

# JENKINS & HOGIN, LLP

A LAW PARTNERSHIP

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## MEMORANDUM

FROM: Christi Hogin, City Attorney

DATE: August 7, 2007

RE: Primer on Conflicts of Interest and Bias

The purpose of this memorandum is to acquaint you with the rules governing the conduct of public officials. This is the same information discussed during Commissioner training sessions and workshops and that you will find in materials prepared by the League of California Cities.

### *Conflict of Interest Analysis Under the Political Reform Act*

The conflict of interest law contained in the Political Reform Act (Government Code § 81000 et seq.) impose affirmative duties on public officials to avoid actual impropriety and the appearance of impropriety. The purpose of the conflict of interest laws is to promote public confidence in public agencies by assuring that official conduct is above reproach. Violations of the Political Reform Act are punishable by both criminal and civil sanctions, depending on the severity of the violation. In addition, the Fair Political Practices Commission may levy administrative fines of up to \$5,000 per violation. For these reasons, this office has consistently advised erring on the side of caution to avoid even the appearance of impropriety in any given situation.

This memo details an eight-step analysis for determining the existence of a financial conflict of interest under the Political Reform Act. If the analysis reveals that a public official has a prohibited financial conflict of interest, the official may not make, participate in making, or influence a governmental decision. Furthermore, if an official has a financial conflict of interest, he/she must publicly disclose the specific nature of the conflict, recuse him/herself, and must leave the room during discussion of the item.

The eight-step analysis is summarized in the box below and detailed in the following discussion.

## The Eight Steps of A Conflict Of Interest Analysis

1. A **public official** within the meaning of the rules?
2. **Making, participating in making, or influencing a governmental decision?**
3. Does the public official have an **economic interest in the decision?**
4. Is the **economic interest directly or indirectly** involved in the decision?
5. Are the **financial impacts on the official's economic interests considered important** (material) enough to trigger a conflict of interest?
6. Is it **reasonably foreseeable (substantially likely)** that the **governmental decision will result in one or more of the materiality standards** being met for one or more economic interests?
7. Does the **“public generally” exception** apply?
8. Even if a disqualifying conflict of interest exists, is the official's participation legally required?

### 1. *A Public Official Within The Meaning Of The Rules?*

All city council members and appointed commissioners and board members are public officials for purposes of a conflict of interest analysis.

### 2. *Making, Participating In Making, Or Influencing A Governmental Decision?*

Typical activities that fall under this section are deliberating, voting, making recommendations or even communicating to someone who will be involved in the decision-making process. Other activities include responding to public comments, negotiating or researching materials relating to a decision on behalf of a public agency—whether or not these activities occur in the context of a public meeting. The issue is whether officials are using their official positions to influence or attempt to influence a governmental decision. Thus, the inquiry begins with the question of whether the official is making, participating in making, or influencing a governmental decision.

If the answer to this question is “yes,” go on to step 3. If the answer is “no,”

then there is no conflict of interest for purposes of the Political Reform Act.

3. ***Does the Public Official Have An Economic Interest In The Decision?***

There are six different ways in which an official may have an economic interest in a decision:

1. *Real Property.* Investing \$2,000 or more in real property creates an economic interest. The interest may be held by an official, the official's spouse and dependent children or anyone acting on the official's behalf. Real property interests can also be created through leaseholds, options and security or mortgage interests in property.
2. *Sources of Income.* Receiving \$500 or more in income from one source within twelve months prior to the decision creates an economic interest. This includes a community property interest in a spouse's income.
3. *Business Investment.* An economic interest is created if an official, the official's spouse or dependent children or anyone acting on the official's behalf has created an investment worth \$2,000 or more in a business entity even if the official does not hold an investment interest or receive income.
4. *Business Employment or Management.* If a public official serves as a director, officer or partner, trustee, employee or otherwise serves in a management position in a company, an economic interest is created.
5. *Gifts.* The receipt of a single gift or multiple gifts with a total value of \$380 or more in a twelve month period prior to the decision from any one person or organization creates an economic interest regardless of whether the gift-giver is in the agency's jurisdiction. If an intermediary gave an official the gift, the official has an economic interest in the intermediary. Additionally, if an official has been promised a gift of \$380 or more within a twelve-month period prior to the decision, an economic interest has been created.

