

Cary's Government-Funded Municipal Elections: A Model for North Carolina?

Until 1999, no candidate for municipal office in Cary, North Carolina had ever spent more than \$10,000 for a campaign.¹ The 1999 election changed everything. Cary Mayor Glen Lang spent \$37,000 to defeat challenger Mary Kamm, who raised \$147,000, largely with donations from developers opposed to Lang's "slow-growth" policies.² In addition, an unsuccessful candidate for Cary Town Council, Bob Hayworth, raised \$47,000, with developers accounting for more than ninety percent of his contributors.³ In response, Mayor Lang and others on the Town Council vowed to "ensure that the average citizen can be elected, and that various special interest groups cannot buy elections."⁴ To realize this goal, Cary enacted a campaign finance reform ordinance combining voluntary spending and fundraising limits with partial government funding⁵ for some municipal candidates⁶—the first such program in North Carolina.⁷

1. Jay Price, *Four Cary Candidates Accept First Money from Town's Coffers*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 16, 2001, at 3B [hereinafter Price, *Four Cary Candidates*] (noting that such unprecedented spending was one of the primary reasons for the proposal of government funding of elections in Cary).

2. *Id.* Lang and his supporters enacted slow-growth policies to maintain open space by creating buffers around creeks, establishing a fund to preserve open space, encouraging affordable housing, and charging higher use fees to commercial developers. See, e.g., Jay Price, *Council Seeks Diversity of Age, Wealth in Cary's Growth*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 24, 2001, at 1B (describing the impact of charging higher use fees in Cary); Jay Price, *Year-end Numbers Show Slow Growth Works, Cary Boasts*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 10, 2001, at 1B (detailing Cary's leaders' plans for future growth in the town).

3. Price, *Four Cary Candidates*, *supra* note 1.

4. Jay Price, *Campaign Finance Priority in Cary*, NEWS & OBSERVER (Raleigh, N.C.), July 15, 2000, at 3B [hereinafter Price, *Campaign Finance Priority*] (quoting Mayor Lang).

5. Professor Bradley A. Smith asserts that systems commonly referred to as "public" funding systems are misnamed. Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 592 (1999). "Campaigns are funded by the public now—by hundreds of thousands, even millions of citizens who make voluntary contributions to various candidates and organizations. What is euphemistically called 'public' funding actually means 'government' funded campaigns, or 'tax' funding of campaigns." *Id.* Throughout this Recent Development, I will use the terminology advocated by Professor Smith.

6. The ordinance reimburses the expenses of the top two finishers in a given race, less the amount they raised, as long as their expenditures remain below an established maximum. For example, a candidate for mayor can spend up to \$25,000, and must raise at least \$5000 to qualify, so she can at most receive \$20,000 in taxpayer funds. See CARY,

This Recent Development considers the objectives and functioning of Cary's system and its ineffectiveness in addressing the perceived ills of a privately financed system. It concludes that this system is a poor model for future governmental funding systems in North Carolina.⁸

In enacting its taxpayer-funded campaign system, the Cary Town Council identified several purposes commonly acknowledged as foundations for any campaign finance reform initiative.⁹ Cary's

N.C., ORDINANCE 01-013.1 § 2-55.8 (2001), at <http://www.townofcary.org/depts/tcdept/01013-1.htm> (last visited Jan. 30, 2002) (on file with the North Carolina Law Review).

7. Jay Price, *Cary Council Passes Campaign Finance Reform*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 15, 2000, at 1B [hereinafter Price, *Cary Council Passes Campaign Finance Reform*]. In 1988, North Carolina enacted a campaign financing act to provide government funding to candidates for Governor and the Council of State. See Act of July 7, 1988, ch. 1063, 1987 N.C. Sess. Laws 466, 466-71 (codified at N.C. GEN. STAT. §§ 163-278.46 to -278.57 (1999)). The Act was later amended to allow government funding only for gubernatorial candidates. See Act of June 25, 1991, ch. 397, sec. 1, 1991 N.C. Sess. Laws 740, 740-41 (codified at N.C. GEN. STAT. §§ 163-278.46 to -278.57 (1999)). This system establishes a fund for candidates from voluntary contributions of taxpayers due a state income tax refund. See N.C. GEN. STAT. § 163-278.46 (1999). Gubernatorial candidates who choose to accept government funding must limit their expenditures to one dollar multiplied by the number of votes in the most recent contested gubernatorial election. *Id.* § 163-278.48. A candidate receiving government funds is entitled to dollar-for-dollar matching for qualifying contributions from individuals or political action committees. See *id.* § 163-278.50(b). No candidate may receive government funds in an amount more than half of the expenditure limit in N.C. GEN. STAT. § 163-278.48. N.C. GEN. STAT. § 163-278.50(b) (1999).

The idea of governmental funding of political campaigns, especially for elected judges, has been gaining increasing currency lately. The American Bar Association's Commission on Public Financing of Judicial Campaigns recently published a draft report recommending that all states with contested judicial elections create a system of governmental funding as soon as possible. See ABA COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS, REPORT 31 (2001) [hereinafter ABA Report]. The North Carolina General Assembly considered several bills to provide for government funding in appellate court elections in its 2001 session. See, e.g., H.R. 1171, 2001 Gen. Assemb., 1st Sess. (N.C. 2001); S. 1054, 2001 Gen. Assemb., 1st Sess. (N.C. 2001).

