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by Nick Warshaw

Practice Tips

SB 1439 Restricts Pay-to-Play Campaign Financing

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Three sitting or former Los Angeles City Councilmembers were indicted in less than two years.¹

Furthermore, a Mayor of Anaheim resigned after being indicted in connection with a sprawling corruption scheme involving Angels Stadium.² Against this backdrop, in 2022, the California Legislature passed, and Governor Gavin Newsom signed, Senate Bill 1439 to amend the Political Reform Act of 1974.³ The bill dramatically restricts the extent to which parties⁴ seeking approvals from local governments can make campaign contributions to local elected officials. The bill's author, Senator Steve Glazer (Democrat, 7th District), declared the legislation "could very well be the most significant political reform in the last 50 years."⁵ Glazer contends that SB 1439 "would seriously curtail the current, legal pay to play activity," and that there have "been criminal acts and other pay to play schemes that have passed the current legal test."⁶

As of January 1, 2023,⁷ Government Code Section 84308 prohibits parties and their agents⁸ from contributing \$250 or more to most local officers⁹ (e.g., city coun-

cilmember, county supervisor) while a proceeding involving a license, permit, use entitlement, franchise, or, with some exceptions, other contract¹⁰ (Government Benefit) is pending¹¹ before the officer's agency, and for 12 months after a final decision. Parties also must disclose their contributions to a local officer within the past 12 months before they file their Government Benefit application. For contributions made while a Government Benefit application is pending, parties must disclose their contribution within 30 days of making the contribution or on the date they make an appearance before the agency, whichever is earlier.

Most local officers are

prohibited from accepting, soliciting, or directing¹² contributions over \$250 from a party or their agent while a Government Benefit application is pending before the officer's agency and for 12 months after a final decision. Such local officers also may not participate in a pending Government Benefit decision or influence such a decision if a party, a participant,¹³ or their agent contributed over \$250 to the officer in the prior 12 months and the officer "willfully or knowingly" received the contribution. The recusing local officer must disclose—either orally or in writing—the fact that he or she received a contribution of over \$250 on the public record of the proceeding.¹⁴ These local officers



also may not accept or solicit contributions over \$250 from a participant or their agent while a Government Benefit application is pending before the officer's agency and for 12 months after a final decision if the officer knew or had reason to know that the participant has a financial interest in the project being considered.

Scenarios

The Fair Political Practices Commission (FPPC)—the state agency that administers and enforces the Political Reform Act—provided illustrative examples of how SB 1439 works in practice. Abridged and slightly modified versions of the FPPC's scenarios appear below. Since this is a new statute, some FPPC commissioners emphasized that they may need to revisit the regulations, depending on how the law and regulations play out in practice.

Scenario 1. *On January 2, 2023, Daphne, a developer, applied for a permit from the City of Los Angeles to convert an office building into housing. The application must first be approved by the planning commission before the city council votes on the matter. On January 3, 2023, Daphne contributed \$1,000 to City Councilmember West. On January 5, 2023, Daphne contributed \$1,500 to Planning Commissioner Nakano, who is also a candidate for city council in 2023.*

Under SB 1439, Daphne would be prohibited from making these campaign contributions to both Councilmember West and Commissioner Nakano. She contributed over \$250 and had a housing project application pending before an officer of the city. Because Daphne made her contributions after filing her application, she also would be required to disclose those contributions within 30 days of making them.

Whether Commissioner Nakano or Councilmember West violated SB 1439 by accepting Daphne's campaign contribution depends on whether the housing project application was "pending" before either officer for consideration. If the officer is a member of a governing body, this includes all matters placed on agenda by the officer's agency for officer discussion or public comment. The decision was potentially before Commissioner Nakano, as the housing project may have been before the planning commission. Since the housing project required planning commission approval before getting to the city council, the housing project decision likely was not

before Councilmember West.

A Government Benefit decision is also pending before Commissioner Nakano or Councilmember West if they 1) knew or had reason to know a proceeding is before the jurisdiction of the city and 2) it was reasonably foreseeable the decision would come before either of them in their decision-making capacities.¹⁵ According to FPPC staff, under this scenario Commissioner Nakano potentially would have been barred from accepting the campaign contribution, because Daphne's application was likely pending before her. Since the decision was not pending before Councilmember West, she likely could have accepted the campaign contribution unless she had reason to know about Daphne's housing application.¹⁶

Scenario 2. *On July 1, 2023, the planning commission considered Daphne's application. Daphne testified at the planning commission meeting in support of her application.*

