

Nov 1, 2023



Understanding the Levine Act, Post SB-1439

**A Guide to Section 84308 and
Regulations 18438-18438.8**

Objectives of Training

- Understand what Section 84308 is and why it was enacted;
- Determine the types of proceedings and individuals Section 84308 applies to;
- Recognize the distinctions between parties, participants, and agents;
- Examine the basic requirements and limitations of Section 84308 and when they apply;
- Familiarize ourselves with the concept of aggregation for purposes of calculating total contributions; and
- Learn where to access additional information and how to request assistance from the FPFC.

What is Section 84308?

- Commonly referred to as “the Levine Act”
- California law originally enacted in 1982, in response to *Los Angeles Times* Article
- Amended in 2022 to address inconsistent application
- Aimed at combatting “pay-to-play” or *quid pro quo* practices, and the appearance of such practices

General Overview of Requirements

- Limits **officers'** ability to accept contributions greater than \$250 during specific periods
- Limits **parties', participants', and their agents'** ability to contribute more than \$250 during specific periods
- **Officers must recuse** themselves from proceedings **or return** portion of contribution exceeding \$250
- **Disclosure** by officers and parties of contributions
- Violations of the Act may result in fines of up to **\$5,000 per violation**

Scope of Section 84308

- However, these restrictions and requirements **only** apply in a specific context: proceedings involving a license, permit, or other entitlement for use, or “**entitlement for use proceeding,**” for short.
- Section 84308 **does not apply** to proceedings involving general policy decisions or rules where the interests affected are many and diverse. It also **does not apply** to ministerial (i.e., completely objective) decisions.

What is an Entitlement for Use Proceeding?

- Section 84308 implements certain restrictions and requirements that apply to contributions greater than \$250 made before, during, or after an entitlement for use proceeding.
- Section 84308 defines “license, permit, or other entitlement for use” to mean “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.”

Entitlement for Use Proceedings

- These proceedings involve **specific, identifiable parties directly affected** by the proceeding or **participants that would experience a substantial financial impact**.
- Generally, ask, “does this proceeding involve an identifiable person or persons seeking some type of permission or allowance, specific to them, from the government agency?”
- Again, Section 84308 **does not apply** to proceedings involving general policy decisions or rules where the interests affected are many and diverse. It also **does not apply** to ministerial (i.e., completely objective) decisions.

Entitlement for Use Proceeding Examples

- Building Permits
- Charter School Petitions
- Conditional Use Permits
- **Contracts (w/ exceptions)**
- **Event Permits**
- Private Development Plans
- Professional License Revocations
- Rezoning of Specific Parcels
- Rulemaking Procedure Affecting Small Industry w/ Limited Businesses
- Special District Formations
- Subdivision/Parcel Maps
- Zoning Variances

Entitlement for Use Proceeding DO NOT Include

- Applications Decided Based Solely on Objective Criteria
 - City/County Ordinances
 - City/County Measures
- City/County/Departmental Policies
 - Competitively-Bid Contracts
- Labor/Personal Employment Contracts

Entitlement for Use Proceeding Examples

- A non-profit organization reaches out to a County Board of Supervisors regarding the potential amendment of a specific contract between the non-profit and the County based on inadequate reimbursement rates.
 - The contracting amendment process **would qualify** as an entitlement for use proceeding.
- A non-profit organization reaches out to a County Board of Supervisors regarding the need for changes in the County contracting process generally (e.g., amending contractor reimbursement methodology).
 - This **likely would not qualify** as an entitlement for use proceeding given the general application and numerous County contractors such a change would apply to.

Entitlement for Use Proceeding

Examples

- At a City Council meeting, a non-profit organization advocates in favor of the City allocating increased funds in the City budget for local mental health crisis response resources.
 - Because the issue relates to a general policy decision (allocation of resources in the City budget), it **would not qualify** as an entitlement for use proceeding.
- The City Council approves additional funding. The City's Health Department then contracts with the non-profit to provide mental health crisis response resources on behalf of the City.
 - Unless the contract was competitively bid, the contract and contracting process **would qualify** as an entitlement for use proceeding.

Who Does Section 84308 Apply to?



Officers



Parties



Participants



Agents

Officers

- Section 84308 defines “officer” to include two categories:
 - 1) Candidates for office; and
 - 2) Officers of the agency
- FPPC regulations further define “officer of the agency” to include:
 - 1) Elected Officials;
 - 2) Board & Commission Members;
 - 3) Chief Executives of the Agency; and
 - 4) Agency employees with decisionmaking authority in the proceeding, who are candidates for office or have been candidates within the preceding 12 months



Officers

- “Agency employees with decisionmaking authority in the proceeding, who are candidates for office or have been candidates within the preceding 12 months”
- Who does this apply to?
 - Example: A city employee with discretion to approve or reject an event permit application, and who is running for a position on a local school board.
- This person doesn’t have to be a member of the City Council or Planning Commission to be an “officer of the agency.”