8. For example, the North Carolina General Assembly considered a bill this past session that would have provided a voluntary government funding scheme for appellate court candidates. See S. 1054. The bill would provide \$137,500 for candidates for the North Carolina Court of Appeals, and \$201,300 for candidates for the North Carolina Supreme Court, provided they can verify their legitimacy by raising at least 250 donations of no more than \$500, getting 2,000 signatures on a petition, or by currently sitting on one of the courts. See Rob Christensen, *Senate Backs Funding for Judicial Races*, NEWS & OBSERVER, (Raleigh, N.C.), Nov. 20, 2001, at 3A; see also S. 1054 § 163-278.64(b) (stating qualifications required for government funding).

9. See, e.g., Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 563 (1999) (noting that two main problems of the present system are inequality of voter influence and concerns about the system's integrity); Smith, *supra* note 5, at 591 (observing that the two principal arguments against private funding of campaigns are the inequality of influence of some voters and the possibility of corruption by politicians who may feel beholden to contributors); Christopher J. Ayers, *Recent Development*, Perry v. Bartlett: *A Preliminary Test for Campaign Finance Reform*, 79

ordinance first notes that high campaign costs often discourage qualified citizens from running for office.¹⁰ This statement reflects a desire for equality of participation—any person, regardless of wealth, should be able to run for office.¹¹ The second concern stimulating Cary's ordinance is the appearance of impropriety in the democratic process that may arise from large campaign contributions.¹² A third objective of Cary's system is to avoid the perception that an elected official is beholden to contributors, or that those contributors will have special influence on a politician's behavior.¹³ The Cary Town Council concluded that a system of voluntary spending limits and government funding is a reasonable way to address these equality and political access concerns.¹⁴

N.C. L. REV. 1788, 1794–95, 1797–98 (2001) (stating that two compelling arguments for campaign finance reform are reducing corruption and allowing equal political opportunity by providing a level playing field for the electorate). The ABA Commission on Public Financing of Judicial Campaigns has also found that qualified candidates may be discouraged from running for judicial office if they lack access to large contributors and that the public may be concerned that donors receive special treatment from judges they supported. See ABA Report, *supra* note 7, at 20, 26; see also Briffault, *supra*, at 581–83 (noting the effects of large contributions on government and arguing that government funding would cut the ties that bind politicians to large donors).

10. See CARY, N.C., ORDINANCE 01-013.1 § 2-55.1(a).

11. See *id.* (asserting that large sums of money should not be required to take part in local elections). Cary Mayor Lang has argued that public funding “would ensure that the average citizen can be elected.” Price, *Campaign Finance Priority*, *supra* note 4 (quoting Mayor Lang); see also Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 276–77, 297–98 (1993) (asserting that less wealthy citizens are effectively priced out of political participation by the current fundraising system and arguing that this “wealth primary” unconstitutionally blocks nonaffluent citizens from political involvement and diminishes their influence in elections).

12. See § 2-55.1(b); see also *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976) (per curiam) (concluding that Congress properly could limit individual political contributions to diminish the appearance of corruption inherent in a wholly unregulated system).

13. Indeed, the ordinance states that no contributor should receive any special political access (or even the appearance of such access) for his contributions. See § 2-55.1(b). Mayor Lang affirmed this position, stating that government funding ensures “that various special interest groups can't buy elections.” Price, *Campaign Finance Priority*, *supra* note 4; see also *Buckley*, 424 U.S. at 26–27 (noting that the integrity of a democracy is damaged if contributors are able to get a quid pro quo from politicians). *But cf.* Smith, *supra* note 5, at 609, 619–20 (arguing that the very point of political participation is to influence political decision making, and that notwithstanding campaign contributions, most politicians act based on their best judgment or their constituents' opinions).

14. See § 2-55.1(c); see also *id.* § 2-55.1(e) (concluding that the ordinance will assure the public that qualified persons will not be discouraged from running for office and that no persons will receive special influence because of political donations).

Cary's approach has two main elements: a voluntary cap on campaign expenditures¹⁵ and a system of matching funds as an incentive for those who accept such a cap.¹⁶ To participate in the Cary system, a candidate for municipal office must sign a campaign contract within ten days of filing with the Board of Elections.¹⁷ This contract mandates that a candidate will neither raise nor spend more than \$10,000 in the case of candidates for a town council district or \$25,000 in the case of candidates for at-large seats or mayor.¹⁸ Importantly, however, "independent expenditures," expenditures in support of a candidate which are made without consultation or coordination by the candidate or her agents,¹⁹ do not count as contributions or expenditures for the purposes of the Cary system.²⁰

In some circumstances a candidate may escape from the campaign contract after signing. A candidate may rescind his campaign contract by written notice within fifteen days after the filing period ends if no other candidate for the same office has entered into a campaign contract.²¹ A candidate who does not rescind her contract and participates in a race with at least three candidates, one of whom has not signed such a contract, may elect to rescind her agreement if she is a runoff candidate competing against the non-signing candidate.²² In this case, the candidate is no longer bound by contribution or expenditure limits for the runoff period.²³

Once a candidate has signed the campaign contract and filed the state-required organizational report,²⁴ he has met the initial eligibility requirements for receiving government funding. Two obstacles

15. See *id.* § 2-55.6(a). In *Buckley*, the U.S. Supreme Court decided that the government could not impose a mandatory campaign expenditure cap consistent with the First Amendment. 424 U.S. at 58.

