



Fair Campaign Practices Commission

PUBLIC HEARING

July 23, 2019

To: Honorable Mayor and Members of the City Council
 From: Dean Metzger, Chair, Fair Campaign Practices Commission
 Submitted by: Emma Soichet, Secretary, Fair Campaign Practices Commission
 Subject: Amendments to the Berkeley Election Reform Act; Amending BMC Chapter 2.12

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt an ordinance amending the Berkeley Elections Reform Act, Berkeley Municipal Code Chapter 2.12, regarding the public financing program.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The proposed amendments to the Berkeley Election Reform Act (BERA) were adopted by the Fair Campaign Practices Commission (FCPC) at its regular meeting of May 16, 2019.

Motion to adopt amendments, regulations, and text of the report to Council (M/S/C: Smith/Blome; Ayes: Blome, Ching, McLean, Metzger, O'Donnell, Saver, Smith, Tsui; Noes: None; Abstain: None; Absent: Harper (excused)).

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the “double green light” process. This process requires that the FCPC adopt the amendments by a two-thirds vote and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

BACKGROUND

In the November 2018 election cycle, the public financing program was used for the first time. The lessons learned from the initial implementation of the public financing program and other campaign finance issues have surfaced the need for amendments to BERA. City staff consulted with representatives from MapLight, the original sponsors of the Fair Elections Act of 2016, regarding the types of changes staff identified. In these discussions, many of the amendments identified by staff were similar to the issues

raised by MapLight and campaign committees that participated in public financing in 2018. The proposed amendments are listed and explained below.

1. Violations prior to statement of participation

In the 2018 election, multiple candidates experienced difficulty with starting up their committee and opening their checking account. The \$50 limit resulted in several inadvertent minor violations of the public financing regulations and actually resulted in one candidate being barred from participation in the program. Many candidates start by opening a checking account first, and some banks require a minimum initial deposit of \$100.

The proposed amendment allows a candidate to contribute up to \$250 to their own committee, but makes these contributions ineligible for matching funds. This amendment strikes a balance between allowing higher contributions from candidates, but maintains the purposes of the Fair Elections Act. The FCPC noted that candidate contributions to their own committee do not demonstrate community support of their candidacy in the same manner as a contribution from a Berkeley resident.

Proposed Remedy: Amend BERA 2.12.500.A.6.

A. To be eligible to be certified as a participating candidate, a candidate must:

6) Not make expenditures from or use his or her personal funds or funds jointly held with his or her spouse, domestic partner, or unemancipated children in connection with his or her election except as a qualified monetary or non-monetary contribution to his or her controlled committee of \$250 or less. Contributions from a participating candidate to his or her own controlled committee are not eligible for matching funds. ~~A Participating Candidate may make non-monetary contributions to his or her controlled committee. However, the aggregate amount of a Participating Candidate's monetary and non-monetary contributions to his or her controlled committee must not be greater than fifty dollars (\$50);~~

2. Remove requirement for FCPC to approve matching funds – administrative process and approval only.

This change furthers the purposes of the public financing program by reducing the timeline from submission to payment from 17 days to 7 days.

No payments were denied by the commission in the 2018 election cycle. The review and verification of the hundreds of individual contributions that are eligible for matching funds is a time-consuming administrative process that is infeasible for the commission to perform. Faster distribution of matching funds

will benefit participating candidates and this change will also eliminate the occurrence of delayed payments due cancelled meetings, as was the case in November 2018 during the wildfires.

City staff will process matching requests and distribute the funds according to the distribution schedule adopted by the FCPC and continue to provide the commission with detailed summaries of all public financing requests and itemized reports of the matching funds submissions and their status. The Commission would maintain its authority to approve candidates' initial applications to participate in the public financing program.

Proposed Remedy: Amend Section 2.12.505, Paragraphs D, E, and G.

D. The ~~Commission-City~~ shall verify that a candidate's qualified contributions meet all of the requirements and restrictions of this Act prior to the disbursement of Fair Elections funds to the candidate. A participating candidate who receives a qualified contribution that is not from the person listed on the qualified contribution receipt shall be liable to pay the Fair Elections Fund the entire amount of the inaccurately identified contribution, in addition to any penalties.

E. The ~~Commission-City~~ shall make an initial payment of Fair Elections funds within seven business days of the Commission's certification of a participating candidate's eligibility, or as soon thereafter as is practicable.

G. The ~~Commission-City~~ shall provide each participating candidate with a written determination specifying the basis for any non-payment of Fair Elections funds. The Commission shall provide participating candidates with a process by which they may immediately upon receipt of such determination petition the Commission for reconsideration of any such non-payment and such reconsideration shall occur within seven business days of the filing of such petition. In the event that the Commission denies such petition then it shall immediately notify the candidate of his or her right to seek judicial review of the Commission's denial pursuant to Section 2.12.235.

