Rent Stabilization Board

RENT STABILIZATION BOARD

AD HOC COMMITTEE TO CONSIDER RENT ORDINANCE AMENDMENTS AT THE NOVEMBER 2024 GENERAL ELECTION

Monday, October 2, 2023 – 5:00 p.m.

Rent Stabilization Board Law Library – 2001 Center Street, 2nd floor, Berkeley

PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED IN A HYBRID MODEL WITH BOTH IN-PERSON ATTENDANCE AND VIRTUAL PARTICIPATION.

For in-person attendees, face coverings or masks that cover both the nose and the mouth are encouraged. If you are feeling sick, please do not attend the meeting in person.

To access this meeting remotely: Join from a PC, Mac, iPad, iPhone, or Android device by clicking on this URL: https://us06web.zoom.us/j/83989039050?pwd=HRxfKnTNMJo4QfFYlzD465HgCj27DN.1. If you do not wish your name to appear on the screen, then use the drop-down menu and click on "Rename" to rename yourself as anonymous. To request to speak, use the "Raise Hand" icon by rolling over the bottom of the screen.

To join by phone: Dial 1-669-900-6833 and enter Webinar ID: 839 8903 9050 and Passcode: 522414. If you wish to comment during the public comment portion of the agenda, Press *9 and wait to be recognized by the Committee Chair.

To submit an email comment for the Committee's consideration and inclusion in the public record, email mbrown@berkeleyca.gov with the Subject line in this format: "PUBLIC COMMENT ITEM FOR AD HOC COMMITTEE ON RENT ORDINANCE AMENDMENTS." Please observe a 150-word limit. Time limits on public comments will apply. Written comments will be entered into the public record. Email comments must be submitted to the email address above **by 3:00 p.m.** on the day of the Committee meeting in order to be included.

Please be mindful that this will be a public meeting and all rules of procedure and decorum apply for both in-person attendees and those participating by teleconference or videoconference.

This meeting will be conducted in accordance with Government Code Section 54953 and all current state and local requirements allowing public participation in meetings of legislative bodies. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to DéSeana Williams, Executive Director of the Rent Board, at 510-981-7368 (981-RENT). The Committee may take action related to any subject listed on the Agenda.

COMMUNICATION ACCESS INFORMATION:
This meeting is being held in a wheelchair accessible location. To request disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services Specialist at (510) 981-6418 (voice) or (510) 981-6347 (TDD) at least three (3) business days before the meeting date.

Attendees at public meetings are reminded that other attendees may be sensitive to various scents, whether natural or manufactured, in products and materials. Please help the City respect these needs.

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AGENDA

1. Roll Call

2. Land Acknowledgment Statement: *The Berkeley Rent Stabilization Board recognizes that the rental housing units we regulate are built on the territory of xučyun (Huchiun-(Hooch-yoon)), the ancestral and unceded land of the Chochenyo (Cho-Chen-yo)-speaking Ohlone (Oh-low-nee) people, the ancestors, and descendants of the sovereign Verona Band of Alameda County. This land was and continues to be of great importance to all of the Ohlone Tribes and descendants of the Verona Band. As we begin our meeting tonight, we acknowledge and honor the original inhabitants of Berkeley, the documented 5,000-year history of a vibrant community at the West Berkeley Shellmound, and the Ohlone people who continue to reside in the East Bay. We recognize that Berkeley's landlords and tenants have and continue to benefit from the use and occupation of this unceded stolen land since the City of Berkeley's incorporation in 1878 and since the Rent Stabilization Board's creation in 1980. As stewards of the laws regulating rental housing, it is not only vital that we recognize the history of this land but also recognize that the Ohlone people are present members of Berkeley and other East Bay communities today.*

3. Approval of agenda

4. Public Comment

5. Election of Committee Chair

6. Discussion and possible action regarding Permissible Activities by Agency Staff and Individual Board Commissioners during an Initiative Process (Attached to Agenda)

7. Discussion and possible action regarding Potential Berkeley Rent Ordinance Amdendments to be placed on the November 2024 General Election Ballot

8. Discussion and possible action to set the next meeting

9. Adjournment

STAFF CONTACT: Matt Brown, General Counsel (510) 981-4930

COMMITTEE: Soli Alpert, Xavier Johnson, Andy Kelley, Leah Simon-Weisberg

Rent Stabilization Board
Legal Unit

M E M O R A N D U M

DATE: October 2, 2023

TO: Ad Hoc Committee to Consider Rent Ordinance Amendments at the 2024 November General Election

FROM: Matt Brown, General Counsel MB
Hannah Kim, Staff Attorney
Ollie Ehlinger, Staff Attorney

SUBJECT: Permissible Activities by Agency Staff and Individual Board Commissioners during an Initiative Process

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Background:

Several Commissioners have expressed interest in qualifying proposed amendments to the Rent Stabilization Ordinance ("Ordinance") for the 2024 ballot through the initiative process. This memorandum outlines permissible and impermissible activities, for Rent Board Commissioners ("Board") and Rent Stabilization Board staff ("Staff"), throughout the various stages of the ballot initiative process.