16. See § 2-55.8.

17. *Id.* § 2-55.4(a).

18. *Id.* § 2-55.6(a).

19. See N.C. GEN. STAT. § 163-278.6(9a) (1999).

20. CARY, N.C., ORDINANCE 01-013.1 § 2-55.6(b).

21. *Id.* § 2-55.4(c).

22. *Id.* § 2-55.4(d).

23. *Id.* A candidate who makes this choice can still receive government funding for expenditures for the election prior to his rescission, provided he has complied with all requirements of the ordinance and files all reports required. See *id.*

24. See N.C. GEN. STAT. § 163-278.40A (requiring filing of an organizational report with the county board of elections showing all contributions and expenditures made on a candidate's behalf). This report, showing a deposit of a qualifying amount of funding to the candidate's campaign account, must be filed with the town administrator within ten days of the close of the filing period. CARY, N.C., ORDINANCE 01-013.1 § 2-55.5. The qualifying amount is \$2000 for a candidate for a town council district, and \$5000 for a candidate for an at-large position, or mayor. *Id.* § 2-55.2.

remain for receipt of such funds. First, in order to ensure that only bona fide candidates receive taxpayer funds, only the top two finishers in each race are eligible to receive funds.²⁵ Second, to ensure that candidates have complied with the ordinance, candidates must file a final report with the Cary campaign finance administrator showing all contributions and expenditures, and indicating how taxpayer funds will be dispersed once received.²⁶

Candidates who receive taxpayer funds are paid out of a special account established with money from Cary's general fund.²⁷ After the election, candidates receive an amount equal to the difference between their expenditures²⁸ and the contributions they have received.²⁹ These government funds can only be used for a candidate's "direct" expenses, and not for "indirect" expenses such as the candidate's personal support or donation to another's campaign.³⁰

25. § 2-55.7(a)(1). Mayor Lang admitted that the top two candidate limit was implemented in part because the town could not afford to subsidize all candidates for office. See Cary Town Council, *Minutes*, Dec. 14, 2000 [hereinafter *Dec. 14 Minutes*] (statement of Mayor Lang) at <http://www.townofcary.org/agenda/councilmin00/cm121400e1.htm> (on file with the North Carolina Law Review).

26. § 2-55.7(a)(4).

27. *Id.* § 2-55.10.

28. Expenditures include any payment, purchase, distribution of funds, or contract to do the same, made to support the election of a candidate. See N.C. GEN. STAT. § 163-278.6(9) (1999). Candidates must calculate their own expenditures for their report to the Cary campaign finance administrator, see CARY, N.C., ORDINANCE 01-013.1 § 2-55.7(a)(4), as well as for reports to the County Board of Elections. See N.C. GEN. STAT. § 163-278.40C (1999).

29. See CARY, N.C., ORDINANCE 01-013.1 § 2-55.8(a)(1). For example, a candidate for mayor or an at-large seat can spend at most \$25,000 under his campaign contract and must raise at least \$5,000 to qualify, so he can receive at most \$20,000 if he is one of the top two finishers in such races. For district candidates, \$8,000 is available for the top two finishers in each district (\$10,000 spending cap less a \$2,000 qualifying amount). A candidate who spends less than the maximum or raised more than the minimum would receive a smaller amount of taxpayer funds. A candidate who spends more than her limit is in breach of her campaign contract and is not eligible to receive any taxpayer money. See *id.* § 2-55.8(b). Campaign expenditures not more than ten percent greater than the maximum, however, will not prevent a candidate from collecting government funds if the expenditures are unintentional. See *id.* A candidate who knowingly spends more than her limit is also subject to a civil penalty of \$500 or three times the amount exceeding the limit, whichever is more. *Id.* § 2-55.13.

30. See *id.* § 2-55.11(a). Direct expenses include common campaign expenditures such as printing campaign materials, buying media time, maintaining a campaign headquarters and telephones, and direct mailings. *Id.* Although candidates only receive taxpayer funds after the election, the prohibition on using the funds for indirect expenses is enforced through the final report. This report must indicate how the taxpayer money will be spent, and the campaign finance administrator will not disburse funds that will be spent in violation of the ordinance. *Id.* § 2-55.7(a)(4).

Cary's new system is problematic for several reasons, making it an inadequate prototype for other governments. First, the amount allocated for funding is probably too low to inspire additional participation or to reduce corruption.³¹ Second, by setting the maximum number of recipients at two per race, Cary's system may discourage any additional entrants.³² Further, because the outcome of the election dictates who will receive the funds, candidates must spend money with no guarantee of reimbursement.

