

Oakland Planning Commission

Retreat

September 17, 2014

Item #4a

CONFLICTS OF INTEREST

Presentation to Oakland Planning
Commission, 2014

CONFLICT OF INTEREST LAWS

California Political Reform Act [Gov. Code §87100, et seq.]

- “No public official... shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

Government Code Section 1090

- “[C]ity officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

Common law conflict of interest

- “A public official is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.”

CONFLICT OF INTEREST LAWS (cont.)

Real property ordinances

- Prohibit enumerated City officers, including members of the Planning Commission, from purchasing or leasing City property.

Dual officeholding

- Common law rule against holding two public offices, if
 - There is a potential clash in duties or loyalties between the two offices; or
 - One office exercises power over the other.
- Applies to offices, not employment.

Gift and honoraria rules

POLITICAL REFORM ACT

EIGHT-STEP CONFLICT OF INTEREST TEST

1. Is the individual a “**public official**?”
2. Will the official be “**making**,” “**participating in making**,” or using or attempting to use his/her official position to “**influence**” a governmental decision?
3. What are the official’s “**economic interests**” that could be involved in the decision?
4. Are the economic interests “**directly**” or “**indirectly**” involved in the decision?
5. What is the applicable “**materiality**” standard for each economic interest?
6. Is it “**reasonably foreseeable**” that the decision will have a “**material financial effect**” on any economic interest?
7. Is the effect distinguishable from the effect on the “**public generally**?”
8. Is participation “**legally required**?”

STEP 1: Is the individual a “**public official**?”

- Any member, officer, employee, or consultant of a local government agency is a covered “public official.”
- “Members” include members of boards and commissions with decisionmaking authority, such as the Commission.
- A member of an advisory body is a public official if the body makes substantive recommendations which have been regularly approved without significant amendment or modification over an extended period by another official or agency.

STEP 2: Will the official be “**making**,” “**participating in making**,” or using or attempting to use his/her official position to “**influence**” a governmental decision?

- “Making” a decision includes voting as a Commissioner.
- “Participating” in a decision includes discussing the matter before the Commission.
- “Influencing” a decision includes:
 - Appearing before the Commission, or
 - Contacting, appearing before, or attempting to influence an agency within the official’s budgetary control, or
 - Acting or purporting to act on behalf of the Commission to another agency.
 - Exception: may communicate or appear as a member of the general public to represent real property or business interests owned or controlled by the official.
 - Exception: may prepare architectural or engineering drawings or submissions for a client, if official does not contact the agency.
 - Exception: may appear before design review body to present architectural or engineering drawings or submissions for a client in certain cases.

STEP 3: What are the official's “**economic interests**” that are involved in the decision?

- Any income, assets, expenses, or liabilities of the official, i.e., personal finances.
 - Includes personal finances of spouse or dependent children.
- Any for-profit business entity if the official...
 - has a direct or indirect investment worth \$2,000 or more, or
 - is a director, officer, partner, trustee, employee, or manager.
- Any source of income exceeding \$500 the prior year.
 - Limited exception for income from former employers, commission income.
- Any source of gifts exceeding \$440 the prior year.
- Any real property if the interest is worth \$2,000 or more.
 - Includes ownership, beneficial, option, and leasehold interests.
 - Includes personal residence.
 - Excludes month-to-month tenancies.
 - Includes real property of a business entity in which official holds at least a 10% interest.

STEP 4: Are the economic interests “**directly**” or “**indirectly**” involved in the decision?

- Skip this step for personal financial interests and real property interests.
- Business entities or sources of income/gifts are directly involved in decisions, if the entity...
 - initiates the proceeding, or
 - is the subject of or a named party in the proceeding.
 - Example: The decision is to issue a license, permit, contract, or other entitlement to the entity/source.
- Otherwise, business entities or sources of income/gifts are considered indirectly involved.

STEP 5: Is the financial effect on the official's economic interest
“**material**”?