The Board and Staff may draft proposed Ordinance amendments and seek a potential sponsor for any amendments that the Board seeks to add to the ballot through the initiative process. However, Staff and the Board in their official capacity may not take any action to qualify any initiative for the ballot or to support any initiative that has qualified for the ballot. Once an initiative has qualified for the ballot, Staff may publish informational material regarding the initiative.

Analysis:

A. State law generally prohibits participation by local agencies and elected officials in elections.

Public entities are severely restricted from using public funds for election activities. In *Stanson .v Mott*[1], the California Supreme Court found that the Director of Beaches and Parks was not permitted to spend public funds in support of bond measures that would benefit the parks system because no statute explicitly gave the Director the authority to do so. The Court set forth the basic rule that "(I)n the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign."[2] However, the Court drew a distinction between partisan election activities and lobbying or legislative activities, stating that a public agency is permitted to engage in lobbying and legislative activities to implement the agency's policies.[3]

B. Staff and Board have authority to draft proposed Ordinance amendments because this activity is legislative and not partisan in nature.

Public funds, including Staff time, may lawfully be used to draft initiative language relating to proposed amendments to the Ordinance, assuming the proposed amendments to the Ordinance serve the legitimate governmental interest of the Rent Stabilization Board. Courts have found that the formulation and drafting of a proposed ballot measure before its qualification for the ballot fall within the power of a local agency to advance its interest through lobbying or legislating. (*See League of Women Voters v. Countywide Crim. Justice Coordination Com* (1988) 203 Cal.App.3d 529; *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments* (2008) 167 Cal.App.4th 1229, 1241).

In *League of Women Voters v. Countywide Criminal Justice Coordination Committee,* the Court found that Los Angeles County officials were permitted to draft a proposed state initiative measure to provide for certain procedural changes in the criminal justice system relating to juries in criminal cases. The Court stated that the development and drafting of a proposed initiative was "not akin to partisan campaign activity, but was more closely akin to the proper exercise of legislative authority." [4]

Likewise, in *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara*

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[1] (1976) 17 Cal.3d 206

[2] *Id*. at pp.209-210

[3] *Id*. at 218.

[4] *League of Women Voters,* supra, 203 Cal.App.3d at 550.

County Association of Governments, the Court found that an association of local governments was permitted to propose a ballot measure that would impose a one-half percent sales tax to pay for transportation projects that the association planned. The Court stated that "Nothing in *Stanson* suggests that the formulation and drafting of a proposed ballot measure before its qualification for the ballot constitutes partisan campaigning for the ballot measure."

In both instances, the Court analyzed whether the local agency had the authority to offer legislation. In Santa Barbara County Coalition, the Court found the local agency's authority derived from a specific statute allowing a local transportation agency the ability to levy up to a one percent to fund transportation improvements and services in its county.[5] Conversely, In League of Women Voters, the Court found Los Angeles County had "broad autonomous legislative and fiscal authority" to manage affairs within its jurisdiction and that the drafting of a ballot initiative fell within that authority.[6]

Local agencies may draft an initiative as long as the subject matter is of legitimate interest to the drafting public agency and that public funds are not used to endeavor to secure the support of only one side of the issue. To be of "legitimate interest" to the local agency, the legislation at which the measure is directed must affect the local agency as a local agency, or affect the citizens of the local agency in their status as citizens of that local agency. [7] Mere general interest of the electorate in a matter, (e.g., in "pro-life" or "pro-choice" matters), would not be a sufficient or a legitimate interest.

The Board has similar authority to draft proposed amendments to the Ordinance and can work with Staff in the drafting of proposed amendments that fall within the "legitimate interest" of the agency's mission. Section .060F sets forth the enumerated powers of the Board; this section does not include a specific ability of the Board to draft or offer voter initiatives. However, similar to the how *Santa Barbara County Coalition Against Automobile Subsidies* and *League of Women Voters* Courts found the broad authority for the subject agencies to put draft proposed ballot initiative, any proposed amendment that reasonably advances the purpose of the Ordinance[8] is likely permissible.

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[5] *Santa Barbara County Coalition Against Automobile Subsidies, supra,* 167 Cal.App. 4th at 1240.

[6] *League of Women Voters,* supra, 203 Cal.App.3d at 551

[7] Op.Atty.Gen. 89-1202 at pg. 7

[8] *See* BMC section 13.76.030: The purposes of this Chapter are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing… to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged.

C . Staff and Board may seek a sponsor for a proposed Ordinance amendment because this power is inherent in the power to draft a proposed Ordinance amendment.