Excluded Officers

- Very few officers and agencies are excluded from the scope of Section 84308:
 - Courts or any agency in judicial branch;
 - The Legislature;
 - The Board of Equalization;
 - Constitutional Officers (e.g., Governor, Lieutenant Governor, Secretary of State)
- If an individual is an elected or appointed official at the local level (or running for such an office), they are subject to Section 84308.



Requirements for Candidates

- For someone who is just a candidate for office, but doesn't act as a decisionmaking employee in the proceeding, **Section 84308 does not restrict how much can be contributed to them or how much they can accept beyond ordinary contribution limits.**
- However, if the candidate wins and takes office, they will **likely be required to either recuse** themselves from the proceeding **or return** the excess portion of the contribution.



Requirements for Officers of the Agency

- Section 84308 places more immediate restrictions on those who qualify as an “officer of the agency.”
- Prohibited from accepting, soliciting, or directing a contribution greater than \$250 from a party, participant, or their agent while the entitlement for use proceeding is pending, and for 12 months after a final decision in the proceeding.
- Officers of the agency who have received a contribution exceeding \$250 within the past 12 months must either recuse themselves or return the excess contribution.
 - Must also disclose such contributions.



Requirements for Parties

- Section 84308 defines a “party” as “any person who files an application for, or is **the subject of, a proceeding** involving a license, permit, or other entitlement for use.”
 - Examples: applicants, claimants, respondents, contracting parties
- Parties and their agents **cannot contribute more than \$250** to an officer of the agency **while the entitlement for use proceeding is pending, and for 12 months after** a final decision in the proceeding.
- Parties **must disclose** any contribution greater than \$250 they have made to an officer of the agency within the 12 months prior to the entitlement for use proceeding.



Participants

- A “participant” in an entitlement for use proceeding is a person (or entity) who:
 - (1) is **not a party**; but
 - (2) who **actively supports or opposes** a particular decision in a proceeding involving a license, permit, or other entitlement for use; and
 - (3) who **has a financial interest** in the decision.



Requirements for Participants

- Like parties, participants and their agents **cannot contribute more than \$250** to an officer of the agency **while the entitlement for use proceeding is pending**, and for **12 months after** a final decision in the proceeding.
- Unlike parties, participants are **not required to disclose** any contribution greater than \$250 they have made to an officer of the agency within the 12 months prior to the entitlement for use proceeding.



Active Support or Opposition

- **Communication** with an officer or employee of an agency **for the purpose of influencing** a decision
 - Can be made via agent
 - Examples: Providing public comment during a public meeting, directing a message to an officer or employee of the agency via phone, email, physical mail, or in person
- Does **not** include communications made to public outside the proceeding
 - Examples: Protesting outside government buildings, publishing op-ed articles, advertisements



Financial Interests

- An individual generally has a “financial interest” in an entitlement for use proceeding if it would have a **reasonably foreseeable, material financial effect** on one or more of their economic interests.
- To determine “reasonable foreseeability,” ask:
 - Is a material financial effect a **realistic possibility**, and not just hypothetically or theoretically possible?



Material Financial Effects

- To determine if a proceeding would have a reasonably foreseeable material financial effect on an individual or entity's economic interest to qualify them as a "participant," different standards apply based on the type of economic interest involved, including:
 - Business entity interests;
 - Real property interests; and
 - Source of income interests.
- These are the same standards that apply when a public official is determining if they have a conflict of interest in a governmental decision.



Agents

- A person is an “agent” of a party or participant in a pending entitlement for use proceeding if the person:
 - **Represents** that party or participant **for compensation**; and
 - Appears before or otherwise **communicates** with the governmental agency **for the purpose influencing** the proceeding.
- An agent’s contributions are combined with those of the party or participant they represent for purposes of calculating the \$250 contribution limit.
- Like parties, agents’ contributions exceeding \$250 within the past 12 months must be disclosed.



How Does Section 84308 Affect Employees?

- **Most employees will not qualify as agents** because their work does not involve representing a company, non-profit, or other entity in the entitlement for use proceeding and they are not communicating with the government agency for the purpose of influencing the proceeding.
- If an employee *does* meet those criteria, they will qualify as an agent for purposes of Section 84308.
- **An employee qualifying as a “participant” is also a limited scenario** and will only occur if they take part in the proceeding (e.g., provide public comment) and the proceeding would have a reasonably foreseeable, material financial effect on one of their economic interests, including their employer.



