



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 13, 2024

John Bakker
City Attorney
Dublin City Manager
1999 Harrison Street, 9th Floor
Oakland, California 94612

Re: Your Request for Advice
Our File No. A-24-004

Dear Mr. Bakker:

This letter responds to your request for advice regarding Section 84308 (the “Levine Act”) of the Political Reform Act (the “Act”).¹

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. Is the City’s rulemaking proceeding to amend the Downtown Dublin Specific Plan (“DDSP”) to eliminate minimum parking requirements and modify parking regulations a “proceeding involving a license, permit, or other entitlement for use” for purposes of Section 84308?
2. For purposes of returning contributions pursuant to Section 84308(d)(1), as interpreted by Regulation 18438.7(c), does the phrase “knows or should have known” about a proceeding include actual knowledge, or does it specifically refer to constructive knowledge due to the publication of a meeting agenda?

CONCLUSIONS

1. No, the DDSP proceeding does not fall within the scope of Section 84308 as a proceeding involving a license, permit, or other entitlement for use. As discussed below, the proceeding involves general policy decisions where the interests affected are many and diverse. Consistent with past advice, the proceeding does not fall under Section 84308, as it was initiated by the City and not

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

the result of formal or informal request by the affected business and property owners, nor does it involve a contract with the affected owners.

2. Yes, based on the plain language of Section 84308(d)(1), the circumstances in which an officer “knows or should have known” about a proceeding necessarily include where the officer has actual knowledge, which may predate the publication of a meeting agenda.

FACTS AS PRESENTED BY REQUESTER

Linda Smith is the City Manager for the City of Dublin (“City”). Ms. Smith wants to advise the City Council when proceedings subject to Section 84308 are pending, such that the City Councilmembers will be able to consider the consequences of accepting contributions from persons that might be parties, participants, or their agents in such proceedings.

The City Council will consider amendments to the Downtown Dublin Specific Plan (DDSP) that propose to eliminate minimum parking requirements and modify parking regulations for all land use designations located within the DDSP area. These amendments address recent changes in state law (Assembly Bill 2097) that prohibit a public agency from imposing or enforcing minimum automobile parking requirements on most land use designations located within one-half mile of public transit.

The DDSP area is located in the southwestern portion of the City and is approximately 284 acres in size. This area is generally bound by Village Parkway, Interstate 580, San Ramon Road, and Amador Valley Boulevard. There is a Bay Area Rapid Transit station within the DDSP area, which makes AB 2097 applicable in some portions.

The City proposes to eliminate minimum parking requirements to the Retail District, Transit-Oriented District and Village Parkway District of the City to both comply with AB 2097 and to go beyond the requirements of state law, eliminating parking requirements for all new and existing development in the DDSP. The parking amendments were presented by City staff to the Planning Commission on October 24, 2023, and a resolution was adopted to recommend that the City Council approve the proposed DDSP Amendments. Next, a presentation and resolution will be presented to the City Council to amend the DDSP to eliminate parking requirements in the Retail District, Transit-Oriented District, and Village Parkway District.

There are a limited number of property owners within the DDSP area, including one large property owner. The elimination of parking restrictions may increase the development potential of the property within the DDSP area. The proposed changes were initiated by the City, and none of the property owners or other beneficiaries of the proposed changes played any part in initiating the proposed changes.

The City is presently unaware of any specific persons who may seek to comment on the DDSP parking proceeding, but it is possible that some of the property owners and business owners in the DDSP parking proceeding will be interested and become involved in the proceedings. Similarly, third parties may support or oppose the proceeding. Some of those potential participants and their agents may be contributors to campaigns.

In a follow-up email, you provided data on the number of businesses and business owners in the DDSP, as well as those within a 0.5 mile radius of the BART Station, as those businesses are already receiving the benefits of the City's changes to parking regulations under state law. You clarified the City is seeking to make the parking regulations uniform for ease of administration. There are 565 businesses located in the DDSP. Of those 565 businesses, 185 are within 0.5 miles of the BART Station and 380 are located further than 0.5 miles away. There are 93 unique property owners in the DDSP. Of those 93 property owners, 37 have businesses located within 0.5 miles of the BART Station and 56 have businesses further than 0.5 miles away.