With regard to the ordinance's first weakness, defining how much funding is "too little" to meet a governmental funding system's goals can be problematic.³³ As noted above, spending in the 1999 mayoral race far surpassed anything seen before in Cary.³⁴ Notwithstanding these unprecedented expenditures, if the candidates for mayor in 2003 choose to accept government funding, their expenditures will be limited to \$25,000.³⁵ Mayor Lang supported the Cary ordinance, so one can reasonably assume that he would accept the government funding and spending cap if he ran for reelection in 2003.³⁶ Given Mayor Lang's "slow growth" attitude,³⁷ one can also

31. Several commentators have asserted that a system that set the amount of government funding too low will rarely be used. See Briffault, *supra* note 9, at 587 (asserting that low limits "discourage participation, promote evasion, and increase the burdens of enforcement"); John C. Nagle, *Voluntary Campaign Finance Reform*, 85 MINN. L. REV. 1809, 1830 (2001) (arguing that the primary ways to inspire participation in a government financing system are to increase funding or to reduce conditions on spending); Smith, *supra* note 5, at 596 (noting that candidates will believe they can be more successful running a campaign with private money when government-financed amounts are too low); see also ABA Report, *supra* note 7, at 48 (stating that candidates will eschew private money only if government funds are sufficient to allow them to communicate effectively with the voters).

32. While it might be hard to quantify how many individuals actually chose not to enter the race because of the top two candidate limit, at least one failed candidate admitted he would not have spent as much of his own money had he known he would not qualify for town funding. See Lorenzo Perez, *Cary Gave Council Candidates \$27,000 for Campaigns*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 22, 2002, at 1B (quoting Don Hyatt).

33. Without mentioning a specific amount, Professor Briffault asserts that challengers must be given a "critical mass of funds" to be successful. Briffault, *supra* note 9, at 569. The ABA recommends "amounts sufficient to permit [candidates] to compete for judicial office effectively." ABA Report, *supra* note 7, at 49.

34. See *supra* text accompanying notes 1-3.

35. See § 2-55.6(a) (limiting mayoral candidates' spending to \$25,000).

36. See *Dec. 14 Minutes*, *supra* note 25 (statement of Mayor Lang) (arguing that candidates will feel pressure to participate in the program).

37. See Jay Price, *Cary Council To Discuss Campaign Spending Limits*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 14, 2000, at 3B (noting that Mayor Lang and his allies were outspent considerably by unsuccessful pro-development challengers); see also *supra* note 2 (giving examples of Cary's slow growth policies).

assume that, as in 1999, a well-funded candidate more supportive of development will be a leading challenger.³⁸

Any challenger, pro-development or not, is unlikely to choose to accept the \$25,000 spending cap.³⁹ Mayor Lang will have significant advantages because of his incumbency status, including better name recognition, the opportunity to provide services to his constituents, and more "free" campaign time through media coverage of his acts as mayor.⁴⁰ A challenger will most likely have to spend large amounts of money just to achieve some level of name recognition, which is essential to candidate viability.⁴¹ If both candidates are limited to \$25,000 and the challenger has to spend a greater portion of this amount on name recognition, the mayor will have relatively more money to spend on other forms of campaigning, such as public meetings or get-out-the-vote efforts.⁴² The spending cap can thus augment the inherent advantages of incumbency, severely limiting the challenger's chances of victory.⁴³ A serious challenger, or at least one

38. Slow growth council members, led by Mayor Lang, now dominate the town council. See Jay Price, *Cary Council Candidates May Play Musical Chairs*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 21, 2001, at 3B (noting the dominance of Mayor Lang's bloc). Although growth policies themselves were not a primary issue in the 2001 election, several candidates complained about high development fees, and at least one candidate noted that the tax burden could shift to homeowners if commercial growth was slowed too much. See Jay Price, *Cary Candidates Spar over Campaign Issues*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 7, 2001, at 3B [hereinafter Price, *Cary Candidates Spar over Campaign Issues*]. If this slow growth domination of the council and increased tax burden fully materializes, pro-development candidates may find more public support in the future.

39. See Nagle, *supra* note 31, at 1829-30 (arguing that challengers must be given sufficient funds to compete with incumbents to overcome their general hesitancy to accept a spending cap).

40. See Briffault, *supra* note 9, at 569 (noting these advantages and asserting that an important goal of campaign financing should be providing challengers with sufficient funds to challenge incumbents effectively).

41. See Smith, *supra* note 5, at 600 n.24.

42. Cf. Editorial, *A Cap in Cary*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 20, 2000, at A28 (arguing that a spending cap coupled with government funding would level the field for challengers, who must battle the incumbent's name recognition and fundraising advantages). While Cary's system may equalize the fundraising difference for agreeable candidates, the spending advantage would remain uneven. A challenger faces a serious disadvantage if she can spend only as much as the well-known incumbent. See Smith, *supra* note 5, at 605 (noting that challengers can compete on an equal basis with incumbents only by being allowed to spend more).

43. See Briffault, *supra* note 9, at 569-70 (arguing that candidates cannot be successful in government-funded campaigns unless they are given enough money to make them a viable alternative to the incumbent). Mayor Lang and Council Member Jack Smith contend that the measure is in fact anti-incumbent because incumbents usually have a significant fundraising advantage over challengers. See Price, *Cary Council Passes Campaign Finance Reform*, *supra* note 7. Their assertion, however, fails to address the

with access to large-scale funding, would almost certainly eschew the Cary system if she is to have any real chance for success.⁴⁴

One of Cary's goals in enacting the government funding system was to increase the possibility of participation by its citizens—those who are unable to raise significant amounts of contributions—in municipal elections.⁴⁵ With the spending limit set at \$25,000 for mayoral campaigns, increased participation seems unlikely.⁴⁶ It would be an almost impossible task for a political newcomer to defeat an incumbent mayor with a \$25,000 budget, even if the mayor similarly has limited his own spending.⁴⁷ The only viable challenger will be one who is able to raise large amounts of donations. The same holds true for open seats, when no candidate has the incumbency advantage.⁴⁸ Once one or two candidates have broken away from the group and have decided to raise and spend significantly more than their opponents, the "citizen-candidate," who is unable to raise a competitive amount of money, has little incentive to remain in the race.⁴⁹ With the spending cap for government funding set so low, participation by those unable to raise significant donations will

spending problem for a challenger who is limited to spending the same amount as the incumbent.