How is the \$250 Contribution Calculated?

- The \$250 limit applies to any 12-month period.
 - Example: A company contributes \$100 to a City Councilmember on January 1, then submits a permit application to the City on January 2. At that point, an entitlement for use proceeding is pending. During the next 12 months, the company may only contribute an additional \$150 to that City Councilmember.
 - Example: An individual submits a permit application to the City on January 1, 2024, then contributes \$250 to each City Councilmember on January 2. On January 2, 2025, the proceeding is still pending before the City with no final decision having been made yet. The individual may contribute another \$250 to each City Councilmember, even though the proceeding is still pending, because it has been 12 months since any contribution was made.

Aggregation

- Contributions by a party or participant are combined with contributions by:
 1. Their respective agent(s) (e.g., the employee paid to represent the non-profit at the proceeding);
 2. Those who direct or control the party's/participant's contribution (e.g., a CEO or CFO);
 3. Entities with contributions controlled by that same person or a majority of the same persons (e.g., a "parent organization" with contributions controlled by the same person(s))
 4. The majority owner and other entities majority-owned by that person.

NOTE: Contributions by **non-compensated** non-profit officers are **not aggregated**

Aggregation Example

On January 1, a non-profit organization applies for a grant from the City. On January 2, the non-profit organization makes a \$100 contribution to a city councilmember who will vote on the grant applications. **Current total from non-profit: \$100**

The non-profit organization's contributions are controlled by two executive team members: Alex and Bobby. Alex is compensated for their work as the company's CEO. Bobby is not compensated, but serves as a voluntary executive director for the organization.

On January 3, Alex and Bobby each contribute \$100 to the same city councilmember who received the earlier contribution from the non-profit. Ordinarily, because Alex and Bobby both control the non-profit's contributions, both of their contributions would be aggregated with the non-profit's. However, because Bobby is an uncompensated officer of the non-profit, Bobby's contribution is not aggregated. Because Alex is compensated, their contribution is aggregated.

Current total from non-profit: \$200

Aggregation Example Continued

On January 4, two of the non-profit's employees—an Organizational Health Manager and a Community Outreach Coordinator—each contribute \$100 from their personal funds to the same city councilmember. Because neither employee currently qualifies as an agent, their contributions are not aggregated with the non-profit's. Additionally, because neither employee currently qualifies as a participant, neither employee is limited to contributing \$250, but are only limited to the ordinary campaign contribution limits. **Current total from non-profit: \$200**

On January 5, a City Council meeting on the grant application is held. The Community Outreach Coordinator attends in her capacity as an employee of the non-profit and advocates on behalf of the organization. Because the Community Outreach Coordinator is (1) representing the non-profit (2) for compensation and (3) appearing before or communicating with the City Council for the purpose of influencing the proceeding, they now qualify as an agent. Going forward, any additional contribution by the Community Outreach Coordinator will be aggregated with contributions by the non-profit.

On January 6, the Community Outreach Coordinator contributes another \$50. The non-profit has now reached the limit of what it may permissibly contribute to the city councilmember. **Current total from non-profit: \$250**

Participants vs. Agents

Participants	Agents
<ul style="list-style-type: none">• <u>Not</u> a party or representative of party	<ul style="list-style-type: none">• Representative of party or participant
<ul style="list-style-type: none">• Must have personal financial interest	<ul style="list-style-type: none">• Does not need personal financial interest
<ul style="list-style-type: none">• Uncompensated in connection w/ proceeding	<ul style="list-style-type: none">• Compensated in connection w/ proceeding
<ul style="list-style-type: none">• Contributions are <u>not</u> combined w/ contributions by party	<ul style="list-style-type: none">• Contributions <u>are</u> combined w/ contributions by party or participant agent is representing



Participants vs. Agents Example

A non-profit focused on a specific medical issue has submitted an application to the City's Parks and Recreations Department for an event permit that would allow the non-profit to host a large fundraising and issue awareness event at a City park.

- The non-profit is a party in the proceeding.

The non-profit has an employee who serves as the organization's Community Outreach Coordinator. In her capacity as an employee, the Community Outreach Coordinator writes to the Executive Director of the Parks and Recreation Department and appears at a Parks and Recreation Department meeting to express support for the application and explain how the event will benefit the City.

- The Outreach Coordinator is an agent in the proceeding.

