



Fair Campaign Practices Commission

DATE: January 16, 2014
TO: FAIR CAMPAIGN PRACTICES COMMISSION
FROM: KRISTY VAN HERICK, FCPC Secretary/Staff Counsel *KVH 1/13/14*
SUBJECT: STAFF REPORT REGARDING STIPULATION BETWEEN COMMISSION
AND COALITION FOR BERKELEY CIVIL SIDEWALKS, YES ON S

This report provides an update on the status of the Stipulation negotiation approved at the last meeting related to the Coalition for Berkeley Civil Sidewalks, Yes on S committee ("Yes on S").

The draft Stipulation is attached for the Commission's review. The Commission may choose to accept the Stipulation as the final decision and order of the Commission, thereby authorizing staff and the Commission chair to sign the Stipulation, Decision and Order. Alternatively, the Commission may opt to approve the Stipulation with amendments. If the Commission makes any proposed amendments to the Stipulation, those amendments will be subject to review and approval or rejection by the Yes on S committee. If the Commission rejects the proposed Stipulation or approves it with a modification that is not acceptable to Yes on S, the Commission must decide whether to proceed with a probable cause determination and hearing or other action in line with the Berkeley Election Reform Act and Commission Procedures.

The attached draft Stipulation is the product of Commission staff's negotiation with Yes on S. As a negotiated document, it does not necessarily reflect either party's preferred outcome. Instead, as with settlements generally, the Stipulation reflects a proposed compromise made in furtherance of reaching a timely and equitable resolution of this matter. It is now left to the Commission, within the parameters noted above, to determine how best to proceed.

Staff considered a number of factors in preparing the Stipulation. Staff consulted with the FPPC and staff of the San Francisco Ethics Commission regarding any similar cases, and reviewed Stipulations from other local campaign finance commissions. Staff also took into consideration the prior Stipulations approved by this Commission, including a recent Stipulation with the No on S committee and Stipulations related to the Berkeley TUFF slate. While pre-2012 Stipulations were also consulted, those Stipulations were drafted prior to the addition of the penalty clause at BMC Section 2.12.231.

The Commission may also consider factors from the Commission Procedures in its review of this Stipulation. While these factors are typically applied *after* a probable cause determination is made, and while this matter was referred to staff to negotiate a Stipulation before a probable cause determination, these factors may still serve as a useful guideline in the Commission's review of the Stipulation:

"C. Proceeding after a Determination of Probable Cause

1. Upon making a determination of probable cause, the Commission shall consider what course of action to take. When deciding upon appropriate action, the Commission may take into consideration:
 - a. Its policies, procedures, regulations, and past actions in similar situations.
 - b. The amount of experience of the candidate, if any, and treasurer in campaign reporting, the history or absence of other campaign violations, and the degree to which these persons made good faith efforts to correct any relevant reporting deficiencies.
 - c. The presence, if any, of an apparent intent to conceal, deceive or mislead.
 - d. Whether the probable violation appears deliberate, negligent or inadvertent.
 - e. The effect of the probable violation upon the election or upon the administration of BERA."

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6
7 **BEFORE THE FAIR CAMPAIGN PRACTICES COMMISSION**
8 **CITY OF BERKELEY**

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10 In the Matter of

11 Coalition for Berkeley Civil Sidewalks,
12 Yes on S,

13 Respondent.

STIPULATION,
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DECISION AND ORDER

15 This Stipulation is entered into by and between the Complainant, Fair Campaign
16 Practices Commission (“Commission” or “FCPC”), and Respondent, Coalition for Berkeley
17 Civil Sidewalks, Yes on S (“Respondent”), through Steven Donaldson, Respondent’s principal
18 officer and assistant treasurer.