44. See Nagle, *supra* note 31, at 1829 (noting that challengers are hesitant to agree to spending restrictions when their incumbent opponents already have the benefit of better name recognition among the electorate).

45. Mayor Lang stated that without a source of money, a candidate cannot defeat one funded by special interest groups, which results in a government that is not representative of its community. See Cary Town Council, *Minutes*, Feb. 17, 2000 [hereinafter *Feb. 17 Minutes*] (statement of Mayor Lang), at <http://www.townofcary.org/agenda/councilmin00/cm021700.htm> (on file with the North Carolina Law Review); see also CARY, N.C., ORDINANCE 01-013.1 § 2-55.1(a) (2001) at <http://www.townofcary.org/depts/tcdept/01013-1.htm> (last visited Jan. 30, 2002) (on file with the North Carolina Law Review) (noting that one of the purposes of the ordinance is to facilitate participation in elections by qualified people who lack access to large sums of money).

46. As noted above, the incumbent has significant advantages over challengers, including better name recognition and a better ability to raise money. See *supra* notes 40-42 and accompanying text.

47. Council member Jess Ward apparently agreed, arguing that the system favored incumbents because the equal amount of funding failed to address the incumbent's name recognition advantage. See *Dec. 14 Minutes*, *supra* note 25. On the other hand, Council member Jack Smith asserted that the equal funding level gives the challenger a fighting chance by eliminating the incumbent's fundraising advantage. See *id.* Determining whether Cary's system encourages new candidates is difficult because only one election has been completed under the new scheme. See *infra* notes 51-53 and accompanying text.

48. See Raskin & Bonifaz, *supra* note 11, at 289 & n.93 (noting that in elections for open seats in the United States House of Representatives, the candidate that raised the most money won seventy-one out of ninety-one races).

49. See Smith, *supra* note 5, at 605 (arguing that a candidate has little chance to win unless he can spend enough to make his name and positions known to the public).

remain small.⁵⁰ For example, in Cary's fall 2001 election for Town Council, only four out of the thirteen candidates opted to sign a campaign contract and to accept government funding.⁵¹ Two of the four were incumbents,⁵² so at least for now, apparently, few additional citizens are encouraged enough by Cary's system to enter municipal elections.⁵³

Cary's second main objective in enacting the ordinance was to reduce the appearance of corruption in elections.⁵⁴ When faced with a well-funded challenger who does not accept government funding, an incumbent might continue to stand by a commitment to a \$25,000 cap, but this course is fraught with risk. At some point, a challenger can spend enough to overcome the powers of the incumbency.⁵⁵ On the other hand, if the race is only between two candidates,⁵⁶ the incumbent can rescind the contract limiting his spending.⁵⁷ This response, however, also may present significant political risk for the

50. An amount that would be sufficient to encourage participation is difficult to quantify. See Raskin & Bonifaz, *supra* note 11, at 326 (arguing that the spending limits struck down in *Buckley* (which would have been \$152,000 in 1992), would not have been sufficient that year, when the average cost of a U.S. House race was \$543,000). The amount could be more than a municipality dependent on property tax revenue is willing to spend. Mayor Lang stated that the town "is not a source of unlimited funds" and that the ordinance establishes the maximum the town is willing to spend. *Dec. 14 Minutes, supra* note 25. Nevertheless, as this Recent Development explains, with Cary's funding limited to the top two finishers in a given race, even a substantially greater amount of government funding may not induce many more participants in future races. See *infra* notes 80-82 and accompanying text.

51. Price, *Four Cary Candidates, supra* note 1.

52. *Id.*

53. In the last pre-funding race, there were fifteen total candidates: four for mayor, two for an at-large seat, four for one district council race, and five for a second district seat. See Wake County Board of Elections, *November 2, 1999 Official Election Results*, at http://web.co.wake.nc.us/bordelec99Nov_official.htm (on file with the North Carolina Law Review). Nevertheless, changes in the numbers of candidates in a race cannot be attributed solely to changes in campaign finance systems. Incumbents may retire, choose not to run for personal reasons, or choose to run for a different office.

54. Mayor Lang argued that large contributions by special interest groups raise the possibility of corruption. See *Feb. 17 Minutes, supra* note 45; Price, *Campaign Finance Priority, supra* note 4 (quoting Mayor Lang) (asserting that government funding will lead to "clean government"); see also CARY, N.C., ORDINANCE 01-013.1 § 2-55.1(b) (2001) at <http://www.townofcary.org/depts/tcdept/01013-1.htm> (last visited Jan. 30, 2002) (on file with the North Carolina Law Review) (stating that large contributions may create the appearance of corruption).

55. See Smith, *supra* note 5, at 605 (arguing that challengers who can spend more than incumbents can overcome the advantages of the incumbency and have a chance to win).