3. Change 2.12.530.B.2 to clarify the prohibited uses of public matching funds.

The changes to this section arise, in part, from a difficult question from a candidate regarding a mailer that they planned to send that included voting recommendations on other candidates and measures. The proposed "direct personal benefit" language is from Fair Political Practices Commission State Manual 2, and the reference to BERA's definition of an independent expenditure is for additional clarification.

Proposed Remedy: Amend section 2.12.530 (Use of Fair Elections funds).

- A. A participating candidate shall use Fair Elections funds and contributions only for direct campaign purposes.
- B. A participating candidate shall not use Fair Elections funds or contributions for:
 - 1) Costs of legal defense in any campaign law enforcement proceeding under this Act, or penalties arising from violations of any local, state, or federal campaign laws;
 - 2) The candidate's personal support or compensation to the candidate or the candidate's family;
 - 3) Indirect campaign purposes, including but not limited to:
 - a) ~~The candidate's personal support or compensation to the candidate or the candidate's family~~;
 - ba) Any expense that provides a direct personal benefit to the candidate, including clothing and other items related to the candidate's personal appearance;
 - cb) Capital assets having a value in excess of five hundred dollars (\$500) and useful life extending beyond the end of the current election period determined in accordance with generally accepted accounting principles;
 - dc) A contribution or loan to the campaign committee of another candidate or to a party committee or other political committee;
 - ed) An independent expenditure as defined in Berkeley Municipal Code Section 2.12.142 as may be amended;
 - fe) Any payment or transfer for which compensating value is not received;
- C. The term "Contribution" is defined in 2.12.100 and includes "Qualified Contributions" as defined in 2.12.167 and contributions from non-residents of Berkeley as described in 2.12.500.A.7.

4. Timing of requests submitted, especially at qualifying period deadline.

When a candidate participates in the public financing program, a sentence is added to his or her candidate statement (published in ballot materials) indicating this participation. In 2018, a candidate submitted an application for participation by the qualification deadline and thus had the sentence stating her participation included with their candidate statement. However, she subsequently decided not to participate in program and did not submit an initial qualifying request. By the time the City was aware that the candidate would not participate, it was too late to remove the participation sentence from their candidate statement. This amendment will require the candidate to submit their qualifying request before the end of qualifying period.

Proposed Remedy: Amend BERA 2.12.500.A.3

3) Before the close of the qualifying period, collect [and submit](#) at least 30 qualified contributions, from at least 30 unique contributors, of at least ten dollars (\$10), for a total dollar amount of at least five-hundred dollars (\$500).

5. Amendment to prohibit all loans.

This change is needed for consistency and clarity. The definition of a Qualified Contribution excludes loans, however, no similar restriction is made on a contribution from a non-resident. Loans are inconsistent with public financing programs since the matching funds and contributions are not accounted for separately by participating committees.

Proposed Remedy: Add BERA 2.12.500.A.9

[9\) Not accept loans from any source.](#)

6. Discretion for FCPC on Disqualifying Violations

Related to the issues that were raised regarding startup problems and inadvertent, minor disqualifying actions by campaign committees, it is warranted to grant the FCPC some discretion in enforcement of certain Public Financing requirements.

Proposed Remedy: Add Paragraph (10) to Section 2.12.500 (Eligibility for Fair Elections campaign funding)

[\(10\) The Commission has the authority to approve a candidate's application for public financing, despite a violation by the candidate related to participation and qualification in the public financing program, if the violation is minor in scope and the candidate demonstrates a timely, good-faith effort to remedy the violation. The Commission may adopt regulations setting forth guidelines for what constitutes a minor violation under this provision.](#)

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects related to the recommendation in this report.

RATIONALE FOR RECOMMENDATION

The proposed amendments to BERA will provide expanded access to the program, provide clarifying language for several passages, and allow for some additional discretion regarding minor violations to assist non-professional treasurers.

ALTERNATIVE ACTIONS CONSIDERED

None.

CITY MANAGER

The City Manager concurs with the recommendation in this report.

CONTACT PERSON

Dean Metzger, Chair, Fair Campaign Practices Commission, 981-6998

Emma Soichet, Commission Secretary, Fair Campaign Practices Commission, 981-6998

Attachments:

1: Ordinance

2: Public Hearing Notice

ORDINANCE NO. -N.S.