6. *Personal Financial Effect.* An official has an economic interest in the official's own expenses, income, assets or liabilities and those of the official's immediate family. If the agency's decision would affect the official personally by causing any expenses, income, assets or liabilities to change in a twelve-month period, the decision has a personal financial effect on the official.

#### *What Constitutes a Year?*

The timeline for determining whether you have an economic interest is twelve months preceding the governmental decision in question—not the calendar year.

If the requirements for having an economic interest are met, proceed to step 4. If the requirements have not been met, then there is no conflict of interest for purposes of the Political Reform Act.

1. *Are Your Economic Interests Directly Or Indirectly Involved In The Decision?*

If a decision directly affects a public official's economic interests, a greater risk of bias exists. An indirect effect will pose less of a risk of a bias. The test for whether an interest is directly affected varies according to the type of economic interest involved.

**Directly Involved.** The most general test provides that *if one's economic interest is in the applicant or the subject of the decision, one's economic interest is directly involved.* For instance, if the source of income or business entity in which an official has a financial interest initiates a proceeding before the City, is a named party, or if the decision involves issuing, renewing, approving, denying or revoking a license, permit or other item for that business, the official's economic interest is directly affected by the decision. Likewise, if the official's personal finances or a family member's personal finances are involved, the official's economic interests are directly involved.

### *Real Property Interests*

Real property is directly involved in a decision if the official's property is within 500 feet of the boundaries or proposed boundaries of the property that is the subject of the decision or if the decision involves one of the following with respect to the property:

- Zoning, rezoning, annexation, de-annexation, sale, purchase, lease, or inclusion in or exclusion from any governmental subdivision of the property;
- Issuance, denial or revocation of a license, permit or other land use entitlement;
- Designation of the survey area, selection of the project area, adoption of the preliminary plan, formation of a project area committee or adoption of the redevelopment plan; or
- Construction of, or improvements to, streets, water, sewer storm drainage or similar facilities and the real property will receive new or improved services (excluding repairs, replacement or maintenance of existing services).

**Indirectly Involved.** Generally, if an official's economic interest is not the subject of the decision, the official's economic interest is indirectly involved.

Once there is an answer to step 4, proceed to step 5.

1. ***What Are The Standards For Determining Whether Economic Interests Are Considered Important (Material) Enough To Trigger A Conflict Of Interest?***

For each economic interest, an official must determine whether the impact of the decision is material; if so, the interest presents a problem under the Political Reform Act. The standard for materiality varies for each type of economic interest.

The answer to step 4 shapes the answer to this question. The rules in this area are complicated. If an official has reached this step, the official should consult with the city attorney or another lawyer to help evaluate the facts. Our advice will also reflect a full examination of the current and relevant authorities, especially since the law in this area frequently changes. A general discussion, though, of the most common situations follows.

Note: It does not matter if the financial impact is positive or negative. Even if the impact of the decision the official would make has a negative impact on the official's interests, a conflict of interest still exists under Political Reform Act.

**Business Entities.** If the business entity in which the official has an economic interest is directly involved in a decision, the effect is considered material if there is any financial effect on the business. Note that there is an exception when the investment is in a Fortune 500 or New York Stock Exchange company and is less than \$25,000.

State law creates other monetary thresholds. The City Attorney's office will be able to provide the most relevant and up-to-date information.

**Sources of Income and Gifts.** Any reasonably foreseeable financial effect on a person who is a source of income or giver of a gift to an official, and who is directly involved in a decision before the official's agency, is deemed material.

**Real Property.** If a real property interest is directly involved in the decision, the effect is considered material unless an official can prove that the decision will not have any impact on the value of the property. If one's real property interest is indirectly involved, the effect is presumed not to be material unless there are special circumstances involved that would make the decision have a material financial effect on the property.