19 The following is a true and accurate summary of the facts in this matter:

20 1. Respondent, a City ballot measure committee created to support the passage of
21 Measure S on the November 2012 ballot, opened as a campaign committee on July 19, 2012.
22 Measure S failed to achieve a majority vote at the polls. Had it passed, Section 13.36.025 would
23 have been added to the Berkeley Municipal Code to “Prohibit Sitting on Sidewalks in
24 Commercial Districts” with certain exceptions. According to the Form 460 statements on file
25 with the Berkeley City Clerk, Respondent made expenditures during the election cycle totaling
26 \$118,544.46. On January 31, 2013, with no funds left in the campaign account, Respondent filed
27 a Form 410 terminating the committee.
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1 2. On August 15, 2013, Patricia Wall and Bob Offer-Westort filed a complaint with
2 the Commission regarding the Berkeley Democratic Club (“BDC”). The complaint also
3 referenced actions by Respondent which potentially violated the Berkeley Election Reform Act
4 (BERA). In a report to the Commission, staff noted that the specified campaign activity merited
5 a separate investigation. At the September 19, 2013, Commission meeting, the Commission
6 requested that staff initiate an investigation of possible violations by Respondent.

7 3. On September 19, 2013, John Caner, a volunteer for Respondent, voluntarily
8 contacted Commission staff regarding the actions referenced in the complaint, and confirmed
9 that Respondent had paid canvassers in cash on Election Day, as referenced in more detail
10 below.

11 4. On October 15, 2013, Respondent reopened its committee in order to respond to
12 this matter and amend its filing for the period of October 21 through December 31, 2012. On
13 November 6th, Respondent amended its post-election Form 460 Report, as referenced in more
14 detail below.

15 5. Staff presented an initial investigative report to the Commission on November 21,
16 2013. Staff put forward three separate counts of possible violations of BERA. Rather than
17 reaching a probable cause determination and setting the matter for a hearing, the Commission
18 directed staff to attempt to negotiate a stipulated settlement with Respondent on the three issues
19 identified in the report.

20 **ISSUE ONE: VIOLATION OF SECTION 2.12.250.B**

21 6. BERA prohibits payment of expenditures in cash above a set sum. BERA, at
22 BMC Section 2.12.250.B¹, states:

23 “Amounts shall be paid by the campaign treasurer from the campaign contribution
24 checking account only upon receipt of a bill or voucher from a person furnishing
25 goods or services to the candidate or committee, which bill or voucher itemizes
26 and identifies the goods or services furnished or to be furnished and lists the unit
and total price therefor. **All payments of fifty dollars or more shall be made by**

27 ¹ State law similarly restricts cash expenditures, although the threshold under state law is \$100 rather than \$50.
28 See Government Code 84300(b): “No expenditure of one hundred dollars (\$100) or more shall be made in cash.”

check, credit card or debit card, and payable to the person furnishing the goods or services to a candidate or committee.” (BMC 2.12.250.B.)

7. Respondent made contributions to the BDC to help defray the cost of a BDC 2012 endorsement mailer, which included a Yes on S message. The mailer noted on the bottom “Paid for by BDC and its endorsed local candidates and measures”. Mr. Caner requested permission from BDC to order an additional run of the same campaign mailer. BDC authorized Respondent’s use of the print design/art work for the second run. On November 2nd, Respondent paid Autumn Press \$1,692.45 for a 10,000 copy second run of the identical endorsement mailer.

8. Rather than mail the second run of the mailer, Respondent hired canvassers to distribute mailers by hand on Election Day. Respondent’s professional political consultant advised Respondent that they could pay canvassers in cash. Mr. Caner made a loan to Respondent by check in the amount of \$5,000 to cover the cost of canvassers. The treasurer, Jeffrey Kohn, deposited the funds, and then paid out to Mr. Caner \$5,000 by check in order to pay the campaign workers on Election Day.

9. On Election Day (November 6, 2012), Respondent, through Mr. Caner, made 58 cash payments to 55 canvassers totaling \$5,530. Of those payments, 52 payments were for \$100, 3 payments were \$60, and 3 payments were \$50. Based on the \$5,000 payment to Mr. Caner, at least 50 of the 58 cash payments were directly funded by Respondent. These cash payments of \$50 or more did not comply with BMC Section 2.12.250.B.