Given that Daphne contributed more than \$250 to Commissioner Nakano while a proceeding was clearly pending before the planning commission, if Commissioner Nakano knew or had reason to know about Daphne's contribution, she must: 1) disclose Daphne's contribution, 2) recuse herself from voting on the matter, and 3) not influence fellow commissioners on the matter. Whether Commissioner Nakano knew or had reason to know about the contribution will depend on whether the contribution was properly disclosed by Daphne and the facts and circumstances surrounding the contribution (e.g., did Daphne tell Commissioner Nakano she contributed or was the contribution disclosed to Commissioner Nakano's campaign reports).¹⁷

Scenario 3. *Jay, who owns a deli within 200 feet of Daphne's proposed project, testifies in support of Daphne's application. On June 30, 2023, Jay made a \$500 contribution to Commissioner Nakano's candidate committee.*

Commissioner Nakano would also need to recuse herself if she knew or had reason to know that Jay, a participant testifying about Daphne's housing project, has a financial interest in the project. Without discussing his nearby deli, Jay's general support alone for the project would not trigger recusal and disclosure. However, if Jay discussed how the project would help his deli hire more workers, Commissioner Nakano likely

would need to recuse herself and disclose Jay's contribution on the record.

Competing Arguments

The bill's author, Senator Glazer, said regarding SB 1439:

The need for this bill was made clear by recent cases around the state. In 2016, a Los Angeles developer contributed \$50,000 to a campaign committee supporting a city councilmember just two months before a scheduled vote on the developer's project. In 2018 and 2020, nearly a third of about \$125,000 donated to Huntington Park city council members came from eight companies and their executives who had contracts pending with the city, according to an investigation by KCET.¹⁸

When advocating for the bill in the California Legislature, Senator Glazer emphasized that the bill was a natural extension of old state law that prohibited certain non-elected agency officials (e.g., planning commissioners who were also running for office) from taking part in a Government Benefit proceeding if they received more than \$250 in campaign contributions.

Rancho Cordova City Councilmember Garrett Gatewood argues, "SB 1439 is a well-intentioned disaster that will disproportionately hurt minorities trying to win a seat at the table."¹⁹ He believes the contribution limitations on certain groups "forces campaign money underground and empowers wealthy candidates and special interests."²⁰ Specifically, he contends these limitations shift political spending "into dark-money PACs and independent expenditure campaigns funded by special interests with no spending limits and little motivation to tell the truth."²¹

Rachel Michelin, California Retailers Association president, also says SB 1439 will make recruiting quality local candidates for office more challenging. Opponents, including Michelin, also point out that the new law exempts state legislators from the pay-to-play restrictions. Glazer responded that the legislature generally does not vote on land use projects for individuals and he hopes to close this gap in law later. Robert Rivinius, executive director of the Family Business Association of California, argued that people may "contribute to a local official, not even realizing that eight months later they'll need a permit and all of a sudden the people they need a vote from aren't able to vote."²²

A coalition of business groups, including the California Building Industry Association, the California Business Roundtable, and the California Retailers, challenged the constitutionality of SB 1439. The business groups claimed the law violated the free speech rights guaranteed by the U.S. and California constitutions. A Sacramento Superior Court judge rejected these arguments.²³ As of this writing, the decision has not been appealed.

Unintended Consequences

As Councilmember Gatewood pointed out, SB 1439 may unintentionally increase contributions to independent expenditure committees (e.g., a Super PAC). Nothing in the law restricts supporters from contributing to a Super PAC supporting their preferred candidate. For example, a supporter who usually contributes directly to Jill Smith's candidacy committee can still contribute to an independent expenditure committee that supports "Jill Smith for Council" without triggering the statute. All individuals and even corporations can contribute an unlimited amount to Super PACs.

Senator Glazer argues this line of criticism is flawed because the U.S. Supreme Court in *Citizens United v. Federal Election Commission* held that states cannot restrict corporate contributions to independent expenditure committees.²⁴ While the legislature could not have restricted developers' contributions to Super PACs, SB 1439 likely will push the flow of developers' contributions toward Super PACs. Political consultants are already forming Super PACs, assuming developers and other parties will donate to Super PACs instead of directly to candidates. In California, contributions to Super PACs are almost entirely disclosed. However, SB 1439 may also encourage contributions to 501(c)(4) nonprofits, which are subject to less stringent disclosure requirements.