AMENDMENTS TO THE BERKELEY ELECTION REFORM ACT RELATED TO PUBLIC FINANCING FOR CAMPAIGNS; AMENDING BERKELEY MUNICIPAL CODE CHAPTER 2.12

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 2.12.500 is amended to read as follows:

2.12.500 Eligibility for Fair Elections campaign funding.

A. To be eligible to be certified as a participating candidate, a candidate must:

1) During the qualifying period for the election involved, choose to participate in the Fair Elections program by filing with the Commission a written application for certification as a participating candidate in such form as may be prescribed by the Commission, containing the identity of the candidate, the office that the candidate seeks, and the candidate's signature, under penalty of perjury, certifying that:

a) The candidate has complied with the restrictions of this chapter during the election cycle to date;

b) The candidate's campaign committee has filed all campaign finance reports required by law during the election cycle to date and that they are complete and accurate; and

c) The candidate will comply with the requirements of this Act during the remainder of the election cycle and, specifically, if certified an eligible participating candidate, will comply with the requirements applicable to participating candidates.

2) Meet all requirements to be eligible to hold the office of Mayor or Councilmember as set forth in Sections 9 and 10 of Article V of the Charter of the City of Berkeley;

3) Before the close of the qualifying period, collect and submit at least 30 qualified contributions, from at least 30 unique contributors, of at least ten dollars (\$10), for a total dollar amount of at least five-hundred dollars (\$500).

a) Each qualified contribution shall be acknowledged by a receipt to the contributor, with a copy retained by the candidate. The receipt shall include the contributor's signature, printed name, home address, and telephone number, if any, and the name of the candidate on whose behalf the contribution is made. In addition, the receipt shall indicate by the contributor's signature that the contributor understands that the purpose of the qualified contribution is to help the candidate qualify for Fair Elections campaign funding and that the contribution is made without coercion or reimbursement.

b) A contribution for which a candidate has not obtained a signed and fully completed receipt shall not be counted as a qualified contribution.

- 4) Maintain such records of receipts and expenditures as required by the Commission;
- 5) Obtain and furnish to the Commission any information it may request relating to his or her campaign expenditures or contributions and furnish such documentation and other proof of compliance with this chapter as may be requested by such Commission;
- 6) Not make expenditures from or use his or her personal funds or funds jointly held with his or her spouse, domestic partner, or unemancipated children in connection with his or her election except as a qualified monetary or non-monetary contribution to his or her controlled committee of \$250 or less. Contributions from a participating candidate to his or her own controlled committee are not eligible for matching funds.~~A Participating Candidate may make non-monetary contributions to his or her controlled committee. However, the aggregate amount of a Participating Candidate's monetary and non-monetary contributions to his or her controlled committee must not be greater than fifty dollars (\$50);~~
- 7) Not accept contributions in connection with the election for which Fair Elections funds are sought other than qualified contributions, contributions not greater than fifty dollars (\$50) made by a natural person non-resident of Berkeley, or non-monetary contributions with a fair market value not greater than fifty dollars (\$50). The aggregate value of all contributions from any individual must not be greater than fifty dollars (\$50);
- 8) Not solicit or direct contributions in connection with any election during the election cycle in which Fair Elections funds are sought other than qualified contributions, contributions not greater than fifty dollars (\$50) made by a natural person non-resident of Berkeley, or non-monetary contributions with fair market value not greater than fifty dollars (\$50) to such candidate's controlled committee.
- 9) Not accept loans from any source.
- (10) The Commission has the authority to approve a candidate's application for public financing, despite a violation by the candidate related to participation and qualification in the public financing program, if the violation is minor in scope and the candidate demonstrates a timely, good-faith effort to remedy the violation. The Commission may adopt regulations setting forth guidelines for what constitutes a minor violation under this provision.

Section 2. That Berkeley Municipal Code Section 2.12.505 is amended to read as follows:

2.12.505 Fair Elections fund payments.

A. A candidate who is certified as an eligible participating candidate shall receive payment of Fair Elections funds equal to six-hundred percent (600 percent) of the amount of qualified contributions received by the candidate during the election cycle with respect to a single election subject to the aggregate limit on the total amount of Fair Elections funds payments to a candidate specified in Section 2.12.505.B.

B. The aggregate amount of Fair Elections funds payments that may be made to a participating candidate during an election cycle may not exceed:

- 1) \$120,000 for a candidate running for the office of Mayor;
- 2) \$40,000 for a candidate running for the office of City Council.

C. A participating candidate's application for Fair Elections funds, including an initial request submitted with an application for certification as a participating candidate, shall be made using a form prescribed by the Commission and shall be accompanied by qualified contribution receipts and any other information the Commission deems necessary. This application shall be accompanied by a signed statement from the candidate indicating that all information on the qualified contribution receipts is complete and accurate to the best of the candidate's knowledge.

1) All Qualified Contributions, of any dollar amount, eligible for matching Fair Elections funds must be publically disclosed with the contributor information required under Sections 2.12.280 and 2.12.283.

