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**ATTORNEY-CLIENT PRIVILEGED COMMUNICATION/
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Via E-Mail: cconnolly@boro.belmar.nj.us and Fax

Colleen Connolly, Business Administrator
Belmar Municipal Building
601 Main Street
Belmar, New Jersey 07719

Re: Borough of Belmar's "Pay to Play" Ordinances

Dear Ms. Connolly:

You have requested that this firm review the Borough of Belmar's "Pay to Play" Ordinances, in particular Ordinance 4-19 "Restrictions on Campaign Contributions by Vendors to the Borough" and Chapter IX "Conflicts of Interests." We have reviewed the Borough's current ordinance and draft Ordinance No. 2016-01, which would amend and supplement Chapter IX "Conflicts of Interest." Our analysis is provided below.

It is our opinion that the Borough's current "Pay to Play" Ordinance goes beyond the scope of the municipality's power as it broadly restricts vendors who have made expenditures or contributions to political campaigns from contracting with the Borough. Specifically, the current Ordinance exceeds the Municipality's authority due to its potential restriction of State campaign contributions; inclusion of conflict of interest penalties; temporal restrictions that are in conflict with State Election Law; and broad definitions that raise First Amendment concerns. As such, it is recommended that the Borough amend the Ordinance to comply with New Jersey Law.

Generally, N.J.S.A. 40:48-2 authorizes municipalities in the State of New Jersey to adopt such ordinances, regulations, rules and by-laws as necessary and proper for a good government. Further, N.J.S.A. 40A:11-51 authorizes the Borough to adopt ordinances limiting the award of public contracts to entities that have made campaign contributions; and limiting the contributions that such vendors may make. However, the language of current "Definitions" 9-1, Chapter IX, "Conflicts of Interest" includes language that goes beyond restricting the municipality from definition is overly broad and violates the State's pay to play laws as it may be read to restrict out

of County and State-level contracting and contributions. Thus, this definition should be removed from the Ordinance.

In Schroeder v. Cnty. of Atl., 440 N.J. Super. 251 (2014), the Court provided that:

The state pay-to-play statute ...restricts contributions as they relate to state contracts only. Therefore, the state's ability to contract with donors remains exclusively subject to the state pay-to-play statute. It is also important that the state has conferred the power on local government to create their own pay-to-play laws which exclusively dictate the effect of campaign contributions of any type on the ability to contract with the local government and not with the state.

Id. at 266-67, emphasis added. In other words, a municipality cannot restrict contracts between the State and its vendors. Id. The Borough should legally revise its current ordinance in this respect to regulate only municipal election contributions and eliminate broad language that may implicate State-level activity, over which the Borough does not have jurisdiction.

In addition, the current Ordinance's inclusion of "Prohibited Activities," Chapter IX, Section 9-3, also goes beyond the municipality's authority as it regulates elected officials with respect to ethical considerations and imposes penalties with respect to same in Section 9-10. While, as noted above N.J.S.A. 40:48-1 gives a municipality broad police powers to prescribe the duties of its officers, it has been held that the Statute does not give the municipality the authority to regulate ethical conduct.

In Traino v. McCoy, 187 N.J. Super. 683 (1983) the Court provided that:

[N.J.S.A. 40:48-1] has been interpreted as not giving a municipal governing body any authority to affect the duties and terms of office of elected officials. In Lynch v. West New York, 115 N.J. Super. 1 (App. Div. 1971), the court struck down an ordinance which altered the eligibility and the terms of service of the Commissioners of West New York. It held:

The above statutory provision [N.J.S.A. 40:48-1] does not apply to or warrant the making of an ordinance prescribing and defining the duties and terms of office or commissioners elected by the people. Their duties and terms of office are prescribed and defined by acts of the Legislature. The commissioners are not "officers or employees" to be paid compensation for the services rendered in their employment. The commissioners constitute a "governing body of the municipality."

For the same reasons, N.J.S.A. 40:48-1 does not authorize the adoption of an ethics code which regulates elected officials.

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Id. at 644. Here, the Borough has enacted what appears to be ethical prohibitions with attendant penalties, which are clearly within the ambit of the State Legislature. As such this portion of the Ordinance should be amended to legally conform with N.J.S.A. 40:48-1.

Further, a municipality may not preempt federal law or state constitutional law in regulating local campaign contributions. For example, "pay to play" regulations may not restrict the free speech rights of individuals or organizations. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). From our initial review of the current ordinance it is subject to a First Amendment challenge as it contains a broad description of "campaign contributions" including "pass through" contributions. Chapter IX, Section 9-1. Such broad language prohibits independent expenditures and has been deemed unconstitutional. Id. see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 U.S. 2806 (2011).

The definition of "entity" in the Ordinance is also problematic because it does not conform to the definition of "business entity" as provided in N.J.S.A. 19:44A-20.7. Currently, the Ordinance broadly defines the term as: "Entity shall mean any corporation, professional corporation, joint venture, general or limited partnership, trust or limited liability company, or subsidiary or parent of any of the foregoing." The current ordinance further violates the law as it does not carve out exceptions for labor unions within the definition of "entity." Chapter IX, Section 9-1. Such restrictions have been held to be invalid. Commc'ns Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. 229, 274 (App. Div. 2010). The Ordinance should be revised as recommended above.

Please note that any local ordinance adopted regarding campaign expenditures must be filed with the Secretary of State. N.J.S.A. 40A:11-51(c). Upon review of the Secretary of State's website it does not appear that the current Ordinance was so submitted.

Lastly, please be advised that we have reviewed the Referendum Petition in Protest of the Adoption of Ordinance No. 2016-01 and recommend that the Borough reject the Petition.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



RAMON E. RIVERA
For the Firm

RER/STD/jw