ISSUE TWO: VIOLATION OF SECTION 2.12.280.H

10. BERA requires all expenditures of \$50 or more to be itemized, including a brief description of the consideration and identification of the end vendor in cases where an agent has made reimbursements on behalf of a committee.

11. An expenditure is defined by BERA to include the following:

“Expenditure” means a payment, pledge or promise of payment of money or anything of value or other obligation, whether or not legally enforceable, for goods, materials, services or facilities in aid of or in opposition to the nomination or election of one or more candidates or the qualification for the ballot or adoption of one or more measures. The term “expenditure” includes any transfer, payment, gift, loan, advance, deposit, pledge, contract, agreement or promise of money or

1 anything of value or other obligation, whether or not legally enforceable, made
2 directly or indirectly by one committee to another committee. "Expenditure" also
3 includes the forgiving of a loan or the repayment of a loan by a third party."
(BMC Section 2.12.130.)

4 12. According to BMC Section 2.12.280.H, each campaign statement must include:

5 "The full name and street address of each person to whom an expenditure or
6 expenditures totaling fifty dollars or more has been made, together with the
7 amount of each separate expenditure to each person during the period covered by
8 the campaign statement; a brief description of the consideration for which the
9 expenditure was made; **the full name and street address of the person
providing the consideration for which an expenditure was made if different
from the payee;** and in the case of committees which are listed, the full name and
street address of the treasurer of the committee; . . ."

10 13. Similarly, BMC Section 2.12.315 states:

11 "No expenditure shall be made, other than overhead or normal operating
12 expenses, by an agent or independent contractor, including but not limited to an
13 advertising agency, on behalf of or for the benefit of any candidate or committee
14 **unless it is reported by the candidate or committee as if the expenditure were
made directly by the candidate or committee.** The agent or independent
15 contractor shall make known to the candidate or committee all information
16 required to be reported by this section. This section is intended as a limitation and
does not authorize any expenditures which are otherwise prohibited by this
chapter."

17
18 14. Respondent collected the names and addresses of the canvassers on Election Day,
19 but failed to identify any of the 55² "end vendors" (the persons paid to canvass on November 6th)
20 in the post election Form 460 filed on January 31, 2013, covering the period of October 21
21 through December 31, 2012. Respondent's campaign statement disclosed the \$5,000 payment to
22 Mr. Caner and coded the payment as "POL" for polling work, rather than as an expenditure used
23 to pay canvassers. In contradiction to Section 2.12.280, Respondent failed to identify the
24 persons providing services to the committee and inaccurately described the consideration
25 provided for the payment.

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28 ² Not all of the 55 canvassers were paid by Respondent, as Mr. Caner paid at least 4 or 5 of the 55 vendors
directly, discussed below.

1 15. As noted above, the term “expenditure” includes payment to a vendor made by
2 one committee on behalf of another committee (*see* BMC Section 2.12.130). In addition to the
3 vendors excluded from the post-election Form 460, Respondent also incompletely identified an
4 expenditure to Autumn Press. A payment of \$1,692.45 to Autumn Press for the BDC mailers
5 distributed on Election Day by Respondent was initially recorded only as an expenditure for
6 literature, but should have been recorded as a particular type of expenditure, as the expense
7 constituted a nonmonetary contribution from Respondent to BDC. The literature did include a
8 mention of Yes on S, but the main advantage of the re-run was to advertise the overall list of
9 endorsements by BDC rather than to directly promote Yes on S. In order to accurately describe
10 the consideration for the expenditure as required by Section 2.12.280.H, the print costs should
11 have been disclosed as a nonmonetary contribution to BDC.

12 16. On November 6, 2013, Respondent amended its Form 460 for the post-election
13 statement (10/21-12/31, 2012). The amended statement now identifies the 55 end-vendor
14 canvassers, correctly describes the \$5,000 payment made to Mr. Caner, and correctly identifies
15 the \$1,692.45 expenditure to Autumn Press as also constituting a nonmonetary contribution to
16 BDC.