If an official has a leasehold interest in property that will be directly affected (see step 4), the decision will be considered to have a material effect unless the official can show that the decision will not have an effect on the leasehold (for example, no effect on the termination date of the lease, the amount of rent, the value of sublease rights, or the use or enjoyment of the leased real property). If the leasehold interest will be indirectly affected, the decision will be considered not to have a material effect unless certain conditions would arise (the decision will change the use of the property, raise or decrease rent by five

percent or more within any twelve month period or change the termination date of the lease).

Once it has been determined which materiality standard applies to an economic interest, proceed to step 6.

2. ***Is It Reasonably Foreseeable (Substantially Likely) That The Governmental Decision Will Result In One Or More Of The Materiality Standards Being Met for One Or More Of Your Economic Interests?***

After evaluating steps one through five above, an official must decide whether it is reasonably foreseeable that the decision will have a material impact on the official's economic interest. The Fair Political Practices Commission has provided guidance on analyzing foreseeability, which is available on the Commission's Web site ([www.fppc.ca.gov](http://www.fppc.ca.gov)).

If it is reasonably foreseeable that one's economic interest will be materially affected, then the official must proceed to step 7. If it is *not* reasonably foreseeable that there will be a material financial effect, then the official does not have a conflict of interest under the Political Reform Act.

In close situations, it is wise to err on the side of caution.

3. ***Does the "Public Generally" Exception Apply?***

Step 7 is an exception to the conflict of interest rule. If a significant segment of the public would be affected by the agency's decision in substantially the same manner as a public official would be affected, the exception applies. The thought is that the official will be less biased in these situations. This rule arises in rare situations and will be closely examined by the City Attorney before being applied, especially since the Fair Political Practices Commission has adopted regulations to determine what a "significant segment" of the public is, depending on the specific facts surrounding the decision.

4. ***Even If the Official Has A Disqualifying Conflict of Interest, Is His/Her Participation Legally Required?***

Step 8 is another exception to the conflict of interest rule. If the official with the conflict of interest does not participate in the decision, will the agency be prevented from acting in a situation in which it must legally act? In other words, will the agency lack a quorum and is there no alternative means of making the decision? This rule cannot be used to break a tie, when a quorum can be convened without the conflicted official or when a non-conflicted member of the agency is absent. Again, the City Attorney should closely examine this rule and an official's situation before this rule is applied.

If this exception applies, the conflicted official may participate in the decision. If it does not apply, the conflicted official has a conflict of interest under the Political Reform Act and may not participate.

### ***Recusal Procedure for Conflicts Under the Political Reform Act***

California Code Regulations § 18702.5, adopted in 2003, details the steps that must be taken when a public official has a financial interest in a decision relating to an agenda item which is noticed for a meeting under the Brown Act. The section reads, in relevant part, as follows:

(b) Content & Timing of Identification: The public official shall, following the announcement of the agenda item to be discussed or voted upon but before either the discussion or vote commences, do all of the following:

(1) The public official shall publicly identify:

(A) Each type of economic interest held by the public official which is involved in the decision and gives rise to the conflict of interest (i.e. investment, business position, interest in real property, personal financial effect, or the receipt or promise of income or gifts), and

(B) The following details identifying the economic interest(s):

(i) if an investment, the name of the business entity in which each investment is held;

(ii) if a business position, a general description of the business activity in which the business entity is engaged as well as the name of the business entity;

(iii) if real property, the address or another indication of the location of the property, unless the property is the public official's principal or personal residence, in which case, identification that the property is a residence;

(iv) if income or gifts, then identification of the source; and

(v) if personal financial effect, then identification of the expense, liability, asset or income affected.

(2) Form of Identification: If the governmental decision is to be made during an open session of a public meeting, the public identification shall be made orally and shall be made part of the official public record.

(3) Recusal/Leaving the Room: The public official must recuse himself or herself and leave the room after the identification required by subdivisions (b)(1) and (b)(2) of this regulation is made. He or she shall not be counted toward achieving a quorum while the item is discussed.

(c) Special Rules for Closed Session: If the governmental decision is made during a closed session of a public meeting, the public identification may be made orally during the open session before the body goes into closed session and shall be limited to a declaration that his or her recusal is because of a conflict of interest under Government Code section 87100. The declaration shall be made part of the official public record. The public official shall not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.

