



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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December 29, 2023

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Re: Your Request for Informal Assistance  
**Our File No. I-23-178**

This letter responds to your request for advice regarding Section 84308 of the Political Reform Act (the “Act”).<sup>1</sup> Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

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. Your request for advice is general in nature as it does not specifically identify a governmental decision pending before the Anaheim City Council. Accordingly, we are treating your request as one for informal assistance.<sup>2</sup>

### QUESTION

Is the Anaheim City Council’s mandated periodic review of a development agreement a proceeding subject to Section 84308 that would thus prohibit a City Council member from participating in the review if the Council member received a contribution of more than \$250 from a party or a participant or their agent?

### CONCLUSION

Yes. Section 84308 applies to a proceeding involving a “license, permit, or other entitlement for use” which includes all contracts other than a competitively bid, labor, or personal employment

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<sup>1</sup> 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.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

contract. (Section 84308(a)(5) and Regulation 18438.2.) The periodic review of a development agreement is a proceeding subject to Section 84308, as it is a substantive review of the contract agreement between the City and the applicant (project proponent) that involves a determination of substantial evidence of good faith compliance and may result in the City Council modifying or terminating the agreement.

### **FACTS AS PRESENTED BY REQUESTER**

You are the City Attorney for the City of Anaheim (“City”) and request advice on behalf of the City and its City Council members. The City Council is mandated by state law, and the City’s Enabling Ordinance and Procedures Resolution to periodically review all development agreements it has entered into at least once every twelve months after the City enters into a development agreement. Procedurally, the applicant is required to submit evidence of the applicant’s good faith compliance with the development agreement, and the City Council must, upon receipt of this evidence, determine on the basis of substantial evidence whether or not the applicant has complied in good faith with the terms and conditions of the development agreement.

If the City Council determines that the applicant has complied in good faith with the terms and conditions of the development agreement during the period under review, the review for that period is deemed concluded. If the City finds and determines that the applicant has not complied, the City Council may proceed to modify or terminate the development agreement or establish a time schedule for compliance. The City makes this type of determination on its existing development agreements multiple times a year.

### **ANALYSIS**

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 significant 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. Thus Section 84308 prohibits an officer of an agency from soliciting, directing or accepting contributions of more than \$250 from a party, participant or their agent while the proceeding is pending and for the following 12 months. (Section 84308(b).)<sup>3</sup> And, if the officer has received such a contribution in the preceding 12 months, the officer must disclose this on the record and not participate in the proceeding.<sup>4</sup>

At issue is whether the periodic review and determination of good faith compliance on the part of the applicant is a “proceeding involving a license, permit or other entitlement for use” for purposes of Section 84308. It is undisputed that the underlying development agreement proceeding is a contract that is subject to Section 84308. Section 84308(a)(5) states that a license, permit, or

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<sup>3</sup> Section 84308(d)(2) provides that an officer who is involved in a contribution in the 12 months following the final decision in violation of subdivision (b) may cure the violation by returning the contribution or excess amount within 14 days, but only if the officer did not knowingly or willfully accept, solicit or direct the prohibited contribution.

<sup>4</sup> Section 84308(d)(1) provides that an officer may participate in the proceeding if the contribution is returned within 30 days of when the officer knew or should have known about the contribution and the proceeding.

other entitlement for use proceeding includes “all contracts (other than competitively bid, labor, or personal employment contracts).” There is no assertion in the facts that this is a competitively bid contract. Thus the development agreement proceedings are subject to Section 84308.

Your inquiry is whether the periodic review of each agreement is also subject to Section 84308. Regulation 18438.2(a) states that a “proceeding involving a license, permit or other entitlement for use” means any 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.

The City Council’s periodic reviews are not ministerial. The review involves a substantive determination, based upon substantial evidence, of whether the applicant has complied with the terms and conditions of the agreement. If the City Council determines the terms and conditions are not being met by the applicant, the City Council may set a time for the applicant’s compliance, or it may modify or terminate the agreement. The review is not a general policy decision, it is specific to the applicant and the contract. Therefore the periodic review of the development agreement meets the definition of a proceeding subject to Section 84308.

#### *Pending Proceeding under Section 84308*

We note that Section 84308(b)’s restrictions apply while the proceeding is pending and for the following 12 months. Regulation 18438.2(b)(1) states that a proceeding is “pending” for purposes of Section 84308 in regard to the officer of the agency<sup>5</sup> only under the following circumstances:

(A) The decision is before the officer for the officer’s consideration. If the officer is a member of a governing body, this includes any item placed on the agenda for discussion or decision at a public meeting of the body; or

(B) The officer knows or has reason to know a proceeding involving a license, permit or other entitlement for use is before the jurisdiction of the agency

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<sup>5</sup> Regulation 18438.2(b) provides the following standard for determining if the proceeding is pending in regard to a party or a participant, or agent thereof:

(2) For a party or party’s agent, or a participant or participant’s agent, a proceeding involving a license, permit or other entitlement for use is pending when it is before the jurisdiction of the agency for its decision or other action.

for its decision or other action, and it is reasonably foreseeable the decision will come before the officer in the officer's decisionmaking capacity.

Accordingly, Section 84308's requirements and prohibitions will apply to the City Council's periodic review of development agreements.

If you have other questions on this matter, please contact me at [KHarrison@fppc.ca.gov](mailto:KHarrison@fppc.ca.gov)

Sincerely,

Dave Bainbridge  
General Counsel

**L. Karen Harrison**

By: L. Karen Harrison  
Senior Counsel, Legal Division

LKH:aja