ANALYSIS

Rulemaking Proceedings as Entitlement for Use Proceedings

The Act's "pay to play" restrictions, contained in Section 84308, aim to ensure that officers of government agencies are not biased by contributors or potential contributors of large campaign contributions, who might appear before them in a proceeding involving a license, permit or entitlement for use. Section 84308 is aimed not only at actual corruption or bias, but also the appearance of corruption or bias which may occur if a public officer were to solicit or accept contributions from a party or financially interested participant while a proceeding is pending before the public officer's agency or has recently concluded. Among the statute's prohibitions, Section 84308(b) provides:

While a proceeding involving a license, permit, or other entitlement for use is pending, and for 12 months following the date a final decision is rendered in the proceeding, an officer of an agency shall not accept, solicit, or direct a contribution of more than two hundred fifty dollars (\$250) from any party or a party's agent, or from any participant or a participant's agent if the officer knows or has reason to know that the participant has a financial interest, as that term is used in Article 1 (commencing with Section 87100) of Chapter 7.

Section 84308's restrictions and requirements only apply in the context of a "proceeding involving a license, permit, or other entitlement for use." Section 84308 defines "[l]icense, permit, or other entitlement for use" to mean "all business, professional, trade, and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises." Regulation 18438.2(a) further defines the phrase "proceeding involving a license, permit, or other entitlement for use" to mean:

[A]ny proceeding to grant, deny, revoke, restrict, or modify a license, permit or other entitlement for use, that does not solely involve purely ministerial decisions and is:

- (1) Applied for by the party;
- (2) Formally or informally requested by the party; or
- (3) A contract between the agency and the party or a franchise granted by the agency to the party, other than a contract that is competitively bid, a labor contract, or a personal employment contract. . . .

Under the facts presented, the DDSP amendments will alter the affected business or property owner's entitlement for use of their properties in regard to parking requirements for new and existing developments. However, the amendments were initiated by the City, rather than applied for or otherwise initiated by a party, with the goal of satisfying and exceeding recent requirements under state law. There is no indication the proposed DDSP amendments are the result of a formal or informal request by property or business owners within the DDSP. The DDSP amendments, as described, also do not involve a contract of any sort between the City and affected property or business owners. Finally, as such, the DDSP parking proceeding does not meet the definition of "proceeding involving a license, permit, or other entitlement for use," such that Section 84308's restrictions and requirements are not applicable.

You have also asked for clarification on the instances in which a "rulemaking" proceeding can fall within the scope of Section 84308. Necessarily, any determination of whether a rulemaking proceeding may fall within the scope of Section 84308 would require a case by case determination based on the nature of the proceeding. For instance, in the *Quadri* Advice Letter, No. A-02-096, we advised that a rulemaking procedure impacting three cement plants qualified as a proceeding involving a license, permit, or other entitlement for use for purposes of Section 84380. Subsequent letters have cited *Quadri* for the general proposition that a classification as a "rulemaking proceeding" does not inherently indicate a proceeding falls outside the scope of Section 84308. (See, e.g., *Waldman* Advice Letter, No. I-08-005; *Dorsey* Advice Letter, No. I-06-128.)

Generally, we can advise only that a rulemaking proceeding may be considered a "proceeding involving a license, permit, or other entitlement for use, and subject to 84308, if it implicates or targets a limited number of persons, or businesses, or properties. To the extent you have additional questions regarding a rulemaking proceeding that may implicate or target a limited number of persons, businesses, or properties, you should seek additional advice identifying the specific proceeding.

Knowledge of a Proceeding

Section 84308(d)(1) provides:

If an officer receives a contribution which would otherwise require disqualification under this section, and returns the contribution within 30 days from the time the officer knows, or should have known, about the contribution and the proceeding involving a license, permit, or other entitlement for use, the officer shall be permitted to participate in the proceeding.

Regulation 18438.7(c) provides:

For purposes of Section 84308(d)(1), an officer can return a contribution if:

(1) The contribution was received from a party prior to the officer knowing or having reason to know that a proceeding involving the party had commenced. For purposes of this provision, an officer serving on a governing body or board knows or has reason to know a proceeding involving the party has commenced if the proceeding has been noticed on the agenda for a public meeting of the body or board; or

(2) The contribution was received from a participant prior to the officer knowing or having reason to know that the participant had a financial interest in the proceeding.

You ask whether the above language may be interpreted such that an official would be able to return a contribution within 30 days of a proceeding being noticed on the agenda, rather than within 30 days of the time the official had prior knowledge of the proceeding. Section 84308(d)(1) states that the return must be within 30 days “from the time the officer knows, or should have known, about the contribution and the proceeding.” The language in Regulation 18438.7(c) provides a definitive time in which the officer is deemed to have constructive knowledge of a proceeding, as the officer will “know or have reason to know” of a proceeding when it has been noticed on an agenda. Nothing in Regulation 18438.7(c) would negate an official’s actual knowledge or constructive knowledge of a proceeding prior to the agenda posting in terms of setting the 30-day time period to return the contribution as required under Section 84308(d)(1).

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

KC:aja