(d) Exceptions:

(1) Uncontested Matters: The exception from leaving the room granted in Government Code section 87105(a)(3) for a "matter [that] has been placed on the portion of the agenda reserved for uncontested matters" shall mean agenda items on the consent calendar. When the matter in which the

public official has a financial interest is on the consent calendar, the public official must comply with subdivisions (b)(1) and (b)(2) of this regulation, and recuse himself or herself from discussing or voting on that matter, but the public official is not required to leave the room during the consent calendar.

(2) Absence: If the public official is absent when the agenda item subject to subdivision (a) of this regulation is considered, then Government Code section 87105 and this regulation impose no public identification duties on the public official for that item at that meeting.

(3) Speaking as a Member of the Public Regarding an Applicable Personal Interest: When a personal interest found in 2 Cal. Code Regs. section 18702.4(b) is present, a public official may speak as a member of the general public if he or she complies with subdivisions (b)(1) and (b)(2) of this regulation, recuses himself or herself from voting on the matter and leaves the dais to speak from the same area as the members of the public. He or she may listen to the public discussion of the matter with the members of the public.

COMMENT: Nothing in the provisions of this regulation is intended to cause an agency or public official to make any disclosure that would reveal the confidences of a closed session or any other privileged information as contemplated by law including but not limited to the recognized privileges found in 2 Cal. Code Regs. section 18740.

### *Disqualification Based on Common Law Bias*

The common law doctrine against conflicts of interest requires public officials to avoid placing themselves in a position in which personal interests may come into conflict with their duty to the public. The common law doctrine extends to non-economic conflicts and, therefore, a financial interest is not a prerequisite. The California Court of Appeal has described the doctrine as follows:

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public. Actual injury is not the principle the law

proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason. [Citation.]

*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171, n.18.

Under the common law doctrine, public policy forbids the sustaining of a municipal action founded upon a vote of a councilmember in any matter before it which directly or immediately affects him or her individually. Non-financial personal embroilment or involvement in a matter is sufficient to create a common law conflict in that it interferes with impartiality. As one treatise explains:

The public is entitled to have its representatives perform their duties free from any personal or pecuniary interest that might affect their judgment. Public policy forbids the sustaining of municipal action founded upon a vote of a council member ... in any matter before it which directly or immediately affects him or her individually.... A finding of self-interest sufficient to set aside municipal action need not be based upon actual proof of dishonesty, but may be warranted whenever a public official, by reason of personal interest in a matter, is placed in a situation of temptation to serve his or her own purposes, to the prejudice of those for whom the law authorizes that official to act.... [A]n individual member ordinarily cannot vote on a matter in which that member ... is interested. If the member does, the action taken by the body of which he or she is a member is invalidated.... Where the vote of a member interested is necessary to pass an ordinance or bylaw, such ordinance or bylaw is void, irrespective of how beneficial the ordinance may be."

4 McQuillin, *The Law of Municipal Corporations* (3d ed. rev. 1992) §§ 13.35, pp. 840-841, italics added, fns. omitted (quoted in *Clark, supra*, at 1171).

Common law conflict of interest most often arises in the context of quasi-judicial or administrative proceedings, where partiality or bias will have an immediate effect on a particular party whose interests are at stake. The doctrine seldom arises in the context of legislative or policy-making matters.

The common law conflict doctrine does not create a disqualification merely because an official brings to the table a particular point of view. By way of example, a city councilmember who is by philosophical orientation predisposed in favor of unionization of workers, is not as a result barred from participation in labor relations matters. The disqualifying characteristic must be *personal*, not philosophical, and result from some personal involvement or personal relationship with others involved in the matter that renders the official incapable of discharging his or her duties faithfully and dispassionately. For example, a strong animosity about a permit applicant based on conduct that occurred outside the hearing would give rise to party bias. Conversely, a strong personal loyalty toward a party could cause bias as well.

According to the Attorney General, a common law conflict may usually be avoided by complete abstention from any action with respect to (or any attempt to influence) the transaction. 64 Ops.Cal.Atty.Gen. 795.