2) All campaign filings must be current in order for a Participating Candidate to receive a disbursement of Fair Elections funds and the Participating Candidate and a Participating Candidate's controlled committee must not have any outstanding fines related to campaign filings or violations of municipal, state or federal election law. All applications for Fair Elections funds shall include a certification by the Participating Candidate that the Participating Candidate or his or her controlled committee does not have any outstanding fines or penalties related to campaign filings. Upon submission of outstanding campaign filings and payment of any outstanding fines, withheld Fair Elections funds will be disbursed at the next regularly scheduled distribution for that election cycle.

D. The ~~Commission-City~~ shall verify that a candidate's qualified contributions meet all of the requirements and restrictions of this Act prior to the disbursement of Fair Elections funds to the candidate. A participating candidate who receives a qualified contribution that is not from the person listed on the qualified contribution receipt shall be liable to pay the Fair Elections Fund the entire amount of the inaccurately identified contribution, in addition to any penalties.

E. The ~~Commission-City~~ shall make an initial payment of Fair Elections funds within seven business days of the Commission's certification of a participating candidate's eligibility, or as soon thereafter as is practicable.

F. The Commission shall establish a schedule for the submission of Fair Elections funds payment requests, permitting a candidate to submit a Fair Elections funds payment request at least once per month. However, the Commission shall schedule

a minimum of three payment request submission dates within the thirty days prior to an election.

G. The ~~Commission-City~~ shall provide each participating candidate with a written determination specifying the basis for any non-payment of Fair Elections funds. The Commission shall provide participating candidates with a process by which they may immediately upon receipt of such determination petition the Commission for reconsideration of any such non-payment and such reconsideration shall occur within seven business days of the filing of such petition. In the event that the Commission denies such petition then it shall immediately notify the candidate of his or her right to seek judicial review of the Commission's denial pursuant to Section 2.12.235.

H. Unspent funds of any Participating Candidate who does not remain a candidate until the election for which they were distributed, or such funds that remain unspent by a Participating Candidate following the date of the election for which they were distributed shall be deposited into the Fair Elections Fund. A Participating Candidate shall deposit all unspent funds into the Fair Elections Fund, up to the total amount of funds that the Participating Candidate received as Fair Elections Fund distributions in that election cycle, within sixty (60) days after the date of the election.

Section 3. That Berkeley Municipal Code Section 2.12.530 is amended to read as follows:

2.12.530 Use of Fair Elections funds.

- A. A participating candidate shall use Fair Elections funds and contributions only for direct campaign purposes.
- B. A participating candidate shall not use Fair Elections funds or contributions for:
 - 1) Costs of legal defense in any campaign law enforcement proceeding under this Act, or penalties arising from violations of any local, state, or federal campaign laws;
 - 2) The candidate's personal support or compensation to the candidate or the candidate's family;
 - 3) Indirect campaign purposes, including but not limited to:
 - ~~a) The candidate's personal support or compensation to the candidate or the candidate's family;~~
 - ba) Any expense that provides a direct personal benefit to the candidate, including** ~~C~~clothing and other items related to the candidate's personal appearance;
 - eb) Capital assets having a value in excess of five hundred dollars (\$500) and useful life extending beyond the end of the current election period determined in accordance with generally accepted accounting principles;**
 - ec) A contribution or loan to the campaign committee of another candidate or to a party committee or other political committee;**
 - ed) An independent expenditure as defined in Berkeley Municipal Code Section 2.12.142 as may be amended;**
 - fe) Any payment or transfer for which compensating value is not received;**
- C. The term "Contribution" is defined in 2.12.100 and includes "Qualified Contributions" as defined in 2.12.167 and contributions from non-residents of Berkeley as described in 2.12.500.A.7.

Section 4. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

**NOTICE OF PUBLIC HEARING
BERKELEY CITY COUNCIL**

AMENDMENTS TO THE BERKELEY ELECTION REFORM ACT

The Fair Campaign Practices Commission is proposing amendments to the Berkeley Election Reform Act related to the public financing program for campaigns.

The hearing will be held on July 23, 2019 at 6:00 p.m. in the School District Board Room, 1231 Addison Street.

A copy of the agenda material for this hearing will be available on the City’s website at www.CityofBerkeley.info as of **July 11, 2019**.

For further information, please contact Emma Soichet, Commission Secretary at 981-6998.

Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

Communications to the Berkeley City Council are public record and will become part of the City’s electronic records, which are accessible through the City’s website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the City Clerk. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at 981-6900 or clerk@cityofberkeley.info for further information.

Published: July 12, 2019 – The Berkeley Voice
Pursuant to Berkeley Municipal Code Section 2.12.051

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I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City’s website, on July 11, 2019.

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Mark Numainville, City Clerk