17 **ISSUE 3: VIOLATION OF BMC SECTIONS 2.12.280.B AND G**

18 17. According to BMC Section 2.12.280, all contributions received, including
19 nonmonetary (in-kind) contributions³, must be disclosed on required campaign statements, to
20 include the following information:

21 “B. The total amount of contributions received during the period covered by the
22 campaign statement from persons who have given fifty dollars or more;...

23
24 ³ BMC Section 2.12.100 defines contributions to include payment of a debt by a third party: “Contribution”
25 means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, **payment of a debt by a**
26 **third party**, contract, agreement, or **promise of money or anything of value or other obligation, whether or not**
27 **legally enforceable, made directly or indirectly in aid of or in opposition to** the nomination or election of one or
28 more candidates or the qualification for the ballot or voter approval of one or more measures. The term “contribution” includes the purchase of tickets for events such as dinners, luncheons, rallies and similar fund-raising events; a candidate’s own money or property used on behalf of his or her candidacy; the granting to a candidate or committee of discounts or rebates not available to the general public; **and payments for the services of any person serving on behalf of a candidate or committee, when such payments are not made from contributions the candidate or committee must otherwise report under the terms of this chapter. ...**

1 G. The full name of each person from whom a contribution or contributions
2 totaling fifty dollars or more has been received together with his or her
3 street address, occupation, and the name of his or her employer, if any, or
4 the principal place of business if he or she is self-employed, the amount
5 which he or she contributed, the date on which each contribution was
6 received during the period covered by the campaign statement, and the
7 cumulative amount he or she contributed. In the case of committees which are
8 listed as contributors, the campaign statement shall also contain the full name
9 and street address of the treasurer of the committee...”

10 18. On Election Day, Respondent incurred more expenses for campaign workers than
11 expected, with a total expense of \$5,530 owed to canvassers. The \$5,000 in campaign funds
12 provided to Mr. Caner did not fully cover payments owed to the canvassers, so Mr. Caner paid
13 four or more of the canvassers from his personal fund for services to Respondent, in the total
14 sum of \$530. Mr. Caner did not submit the expense for reimbursement, and thus the payment
15 constituted a nonmonetary contribution to Respondent.

16 19. Respondent failed to disclose Mr. Caner’s \$530 nonmonetary contribution in its
17 initial Form 460 post-election statement as required by Section 2.12.280.B and G.

18 20. On November 6, 2013, Respondent amended its Form 460 for the post-election
19 statement (10/21-12/31, 2012), disclosing the previously omitted \$530 contribution from Mr.
20 Caner.

21 FACTORS IN MITIGATION

22 21. Respondent has cooperated with the Commission staff throughout this process.
23 Respondent voluntarily provided information regarding the cash expenditures and reporting
24 errors to Commission staff and voluntarily amended its campaign statement to address the
25 concerns identified in Issues 2 and 3.

26 22. Respondent had a volunteer treasurer who had not previously worked on a
27 political campaign. Respondent relied on the advice of its professional political consultant that it
28 could pay the canvassers in cash. Respondent hired a professional treasurer to prepare and file
the amendment to its post-election Form 460, and to prepare and file any future campaign
statements.

23. Voters were not denied access to information pre-election, because Respondent made its cash expenditures on Election Day, after all pre-election disclosures were due. The incomplete Form 460 disclosure was due January 31st, almost 3 months after the election.

24. The cash payments constituted less than five percent of Respondent's total expenditures.

FACTORS IN AGGRAVATION

25. The less than \$50 limit on cash expenditures and non-itemized disclosure is a long standing BERA requirement. Additionally, most of the cash expenditures were also inconsistent with California law, which prohibits cash expenditures of \$100 or more.

26. Mr. Caner had previously served as a member of the Berkeley Fair Campaign Practices Commission, has previously served as a committee treasurer, and was a party to a FCPC stipulation in 1999.

