjorie Childress, "ABQ Mayoral Candidates Make Progress on $5 Contributions – and Mayor Chavez is Already Done," *The New Mexico Independent*, March 6, 2009.
[122] Summary Audit Reports: M1, M1 and Q3. In the report labeled Q3, Chavez reported that "contributions and expenditures for the third quarter, related to my re-election, are reported in the S-1 campaign disclosure report filed on July 17, 2009." There is no Q2 report (which was due April 15, 2009) on the City's web site; there are no dates listed for contributions and expenditures listed in the S1 report. http://cognosout.cabq.gov/cognos8/cgi-bin/cognos.cgi.

to obtain qualifying contributions. State Senator Richard Romero raised $34,280 in seed money and expended $25,454, according to reports he filed on January 1 and April 1, 2009. State Representative Richard Berry raised $23,936 in seed money and spent $8,316. Councilor M. Debbie O'Malley raised $21,900 in seed money and spent $16,139, before she withdrew from the mayoral race on March 14. Councilor Michael Cadigan raised $9,460 in seed money and spent $8,286, before he also withdrew on March 16, 2009.[123] Romero and Berry turned in sufficient qualifying contributions late in March 2009.

Proposed Solution:

Require that each disclosure report electronically filed with the city clerk include the date of each individual transaction, whether it is a contribution or expenditure, and show the dates on the reports that are accessible by voters. The only dates currently associated with the campaign finance information on the web site are those upon which reports are due. This is not an appropriate level of information in a system that holds itself out to voters as the source of campaign spending information in general, and should take pains specifically to clarify the spending of taxpayer dollars with regard to publically funded campaigns. It also falls short of best practices for campaign finance disclosure.

[123] The data on seed money contributions and qualifying period expenditures was retrieved from M1 and M2 reports for the candidates indicated found at http://cognosout.cabq.gov/cognos8/cgi-bin/cognos.cgi.

VI. FINDINGS

Since its implementation,

- The OEE has dramatically reduced expenditures in municipal campaigns and restored spending levels that are acceptable to city residents.
- Campaigns have been characterized by a vigorous debate of issues, rather than by aggressive media campaigns by incumbents, well funded by special interests.
- The OEE has been used by more than 60% of candidates appearing on the municipal ballot, including all three mayoral candidates in 2009.
- Sitting elected officials have overwhelmingly used the OEE: eight of the ten current elected officials were program participants, including three newcomers to the municipal stage of whom two were newcomers to elected politics.
- There has been no apparent misuse of OEE funds.
- Participating candidates have not exceeded expenditures limits.
- Opposing funds, while they have been used just once and without effect in that race, have perhaps helped to limit campaign spending as privately-funded candidates and measure finance committees appear to have moderated their spending.

VII. CONCLUSION

CGS believes that Albuquerque's Open and Ethical Election program can meet the challenges that lie ahead and remain a stable program for years to come. Our recommendations will help assure that the program will continue to achieve its ambitious goals.

The citizens of Albuquerque should be proud of their impressive civic achievement in adopting and implementing the Open and Ethical Elections program. Their determination to reduce expenditures in municipal campaigns has been richly rewarded. The long-term prospects of the OEE, however, will depend on the city's careful stewardship to assure that its fundamental goals continue to be met. With minor course corrections, the OEE will stand as a model for other municipalities where citizens strive to gain control of the distorting effects of money in civic elections.

Appendix

FORM 5

My signature represents that on this date I declare, under penalty of perjury, that I am a registered voter in the City of Albuquerque and live in Council District ____. I provided a $5 contribution to support the allocation of public funds to the candidate named below.

I personally contributed $5 of my own money, in cash or by check, and for which I received no compensation, to _____, a candidate running for [insert appropriate race], in the municipal election to be held on [insert date], or his/her agent, _____ [insert name of contribution gatherer].

I understand that if any part of this declaration is untrue, I will be subject to penalties and fined a minimum of [a deterrent amount as determined by the Council].

DATE:_____ SIGNED:_____

REGISTERED NAME OF VOTER:_____

REGISTERED ADDRESS OF VOTER:_____

_____

CANDIDATE PETITION SIGNED:_____YES

_____NO

I witnessed the signature of this voter and personally received a $5 qualifying contribution from him/her on this date. I gave nothing of value in return.

DATE:_____ SIGNED:_____

NAME OF CANDIDATE:_____

NAME OF AGENT (if applicable):_____

Public Campaign Financing in Albuquerque:

Citizens Win with Clean Money Elections

Citizens Win concludes that Albuquerque's new system of public campaign financing for municipal elections has been markedly successful. Eight of the city's ten currently elected officials accepted public financing to conduct their campaigns in the last two elections. Candidates decreased their spending. Campaigns focused on issues not fundraising. Large, privately funded campaigns did not materialize. Office holders reported they would accept public financing again instead of raising private donations.

Citizens Win recommends that Albuquerque consider two innovative CGS proposals to give candidates additional public funding when voters lack sufficient information to make informed choices four weeks before the election. Either approach would encourage candidates to participate in the city's public campaign financing program without implicating the First Amendment rights of high-sending opponents or other groups.

Citizens Win also recommends that mayoral candidates receive four extra weeks to gather $5 qualifying contributions. The city should conduct mandatory audits of the records of all participating candidates after each election campaign. And the city should upgrade its website to make campaign disclosure reports more accessible and comprehensible.

Citizens Win is one in a series of CGS reports on public campaign financing programs in states and cities, including Florida, Michigan, Minnesota, New Jersey, North Carolina, Wisconsin, Los Angeles, New York City, Portland, Suffolk County New York, San Francisco and Tucson.

CGS helps civic organizations, decision-makers and the media to strengthen democracy and improve government processes by providing rigorous research, nonpartisan analysis, strategic consulting and innovative media models of public information and civic engagement.

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