Nick Sanders, founder of Sanders Political Law notes:

[T]he bill provides developers and other parties with an opportunity to trigger strategic recusal of certain councilmembers by contributing \$250 or more. To avoid triggering 84308's recusal and disclosure provisions, local officers only have 30 days from the time the officer knew or should have known about a relevant developer's contribution to return their contribution. The FPPC Regulations do establish different standards for when an applicant knows or should have

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known than for local officers. To lessen gamesmanship, the Legislature may want to permit local officers to return contributions at any time.²⁵

Given the novelty and complexity of SB 1439, there will surely be additional unanticipated unintended consequences. If an attorney or attorney's client anticipates any potential need of any Government Benefit (e.g., land use) decisions from a local government entity, it is highly recommended that an election law lawyer be contacted before contributing to local officers in California. ■

¹ Aaron Mendelson and Libby Denkmann, *3 Indictments In 2 Years For Current Or Former LA City Councilmembers, Here Are The Cases*, LAIST (Oct. 14, 2021), <https://laist.com>.

² Nathan Fenno et al., *Anaheim mayor resigns amid corruption probe into his role in Angel Stadium land sale*, L.A. TIMES, May 23, 2022, available at <https://www.latimes.com>.

³ GOV'T CODE §81000 *et seq.*

⁴ The statute defines "party" as any person who files an application for or is subject to a proceeding involving a license, permit, or other entitlement for use. GOV'T CODE §84308(a)(1). When a closed corporation is a party, the majority shareholder is subject to the disclosure and prohibition requirements described herein.

⁵ Spencer Custodio, *New State Law Could Curb Pay to Play Politics in Orange County & California*, VOICE OF OC, Oct. 3, 2022, available at <https://voicEOFoc.org/2022/10/new-state-law-could-curb>

-pay-to-play-politics-in-orange-county-california.

⁶ *Id.*

⁷ Contributions made before January 1, 2023, do not trigger the new prohibitions and requirements discussed in this law. 2 CAL. CODE OF REGS. §18438(a).

⁸ A person is an "agent" if the person represents a party or participant for compensation and appears before or otherwise communicates with the government agency to influence the pending proceeding. 2 CAL. CODE OF REGS. §18483.3.

⁹ "Officer" means any elected or appointed officer of a state or local government agency, any alternate to an elected or appointed officer of an agency, and any candidate who was a candidate within the 12 months prior to the governmental decision at issue. GOV'T CODE §84308(a)(4).

¹⁰ With limited exceptions, a "proceeding" involving an entitlement for use triggers the statute if it is applied for by the party, formally or informally requested by the party, or is a contract between the agency and the party or a franchise granted by the agency to the party. The statute does not apply to purely ministerial decisions or to competitively bid, labor, or personal employment contracts. 2 CAL. CODE OF REGS. §18438.2(a). The term "entitlement for use" has yet to be defined by the FPPC.

¹¹ An entitlement for use is "pending" before an officer when 1) the decision is before the officer or 2) it is reasonably foreseeable the decision will come before the officer and the officer knew or had reason to know the decision is within the jurisdiction of the agency. 2 CAL. CODE OF REGS. §18438.2(b).

¹² This prohibition applies "regardless of whether the officer accepts, solicits, or directs the contribution on the officer's own behalf, or on behalf of any other officer, or on behalf of any candidate for office or on behalf of any [political] committee." GOV'T CODE

§84308(b).

¹³ "Participant" means a person who is not a party but actively supports or opposes a Government Benefit application and has a financial interest in the decision. GOV'T CODE §84308(a)(2).

¹⁴ 2 CAL. CODE OF REGS. §18438.8.

¹⁵ 2 CAL. CODE OF REGS. §18438.2.

¹⁶ Notice and Agenda Commission Meeting, Cal. Fair Pol. Practices Comm'n (June 15, 2023), available at https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/AgendaDocuments/Agendas/2023/00_JUNE_Agenda.pdf.

¹⁷ Disclosure on a campaign report is relevant but not dispositive.

¹⁸ Steve Glazer, *Rooting out local government corruption in California starts by ending pay-to-play*, CALMATTERS (May 20, 2023), available at <https://calmatters.org/commentary/2023/05/local-government-corruption-pay-play>.

¹⁹ Garrett Gatewood, *California pay-to-play law could empower wealth candidates and special interests*, CALMATTERS (Apr. 10, 2023), available at <https://calmatters.org/commentary/2023/04/pay-to-play-law-consequences>.

²⁰ *Id.*

²¹ *Id.*

²² Ben Christopher, *New California pay-to-play law taken to court*, CALMATTERS (Feb. 24, 2023), available at <https://calmatters.org/newsletters/whatmatters/2023/02/campaign-finance-law-california>.

²³ Family Bus. Assoc., et. al v. Fair Pol. Practices Comm'n, et. al., No. 34-2023-00335169-CU-MC-GDS (Sacramento Super. Ct. June 6, 2023).

²⁴ Citizens United v. Federal Election Comm'n, 130 S. Ct. 876 (2010).

²⁵ Personal communication by Nick Sanders to author, Sept. 26, 2023.

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