



FAIR POLITICAL PRACTICES COMMISSION

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May 28, 2003

Guy D. Petzold
City of Stockton
Office of the City Attorney
425 North El Dorado Street
Stockton, CA 95202-1997

**Re: Your Request for Advice
Our File No. A-03-094**

Dear Mr. Petzold:

This letter is in response to your request for advice on behalf of Planning Commissioner Diana Lowery regarding the campaign provisions of the Political Reform Act (the "Act").¹ This letter should not be construed as advice on any conduct that may have already taken place. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders advice; this advice is applicable and confers immunity only to the extent that the facts provided to us are correct, and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code section 83114.)

QUESTION

Does section 84308 prohibit City Planning Commissioner Diana Lowery from accepting a campaign contribution of more than \$250 from a member of the Board of Directors of the Port of Stockton, when the Port of Stockton was previously an applicant before the Planning Commission?

CONCLUSION

Section 84308 does not prohibit Ms. Lowery's acceptance of a campaign contribution of more than \$250 from a Director of the Port of Stockton since, under the facts you provide, the Director was not a party, participant, or an agent for a party or participant, in the prior proceeding before the Planning Commission.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

Previously, the Port of Stockton ("Port") filed an application that was acted upon by the Planning Commission for the City of Stockton ("Planning Commission") in March of 2003. Ms. Lowery is an appointed member² of the Planning Commission and presumably participated in that decision. Ms. Lowery is a candidate for the Stockton City Council and is accepting campaign contributions in connection with her candidacy.

An individual who is a member of the Board of Directors for the Port of Stockton is a potential donor of a campaign contribution of more than \$250 to Ms. Lowery in connection with her campaign for a city council seat. This individual ("Director") did not participate in the March 2003 hearing before the Planning Commission and does not personally have any financial interest in that Planning Commission decision.

ANALYSIS

Section 84308 contains restrictions regarding campaign contributions to an elected or appointed officer of an agency, to an alternate to an elected or appointed officer of any agency, and to any candidate for elective office in any agency. With respect to the question you raise, section 84308 (b) provides as follows:

"(b) No officer of an agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars (\$250) from any party, or his or her agent, or from any participant, or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding 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. This prohibition shall apply regardless of whether the officer accepts, solicits, or directs the contribution for himself or herself, or on behalf of any other officer, or on behalf of any candidate for office or on behalf of any committee." (See regulations 18438.1 through 18438.8, inclusive.)

1. Was consideration of the Port's application a proceeding for purposes of section 84308?

Regulation 18438.2(a) defines the type of agency proceeding subject to section 84308 as including "any proceeding to grant, deny, revoke, restrict, or modify a license, permit or other entitlement for use." You have not provided any facts indicating the nature of the application submitted by the Port, but for purposes of our advice we will assume this application and the resultant hearing before the Planning Commission was a "proceeding" within the meaning of regulation 18438.2.

² In a telephone conversation with the Commission's staff held on May 21, 2003, you indicated that members of the Planning Commission are appointed to office and not elected.

2. Was the Director a “party,” “participant,” or an “agent” for a party or participant in the agency proceeding?

The prohibitions of section 84308(b) apply only with respect to contributions from any party, participant, or agent for a party or participant, in the proceeding. A “party” is defined by subdivision 84308(a)(1) as “. . . any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.” A “person” in this context includes a government agency. (Section 82047.) Thus, the “person” who was the applicant in the proceeding was the Port and not the individual members of its Board of Directors.

A “participant” is defined at subdivision 84308(a)(2) as follows:

“(2) ‘Participant’ means any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision, as described in Article 1 (commencing with Section 87100) of Chapter 7. A person actively supports or opposes a particular decision in a proceeding if he or she lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency.”

The Director fails to meet this definition of “participant” in at least two respects. First, you indicate that he does not have any financial interests in the Planning Commission’s decision. Second, you indicate that the Director did not participate in the hearing (and presumably by this reference, did not engage in any other active support or opposition with respect to a Planning Commission decision in this proceeding).³

With respect to section 84308 and an “agent” of a party or participant, regulation 18438.3(a) provides as follows:

“(a) For purposes of Government Code Section 84308, a person is the ‘agent’ of a party to, or a participant in, a proceeding involving a license, permit or other entitlement for use only if he or she represents that person in connection with the proceeding involving the license, permit or other entitlement for use. If an individual acting as an agent is also acting as an employee or member of a law, architectural, engineering or consulting firm, or a similar entity or corporation, both the entity or corporation and the individual are ‘agents.’”

Under section 84308, the Director is an agent of the Port if the Director **represented** the Port in connection with the application, including the hearing. In prior advice we identified a number of activities which, if done on behalf of a party for the

³ Our advice is based on the facts you supply. Should the facts be that the Director did actively interject himself into the proceeding, as described under section 84308, and regulations 18438.3 and 18438.4, our advice does not stand and you may wish to write to us for further advice.

purpose of influencing the members' vote in the proceeding, would constitute representation for purposes of section 84308. These activities include calling a commissioner, writing a letter to the commission, or testifying at a public hearing. (*Steiner* Advice Letter, No. A-02-095.) Representation, in this context, is more than an individual's involvement at the hearing phase of a proceeding.

You state that the Director did not participate in the Planning Commission hearing.⁴ Assuming that the Director did not undertake any other activities involving him in communication with the Planning Commission or its staff for the purpose of influencing the decision on the Port's application, the Director was not a participant or an agent for a party or participant in this proceeding. (Regulations 18438.3 and 18438.4.) This is a factual question and as such, is for Ms. Lowery, and not the Commission to decide.

Since this Director was not a party, participant, or agent for a party or participant, in the Port's proceeding before the Planning Commission, the prohibitions of section 84308 do not apply to any campaign contributions which this individual may make to Ms. Lowery, provided that the contributions are not at the request of, or in coordination with, or reimbursed by, the Port. (*Pellman* Advice Letter, No. A-85-094.) Similarly, section 84308 does not prohibit any activities of Ms. Lowery's that constitute the acceptance, solicitation, or direction of a contribution of \$250 or more from the Director.

Please note, however, that should Ms. Lowery accept a campaign contribution from the Director in an amount in excess of \$250, the disclosure provisions (and most likely the disqualification provisions) of section 84308(c) will apply with respect to any future proceeding before the Planning Commission in which the Director is a party, a participant, or an agent representing a party or participant. This section provides that prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use, an officer of an agency who received within the preceding 12 months a contribution of \$250 or more from a party or participant in that proceeding, shall disclose that fact on the record of the proceeding. In addition, if the contributor has a financial interest in the outcome of a proceeding, generally the recipient officer may not make, participate in making, or influence the agency's decision:

“ . . . No officer of any agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than two hundred fifty dollars (\$250) within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the

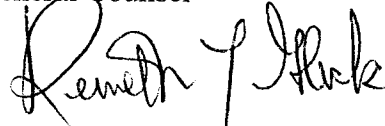
⁴ Of course, the Director might very well represent the Port with respect to other matters before the Planning Commission or in other forums. This would not, however, render the Director an agent of the Port with respect to the particular proceeding you identify in your request. (See *Steiner* Advice Letter, *supra*).

decision, as that term is described with respect to public officials in Article 1 (commencing with Section 87100) of Chapter 7." (Section 84308(c); see also regulations 18438.7 and 18438.8.)

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

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in black ink, appearing to read "Kenneth L. Glick". The signature is written in a cursive style with a large initial "K".

By: Kenneth L. Glick
Counsel, Legal Division

KLJ:jg

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