- For business entities that are **directly** involved, any financial effect on revenues, expenses, assets or liabilities is “material,”
 - Exception: if the entity is listed on a stock exchange or Fortune 500 and the official's investment is less than \$25,000 look to the indirect standard below.
- For business entities that are **indirectly** involved, the materiality standard is pegged to the size of the entity.
 - Example: For a small business, an effect of \$20,000 or more in annual gross revenues, \$5,000 in annual expenses, or \$20,000 in the value of assets or liabilities is “material.”
- For sources of income that are **directly** involved, any financial effect is “material.”
- For sources of income that are **indirectly** involved, the materiality standard is pegged to the nature and size of the source.

Materiality (continued)

- For **ownership** **real** **property** interests, any of the following decisions are considered “material”:
 - Adopt or amend a general plan or specific plan if the property is within plan boundaries
 - Exception: general plan decisions that (1) concern policy or planning objectives, (2) require further implementation decisions, such as permitting, (3) don’t concern specific parcels or projects, and (4) don’t concern agency’s approval of permits, licenses, zoning, land use ordinance, or specific plan.
 - Zone, rezone, annex or de-annex the property
 - Exception: zoning decisions applicable to all properties in the zoning category
 - Impose, repeal, or modify tax, fee or assessment on the property
 - Sell, purchase or lease the property
 - Issue, deny, or revoke license, permit, entitlement, or variance for the property
 - Construct or improve public facilities if property will receive new or improved services distinguishable from other properties, or if property will receive disproportionate benefit or detriment
 - Decision changes development potential, income producing potential, or highest and best use of the property
 - Decision changes character of the property by substantially altering neighboring traffic levels, intensity of uses, parking, views, privacy, noise, air quality, etc.
 - Decision concerns property within 500 feet of the property
 - Decision would foreseeably influence the market value of the property

Materiality (continued)

- For **leasehold** real property interests, any of the following decisions are considered “material”:
 - Change the termination date of the lease
 - Increase or decrease potential rental value of the property
 - Increase or decrease the rental value of the property, and the official has the right to sublease
 - Change the actual or allowable use of the property
 - Impact the official’s use and enjoyment of the property
 - Exception: the decision solely concerns repair, replacement or maintenance of existing public facilities
 - Exception: general plan exception, see above

STEP 6: Is it “**reasonably foreseeable**” that the decision will have a material financial effect on any economic interest?

- A decision is “reasonably foreseeable” to have a material financial effect if the effect is “a realistic possibility and more than hypothetical or theoretical”
- FPPC regulations lay out factors to consider
- If it is “reasonably foreseeable” that the decision will have a “material financial effect” on any “economic interest,” there is a conflict of interest (subject to the exceptions in Steps 7 and 8).
- If there is a conflict of interest, the official...
 - may not make, participate in making, or influence the decision
 - must disclose the interest, and announce the disqualification
 - must leave the room for the item
 - may not discuss the item formally or informally with other Commissioners

STEP 7: Is the effect distinguishable from the effect on the “**public generally**?”

- No conflict if the decision affects the “public generally,” versus a small number of individuals.
- General rule: Two part statistical test....
 - First, the decision affects a significant segment of the public if the decision affects:
 - 5,000 residents or property owners in the jurisdiction, or
 - 10% of residents or property owners in the jurisdiction, or
 - 2,000 or 20% of businesses in the jurisdiction, or
 - “Exceptional circumstances.”
 - Second, the decision affects the official’s economic interest in substantially the same manner as the above “significant segment.”
- Special rules for....
 - small jurisdictions and personal residences
 - decisions re taxes, assessments, rates, fees, etc.
 - board members appointed to represent specific economic interests
 - states of emergency.

STEP 8: Is participation “**legally required**?”

- An official is “legally required” to make or participate in a decision if there is no alternative source of decisionmaking.
- Typically applied when a board cannot establish a quorum because too many members have been disqualified
- Can “rehabilitate” interested members as needed to establish a quorum.
- Disclosure requirements.

GOVERNMENT CODE SECTION 1090

- “[C]ity officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”
- Only applies to City contracts
 - Includes Development Agreements
- “Broad definition of when a public official is involved in the “making” of the City contract
 - Includes negotiations, discussions, planning, preparing plans & specs, etc.
- Unlike PRA, there is no “foreseeability” requirement. Government Code 1090 is applied prospectively.
- Includes noncompensated board members of nonprofit corporations