



FAIR POLITICAL PRACTICES COMMISSION

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January 26, 2009

Paul A. Larsen
Milam & Larsen, LLP
215 North Marengo Avenue, Suite 135
Pasadena, CA 91101

Re: Your Request for Informal Assistance
Our File No. A-08-200

Dear Mr. Larsen:

This letter responds to your request for advice regarding Section 84308 of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that may already have taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Is a recommendation by the Community Services Commission regarding adoption of a Resource Management Plan by the City Council a "proceeding" governed by the provisions of Section 84308?

CONCLUSION

No. As we understand the facts, adoption of the Resource Management Plan by the City Council is not the kind of "proceeding" meant to be governed by Section 84308.

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 18110 through 18997 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.

FACTS

You are an appointed commissioner of the Community Services Commission ("CSC") of the City of Monrovia, a body that provides recommendations to the City Council on a variety of matters. You are planning to run for the City Council in the municipal election on April 14, 2009. As of the date of your letter you had neither solicited nor raised any contributions for your planned candidacy, and you write in particular to learn whether Section 84308's ban on accepting contributions would apply to you as a result of your participation in a CSC's recommendation to the City Council on a Resource Management Plan ("RMP") relating to publicly-owned land in the Monrovia hillsides.

The land subject to the RMP includes Monrovia Canyon Park and the Monrovia Wilderness Preserve. The City has prepared a Mitigated Negative Declaration as required by CEQA, on which the CSC has taken public comments. The CSC will not make any recommendations on these public comments. It will, however, offer recommendations as to whether the City Council should adopt, adopt with changes, or not adopt the RMP. The City Council is the body that has the actual authority to adopt or not adopt the RMP.

The RMP does not grant licenses, permits or entitlements for use to or by any particular person. There is no "party" applying for adoption of the RMP, which is the City's management plan for publicly held lands providing, among other things, for the recreational use of the subject land by the general public. Many persons have appeared before the CSC expressing their support of or opposition to the RMP, or suggesting that the CSC recommend that the City Council make changes to the RMP.

ANALYSIS

In 1983, Section 84308 was added to the Act in order to ensure that appointed members of boards or commissions would not be biased by large campaign contributors or potential contributors who might appear before them in a proceeding involving a license, permit or other entitlement for use. Section 84308 applies to all appointed officers of any state or local government agency, with the exception of the courts or agencies in the judicial branch of government, the Legislature, the Board of Equalization, and constitutional officers. (Section 84308(a)(3).)

Section 84308 imposes two requirements on "officers" subject to the statute. First, a prohibition on solicitation or receipt of contributions over \$250 from parties and participants in a "proceeding" involving a license, permit, or other entitlement for use that is pending before the officer's agency. (Section 84308(b).)

Second, where an officer has in fact accepted a contribution of more than \$250 during the last 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 disqualify himself or herself from participating. (Section 84308(c).)

The CSC is a "local government agency" within the meaning of the Act. (Section 82041.) Local government agencies are subject to Section 84308 except in the special case of an agency "whose members are directly elected by the voters, the Legislature, the Board of Equalization or constitutional officers." (Section 84308(a)(3); Reg. 18438.1(a).) We understand that the CSC is not an agency whose members are elected in such a fashion, and on that understanding the CSC is an agency governed by Section 84308. "Members" of the CSC are "officers" of the CSC within the meaning of Section 84308. (Regulation 18438.1(d)(1).)

As a CSC commissioner you would be an "officer" subject to the contribution limitation of Section 85308(b) which provides, in pertinent part:

"(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 does not apply to an agency whose function is purely advisory. Local government agencies that are purely "advisory" within the meaning of the Act have no explicit or *de facto* authority to make governmental decisions. The decisionmaking capacity possessed by a local governmental agency can be determined only by reference to a number of facts and circumstances. A commission that is commonly called an "advisory" body, or one that makes "recommendations" to an ultimate decisionmaker, does not necessarily serve an "advisory" function within the meaning of the Act. For example, in assessing whether members of a body established to advise a government agency are themselves public officials, the Commission analyzes whether the body's recommendations are routinely adopted without substantive review by the ostensible decisionmaker. (See Regulation 18701(a)(1).) If the recommendations are routinely adopted without substantive review, the body's members are considered public officials under the Act because their actions are more than purely "advisory." For a recent review, see the *Calabresi* Advice Letter, No. I-08-067.

We do not have sufficient information about the CSC's operations, or the City Council's treatment of CSC's recommendations, to offer guidance on whether the CSC is a "purely advisory" body. We will assume, for purposes of this analysis, that the CSC is *not* a "purely advisory" body, and will now consider whether the CSC's recommendation

on the RFM is a “proceeding involving a license, permit, or other entitlement for use,” within the meaning of Section 84308.

“License, permit, or other entitlement for use” is defined to include “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.” (Section 84308(a)(5).) Although this is a relatively broad definition, it cannot be extended to include *potential* rights that *might* be affected by a general plan setting broad parameters for the use of certain lands.

The controlling authority on the meaning of “entitlements for use” in this context is *City of Agoura Hills v. Local Agency Formation Com.* (1988) 198 Cal. App. 3d 480, where the court found that Section 84308 did not apply to LAFCO commissioners when considering a sphere of influence proposal submitted by the City of Agoura Hills. The court followed the analysis of the *Fallon* Advice Letter, No. A-85-050:

“While noting that ‘[t]he term ‘entitlement for use’ does not have a set legal meaning,’ the FPPC expressed the view in the Fallon letter that ‘[s]ection 84308 does not cover proceedings where general policy decisions or rules are made or where the interests affected are many and diverse.’ The staff concluded, “‘Sphere of influence’ plans are general planning documents adopted by LAFCOs which are intended to guide them in their determination of specific proposals. It is our view that these types of general plans do not create any ‘entitlement for use’ within the meaning of section 84308. Thus ‘sphere of influence’ proceedings are not covered by this law.

¶...¶

“Based on our review, we not only find that the FPPC’s opinion is entitled to great weight, but we also find it to be correct as a matter of law.”

The *Fallon* letter also discussed decisions regarding municipal incorporations, concluding that because incorporation proceedings, like proceedings concerning spheres of influence, involved varied and diverse political and financial interests, issues directly affecting all persons within the proposed city boundaries, such proceedings were not entitlements for use for the purposes of Section 84308. (See also the *Alsop* Advice Letter, No. A-04-079.)

As we understand the RMP, it is intended to serve as a blueprint for the use of certain public lands within the city’s jurisdiction, a matter of great importance involving “varied and diverse political and financial interests” throughout the region. You have indicated that the RMP does not grant licenses, permits or entitlements for use to or by

any particular person, and there is no "party" applying for adoption of the RMP. To the extent that there are "participants" in this proceeding, they appear to have been drawn from among the general public and represent large and diverse interests.

We conclude from the facts before us that the RMP is the kind of generalized plan that we, and the court in *Agoura Hills*, have found not to be a proceeding of the sort governed by Section 84308.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in cursive script, appearing to read "Lawrence T. Woodlock".

By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:vll