The Court in *League of Women Voters* states "there appears to be no logical reason not to imply from the indispensable power to draft proposed legislation the power to draft a proposed initiative measure in the hope a sympathetic private supporter will forward the case and the public will prove more receptive . . . We do not perceive the activities of identifying and securing such a proponent for a draft initiative as entailing any degree of public advocacy or promotion, directed at the electorate, of the single viewpoint embodied in the measure." The Attorney General likewise adopts the position that a local agency may identify a sponsor for a draft initiative.[9] Therefore, the Board and Staff may, after the drafting of any proposed initiative language, identify potential sponsors for such an initiative.

D. Staff cannot participate in the signature gathering process.

Conversely, public funds, including Staff time, may not be lawfully used to gather signatures for an initiative to be circulated among the voters with respect to proposed amendments to the Ordinance. In fact, securing signatures at public expense for a proposed initiative would cross the line of improper advocacy or promotion of a single point of view in an effort to influence the electorate.[10] Procedurally, once a proposed initiative is filed with the City of Berkeley, it is the proponents' task to qualify the measure for the ballot by obtaining the requisite number of signatures and filing the petition.[11] As such, the funds would be used to advocate the position taken by the proponents, that is, that the measure they support should not only qualify for the ballot, but should be adopted by the electorate. The public agency cannot do this without clear and explicit authorization under *Stanson* v. *Mott*.

E. Elected Board members cannot participate in signature gathering in their capacities as Commissioners.

As outlined above, public funds cannot be expended to gather signatures in order to place the initiative on the ballot. However, elected Commissioners can likely participate in the signature gathering process in their capacity as an individual citizen of the City of Berkeley. Such participation does not carry with it the Rent Board's approval nor does it involve the use of public funds to imply the Board's position on the merit of the initiative. If the Board chooses to identify themselves as members of the Board, they should clearly indicate they are not gathering signatures on behalf of the Agency, and that they are acting as individuals.

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[9] Op.Atty.Gen. 89-1202 at pg. 9

[10] *League of Women Voters*, supra, 203 Cal.App.3d at p. 554

[11] (*See* generally, Elec. Code, §§ 4002, 4005, 4008, 4053, 5152, and 5200)

F. Staff and Board cannot assist proponents of an initiative in qualifying the initiative for the ballot.

Public resources, including Staff time, the agency website, or agency funds for mailing, cannot be used to promote an initiative that has qualified for the ballot. "Public resources" include any property owned by the Agency, including buildings, facilities, funds, equipment, telephones, supplies, computers, vehicles, and travel.[12] However, once a potential initiative qualifies for the ballot, Staff may offer impartial analysis. The Court in *Stanton* stated that "it would be contrary to the public interest to bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity."[13]

Impartial analysis must be limited to providing informational materials to voters concerning the ballot measure(s) at issue. Staff must make sure all information provided is limited to "educational materials" that provide a "fair presentation" of any issue on the ballot[14] and must refrain from offering campaign literature.

Since no hard and fast rule exists to establish the difference between educational materials and campaign literature, Staff must consider the style, tenor, and timing of the publication. It can be difficult to distinguish between improper campaign activities from proper neutral "informational" activities. With respect to some activities, the distinction is rather clear; thus, the use of public funds to purchase such items as bumper stickers, posters, advertising floats, or television and radio spots unquestionably constitutes improper campaign activity,[15] as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure.[16]

On the other hand, it is generally accepted that a public agency pursues a proper "informational" role when it simply gives a "fair presentation of the facts" in response to a citizen's request for information. [17] (51 Ops.Cal.Atty.Gen. 190, 193 (1968). However, in a number of instances publicly financed brochures or newspaper advertisements which have purported to contain only relevant factual information, and which have refrained from exhorting voters to `Vote Yes,' have

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[12] See Cal. Gov't Code 8314(b)(3)

[13] 17 Cal.3d 206 at 221

[14] *Id*.

[15] *See Mines v. Del Valle (1927)* 201 Cal. 273, 287

[16] *See* 51 Ops.Cal.Atty.Gen. 190 at pg 194

[17] *Id*. at 193

nevertheless been found to constitute improper campaign literature.[18] Any material which suggests an official agency position or a suggestion as to which way the reader of the material should vote would not be permissible.

Lastly, a Commissioner does not give up their first amendment rights to speak about governmental issues once elected.[19] As such, a Commissioner may not be punished or disallowed from expressing such views during a Board meeting. However, they may not use public resources to campaign for the initiative. This is because doing so raises the possibility that the electoral process may be distorted by giving one side an unfair advantage.

Conclusion:

1. Staff and Board can work together to draft proposed Ordinance amendments for the 2024 ballot; and

2. Board can seek and obtain a sponsor for proposed Ordinance amendments for the 2024 ballot; and

3. Staff must refrain from gathering signatures, but individual Board members in their capacity as private citizens of the City of Berkley can seek signatures.

Overall, the Board should take great care to avoid promoting a specific, partisan viewpoint in any materials it produces.

[18] *See Id*; 35 Ops.Cal.Atty.Gen.153.

[19] *See City of Fairfield v. Superior Court of Solano County*, 14 Cal. 3d 768, 780-82