56. For problems associated with races involving more than two candidates, see *infra* notes 69-82 and accompanying text.

57. See § 2-55.4(c).

incumbent.⁵⁸ In addition, if the incumbent rescinds his campaign contract, the election returns to the unregulated privately funded system that Cary had attempted to escape.

A third option is available if the incumbent is not interested in either facing a free-spending challenger or rescinding his campaign contract. Cary's ordinance specifically provides that "independent expenditures" are not counted as expenditures or contributions toward a candidate's spending limit.⁵⁹ Independent expenditures are expenditures made in support of a candidate without consultation or coordination by the candidate or her agents.⁶⁰ Hypothetically, supporters of incumbents constrained by the spending cap might take it upon themselves to purchase newspaper or television advertisements concerning the incumbent's policies, but not his candidacy.⁶¹ These advertisements may well have been designed and aired by the incumbent's campaign but for the spending constraints. Such advertisements are a form of "issue advocacy"⁶² and are closely related to "soft money."⁶³ Effectively, the incumbent's campaign is able to exceed the spending cap with the help of other allies.⁶⁴

58. An opponent will likely attack the incumbent if he supported the taxpayer funding system when proposed, but now shows an apparent lack of faith during an election. See Price, *Cary Candidates Spar over Campaign Issues*, *supra* note 38 (noting that challengers attacked incumbents for the increased spending that the Town Council had proposed). Of course, the challenger may also face the political risk of being branded the "big spender" who forced the incumbent to abandon his commitment to spending caps simply to defend his seat. See *Dec. 14 Minutes*, *supra* note 25 (statement of Mayor Lang) (asserting that a participating candidate can use negative advertising to attack a non-participating candidate for attempting to "buy" the election).

59. § 2-55.6(b).

60. N.C. GEN. STAT. § 163-278.6(9a) (1999); see also *FEC v. Akins*, 524 U.S. 11, 27 (1998) (noting that an independent expenditure is one made advocating the election or defeat of a candidate without consultation with any candidate). The Supreme Court has held that limits on independent expenditures are unconstitutional. See *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1995) (plurality opinion) (striking down limits on independent expenditures by political parties); *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam) (striking down independent expenditure limits for individuals).

61. If the advertisements are not coordinated with the candidate, they are independent expenditures and are not included in calculating a candidate's expenditures for purposes of the Cary ordinance. See CARY, N.C., ORDINANCE 01-013.1 § 2-55.6(b).

62. "Issue advocacy" includes advertisements paid for by parties or interest groups, intended to influence voters by discussing candidates' views on issues, but which do not expressly advocate voting for one candidate or another. See Smith, *supra* note 5, at 607 n.54.

63. "Soft money" is the term for the unregulated contributions made not to candidates directly but to political parties, which often are used to fund issue advertising. See *id.*

64. Soft money is considered such a problem on the national level that Congress recently passed a bill that will, among other things, ban soft money donations to national political parties and curb issue advertising. See David Rogers, *Senate Approves Measure*

Both government funded campaign systems and the current privately funded campaign system have drawn criticism for their encouragement of soft money.⁶⁵ Reformers have attacked soft money, arguing it destroys the integrity of government by creating an arena of influence for those wealthy enough to donate large amounts of soft money.⁶⁶ A system that gives influence to a limited number of wealthy voters, or the appearance thereof, is exactly what Cary hoped to avoid by enacting its government funding mechanism.⁶⁷ By setting its spending cap and level of funding so low, Cary's system may encourage a different kind of corruption in the form of increased use of soft money and issue advocacy, replacing the corruption of direct contributors with the corruption of indirect contributors.⁶⁸

To Curb Big Donations, WALL ST. J., Mar. 21, 2002, at A4. President Bush signed the bill into law on March 27, 2002. Lawrence McQuillan & Jill Lawrence, *Bush Signs Campaign-Finance Bill*, USA TODAY, Mar. 28, 2002, at A5, LEXIS, New Library, USA Today File. Senator John McCain, the leading proponent of the bill, has argued that it will remove "at least half a billion dollars out of political campaigns, and that's a good thing for the political process." Jim Drinkard, *Campaign Finance Bill Clears First Hurdle*, USA TODAY, Apr. 3, 2001, at A1, LEXIS, News Library, USA Today File.

65. See Briffault, *supra* note 9, at 586 (noting that soft money "essentially nullifie[s]" spending limits imposed in government funding systems); see also Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 TEX. L. REV. 1673, 1703 (1999) (calling soft money "the bane of most reformers today"); Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 179 (1998) (describing soft money and issue advocacy as the "villain du jour" for campaign finance reformers).

66. See Donald J. Simon, *Beyond Post-Watergate Reform: Putting an End to the Soft Money System*, 24 J. LEGIS. 167, 177 (1998) (asserting that soft money corrupts because large contributors expect a return on their investment).

67. Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1127, 1156 (1994) (arguing that dependence on soft money has rendered politicians more responsive to special interest groups than citizens and concluding that soft money should be banned to alleviate this problem); see *supra* text accompanying notes 9-14; see also Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 607-13 (2000) (arguing that, contrary to the assertions of soft money supporters, soft money does not produce more competitive elections by helping challengers overcome the spending gap relative to incumbents and that soft money does not increase party loyalty in congressional voting).