Another employee of the non-profit is not authorized or tasked with speaking on behalf of the organization, but submits a public comment in their personal capacity because the issue is important to them and they also believe the event will be beneficial to members of the community. Because the employee's source of income—the non-profit organization—is the subject of the proceeding, the employee automatically has a financial interest in the proceeding.

- Therefore, the employee qualifies as a participant in the proceeding.



Example Continued



At the same Parks and Recreation Department meeting, a City resident offers a public comment, stating that while they agree the issue is important, they think a different park located in a less residential neighborhood is a more appropriate venue. The resident explains he lives directly across the street from the entrance of the proposed park and would have difficulty entering and exiting his property if the event was held there. Based on the facts provided, the City resident has a financial interest in the proceeding based on his real property.

- Accordingly, the City resident also qualifies as a participant in the proceeding.

One of the members of the Parks and Recreations Commission is running for City Council. What are the relevant contribution limits for everyone involved?

Non-Profit	Outreach Coordinator (Agent)	Other Employee (Participant)	City Resident (Participant)
\$250 <u>combined</u>		\$250	\$250

When Do These Restrictions and Requirements Apply?

- Parties, participants, and agents are prohibited from contributing more than \$250 while the proceeding is pending and for 12 months after a final decision is rendered.
- For parties, participants, and their agents, an entitlement for use proceeding is “pending” when it is before the jurisdiction of the agency for its decision or other action.
 - Examples:
 - After a company submits a permit application to the City;
 - After contract bid has been submitted or negotiations have begun.

When Do These Restrictions and Requirements Apply?

- For officers, an entitlement for use proceeding is “pending” when either:
 - 1) The decision is before the officer for the officer’s consideration;
 - Example: A party’s development agreement proposal is placed on the City Council’s meeting agenda for discussion or decision.
 - 2) 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 for its decision or other action, and it is reasonably foreseeable the decision will come before the officer in the officer’s decisionmaking capacity.
 - Example: Before the party’s development agreement proposal comes before the City Council, it is first presented to the City’s Planning Commission. A Planning Commissioner discusses the party’s proposal with a City Councilmember.

What is a Party Required to Disclose?

- When a party has contributed, in the aggregate, more than \$250 to an officer of the agency, the party must disclose:
 - The **amount of the contribution(s)** made within the past 12 months; and
 - The **names** of the persons whose contributions are required to be aggregated with contributions by the party (e.g., contributions by the party's agent or the company officer who directs and controls the party's contributions)
- Generally, **disclosure must be made on the date the party files** the application or other request initiating the proceeding.

What is an Officer Required to Disclose?

- An officer is required to disclose any contribution the officer knows of or has reason to know of, either **orally or in writing, on the public record** at the beginning of a public meeting, if a meeting is held.
- If an officer learns of a contribution *during* a public meeting, the officer shall make the disclosure on the public record prior to continuing to take part in the proceeding.
- If no public record is held, written disclosure shall be entered into the agency's official records.

What is an Officer Required to Disclose?

- An officer is required to disclose:
 - The fact that they have received contributions from the party, participant, or agent greater than \$250 within the past 12 months; and
 - The names of the contributor(s).

What if a Party or Participant Contributed More Than \$250 Before the Proceeding?

- A party or participant does not violate Section 84308 by contributing more than \$250 to an officer of an agency **before** an entitlement for use proceeding is pending.
- However, the officer will likely either have to recuse themselves from the proceeding or return the portion of the contribution exceeding \$250.
- An officer is eligible to return a contribution within 30 days from the time the officer knows, or should have known, about the contribution and the proceeding.

Summary

Officers and Parties

- Section 84308 applies to officers, parties, participants, or agents in entitlement for use proceedings.
- Officers of an agency cannot accept—and parties, participants, and agents cannot give—more than \$250 while a proceeding is pending and for 12 months after a final decision.
- If a person is directly involved in the proceeding, the person is a party.

Summary

Participants and Agents

- If the person is not a party, but is advocating for a decision in the proceeding and has a financial interest in the proceeding, the person is a participant.
 - “Financial interest” means the person’s economic interest would experience a reasonably foreseeable, material financial effect
- If a person is paid to represent a party or participant by communicating with the agency to influence the proceeding, the person is an agent.
- Disclosure is required for parties and their agents, but not participants.

Conclusion

- Resources are available on the FPPC Website
 - [Section 84308 Guide for Officers](#)
 - [Section 84308 Guide for Parties, Participants, and Agents](#)
 - [Section 84308 webpage](#).
 - Email the FPPC at advice@fppc.ca.gov with any requests for informal assistance or formal advice