



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 21, 2023

Randall Sjoblom
Senior Deputy
Office of County Counsel, County of San Diego
1600 Pacific Highway, Room 355
San Diego, CA 92101

Re: Your Request for Informal Assistance
Our File No. I-23-027

Dear Mr. Sjoblom:

This letter responds to your request for advice regarding the application of Section 84308 of the Political Reform Act (the “Act”).¹ Because your inquiry is general in nature, we are treating your request as one for informal assistance.² 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.

QUESTION

Is a decision to vacate an irrevocable offer of dedication (“IOD”) for a public easement considered a “proceeding involving a license, permit or other entitlement for use” subject to Section 84308 under the facts provided?

CONCLUSION

Yes. Section 84308 applies to any proceeding or action to grant, deny, revoke, restrict or modify “licenses, permits, or other entitlements for use.” We conclude that a decision to vacate an IOD or a public easement is a proceeding involving an entitlement for use.

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.

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

FACTS AS PRESENTED BY REQUESTER

An IOD is typically imposed as a condition of the approval of a tentative map per Government Code Section 66475. The government agency may later accept the IOD for purposes of streets, alleys, access, public utility easements, or other public easements. The IOD may be vacated by the same process as streets and other public easements, per Streets & Highways Code Section 8300 et seq. (See Gov. Code, § 66477.2(c).)

You state that requests to process a vacation of a public easement or an IOD happen several times each year. By way of example, you note that two items recently came before the San Diego County Board of Supervisors which concerned vacating IODs for public highway use. They had been deemed excess right-of-way and not needed by the County for future road improvements. One vacation would affect the owners of two parcels, and the other would affect the owners of three parcels.

In a follow up email, your office stated that vacation requests can include vacations of a street, highway, or public service easement (defined to include those for sewers, pipelines, pole lines, electrical lines, drainage, etc. *See* Streets & Highways Code § 8306). Vacation requests typically come from the property owners who are seeking to remove encumbrances from their property, and the County has discretion whether to act on those requests. The County may also be petitioned to consider the request by 10 or more affected property owners (or five or more for public service easements). Finally, the County can initiate a vacation proceeding on its own initiative.

A decision to approve the vacation of IODs would not affect the underlying land use permits that were previously approved. The vacation of the IODs would permit these owners to fully utilize the area of their properties that had previously been subject to the IODs and would likely result in a financial benefit to the value of the property. An approved IOD vacation would remove an encumbrance to the properties, and no entitlements would be granted to the owners.

ANALYSIS

The Act's "pay to play" restrictions, contained in Section 84308, aim to ensure that all officers of local 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.

As pertinent to the question posed, Section 84308 imposes two requirements on officers subject to the section. First, Section 84308(b) states: "[w]hile 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" (Emphasis added.)³

Second, Section 84308(c) requires that if an officer has received a contribution of more than \$250 during the past 12 months from a party or participant in a proceeding involving a license, permit or other entitlement for use pending before an agency, the officer must disclose that fact on the record of the proceeding and must recuse from the proceedings.

Your question concerns the definition of "entitlement for use." However, the term "entitlement for use" has not been defined within the express provisions of Section 84308. The overall scheme and purpose of Section 84308 suggests that the types of proceedings which should be covered by Section 84308 are those in which specific, identifiable persons are directly affected or in which there is a direct substantial financial impact upon the participants. The California courts have examined the term "entitlement for use" in other contexts. These decisions provide useful guidance; however, interpretation of the Act is not necessarily limited by interpretation of other laws. (See Section 81013.)

Examples of the types of decisions covered by Section 84308 include decisions on professional license revocations, conditional use permits, rezoning of real estate parcels, zoning variances, tentative subdivision and parcel maps, consulting contracts, cable television franchises, building and development permits, public street abandonments, and private development plans. (*Washington* Advice Letter, No. I-91-521.) Section 84308 applies to professional contracts, such as engineering, accounting and legal agreements which are not competitively bid, labor or personal employment contracts. (*Ibid.*)

Also illustrative of the scope of the term, is what has been excluded from the coverage of Section 84308. The California Court of Appeal in *City of Agoura Hills v. Local Agency Formation Com.*, (1988) 198 Cal.App. 3d 480, 497-498, explained in the context of disqualification under Section 84308 that "entitlement for use" does not cover proceedings in which general policy decisions or rules are made or where the interests affected are many and diverse. (Citing *Fallon* Advice Letter, No. A-85-050.) The law is intended to apply to decisions which have a direct and significant effect upon specific parties. (*Pleines* Advice Letter, No. A-87-220.)

Here, we examine whether a decision to vacate an IOD or easement is a proceeding involving an "entitlement for use." The California courts have also examined easements in other contexts—decisions that provide useful guidance for our present analysis. An easement is a "restricted right to specific, limited, definable use or activity upon another's property, which right must be *less* than the right of ownership." (*Scrubby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702.) An easement gives a nonpossessory and restricted right to a specific use or activity upon another's property. (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174.) An easement "is not a type of ownership, but rather an 'incorporeal interest in land ... "..." which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another.'"" (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020,

³ Section 84308(a)(5) defines "license, permit, or other entitlement for use" as "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."

1032.) The key distinction between an ownership interest in land and an easement interest in land is that the former involves possession of land whereas the latter involves a limited use of land. (*Ibid.*)

In light of the policy purposes and prior advice on Section 84308, in addition to the case law noted above, we conclude that a decision to vacate an IOD or a public easement is subject to Section 84308. You state that requests to process a vacation of a public easement or an IOD happen several times each year. You indicate that vacation requests typically come from the property owners who are seeking to remove encumbrances from their property, and that the County has discretion whether to act on those requests to remove those encumbrances that otherwise allow for street, highway, or public service uses. Under your facts, there are specific, identifiable persons who will be directly affected, and these numbers are not large or diverse.

There will also be a direct substantial financial impact upon the applicants. As stated in your request, when an IOD or easement is vacated, the owners of the property subject to the IOD or easement would be able to fully utilize the area of their properties that had previously been subject to the IOD or easement and would likely result in a financial benefit to the value of the property. As such, these are proceedings which involve an “entitlement for use” covered by Section 84308. Consequently, Section 84308 applies to IOD vacation proceedings and members of the Board of Supervisors are therefore prohibited from receiving, soliciting, or directing contributions exceeding \$250 from parties and participants while IOD proceedings are pending before the Board of Supervisors and for 12 months thereafter.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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