68. Cary's leaders might consider imposing restrictions on the use of such funds, but this approach would ultimately fail. Cary cannot make banning issue advertisements a condition of the campaign contract because such advertisements are, by definition, independent expenditures. See N.C. GEN. STAT. § 163-278.6(9a) (1999) (defining independent expenditure as one supporting or opposing a candidate, but not made in consultation or coordination with the supported candidate or the opponent of the opposed candidate). If the advertisements were made in consultation with the candidate, then they are not independent expenditures and thus count against the candidate's spending limits. See CARY, N.C., ORDINANCE 01-013.1 § 2-55.6 (2001) at <http://www.townofcary.org/depts/tdept/01013-1.htm> (last visited Jan. 30, 2002) (on file with the North Carolina Law

Another potential problem with Cary's system is that only the top two finishers in any given race can receive taxpayer money.⁶⁹ One of the purposes of Cary's ordinance was to encourage qualified individuals to participate in municipal elections.⁷⁰ If, as previously assumed, an incumbent candidate who supported Cary's system would accept the funding, government funding would be available to, at most, one more candidate. This assumes such a candidate can end up higher in the polls than a well-funded challenger who will not accept government money.

Having three or more candidates for a municipal office is not necessarily unusual in Cary. For the 2001 election, eight candidates ran for one at-large seat; three candidates contended for the District A seat; and two competed for the District C seat.⁷¹ Only four of those thirteen accepted Cary's offer of taxpayer money.⁷² Incumbent council member Jack Smith took no risk in District C by accepting taxpayer money, because he was guaranteed to finish in the top two.⁷³ Incumbent Jennifer Robinson of District A,⁷⁴ on the other hand, took a gamble by accepting money in a three-person race, although had

Review) (counting all expenditures and liabilities as within the campaign contract, except for independent expenditures). If, on the other hand, the advertisements were truly independent, they cannot be counted fairly against a candidate's limit if she had no part in their planning. Cary might attempt instead to limit or ban soft money used for issue advertisements. This is what is being attempted on the federal level with the McCain-Feingold bill recently passed by Congress, but the constitutionality of such regulation is questionable. See Smith, *supra* note 5, at 190-96 (arguing that limits such as those in the McCain-Feingold bill are unconstitutional under a line of precedent beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976)); Ayers, *supra* note 9, at 1791-92 (arguing that the proposed bill would likely fail constitutional scrutiny as long as courts continue to follow *Buckley* jurisprudence); Drinkard, *supra* note 64, at A1 (noting that the limits on issue advertisements are considered to be the most vulnerable to constitutional attack). But see Daniel M. Yarmish, Comment, *The Constitutional Basis for a Ban on Soft Money*, 67 *FORDHAM L. REV.* 1257, 1277-79 (1998) (arguing that soft money expenditures can be limited constitutionally when there is a danger of corruption) (citing *Buckley*, 424 U.S. at 262-65 (White, J., concurring in part and dissenting in part)).

69. See § 2-55.7(a)(1) (attempting to ensure that only bona fide candidates receive taxpayer funds).

70. See *id.* § 2-55.1(a).

71. Wake County Board of Elections, *2001 Candidates for Election*, at <http://web.co.wake.nc.us/bordelec/2001Candidates.htm> (last visited on Apr. 18, 2002) (on file with the North Carolina Law Review).

72. Price, *Four Cary Candidates*, *supra* note 1.

73. Smith won his race and received \$6981.09 from the town. Perez, *supra* note 32.

74. Robinson was not technically an incumbent of District A. Prior to the 2001 election, she sat as an at-large member of the Town Council but chose to challenge then-sitting District A representative Jess Ward. *Id.* Nevertheless, Robinson properly is described as an incumbent because she benefits from the superior name recognition of an officeholder.

she ended up in a runoff against either of her two opponents, she would have been able to rescind her campaign contract.⁷⁵ At-large challengers Don Hyatt and Julie Robison, who also accepted the government money, assumed the greatest risk because they had a much higher chance of finishing outside the top two and thus forfeiting any taxpayer reimbursement for expenses they would incur.⁷⁶

Jennifer Robinson, at least, recognized her risk and was prepared to cover her own expenses.⁷⁷ Her attitude reflects the problems inherent in the "top two" arrangement. Being a person of wealth or the recipient of large donations should not matter in a governmentally funded election.⁷⁸ Yet Robinson admits she might have had to make up a funding difference if she had not finished in the top two.⁷⁹

The fact that the recipients of the government money are not identified until after the election provides an additional disincentive to participation in Cary's funding system.⁸⁰ Knowing that any reimbursement from the Town will not come until after the election, a candidate must have a source of money to spend during the campaign, which discourages participation by those less wealthy potential candidates.⁸¹ While Robinson may have been able to supply the money for her campaign up front and bear the risk of not being reimbursed, many people are not in that position. Cary's system may

75. See § 2-55.4(d); see also *supra* text accompanying note 22 (describing conditions for rescinding a campaign contract during a runoff).

76. Robison won the race in a runoff and received \$16,910.40. Perez, *supra* note 32. Hyatt, on the other hand, came in fifth and ended up spending \$20,000 for which he was not reimbursed. *Id.*

77. Price, *Four Cary Candidates*, *supra* note 1 (quoting Jennifer Robinson) ("Yes, it's a bet, but I'm not too worried about that because . . . I feel like I can make up the loss myself if I have to."). Fortunately for council member Robinson, she won her race and received \$3593.29 from the town. Perez, *supra* note 32.