ADMISSIONS AND STIPULATIONS

THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties as follows:

1. Respondent violated BERA Sections 2.12.250, 2.12.280.H and 2.12.280.B and G, as set forth in paragraphs 1 through 26 above.

2. The failure to comply with any section of BERA, including Section 2.12.250, may result in penalties: “When determining an appropriate remedy for a violation of this Chapter as specified in Section 2.12.230, the Commission may order any of the following: A. Cease and desist violation of this Chapter. B. File any reports, statements, or other documents or information required by this Chapter. C. Pay a monetary penalty of up to \$1,000.00 per violation, or up to the amount or value of the unlawful or undisclosed contribution or expenditure, whichever is greater, to the General Fund of the City.” (BERA § 2.12.231.)

3. Respondent has already filed an amended Form 460 disclosing previously undisclosed information regarding the 55 canvassers, the \$530 nonmonetary contribution from Mr. Caner, and the single undisclosed nonmonetary contribution to BDC.

1 4. The parties agree that Respondent shall pay the sum of \$2750 as a stipulated
2 monetary penalty, payable to the City of Berkeley for deposit into the City's general fund, no
3 later than March 15, 2014. The penalty consists of \$2500 penalty for the \$5,000 in unlawful,
4 undisclosed cash payments to canvassers (Issue 1 and 2), and \$250 for the \$530 undisclosed
5 nonmonetary contribution (Issue 3). The penalty takes into consideration the facts detailed
6 above, the factors in mitigation and aggravation, and prior Stipulations and other actions by the
7 Commission.

8 5. Should Respondent continue as an open committee, Respondent agrees to take
9 necessary and prudent precautions to comply with all provisions of the BERA and FCPC
10 regulations. Further, Respondent will seek advice, as needed, from the City Clerk and FCPC
11 staff on compliance with the BERA and FCPC regulations prior to filing deadlines to aid in
12 future compliance.

13 6. The parties agree to enter into this Stipulation to resolve all factual and legal
14 issues raised in this matter and to reach a final disposition without the necessity of holding an
15 administrative hearing to determine the liability of the Respondent. Respondent understands and
16 hereby knowingly and voluntarily waives any and all procedural rights under the BERA and the
17 FCPC Procedures.

18 7. The FCPC agrees that if Respondent executes this Stipulation, it will forego any
19 further enforcement action against Respondent, and if approved by the FCPC, this stipulation
20 will resolve all factual and legal issues raised in this matter and will be the final disposition of
21 this matter for purposes of BERA Sections 2.12.450 and 2.12.455. Respondent admits to no
22 intentional or willful conduct regarding this matter. Nothing in this section shall be read to
23 preclude the Commission's consideration of any complaint or other action for any false
24 statements stemming from any of Respondent's representations in this Stipulation.

25 8. The parties agree that in the event the FCPC refuses to accept this Stipulation, it
26 shall become null and void. Respondent stipulates and agrees that in the event a full evidentiary
27 hearing before the Commission becomes necessary, no member of the Commission or FCPC
28 staff shall be disqualified because of their consideration of this Stipulation and Order.

1 9. Respondent acknowledges that the FCPC shall retain jurisdiction over this
2 Stipulation, Decision and Order, and that if Respondent fails to pay the stipulated penalty by the
3 date specified, this Stipulation, Decision and Order shall be null and void, and the Commission
4 shall proceed with a probable cause determination, notice and a hearing pursuant to BERA and
5 FCPC Procedures.

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7 Dated: _____, 2014

By _____
Zach Cowan, City Attorney
Kristy van Herick, Deputy City Attorney
Attorneys for Fair Campaign Practices
Commission

11
12 Dated: _____, 2014

By: _____
Steven Donaldson, Responsible Officer and
Assistant Treasurer for Respondent, Coalition for
Berkeley Civil Sidewalks,
Yes on S

Approved as to form:

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16 Dated: _____, 2014

JAMES SUTTON, The Sutton Law Firm,
Counsel for Respondent, Coalition for Berkeley
Civil Sidewalks, Yes on S

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