78. Mayor Lang emphasized that one of the main goals of Cary's system was to allow the average citizen to run for office. See Price, *Campaign Finance Priority*, *supra* note 4; see also § 2-55.1(a) (stating that participation in municipal elections should not be conditioned on large campaign contributions).

79. See Price, *Four Cary Candidates*, *supra* note 1 (quoting Jennifer Robinson).

80. Candidates are paid after certification by the campaign finance administrator and the filing of their final report. See § 2-55.8(a).

81. Unsuccessful candidate Don Hyatt suggested that the post-election reimbursement runs counter to the ideal of increasing participation by citizens of lesser means, because they must borrow or raise money, or spend their own savings until after the race ends. See Perez, *supra* note 32. Hyatt proposed that reimbursement (after meeting prerequisites) on a "pay as you go" system would better address the needs of less wealthy candidates. See *id.*

cause some less wealthy citizens to avoid running for election because of the gamble involved.⁸²

Restricting taxpayer funds to bona fide candidates is an understandable goal.⁸³ No government wants to make its funds so easily available that people run for office just because the money is offered. Nevertheless, the desire to limit the number of government money recipients must be balanced against the goal of increased participation.⁸⁴ Cary's system already requires candidates to raise a qualifying amount of funding,⁸⁵ which itself helps ensure that a candidate is legitimate by showing his support among the voters.⁸⁶ Other ways to further verify a candidate's legitimacy would be to increase the qualifying amount, to increase the number of contributors required, or to mandate a number of signatures on a petition.⁸⁷ An outright limit on the number of recipients, however, serves to discourage participation, or, at the least, fails to encourage it.

82. For example, the political parties have found that many of their best potential candidates have chosen not to run for Congress because they do not want to get involved in the high stakes fundraising necessary to run a successful campaign. See Richard L. Berke, *Run for Congress? Parties Find Rising Stars Are Just Saying No*, N.Y. TIMES, Mar. 15, 1998, § 1, at 1. A post-election funding system like Cary's does not alleviate this fear for a qualified person who lacks access to money to fund the campaign before the results of the election are known.

83. See Smith, *supra* note 5, at 600 (arguing that funds should be available easily enough to encourage candidates, but not so easily as to encourage frivolous campaigns); ABA Report, *supra* note 7, at 51 (recommending that public funds be limited to "serious" candidates).

84. See Nagle, *supra* note 31, at 1830 (explaining that in order to encourage participation in a taxpayer-financed campaign program, governments must impose fewer conditions or increase funding).

85. See CARY, N.C., ORDINANCE 01-013.1 § 2-55.5 (2001) at <http://www.townofcary.org/depts/tcdept/01013-1.htm> (last visited Jan. 30, 2002) (on file with the North Carolina Law Review).

86. See ABA Report, *supra* note 7, at 52 (noting that a qualifying funding level shows that candidates have made a "tangible display of support").

87. For example, Maine uses increasing levels of required contributions to ensure the legitimacy of candidates for various offices. See ME. REV. STAT. ANN. tit. 21-A, § 1125(3) (West 2001) (requiring at least 2500 five dollar contributions for gubernatorial candidates, 150 five dollar contributions for state senate candidates, and 50 five dollar contributions for state house candidates); see also WIS. STAT. ANN. §§ 11.31(1), 11.50(2)(b)(5) (West 1996) (requiring donations of \$53,910 for gubernatorial candidates, \$3450 for state senate candidates, and \$1725 for state house candidates, all in \$100 amounts). The ABA Commission on Public Financing of Judicial Campaigns recommends requiring a candidate to show a certain number of small contributions to prove her legitimacy as a candidate, but acknowledges that a petition-based system, or one based on a party's showing in the previous election could also work. See ABA Report, *supra* note 7, at 51-52.

Despite its weaknesses, Cary's system is the first of its kind for a North Carolina municipality,⁸⁸ and as such can be regarded as a small step forward for advocates of government financing of elections. Still, Cary's ordinance is not a model that other municipalities or states should adopt, because it fails to accomplish its stated goals. With its funding limits and spending caps set so low, Cary's system may be unable to attract increased participation amongst those currently unable to participate in privately funded elections. Moreover, with funding available only to the top two finishers in a given race, persons of lesser means may be unwilling to take the risk of entering the race. Besides its failure to increase participation, Cary's system may increase, rather than reduce, corruption. The low spending caps may encourage some groups to turn to soft money or issue advertising to support their candidate indirectly. If one views soft money as a form of corruption,⁸⁹ Cary's attempt at reform might simply replace the corruption of large direct contributors for the corruption of large indirect, soft money, contributors. If a state or municipality is to provide a viable system of government funding, it must address these concerns.

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88. See Price, *Cary Council Passes Campaign Finance Reform*, *supra* note 7.

89. See, e.g., Simon, *supra* note 66, at 177 (arguing that soft money undermines the "core values" of democracy); Wertheimer & Manes, *supra* note 67, at 1144 (asserting that by circumventing contribution limits, soft money can nullify the advantages of a government funded campaign system).